NORMATIVE DIMENSIONS OF THE RIGHT OF ABORIGINAL SELF-GOVERNMENT

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EXECUTIVE SUMMARY

This paper describes and assesses five perspectives in support of the right of Aboriginal self-government: prior occupancy, prior sovereignty, treaties, self-determination, and preservation of minority culture. It cautions against sole reliance on positive law to justify recognition of the right of Aboriginal self-government, but recognizes the limitations of normative argument in the face of the contingency of social thought. The paper argues that each perspective expresses unique truths about the nature of Aboriginal rights, but that reliance on one perspective to the exclusion of others does not provide a full picture of the importance of Aboriginal rights in general and of a right of self-government in particular.

A claim of prior occupancy, i.e., that Aboriginal peoples lived on and occupied the North American continent before European contact, justifies some aspects of jurisdictional authority, but weakens as a justification for recognizing Aboriginal governmental power not directly connected to land use. A claim of prior sovereignty, i.e., that Aboriginal peoples exercised sovereign authority over territory and persons before European contact, is at the heart of Aboriginal self-government, but there is more to the claim than a retrospective glance at history. Treaties entered into by First Nations and the Crown speak to the fact that First Nations were regarded by the Crown as self-governing entities, but not all Aboriginal people are covered by treaty, and the language of some treaties is less than suggestive of Aboriginal jurisdictional authority. The right of self-determination, i.e., the right of a people to decide whether to be self-governing, is also at the heart of the right of self-government, but it is an unwieldy justification of continued Aboriginal participation in Canadian political institutions. The protection of minority culture, another justification often offered in support of Aboriginal self--government, is surely one of the purposes of the right of self-government, but Aboriginal people in many ways are different from other racial or cultural minorities in Canada.

The right of Aboriginal self-government thus possesses complex normative dimensions. Supported by a number of distinct but intersecting normative justifications, the right of self-government is best defended by a combination of arguments, each supporting a different dimension of the nature of the right. Such a stance blunts critiques based on the contingency of normative thought by consciously refusing to ground the right of self-government in a single normative principle. The paper advances the view that the Royal Commission ought to consider a plurality of arguments housed in principles of equality when defending any recommendations it may propose on the subject.

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INTRODUCTION

In this paper I hope to provide some insight into "the philosophical bases upon which the right of self-government rests" in order to assist in determining whether it is "a right of peoples, of treaties, of indigeneity, of nationhood, of race and/or ethnicity, of occupation of land, and/or [of] politics."[i] Philosophical foundations of the right of Aboriginal self-government depend in no small measure on normative justification.[ii] What are the normative justifications of the right of Aboriginal self-government? Why should Canadian citizens and Canadian institutions recognize a right of Aboriginal self-government? Canadians deserve answers to these questions, and, to this end, I outline, describe, analyze and assess five perspectives in support of the right of Aboriginal self-government: prior occupancy, prior sovereignty, treaties, self-determination, and preservation of minority culture. I argue that each perspective expresses unique truths about the nature of Aboriginal rights, and reliance on one perspective to the exclusion of others does not provide a full picture of the importance of Aboriginal rights in general and of a right of self-government in particular. I advance the view that the Commission ought to consider a plurality of arguments housed in principles of equality when defending any recommendations it may propose on the subject.

In addition to reviewing the strengths and weaknesses of several justifications of the right of Aboriginal self-government, I also address the extent to which such justifications are at variance with western liberal-democratic political values. That is, I hope to examine how "the principles underlying the right of Aboriginal self-government relate to non-Aboriginal traditions of governance."[iii] Liberal-democratic political theory, generally speaking, is hostile to rights that attach to persons on the basis of racial or cultural difference. In this paper I outline ways in which at least some of the principles underlying an Aboriginal right of self-government are more compatible with liberal-democratic political theory than they may appear.

METHODOLOGY

Normative justifications of rights in general invariably make reference to legal sources, and normative justifications of a right of Aboriginal self-government are no different in this respect. Because law and morality are deeply intertwined in questions concerning the nature of rights, it is easy to slip into a mode of justification that has been described as legal positivism: namely, the view that rights are simply the product of positive legislative or judicial action.[iv] A right of Aboriginal self-government can be justified, for example, as an expression of a more general international right of self-determination,[v] or by reference to section 35(1) of the *Constitution Act, 1982* and jurisprudence on "existing Aboriginal and treaty rights."[vi] A positivist justification of a right of Aboriginal self-government would simply point to international or domestic legal sources as support for its recognition and would not seek to provide philosophical or normative reasons why such a right ought to be recognized.

The drawbacks of positivism in this regard are threefold. First, positivist justifications of rights obscure, but do not eliminate, normative or philosophical concerns. In positivist justifications of rights, normative concerns invariably re-emerge, but are rarely addressed, in relation to the legal source invoked as the foundation of the right under scrutiny. If an international right of self-determination is held up as a legal source of a right of Aboriginal self-government, for example, normative concerns surrounding the right of Aboriginal self-government tend to resurface in relation to the right of self-determination, e.g., why *should* peoples have a right of self-determination? Positivist justifications too often appear to be question-begging; law is justified by the fact that it is the law.

Second, positivist justifications of rights tend to assume a degree of determinacy in law that, on many occasions, does not exist.[vii] Legal indeterminacy in this context exists both in relation to the choice of governing legal norm and in relation to the legal norm chosen. With respect to the former, international law, for example, both underpins and undercuts a right of Aboriginal self-government. Article 27 of the *International Covenant on Civil and Political Rights* provides that "persons belonging to [ethnic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture,"[viii] whereas the Universal Declaration of Human Rights recognizes equality before the law.[ix] A positivist assessment of a right of Aboriginal self-government will be influenced by whether one relies on Article 27 or the Universal Declaration, and the law itself offers little guidance in relation to the

choice. Moreover, the legal norm chosen to guide the inquiry often turns out to be a highly abstract principle that logically could be used to support *and* criticize the specific proposition under scrutiny. Does an international right of self-determination, for example, attach to Canadians, or to Aboriginal people who live in Canada? Abstract legal norms often turn out to be contested sites of interpretation, and normative stances are necessary to render them useful in particular circumstances.

Third, positivist modes of reasoning often trap one into thinking that the right in question does not or should not exist if it cannot be justified by reference to legal sources. For example, international law governing a right of self-determination has yet to embrace openly its application to Indigenous peoples.[x] In light of international law's apparent reluctance to extend the right to Indigenous peoples, it is tempting to conclude that self-determination discourse is of secondary importance. Where there are few or no legal sources in support of recognizing a right, an undue emphasis on positivist modes of reasoning may terminate the inquiry prematurely. In such cases, positivism tends to have a conservative effect on inquiries into the foundation of rights and obfuscates the fact that the inquiry is not into whether the law recognizes, but instead whether the law ought to recognize, the right in question.

Nonetheless, law is deeply implicated in the formation and conceptualization of the right of Aboriginal self-government and contains a number of justifications in support of its recognition. Reference to legal sources is virtually unavoidable in assessing normative and philosophical perspectives on the right. This paper makes extensive reference to legal sources, although it attempts to avoid the pitfalls of positivism by not viewing legal support as either a necessary or a sufficient condition for the right's existence.

Having sown seeds of doubt on legal positivism, I must also express reservations at the outset about the ability of normative or philosophical thought to provide secure foundations for rights. In an age marked by "vigorous denunciation of abstract reason and a deep aversion to any project that [seeks] universal human emancipation through mobilization of the powers of...reason",[xi] any attempt to explain, ground, secure, justify, rationalize or simply expound on the nature of rights immediately falls prey to the charge of contingency. Theories once thought to provide normative foundations that transcend cultural difference are viewed increasingly as local, temporal, and embedded in convention and history.[xii]

In the face of claims asserting the contingent `nature' of post-modern life, it is tempting to see contingency itself as providing a justification of rights. Yet attempts to ground rights in contingency ─ as a means of protecting, for example, cultural difference ─ are not immune to critique. Cultural difference, as a foundation of a theory of rights, is as suspect a candidate for a basis of rights as any theory that alleges universal appeal, if only because its alleged beneficiary ─ culture itself ─ is not a monolithic object that can be preserved by imposing a legal grid of right and duty. Instead, culture is an active web of interlocking and intersecting allegiances that continually cut across and frustrate efforts at legal definition,[xiii] as demonstrated by debates over gender and aboriginality in relation to the *Canadian Charter of Rights and Freedoms* and recent efforts at constitutional reform.[xiv]

Neither legal indeterminacy nor the contingency of modern life disarms normative justification. In fact, acceptance of indeterminacy and contingency can have a liberating effect on normative thought. What was once thought to be fixed and immutable is now open to challenge, transformation and reform. Nonetheless, normative justifications that take indeterminacy and contingency seriously are necessarily tentative and incomplete. Instead of attempting to provide ahistorical, acultural and universal foundations of rights, such justifications attempt instead to provide normative reasons that seek to persuade and convince people to recognize certain interests as more important than others and, in the case of an Aboriginal right of self-government, to recognize certain interests as worthy of the mantle of constitutional right.

What follows is an unabashedly tentative attempt to cast in normative terms several justifications of an Aboriginal right of self-government. Each justification makes a moral claim, by which I mean that each provides a normative reason for recognizing a right of self-government. The nature of the appeal varies from justification to justification. Some rest on little more than an intuitive sense of fairness; others appeal to deeper and admittedly contested values such as equality and contractual freedom. What all of them share, I hope, is some degree of acceptance among Aboriginal and non-Aboriginal people. In the face of contingency, all we can aim for is some measure of common purpose.[xv]

PRIOR OCCUPANCY

Perhaps the most common claim in relation to Aboriginal rights in general is that Aboriginal people ought to enjoy Aboriginal rights because they lived on and occupied portions of the North

American continent before European contact. A claim of prior occupancy corresponds to a relatively straightforward conception of fairness that suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals.[xvi] Prior occupancy arguments are commonly found in doctrinal justifications of Aboriginal rights with respect to land. The common law of Aboriginal title is heavily influenced by the fact that Aboriginal people occupied the continent from time immemorial.[xvii] The common law recognizes that Aboriginal people enjoy common law usufructuary rights of use and enjoyment of land if they can demonstrate that they and their ancestors were members of an organized society that occupied the specific territory over which rights are asserted to the exclusion of other organized societies at the time sovereignty was asserted by England.[xviii]

Discourse surrounding Aboriginal rights has begun recently to shift from a focus on property entitlements toward an emphasis on rights of governance. Although prior occupancy is typically relied on as a justification for recognizing Aboriginal title at common law, a claim of prior occupancy can be and has been stretched to justify not only differential property entitlements but also certain aspects of self-governance. Prior occupancy, in other words, can also be used to support arguments with respect to the right of Aboriginal self-government, at least in relation to decisions about land and resource use.[xix]

One advantage to a claim of prior occupancy in this context is that it enjoys normative significance for non-Aboriginal and Aboriginal people alike. A claim of prior occupancy conforms to a relatively straightforward non-Aboriginal philosophical and legal conception of just holdings with respect to land, namely, all other things being equal, prior occupants of land have a stronger claim to use and enjoyment than newcomers.[xx] Jean-Jacques Rousseau, for example, traced the origin of property to the "first claimant".[xxi] Similarly, Sir William Blackstone, in his *Commentaries on the Laws of England*, wrote that "occupancy is the thing by which the title was in fact originally gained; every man seising to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else."[xxii] More recently, the libertarian philosopher Robert Nozick has constructed an entire theory of justice based on property entitlements. In his view, state action that does not respect just acquisitions or transfers of property is itself unjust.[xxiii]

Claims of prior occupancy also have particular resonance and appeal to Aboriginal people, in so far as Aboriginal use and enjoyment of land is often spoken of by Aboriginal people

as possessing a profound spiritual dimension. Aboriginal people often refer to a uniquely Aboriginal conception of land, where land is viewed not simply as a commodity but as something to which Aboriginal people are spiritually connected. Testimony by Gitksan chiefs in 1884 provides a powerful illustration of Aboriginal conceptions of land:

> We liken this district to an animal, and our village, which is situated in it, to its heart. Lorne Creek, which is almost at one end of it may be likened to one of the animal's feet. We know that an animal may live without one foot, or even without both feet; but we also know that every such loss renders him more helpless, and we have no wish to remain inactive until we are almost or quite inactive.[xxiv]

As stated succinctly by Chief James Gosnell in his testimony before the 1983 First Ministers' Conference on Aboriginal Constitutional Matters:

> It has always been our belief...that when God created this whole world he gave pieces of land to all races of people throughout this world, the Chinese people, Germans and you name them, including Indians. So at one time our land was this whole continent right from the tip of South America to the North pole...
>
> It has always been our belief that God gave us this land...and we say that no one can take our title away except He who gave it to us to begin with.[xxv]

Similarly, Oren Lyons has stated:

> What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals. We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfil its responsibility under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfil that responsibility.[xxvi]

Justifying the right of Aboriginal self-government by reference to the fact that Aboriginal people lived on and occupied portions of the continent prior to European contact conforms closely to the subjective experiences of many Aboriginal people in relation to land.

A second advantage of grounding a right of Aboriginal self-government by reference to prior occupancy is that this mode of justification corresponds with the dominant legal framework surrounding the assertion of Aboriginal rights in Canada. Jurisprudence on section 35(1) of the *Constitution Act, 1982* provides that Aboriginal practices "integral" to the definition of an Aboriginal community that were not extinguished by law before 1982 can be asserted as constitutional rights.[xxvii] It is not a far leap from protecting a right to fish, for example, as an incident of Aboriginal title, to protecting rights to decide where, when and by whom fishing can occur. The latter set of protected activities involves elements of jurisdiction over land and

persons and can thus be described as incidents of a more general right of Aboriginal self-government. A claim of prior occupancy in support of the right of Aboriginal self-government, in other words, has the advantage of conforming closely to traditional legal modes of conceptualizing Aboriginal rights.

The strength of prior occupancy as a justification begins to weaken, however, once the right of self-government is asserted in contexts other than land use. Prior occupancy of land may justify recognizing some degree of jurisdictional control over how land is to be used and by whom ─ control that could be viewed as instances of a right of self-government. It is less clear why or how prior occupancy of land justifies, for example, Aboriginal authority to regulate assault against the person. A claim stronger than prior occupancy is needed to provide normative support for the differential treatment of persons based on indigenous difference entailed by the right of Aboriginal self-government. Supporting a general right of Aboriginal self-government by reference to claims of prior occupancy of land, although familiar to now-traditional Canadian legal understandings of Aboriginal title, justifies only some types of Aboriginal jurisdictional authority.

PRIOR SOVEREIGNTY

A variation on the claim of prior occupancy is a claim of prior sovereignty. More specifically, Aboriginal people ought to be entitled to exercise jurisdiction over their lands and people because they exercised sovereign authority over their lands and people before European contact. In the words of Georges Erasmus and Joe Sanders, "[i]t is a matter of historical record that before the arrival of Europeans,...First Nations possessed and exercised absolute sovereignty over what is now called the North American continent."[xxviii] A prior sovereignty claim posits that inherent Aboriginal sovereignty should not be viewed as surrendered or extinguished by the establishment of western-style nation-states or by treaty with the Crown. Instead, pre-existing Aboriginal sovereignty ought to be recognized in the form of an Aboriginal right of self-government within the Canadian federation. In this context, a right of self-government recognizes a compromise of sorts between an idealistic desire to turn back the clock to preserve complete Aboriginal sovereignty in the face of the Canadian state, and a resigned acceptance of Aboriginal assimilation. Recognition of a right of self-government would restore at least some of the sovereign authority Aboriginal people enjoyed prior to contact. It would provide Aboriginal

nations with a measure of jurisdictional authority over matters central to their indigenous difference, while at the same time permit Aboriginal people to participate and be represented in Canadian political institutions.

The normative force behind a claim of prior sovereignty lies in its implicit criticism of the justice of British and French assertions of sovereignty over Aboriginal peoples. International legal principles governing claims of sovereignty at the time of European contact recognized assertions of sovereignty in the event of conquest and, in the context of Indigenous peoples, settlement. Criticizing the justice of legal principles of conquest in this context involves claims that Indian nations were not conquered, that they should not have been conquered, or that conquest should not result in the eradication of pre-existing Aboriginal sovereignty. Criticizing the justice of principles of settlement involves claims that settlement of North America, in itself, should not permit the eradication of prior Aboriginal sovereignty. While British sovereignty perhaps ought to follow and govern settlers of the continent, there is no acceptable reason why it ought to have applied to Aboriginal nations as well, to the exclusion of Aboriginal forms of government.

There are legal reasons why international law permitted the assertion of British and French sovereignty over Aboriginal people and seemingly authorized the denial of a right of Aboriginal self-government. However, those legal reasons can and ought to be subjected to normative scrutiny. As is well known, international law at the time of European contact, according to the doctrine of discovery, viewed Aboriginal nations as inferior to European nations and therefore did not recognize the fact of Aboriginal sovereignty in North America. As a result, mere settlement, as opposed to conquest or treaty, was sufficient to assert sovereignty over Aboriginal people on the continent.[xxix] As is also well known, the justification offered by international law in support of this conclusion rested on racist premises; as a result it is normatively unacceptable by Aboriginal and non-Aboriginal standards alike as a reason to deny Aboriginal people a right of self-government.

One advantage of grounding the right of Aboriginal self-government in the fact of prior indigenous sovereignty is that an analogy can be drawn with Quebec. After the conquest of the French, Quebec's laws and institutions, indeed the right to self-government, continued in force until they were expressly overruled by the British Parliament. Recognition of prior sovereignty informed British, and continues to inform Canadian, treatment of the French population. It is true

that British sovereignty over Quebec was acquired by conquest, whereas British and French sovereignty over Aboriginal people, in the eyes of international law, was acquired by the mere fact of settlement. However, one would have thought that the case for the recognition of prior sovereignty is normatively *more* compelling in the event of settlement than it is in the event of conquest. Nonetheless, even accounting for some difference in principle between conquest and settlement, British and Canadian treatment of Quebec is an indication that continued recognition of the prior sovereignty of a colony or nation is not foreign to basic political principles of the Canadian state.

There are several drawbacks to emphasizing prior sovereignty in a normative defence of the right of Aboriginal self-government. Although the assertion of European sovereignty over Indigenous peoples was clearly based on racist assumptions about indigenous difference, can it be said that the assertion of Canadian sovereignty over Aboriginal people today is based on racist principles? That is, the assertion of sovereignty by one nation over another nation is not *per se* normatively illegitimate; its legitimacy depends on the reasons that can be offered in its defence. One reason will no doubt be the actual historical reason for the initial assertion of sovereignty; however, other reasons, unrelated to the historical justification, may emerge over time independently to support the assertion of sovereignty. Demonstrating the moral bankruptcy of the historical justification may not end the inquiry.

For example, it may be that, regardless of the historical reasons behind its existence, there are pragmatic reasons to continue to respect Canadian sovereign authority over Aboriginal people. Chief Justice John Marshall of the United States Supreme Court, speaking of the doctrine of discovery, stated that "if the principle has been asserted in the first instance, and afterward sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."[xxx] An argument that looks backward in time to right past wrongs tends to lose normative force over time. Valid non-Aboriginal and Aboriginal interests arising subsequent to the assertion of sovereignty over Aboriginal people may deserve protection in the form of continued respect for Canadian sovereignty and attendant legislation, despite the fact that initial justifications of the assertion of sovereignty itself are suspect.

A similar pragmatic stance marks international law's reluctance to second-guess the legitimacy of state borders. In the words of James Anaya, there exists

> a normative trend within international legal process toward *stability through pragmatism* over instability, even at the expense of traditional principle. Sociologists estimate that today there are around 5,000 discrete ethnic or national groupings in the world, and each of these groups is defined ─ and defines itself ─ in significant part by reference to history. This figure dwarfs the number of the independent states in the world today, approximately 176. Further, of the numerous stateless cultural groupings that have been deprived of something like sovereignty at some point in their history, many have likewise deprived other groups of autonomy at some point in time. If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international law an agent of instability rather than stability.[xxxi]

This objection can be met with the rejoinder that recognition of a right of Aboriginal self-government need not constitute a wholesale rejection of Canadian sovereignty over Aboriginal people. Recognition of a right of Aboriginal self-government is driven by a desire to recognize inherent Aboriginal sovereignty *in light of* the existence of the Canadian state. Interests that have arisen in light of the establishment of Canadian laws and institutions are not automatically threatened by recognition of a right of Aboriginal self-government. Whether such interests ought to be threatened will depend on the scope of the right, which in turn will likely be defined by an open (and indeed pragmatic) assessment of all the relevant interests at stake.

Another disadvantage of relying on a claim of prior sovereignty, however, is that it seems incomplete. That is, the fact that European assertions of sovereignty were based on racist justifications is not the only reason why Canada ought to recognize a right of Aboriginal self-government. A claim of prior sovereignty tends to dilute other purposes furthered by a right of Aboriginal self-government. Such purposes include the protection of Aboriginal difference and the amelioration of Aboriginal disadvantage. It is clear that any normative defence of a right of Aboriginal self-government is likely and ought to make reference to prior Aboriginal sovereignty. However, the right of Aboriginal self-government means more than the partial restoration of prior Aboriginal sovereignty, and a complete normative defence of the right ought to reflect this fact.

TREATIES

Treaties between the Crown or colonial authorities and Aboriginal nations are often offered as justification for recognizing a right of self-government on behalf of Aboriginal peoples.

Aboriginal peoples signalled early on that they were distinct and autonomous by collectively negotiating the terms on which non-Aboriginal settlement and development could occur on the continent. In the words of Francis Bruno, an Aboriginal elder, commenting on Treaty 8, "what I do understand is that we were to share the land with other people who were the white people. That was the purpose of the treaty, I think, since there were going to be more white people, to share the land with them."[xxxii] A treaty-based perspective in favour of the right of Aboriginal self-government argues that the relationship between Aboriginal nations and Canada ought to be modelled after the treaty-making process, which recognized rights of self-government on behalf of Aboriginal people and a relationship of equality and mutual respect between Aboriginal nations and the Crown.

One advocate of this perspective is Robert Clinton, who argues that Aboriginal nations located in the United States are entitled to claim certain collective rights of groups by virtue of treaty promises made by the United States government to provide political autonomy.[xxxiii] In part, Clinton is attempting to show that rights that attach to Indian nations, "while initially appearing foreign to Anglo-American jurisprudence, may share more in common with existing western...legal doctrines than first suspected."[xxxiv] He writes the following:

> Indian tribes and other indigenous peoples also have legitimate claims to group rights. In the United States, for example, the tribes of the southeastern states ceded large portions of their land in exchange for explicit treaty promises. These treaties, made under the solemn authority of the United States, promised that the tribes would remove to an area outside of state or federal governance and once there exclusively govern themselves under their laws, rather than being governed by any state or federal territory....Similarly, most tribes agreed to cede lands, end hostilities, or otherwise remove to those Indian islands that we call Indian reservations based on explicit or implicit guarantees that these islands would provide *group* sanctuary. These agreements envisioned that tribal reservations would allow the tribes to continue some of their culture, their way of life, and their political autonomy, without influence from the dominant colonial society which rapidly was encroaching on and eroding important components of that culture.... All of these rights involved demands for the Indians' rights of group autonomy, not individual freedoms. Indeed, the treaties were negotiated with the tribes, as separate domestic dependent nations, not with individuals.[xxxv]

Clinton points to a treaty between the United States and the Cherokee nation as an illustration of his claims:

> The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such

> laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them....[xxxvi]

Reflected in the terms of this treaty is a powerful claim of self-government, perhaps best articulated by the Cherokee nation's appeal to Congress in 1830 that the Cherokee people be allowed to remain on their ancestral homelands:

> We wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties with us, and the laws of the United States made in pursuance of treaties, guaranty our residence and privileges, and secure us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.[xxxvii]

John Danley combines a focus on prior occupancy with a treaty-based argument in favour of Aboriginal autonomy. He writes that, unlike Aboriginal people, "who were here first and...may count as a people with whom treaties have been signed", individuals who immigrated recently to the United States

> cannot appeal to doctrinal nationalism because they have voluntarily consented to become part of the political community of the United States. They negotiated not as groups but as individuals with the government of the United States. No treaties were signed or ought to have been signed with their representatives.[xxxviii]

Aboriginal nations are entitled to their own distinctive forms of government because, unlike other groups whose members consented to American political values, Indigenous people were here first, and they negotiated their political relationship with the non-indigenous government on a collective, as opposed to an individual, basis.

Perhaps the most well known advocates of a treaty-based approach to the relationship between Aboriginal nations and settler states are Russell Lawrence Barsh and James Youngblood Henderson, who argue that traditional American jurisprudence on the inherent right of self-government assumes erroneously that Aboriginal nations were conquered by the United States and, as a result, they are entitled to govern themselves according to their own laws only until Congress passes a law to the contrary.[xxxix] Barsh and Henderson argue that common law principles governing conquest have skewed understandings of treaties, so that they are wrongly viewed as documents that outline the consequences of conquest and that can be overridden by Congress if circumstances so require. In their view, the application of the law of conquest to Aboriginal nations "has no historical foundation".[xl] Aboriginal nations should not be viewed as simply entitled to govern themselves until Congress decides the contrary. Treaties ought to be viewed instead as a source of *federal* power, as spelling out the terms on which federal power

can be exercised in the United States: that "Treaties are a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States."[xli] Like the compact among American states that created the federal government, treaties reserve to the tribe those powers not expressly delegated to Congress.

The normative significance of the process of treaty making lies in principles of consent, and the process suggests mutual recognition of the respective political authority of the parties.[xlii] Moreover, several contemporary land claims agreements in Canada with the Crees and other nations have made provision for some measure of Indian government and could serve to ground an Aboriginal right of self-government.[xliii] However, a treaty-based defence suffers from several weaknesses. First, a treaty-based defence of an Aboriginal right of self-government is only as powerful as the treaty language upon which it rests. The language in the treaty negotiated by the Cherokee nation cited by Clinton is extremely supportive of rights of self-governance, shielding the Cherokee nation from state law and authorizing the promulgation of Cherokee law. However, many Aboriginal nations in Canada negotiated treaties with the Crown that stripped their people of any special rights to land and forced their relocation to unproductive parcels of land. In such cases, additional argument on how to interpret apparently restrictive treaty language as providing for rights of self-government would be necessary in order to extend a treaty-based right of self-government to those nations under the legacy of truncated treaty rights. Other treaties in Canada, especially those negotiated early in the history of British settlement, do provide for a continuation of Aboriginal autonomy and could serve as foundations for rights of self-government.[xliv] However, if rights of self-government are based exclusively on treaty language, the nature and scope of such a right would vary dramatically from Aboriginal nation to Aboriginal nation. It would result in checkerboard justice, with the nature and scope of Aboriginal autonomy dependent on the extent of bargaining power enjoyed by one's ancestors at a particular moment in the distant past.

Second, many Aboriginal nations have not entered into any form of treaty with Canadian or Crown authorities. The Wet'suwet'en people of interior British Columbia, for example, are not party to any treaty with either the provincial or the federal Crown. If the right of self-government is based on the treaty-making process, what type of right can the Wet'suwet'en claim? If they also enjoy a right of self-government, then the source of the right cannot be the treaty-making process. A treaty-based justification of an Aboriginal right of self-government, to be applicable to

all Aboriginal nations in the country, must be supplemented with other justifications.

Third, the logic of a treaty-based justification drives one to conclude that absent the existence of a treaty, Canada enjoys no sovereign authority over Aboriginal people at all. While this position is certainly defensible, assuming that one concludes that principles of conquest and settlement justifying assertions of sovereignty are themselves unjust,[xlv] it leaves one in the precarious position of arguing for complete Aboriginal independence, which then denies Aboriginal people the right to enjoy benefits associated with Canadian citizenship in addition to rights of self-governance. A treaty-based justification of a right of self-government, when applied to Aboriginal people not party to a treaty, does not provide for a comprehensible defence of their participation in Canadian governmental institutions or of their right to govern themselves.

What is useful and important to retain from scholarship that emphasizes the importance of the treaty process is not so much that treaties are the source of an Aboriginal right of self-government. Treaties may or may not serve as a foundation of a right of self-government for Aboriginal people. As stated above, this will depend on the language of the particular treaty and on whether the Aboriginal nation has entered into a treaty with the Crown. Instead, the importance of treaties and the treaty-making process lies in the fact that the process of negotiating treaties serves as evidence that the Crown historically treated Aboriginal nations as sufficiently autonomous to warrant treaties. Moreover, the process suggests that the Crown viewed treaties as necessary or desirable agreements to obtain before subjecting Aboriginal people to foreign law. In other words, the treaty-making process is evidentiary support of the fact that Aboriginal nations were (and were regarded by the Crown as) self-governing communities and entitled to govern themselves until they suggest an intent to the contrary. The treaty-making process signals that Aboriginal nations enjoy a right of self-government and that the Crown has long recognized this fact.

SELF-DETERMINATION

Another normative argument in favour of a right of Aboriginal self-government is one that focuses on the right of a people or a nation to self-determination. International legal principles concerning a right of self-determination are often invoked in support of the normative proposition that all peoples, or nations, ought to be able to determine their own political future or destiny free of external interference.[xlvi] The right of self-determination, in the words of James

Anaya, has arisen "within international law's expanding lexicon of human rights concerns and accordingly is posited as a fundamental right that attaches collectively to groups of living human beings."[xlvii] In this light, the right of Aboriginal self-government can be portrayed as a domestic, constitutional expression of the normative ideal of self-determination.

International legal sources supporting a right of self-determination include Article 1(2) of the United Nations Charter, which lists the principle of self-determination as one of the purposes of the United Nations.[xlviii] Article 55 of the Charter calls for the promotion of a number of social and economic goals, "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[xlix] Similarly, the International Covenant on Civil and Political Rights provides that "[a]ll peoples have the right of self-determination....[and to] freely determine their political status and freely pursue their economic, social and cultural development."[l] Self-determination has also been described as a right by the International Court of Justice.[li]

Initially, the principle of self-determination was invoked primarily in the international sphere as a justification for the liberation of nations in Eastern Europe under the yoke of foreign domination in the early twentieth century.[lii] It then served increasingly as a clarion call for colonies seeking to shed imperial shackles and assume independent statehood status. In the 1950s, Belgium attempted to extend the principle of self-determination not only to colonies that wished to rid themselves of their imperial masters, but also to populations within independent states, so that indigenous populations and cultural minorities could assert a right of self-determination under international law.[liii] The Belgian initiative was unsuccessful; in passing the *Declaration on the Granting of Independence to Colonial Territories*,[liv] the General Assembly of the United Nations decided expressly to restrict the application of the principle of self-determination to peoples who lived on territories geographically separate from their political masters. The Declaration stated that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations."[lv] In the words of Patrick Thornberry,

> The effect is that colonial boundaries function as the boundaries of the emerging States. Minorities, therefore, may not secede from States, at least, international law gives them no *right* to do so. The logic of the resolution is relatively simple: peoples hold the right of self-determination; a people is the whole people of a territory; a people exercises its right

through the achievement of independence.[lvi]

Little has changed since the passage of the Declaration: international law has yet to extend the right of self-determination to Indigenous peoples who live within the confines of a nation-state.

Current limitations of the principle of self-determination under international law should not obscure its normative dimensionslvii or the possibility that international law will begin to accommodate indigenous demands under the rubric of self-determination.lviii Certainly, indigenous organizations themselves describe their objectives in terms of self-determination. The World Council of Indigenous Peoples, at its second general assembly, described self-determination as one of the "irrevocable and inborn rights which are due to us in our capacity as Aboriginals."lix The International Indian Treaty Council described indigenous populations as "composed of nations and peoples, which are collective entities entitled to and requiring self-determination", which in turn is described as including external and internal features.lx External self-determination presumably involves all the features of independent statehood, whereas internal self-determination includes rights to maintain and promote indigenous cultural difference through independent political institutions.lxi

One promising development on the international law front is the *Draft Declaration on the Rights of Indigenous Peoples*, prepared by a sub-commission of the UN Commission on Human Rights, which proposes to recognize that "Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations."[lxii] Accordingly, the Draft Declaration proposes to recognize *inter alia* indigenous rights of autonomy and self-government, the right to manifest, practise and teach spiritual and religious traditions, rights to territory, education, language and cultural property, and the right to maintain and develop indigenous economic and social systems.[lxiii] An explanatory note accompanying the Draft Declaration draws the aforementioned distinction between `external' and `internal' self-determination. An indigenous right of external self-determination is contingent upon the failure of the state in which Indigenous peoples are located to accommodate indigenous aspirations for internal self-determination:

> Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be "representing the whole people." At that point, and if all international and diplomatic

measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State.[lxiv]

Acceptance by the world community of the Draft Declaration would usher in a new international legal order, wherein Indigenous peoples would not longer be denied the right of self-determination simply because of their indigeneity.

Despite the current lack of international legal recognition, the principle of self-determination can stand as a normative foundation of the right of Aboriginal self-government. The right of Aboriginal self-government could easily be conceptualized as a domestic, constitutional expression of the right of Aboriginal peoples to self-determination. For self-determination to serve as a stable foundation of the right of self-government, its normative value or importance would have to be articulated clearly. Avishai Margalit and Joseph Raz argue that there are two possible normative approaches to the right of self-determination: one that emphasizes the intrinsic value of self-government, and another that emphasizes self-government's instrumental value.lxv Each is sketched out below.

An argument in favour of the right of self-determination based on the intrinsic value of self-government emphasizes the fact that cultural and national membership is an important aspect of individual identity and thus deserves full expression in community life. Full expression of cultural and national membership includes rights of political participation, because political participation is an essential component of community life. Self-government, "the value of entrusting the general political power over a group and its members to the group", is thus an intrinsically valuable component of political participation.lxvi Members of the group thus ought to enjoy a right to determine whether to be self-governing, i.e., a right of self-determination.lxvii

Margalit and Raz argue that viewing self-government as intrinsically valuable wrongly assumes that political participation must occur "in a framework exclusive to one's group or dominated by it".lxviii They acknowledge that "peaceful and equitable sharing of the political arena" by different communities or nations may be impossible in light of historical hostilities, prejudice, or other factors, but they argue that there is nothing inherent in the value of political participation that requires separate political institutions.lxix Instead, self-government is instrumentally valuable to realize group identity. Sometimes it is a necessary instrument; other times it is not necessary at all. Whether it is in fact necessary will depend on a host of historically and politically contingent factors specific to the group in question and its relation to the broader political community in which it is located.

Viewing self-government instrumentally does not mean that the right to determine whether to be self-governing, the right of self-determination, attaches only in circumstances where self-government is necessary to realize group identity. According to Margalit and Raz, a group possesses a right of self-determination even where a case for self-government does not exist, i.e., where a group can realize its identity in political institutions not limited to the group itself. A group has the right to be wrong about the necessity of self-government. However, the right of self-determination must be exercised only for the right reason, i.e., to secure conditions necessary for the realization of group identity. Moreover, it extends only to groups likely to respect the basic rights of all inhabitants of the territory, and its exercise must be accompanied by measures designed to prevent fundamental endangerment of interests of inhabitants of other countries.

One advantage to a defence of the right of Aboriginal self-government based on self-determination is that the principle of self-determination, as described by Margalit and Raz, speaks directly to, and attempts to protect, the profound influence of community on individual identity. Qualified groups ought to be free to determine their collective political future, and if a particular group is of the view that separate political institutions are necessary to protect communal difference, it ought to be free to design institutional arrangements that attempt to secure such a result. Viewing the right of Aboriginal self-government in these terms involves a recognition that Aboriginal forms of government are necessary to secure conditions required for the expression of group identity. This in turn involves an implicit acknowledgement that Canadian political institutions have failed and will continue to fail Aboriginal people in this regard, despite any possible future reforms that seek to ensure greater Aboriginal inclusion.

However, an instrumental conception of the value of self-government does not capture the full dimensions of the right of Aboriginal self-government. Aboriginal self-government is not premised on the failure of Canadian political and legal institutions to accommodate Aboriginal difference; its sources are independent of the machinations of the Canadian state, rooted, at least in part, in the fact of prior indigenous sovereignty. Aboriginal people were self-governing before European contact; at that time, self-government's value was intrinsic or inherent, not simply instrumental, to individual and collective Aboriginal identity. An instrumental theory of the right must provide convincing reasons why extraneous factors, such as the establishment of the Canadian state, transformed self-government into an instrumental value.

This requires an assessment of the justice of the assertion of European sovereignty over Aboriginal people. Viewing the assertion of European sovereignty as just enables one to construct the value of self-government as instrumental, i.e., as premised on the failure of Canadian political and legal institutions to secure conditions necessary for the protection of Aboriginal identity. However, as discussed in the previous section, the justice of European assertions of sovereignty is far from certain.lxx One could make pragmatic arguments in favour of accepting Canadian sovereignty over Aboriginal people (presumably to the extent that it provides conditions necessary for the protection of Aboriginal difference), but it is not clear why pragmatism ought to dictate whether self-government is of intrinsic or instrumental value to Aboriginal people. If Canadian political institutions cannot secure conditions necessary for the protection of Aboriginal difference, then this is all the more reason to recognize Aboriginal forms of government. However, rights of self-governance should not be seen as premised solely on the relative capacity of the Canadian state to accommodate Aboriginal difference, unless further argument is provided on the normative legitimacy of Canadian sovereignty over Aboriginal people itself.

Nonetheless, one can adopt an intrinsic theory of the value of Aboriginal self-government and argue that Aboriginal people ought to possess the right of self-determination, i.e., the right to determine whether to be self-governing. The collective right of Aboriginal people to determine whether to be self-governing is surely at the core of a right of Aboriginal self-government. Defining this `core' as a right of self-determination will likely widen the scope of the right of self-government, in that it would inevitably be interpreted through the prism of international legal discourse on self-determination. It would suggest support for the view that international law ought to recognize a right of Indigenous peoples who live within the confines of particular nation-states, under certain circumstances at least, to claim independent statehood, a position that has yet to be adopted in international law.lxxi

Grounding the right of Aboriginal self-government in an intrinsic theory of the right of self-determination would thus carry weighty international repercussions. Whether such repercussions are desirable is beyond the scope of this paper. However, this discussion points to one drawback of relying on the principle of self-determination in support of the right of Aboriginal self-government. The discourse of self-determination is cumbersome in the context of a reform agenda that seeks to justify and provide Aboriginal political institutions that would

operate alongside Canadian institutions. That is, self-determination discourse is difficult to adapt to the objective of allowing Aboriginal people to participate in their own, as well as Canadian, forms of government. The principle of self-determination, from a normative if not a legal perspective, justifies the recognition of Aboriginal governmental authority, but it is not clear why, having exercised rights of self-determination, Aboriginal people also ought to possess the right to continue to enjoy benefits associated with Canadian citizenship. The principle of self-determination, i.e., the right of a group to decide to be self-governing, does not appear to confer as well on the group in question a right to decide unilaterally the extent to which it is entitled to participate in the polity from which it seeks a measure of distance. If a group exercises its right to exclude others from its political institutions, on what basis can it demand representation in the political institutions of those it has excluded? There may well be normative reasons in support of continued representation, but the principle of self-determination, standing alone, does not appear to provide them.lxxii

PRESERVATION OF MINORITY CULTURE

Aboriginal rights in general and a right of self-government in particular have also been defended as a means of protecting Aboriginal cultural differences from assimilative tendencies of more dominant cultures. The right of Aboriginal self-government can be seen as a collective right exercisable within the confines of the Canadian political system. In this light, Aboriginal rights can be viewed as part of broader national and international efforts to preserve not only the cultural integrity of Aboriginal people, but also the cultural integrity of other peoples otherwise threatened by dominant assimilative forces in modern nation-states.

Protection of minority cultures is not alien to Canadian constitutional traditions. In addition to the protection that Canadian law currently provides to Aboriginal peoples, there are several constitutional provisions that express respect for cultural difference. The federal structure of Canadian government was designed in part "to minimize ethnic competition between French and English by separating the united province of Canada into two provinces, Quebec and Ontario, to be dominated by French and English majorities respectively."lxxiii Section 133 of the Constitution Act, 1867 provides for minority language protection in federal and Quebec political institutions.lxxiv Section 93 of the Constitution Act, 1867 provides certain safeguards in the area religious education.lxxv The Canadian Charter of Rights and Freedoms expresses commitment to

the preservation of minority culture, including provisions for minority language educational rights and an interpretive clause that emphasizes "the preservation and enhancement of the multicultural heritage of Canadians".lxxvi Recognition of Aboriginal rights, including a right of self-government, conforms to a Canadian constitutional tradition of acknowledging and accommodating cultural difference.

Moreover, several international legal norms support claims of cultural integrity of minorities within nation-states. Numerous articles of the United Nations Charter, for example, affirm cultural co-operation and cultural development.lxxvii Article 27 of the International Covenant on Civil and Political Rights recognizes rights of members of "ethnic, religious or linguistic minorities...to enjoy their own culture, to profess and practise their own religion [and] to use their own language." The un Convention Against Genocide provides added support for the concept of cultural autonomy,lxxviii as does the unesco Declaration of Cultural Co-operation, which affirms a right and duty of all peoples to protect and develop minority cultures throughout the world.lxxix The un Convention on Racial Discrimination calls for positive governmental action to "ensure the adequate development and protection of certain racial groups or individuals belonging to them."lxxx

There are several international documents that refer specifically to indigenous populations when speaking of the need to protect minority cultures within nation-states. For example, Convention 107 of the International Labour Organization,lxxxi adopted in 1957, while advocating the "integration" of indigenous populations into national communities, also calls upon governments to develop co-ordinated and systematic action to protect indigenous populations and to promote their social, economic and cultural development.lxxxii While the ilo Convention may now appear somewhat dated in its emphasis on integration,lxxxiii its existence suggests some degree of support at the level of international customary law for a right of Aboriginal self-government.

The International Labour Organization recently circulated a proposed revision of Convention 107, entitled a Proposed Convention Concerning Indigenous and Tribal Peoples in Independent Countries.lxxxiv While conspicuously avoiding reference to the principle of self-determination,lxxxv it nonetheless recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the frameworks of the

States in which they live."lxxxvi It then lists an impressive range of rights that attach to Aboriginal people and responsibilities that attach to governments in relation to Aboriginal people that would facilitate the protection of Aboriginal ways of life.

Both the un Draft Declaration and the ilo Convention provide rich sources of content for the right of Aboriginal self-government. Standing alone, however, they illustrate more than justify the right of Aboriginal self-government. If ratified, the draft Declaration and the Convention would simply form part of customary international law and would obtain normative legitimacy from the fact that the documents provide an indication of what a majority of states view as appropriate domestic treatment of Indigenous peoples. The utility of international legal principles in this context should not be discounted.lxxxvii However, it should be emphasized that, unless one sides with the positivist view that a law obtains legitimacy by its very enactment,lxxxviii the possibility of an International Declaration on the Rights of Indigenous Peoples or the existence of a Convention Concerning Indigenous and Tribal Peoples in Independent Countries will not end normative inquiry. While the right of Aboriginal self-government can be characterized as the domestic expression of international rights of Indigenous peoples, questions surrounding normative justifications of the right of Aboriginal self-government are simply deflected to the international sphere: why should Indigenous peoples possess special collective rights of cultural preservation?

Several authors have offered detailed arguments as to why preservation of cultural difference is normatively desirable within a modern democratic state. Will Kymlicka is perhaps the leading proponent of such a view. Kymlicka argues that cultural membership in some cases may justify unequal distributions of political rights and responsibilities within a political community otherwise committed to equality of individuals.lxxxix In his view, equality of individuals does not demand equality of result and an equal weighting of the interests and preferences of everyone. An individual ought to bear the costs of those choices she makes to give meaning and purpose to her life. However, an individual makes choices from a cultural backdrop of available options, and, in Kymlicka's view, one's cultural history is not a matter of choice but rather a function of circumstance. An individual should not be responsible for the costs associated with coming from one cultural background as opposed to another cultural background. Such differences are, in the language of John Rawls, morally arbitrary.xc

Unequal distributions of political rights and responsibilities to Aboriginal people can be

defended, according to Kymlicka, "as a response, not to shared choices, but to unequal circumstances."xci Those unequal circumstances include differences in cultural background and the fact that, unlike non-Indigenous people, Aboriginal people must expend enormous resources simply trying to protect their cultural history and heritage from encroachment by majority cultures. Aboriginal rights are a means by which Indigenous people can be spared the cost of trying to keep their culture alive. Aboriginal rights are therefore a means by which Indigenous people can be placed on an equal footing with non-Indigenous people by relieving Indigenous people of the costs associated with maintaining a responsibility that, although valuable and necessary, is not of their own making or choice.

One weakness associated with invoking the value of minority cultural protection in relation to the right of Aboriginal self-government is that this strategy runs the risk of reducing Aboriginal claims to those of minority claims. In the forceful words of the International Indian Treaty Council, "[t]he ultimate goal of their colonizers would be achieved by referring to indigenous people as minorities."xcii Grounding the right of self-government in international principles respecting rights of minorities would ignore important historical and contemporary differences between Aboriginal people and other cultural minorities in Canada, namely, that Aboriginal people lived on, occupied, and exercised sovereign authority over, the North American continent before European contact.

On the other hand, it cannot be denied that existing international principles addressing cultural minorities are extremely useful tools for the protection of Aboriginal people. The risk associated with viewing Aboriginal peoples in Canada as constituting `minorities' deserving of minority rights protection can be lessened significantly by tailoring the definition of `minority' so that it does not assume away important differences between the Aboriginal population and other minority populations in the country.xciii More fundamental than whether the label `minority' ought to attach to Aboriginal peoples is the question of what rights Aboriginal people will be entitled to exercise if the right of Aboriginal self-government is viewed as a right of a minority. If the rights that attach to Aboriginal people are those catalogued in the ilo Convention, for example, then important differences between Aboriginal peoples and other cultural minorities presumably will be acknowledged, despite the minority description. Invoking of the label of `minority' should not necessarily mean that Aboriginal people are entitled only to rights and liberties accorded to other minority cultures, but that Aboriginal people are entitled to at least

those rights that attach to other cultural minorities. Whether Aboriginal people ought to be entitled to further legal protection by virtue of their indigeneity is a separate question.

Another drawback of viewing a right of Aboriginal selfgovernment as a collective minority right is that it does not do justice to the nature of Aboriginal claims. The right of self-government involves more than freedom to engage in cultural practices otherwise threatened by assimilative tendencies; it includes the freedom to exercise a measure of governmental authority over lands and peoples. While the discourse of collective rights can be stretched to accommodate jurisdictional concerns, the right of Aboriginal self-government requires a certain amount of political and constitutional restructuring of Canadian governmental institutions. Properly understood, a right of Aboriginal self-government does not take the Canadian state as a given; while it does not demand separate Aboriginal statehood, it also challenges the distribution of legislative authority between Parliament and provincial legislatures as well as current administrative structures of justice. The discourse of collective cultural rights of minorities does not capture fully the constitutional, institutional and jurisdictional dimensions of the right. Nonetheless, it is true that part of the purpose of a right of Aboriginal self-government is to enable Aboriginal communities to exercise greater control over their distinct collective identities, and to this extent, a right of self-government is a collective right of Aboriginal peoples to preserve their distinctive cultures. However, the right involves more than the preservation of Aboriginal cultures, and a normative justification ought to acknowledge this fact.

TOWARD A NORMATIVE SYNTHESIS

Perhaps what all the normative justifications of a right of Aboriginal self-government just discussed share is a measure of incompleteness. Prior occupancy arguments justify some aspects of jurisdictional authority, but they weaken in relation to Aboriginal governmental power not directly connected to land use. Claims of prior sovereignty are at the heart of Aboriginal self-government, but there is more to the claim than a retrospective glance at history. Treaties entered into by First Nations and the Crown speak to the fact that First Nations were regarded by the Crown as self-governing entities, but not all Aboriginal people are covered by treaty, and the language of some treaties is less than suggestive of Aboriginal jurisdictional authority. The right of selfdetermination, i.e., the right of a people to decide whether to be self-governing, is also at the heart of the right of self-government, but it is an unwieldy justification of continued

Aboriginal participation in Canadian political institutions. And the protection of minority culture is surely one of the purposes of the right of self-government, but Aboriginal people are different in many ways from other racial or cultural minorities in Canada.

One means of unifying these claims is to begin with the value of self-government, which infuses claims of self-determination and preservation of cultural difference with normative significance, and then assess claims of self-government by reference to principles of equality.xciv Above all, it is the fundamental value that people attach to self-government that renders self-government worthy of the status of a right. Self-government is valuable because it permits the political expression of individual and collective identities. Participation in Aboriginal forms of government is essential to individual and collective Aboriginal identities. At the core of the right of Aboriginal self-government is self-government's value, as well as a right to determine whether in fact to be self-governing.

Given an apparent desire on the part of most Aboriginal people to couple self-government with continued Canadian citizenship status, however, mere emphasis on the value of self-government and a right of self-determination is insufficient justification of rights of self-governance. Normatively, if not legally, all peoples possess a right of self-determination, regardless of the vagaries of colonial boundaries. Yet a normative justification of rights of self-governance that fall short of independent statehood must refer to more than the value of self-government and the right of self-determination. The broader political community presumably is entitled to refuse continued association with the minority in question and to demand that the right of self-determination be exercised in its entirety.

It is at this point where reference to principles of equality bolster the normative force of Aboriginal claims of a right of self-government. Equality principles are doubly useful in that they possess normative significance to Aboriginal and non-Aboriginal people alike. The normative impulse behind claims of equality is a powerful claim of justice, namely, that equals ought to be treated equally and unequals unequally.xcv In determining whether and the extent to which the value of self-government ought to be recognized in the form of a right short of independent statehood, potential beneficiaries of self-government ought to be treated as formally equal to other potential claimants unless there is a good, i.e., normatively justifiable, reason to the contrary.

Before European contact, First Nations were self-governing societies. While Crown

practice in negotiating treaties with First Nations suggests Crown recognition and acceptance of Aboriginal selfgovernment, Aboriginal authority to continue to be self-governing was ultimately denied by the assertion of sovereignty by settling nations and the establishment of nation-states on the continent. Thus, First Nations were treated in formally unequal terms by European nations under international law and practice. The reasons offered in defence of such formal inequality were not normatively justifiable reasons, in that they were based on unacceptable notions of Aboriginal inferiority. Formal equality supports the recognition of a right of Aboriginal self-government, in that it would seek to place Aboriginal people in the position they would have been in had they been treated as formally equal to European nations at the time of contact. Formal equality underlies normative arguments in favour of a right of self-government based on the fact of prior sovereignty of Aboriginal people.

However, a right of self-government involves more than placing Aboriginal people in the position they would have been in had they been treated as formal equals. It is also a means by which adverse social and economic conditions of Aboriginal people can be alleviated. Many of the debilitating social and economic conditions of Aboriginal people are direct results of historical refusals by Canadian authorities to allow Aboriginal people to make political decisions according to their own political practices concerning matters central to Aboriginal difference. A right of self-government can be viewed as possessing a remedial dimension, in that recognition of the right would permit Aboriginal people to exercise greater control over matters essential to their distinct individual and collective identities, thereby alleviating their disadvantaged economic and social position in Canadian society.

This aspect of the right can also be viewed in terms of equality, namely, principles of substantive equality. Substantive equality refers to the moral ideal of ameliorating adverse economic and social conditions of individuals and groups in order to achieve greater equality among individuals and groups in society.[xcvi] Recognition of a right of Aboriginal self-government can be justified as a measure that will, it is hoped, improve the condition of Aboriginal people in Canada. Thus, substantive equality of peoples supports a right of self-government as a means of ameliorating Aboriginal social and economic disadvantage.

Grounding the right of Aboriginal self-government in its underlying value and principles of equality acknowledges and expresses truths of traditional justifications of the right, but does

not elevate one or more of them to the status of exclusive justification. Treaty-based claims relate to equality principles, in that the treaty-making process evinces a commitment to equality of peoples. Underlying a claim of prior sovereignty is a deeper moral claim concerning the justice of international legal principles legitimating the assertion of European sovereignty on the continent, i.e., that First Nations were not treated as equals to European nations. The moral force of self-determination discourse and normative claims regarding the protection of minority culture lies in their recognition of the profound value of self-government. Even claims of prior occupancy, related only loosely to normative justifications of the right of self-government, express equality concerns, in that equal treatment demands the recognition of Aboriginal property entitlements. This is not to suggest that framing the right in terms of equality is the only way of conceptualizing its underlying normative dimensions.[xcvii] However, equality offers a useful and, in my view, compelling framework for assessing the right of Aboriginal self-government, for it speaks to moral values shared by Aboriginal and nonAboriginal people alike.

CONCLUSION

Under the cover of positive law, the right of Aboriginal self-government possesses complex normative dimensions. Supported by a number of distinct but intersecting normative justifications, the right of selfgovernment is best defended by a combination of arguments, each supporting a different dimension of the nature of the right. Such a stance blunts critiques based on the contingency of normative thought by consciously refusing to ground the right of self-government in a single normative principle. Prior Aboriginal sovereignty and the injustice of legal principles governing conquest, settlement and sovereignty, together with a more general right of self-determination, are at the core of the right of Aboriginal self-government. Prior occupancy of land provides further support for Aboriginal rights of land management and land use. Treaties entered into by First Nations and the Crown serve as evidence that Aboriginal peoples were self-governing and were treated as such by England and France. Rationales underlying minority cultural rights are also useful in their emphasis on cultural autonomy. When housed in principles of formal and substantive equality of peoples, these perspectives represent a convincing, if not solid, set of normative foundations for the right of Aboriginal self-government.

NOTES

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[i]Question 1.9.1, Royal Commission on Aboriginal Peoples, Research Project Proposal, *The Philosophical Bases of Aboriginal Self-Government*.

[ii]By normative justification I mean a process of reasoning whereby a social, legal or political outcome is defended by reference to norms or principles of justice.

[iii]Question 1.9.2, research proposal, cited in note 1.

[iv]See, generally, J. Austin, *The Philosophy of Positive Law* (ed. R. Campbell, 1911); see also O. Fiss, "The Varieties of Positivism", 90 *Yale L.J.* (1981) 1007.

[v]See text accompanying notes 47-73.

[vi]*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

[vii]For scholarship addressing legal indeterminacy, see Robert W. Gordon, "Critical Legal Histories", 36 *Stan. L. Rev.* (1984) 57; Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory", 94 *Yale L. J.* (1984) 1; Duncan Kennedy, "Legal Formality", 2 *J. Legal Studies* (1973) 351.

[viii]*Adopted* December 19, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976.

[ix]G.A. Res. 217A (III), UN Doc. A/77, at 71 (1948), reprinted in *United Nations, Human Rights: A Compilation of International Instruments* 1, UN Doc. ST/HR/Rev.2 (1983).

[x]See text accompanying notes 53-57.

[xi]David Harvey, *The Condition of Postmodernity: An Inquiry Into the Origins of Cultural Change* (1989), p. 41.

[xii]See Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989); and Richard Rorty, *Contingency, irony, and solidarity* (1989), p. 22 ("we treat *everything*─our language, our conscience, our community─as a product of time and chance").

[xiii]See James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (1988); Martha Minow, "Identities", 3 *Yale J. Law & Humanities* (1991) 97. Cf. Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice", paper prepared for the National Round Table on Aboriginal Justice Issues, Royal Commission on Aboriginal Peoples (1993), p. 137 (cultures "evolve, adapt, are continually subject to interpretation and re-interpretation").

[xiv]See, e.g., Teressa Nahanee, "Dancing With a Gorilla: Aboriginal Women, Justice and the Charter", paper prepared for the National Round Table on Aboriginal Justice Issues, Royal Commission on Aboriginal Peoples (1993).

[xv]See Ruth Anna Putnam, "Justice in Context", 63 *S. Cal. L. Rev.* (1990) 1797 at 1802 (politics "requires common ideals, a common conception of justice").

[xvi]For an assessment of the strengths and weaknesses of prior or first occupancy as a normative or philosophical basis for the assertion of property rights, see Lawrence C. Becker, *Property Rights: Philosophic Foundations* (1977), pp. 24-31.

[xvii]*Calder* v. *A.G.B.C.*, [1973] S.C.R. 313; see also *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, per Dickson J. at 376-9 ("aboriginal title [is] a legal right derived from the Indians' historic occupation and possession of their tribal lands").

[xviii]*Baker Lake* v. *Minister of Indian Affairs*, [1980] 1 F.C. 518 (T.D.).

[xix]A.M. Honoré has argued that a `full' conception of ownership includes, among other things, a right to manage property, i.e., deciding how and by whom a thing shall be used. See A.M. Honoré, "Ownership", in *Oxford Essays in Jurisprudence* (ed. A.G. Guest, 1961) 107. For the view that Aboriginal rights "recognized and affirmed" by section 35(1) of the *Constitution Act, 1982* include not only a right to fish but also "the right to select persons intended to be the recipients of the fish for ultimate consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial purposes, and the method or manner of fishing and...the right...to follow directions of the traditional leaders of the band in conducting the fishery, the place of the fishery and the method of the fishery and the right not to be required to choose between an employee or representative of the Department of Fisheries and the traditional leaders of the Wet'suwet'en people", see *R.* v. *Nikal*, [1991] 1 C.N.L.R. 162 (B.C.S.C.), per Millward J.

[xx]It should be noted that while the notion that prior occupancy finds expression in western philosophical traditions, its application to indigenous occupancy of North America was not well received in western philosophical thought. John Locke, for example, argued "Yet there are still *great tracts of land* to be found, which (the inhabitants thereof not having joined with the rest of mankind, in consent of the use of their common money) lie waste, and are more than the people, who dwell on it, do, or can make use of, and so still be in common." (John Locke, *Two Treatises on Government* (rev. ed. P. Laslett, 1963), p. 333). Locke argued that "waste", i.e., uncultivated, land is not occupied or owned and therefore can be appropriated through labour. The Swiss natural law theorist, Emmerich de Vattel, was even more direct:

> There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country....[T]hese tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them. (*The Law of Nations or the Principles of Natural Law* (1964), pp. 85-86.)

Nor did the law apply its acceptance of prior occupancy to Aboriginal occupation of North America. Its application to North America is severely restricted by the legal fiction of underlying Crown title, which posits that the Crown was the original occupant, and therefore owner, of all the lands of the realm. For more discussion of the relationship between Aboriginal title and Crown title, see Kent McNeil, *Common Law Aboriginal Title* (1989).

[xxi]J.J. Rousseau, *Discourse on Inequality* (Penguin ed., 1984), p. 109. See also Immanuel Kant, *The Metaphysics of Morals* (trans. J. Ladd, 1965), pp. 44-56 (first appropriation of land creates rights with respect to that land in certain circumstances); G.W.F. Hegel, *Philosophy of Right* (trans. T.M. Knox, 1942), pp. 37-41 (discussing right of appropriation over all things).

[xxii]Blackstone, II *Commentaries on the Laws of England* (ed. E. Christian), pp. 8-9.

[xxiii]Robert Nozick, *Anarchy, State, and Utopia* (1974), p. 151. For commentary, see David Lyons, "The New Indian Claims and Original Rights to Land", in *Reading Nozick: Essays on Anarchy, State, and Utopia* (ed. J. Paul, 1982), pp. 355-379.

[xxiv]As quoted in *Delgamuukw* v. *British Columbia*, Plaintiffs' Opening Address, May 11, 1987, reported at [1988] 1 C.N.L.R. 14, at 18.

[xxv]Unofficial and unverified verbatim transcript, March 15, 1983, as quoted in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984), p. 29.
[xxvi]Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights", in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (ed. Boldt & Long, 1985), pp. 19-20.
[xxvii]*R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.
[xxviii]Georges Erasmus and Joe Sanders, "Canadian History: An Aboriginal Perspective", in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (ed. Englestad & Bird, 1992), p. 3.
[xxix]As described by Chief Justice Marshall of the United States Supreme Court, "the character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. (*Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).)

Marshall C.J. modified his position in *Worcester* v. *Georgia* (31 U.S. (6 Pet.) 515, 543 (1832)), stating that "[i]t is difficult to comprehend that the discovery...should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." The Canadian and Imperial judiciary traditionally ignored *Worcester* v. *Georgia*, preferring instead the more restrictive approach taken in *Johnson* v. *M'Intosh*. See, for example, *St. Catherines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 (P.C.). See, generally, Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination", 36 *McGill L. J.* (1991) 382 at 396-414.

For views similar to those recorded by Marshall C.J. in *Johnson* v. *M'Intosh*, see John Westlake, *Chapters on Principles of International Law* (1984), pp. 136-38, 141-143 (drawing distinction between "civilization and want of it"); W.E. Hall, *A Treatise on International Law* (8th ed. P. Higgins, 1924), p. 47 (international law governs only states that are "inheritors of that civilization"); L. Oppenheim, *International Law* (3rd ed. 1920), p. 126 (law of nations does not apply to "organized wandering tribes"); I.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922), p. 164 ("native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect"). For a recent treatise arguing that international law now prevents the assertion of sovereignty by settlement over Indigenous people, see J. Crawford, *The Creation of States in International Law* (1979), pp. 176-81; see also "Western Sahara", *I.C.J. Rep.* (1975) 12 at 38-40.
[xxx]*Johnson* v. *M'Intosh*, at 591.
[xxxi]S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", 75 *Iowa L. Rev.* (1990) 837 at 840.
[xxxii]As quoted in Richard Daniel, "The Spirit and Terms of Treaty Eight", in *The Spirit of the Alberta Indian Treaties* (ed. R. Price, 1987), pp. 94-95.
[xxxiii]Robert Clinton, "The Rights of Indigenous Peoples as Collective Group Rights", 32 *Ariz. L. Rev.* (1990) 739. See also Ward Churchill, "Implications of Treaty Relationships Between the United States and Various American Indian Nations", in *Native Americans and Public Policy*, ed. Fremont J. Lyden and Lyman H. Legters (Pittsburgh: University of Pittsburgh Press, 1992), pp. 149-163; Michael Jackson, "The Articulation of Native Rights in Canadian Law", 18 *U.B.C. L. Rev.* (1984) 255.
[xxxiv]Clinton, "The Rights of Indigenous Peoples", p. 740.
[xxxv]Clinton, pp. 744-45 (footnotes removed; emphasis in original).

[xxxvi]Treaty with the Cherokees, December 29, 1835, United States─Cherokee Tribe, art. 5, 7 Stat. 478.
[xxxvii]Reprinted in A. Guttman, *States' Rights and Indian Removal: The Cherokee Nation v. Georgia* (1965), p. 58.
[xxxviii]John Danley, "Liberalism, Aboriginal Rights, and Cultural Minorities" (review of Kymlicka, *Liberalism, Community, and Culture*), 20 *Philo. & Pub. Affairs* (1991) 168 at 183-85.
[xxxix]*The Road: Indian Tribes and Political Liberty* (1980), pp. 270-87.
[xl]*The Road*, p. 278.
[xli]*The Road*, p. 270.
[xlii]*The Road*, p. 270 ("Treaties are a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States").
[xliii]See Evelyn J. Peters, Federal and Provincial Responsibilities for the Cree, Naskapi, and Inuit Under the James Bay and Northern Québec, and Northeastern Québec Agreements", in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (ed. D. Hawkes, 1989), pp. 173-242. See also *Agreement in Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada* (Ottawa: Department of Indian Affairs and Northern Development, 1990).
[xliv]See, for example, *R.* v. *Sioui*, [1990] 1 S.C.R. 1025.
[xlv]See text accompanying notes 30-32.
[xlvi]See, generally, Edward M. Morgan, "The Imagery and Meaning of Self-Determination", 20 *N.Y.U. J. Int'l Law* (1988) 355; Nathaniel Berman, "Sovereignty in Abeyance: Self-Determination and International Law", 7 *Wisc. Int'l L. J.* (1988) 51. See also Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition", 25 *Cornell Int'l L. J.* (1992) 579 at 592 ("Self-determination can be conceptualized as requiring that every culturally and historically distinct people has the right to choose its political status by democratic means, under international supervision, and with international support").
[xlvii]S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", 75 *Iowa L. Rev.* (1990) 837 at 841. See also A Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (1981) pp. 117, 119 (self-determination is "the most important of the principles of international law concerning friendly relations and cooperation among states"). But see Gerald Fitzmaurice, *The Future of Public International Law and the International Legal System in the Circumstances of Today*, in *Évolution et Perspectives du Droit International* (Institut de Droit International, 1973), p. 233 ("juridically, the notion of a `legal right' of self-determination is nonsense").
[xlviii]UN Charter, art. 1(2), June 26, 1945, 1976 Yearbook UN 1043 ("The purposes of the United Nations are...[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples").
[xlix]UN Charter, art. 55.
[l]*International Covenant on Civil and Political Rights*, art. 1, opened for signature December 19, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976. Article 1 of the *International Covenant on Economic, Social and Cultural Rights* contains identical language. Additionally, it provides that "all persons may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be

deprived of its own means of subsistence." (Opened for signature December 19, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.)

[li]*Namibia*, [1971] I.C.J. 16, at 31; *Western Sahara*, [1975] I.C.J. 12, at 31.

[lii]See, generally, Umozurike Oji Umozurike, *Self-Determination in International Law* (1972), pp. 11-26.

[liii]See, generally, Van Langenhove, *The Question of Aborigines Before the United Nations: The Belgian Thesis* (Brussels: Royal Colonial Institute, 1954).

[liv]G.A. Res. 1514, 15 UN GAOR Supp. (No. 16), at 66, UN Doc. A/7218 (1969).

[lv]GAOR 15th Session, Supplement 16, 66.

[lvi]Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p. 18. For criticism of this approach in the context of Indigenous peoples, see Russel Lawrence Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law", in *International Law and Aboriginal Rights* (ed. Hocking, 1988), p. 68.

[lvii]See, for example, Lung-Chu Chen, "Self-Determination and World Public Order", 66 *Notre Dame L. Rev.* (1991) 1287 at 1288 ("Self-determination's appeal is rooted in human dignity and human rights and is linked to the maintenance of world order").

[lviii]Lung-Chu Chen, "Self-Determination", p. 1294 ("the basis for either granting or rejecting the demands of a group should not be whether a given situation is `colonial' or `noncolonial', but whether the decision would move the situation closer to goal values of human dignity").

[lix]Quoted in Thornberry, *International Law and the Rights of Minorities.*

[lx]UN Doc. E/CN.4/Sub.2/476/Add.5, Annex III, 2. See also Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession From Canada* (Commission on Human Rights, 48th Sess., 1992).

[lxi]See also *Declaration by the International NGO Conference on Discrimination Against Indigenous Populations in the Americas*:

1. Recognition of Indigenous Nations. Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental characteristics of nationhood: namely, (a) Having a permanent population (b) Having a defined territory (c) Having a government (d) Having the ability to enter into relations with other States...

4. Accordance of Independence. Indigenous nations or groups shall be accorded such degree of independence as they may desire in accordance with international law. (UN Doc. E/Cn/.4/Sub/21986/7.)

[lxii]*Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1993/26, released June 8, 1993, prepared by the Chair-Rapporteur of the Working Group on Indigenous Populations.

[lxiii]*Draft Declaration on the Rights of Indigenous Peoples*.

[lxiv]*Explanatory note concerning the draft declaration on the rights of indigenous peoples*, E/CN.4/Sub.2/1993/26/Add.1, released July 19, 1993, prepared by the Chair-Rapporteur of the Working Group on Indigenous Populations.

[lxv]Avishai Margalit and Joseph Raz, "National Self-Determination", 87 *J. Philo.* (1990) 439.

[lxvi]Margalit and Raz, "National Self-Determination", p. 440.

[lxvii]Margalit and Raz argue that not all groups enjoy the right of self-determination. In their view, the right attaches only to those groups that possess "characteristics...relevant to the justification of the right." ("National Self-Determination", p. 443.) Given that they base the right in an instrumental defence of the value of self-government, they argue that the right extends to large, historically significant groups that possess common characters and cultures that affect individual

identity, where membership is a matter of belonging and mutual recognition. (pp. 443-447) For a discussion of group rights and participatory goods, see Denise Réaume, "Individuals, Groups, and Rights to Public Goods", 38 *U.T. L. J.* (1988) 1. For literature addressing the definition of `peoples' to which the right of self-determination adheres, see Stavengaven, *The Ethnic Question: Conflicts, Development, and Human Rights* (1990), p. 68; Dinstein, "Collective Human Rights of Peoples and Minorities", 25 *Int'l & Comp. L. Q.* (1976) 102.

[lxviii]Margalit and Raz, "National Self-Determination", p. 453.

[lxix]Margalit and Raz, "National Self-Determination", p. 453.

[lxx]See text accompanying notes 29-31.

[lxxi]See text accompanying notes 52-56.

[lxxii]The *Draft Declaration on the Rights of Indigenous Peoples* avoids this concern by defining the right of self-determination as including rights of political participation within the state structure in which Indigenous peoples find themselves in addition to rights of self-government and political autonomy. See also Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal* ("such complexity can only be handled by means of a flexible approach which sees self-determination as a continue of rights, as a plethora of possible solutions, rather than a rigid absolute right to `external' self-determination in the form of complete independence"). However, a positivist redefinition of the scope of the right of self-determination in this way does not eliminate the necessity of normatively justifying such a definition. The question still remains: why should Indigenous peoples be entitled to rights of self-government and autonomy *and* be entitled to continue to participate in political structures from which they seek a measure of distance? An answer to this question cannot lie solely in an assertion of a flexible, positivist international right of self-determination; resort must also be made to principles of justice that normatively support such a stance.

[lxxiii]Alan C. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (1992), p. 35.

[lxxiv](U.K.) 30 & 31 Vict., c. 3. See also the *Manitoba Act*, R.S.C. 1970, App. II, No. 8.

[lxxv]*Ibid.*

[lxxvi]*Constitution Act, 1982*, ss. 23, 27. See, generally, Cairns, *Charter Versus Federalism*, pp. 62-95; Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987); David J. Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness", 22 *C.J.P.S.*(1989) 699; Thomas R. Berger, "Towards the Regime of Tolerance", in *Political Thought in Canada: Contemporary Perspectives* (ed. Stephen Brooks, 1984), pp. 83-96.

[lxxvii]UN Charter, arts. 13, 55, 57, and 73.

[lxxviii]*Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1961. Article II defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such...". For links between the concept of genocide and the treatment of American Indians, see Lyman H. Legters, "The American Genocide", in *Native Americans and Public Policy* (ed. Fremont J. Lyden and Lyman H. Legters, 1992), pp. 101-112.

[lxxix]*Declaration of the Principles of International Cultural Co-operation*, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session on November 4, 1966, reprinted in *United Nations, Human Rights: A Compilation of International Instruments*, UN Doc. ST/HR/1/Rev.3 (1988), p. 409.

[lxxx]*International Convention on the Elimination of All Forms of Racial Discrimination*, art. 2, para. 2, opened for signature March 7, 1966, 660 U.N.T.S. 195, entered into force January 4, 1969.

[lxxxi]*The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Conventions and Recommendations Adopted by the International Labour Conference, 1919-66* (Geneva: ILO, 1966), at 901 and 909. Canada is not party to the Convention.

[lxxxii]*Ibid*., arts. 2(1), 2(2).

[lxxxiii]For an assessment of the ILO Convention, see Thornberry, *International Law and the Rights of Minorities*, pp. 334-368. See also Martinez-Cobo, *Analytical Compilation of Existing Legal Instruments and Proposed Draft Standards Relating to Indigenous Rights*, UN Doc. M/HR/86/36, Annex V, for a summary of submissions by indigenous groups sharply criticizing the Convention on a number of grounds.

[lxxxiv]*Partial Revision*, Report IV(2A), p. 8.

[lxxxv]In fact, Canada made a submission on this point, arguing that the draft Convention's "use of the term `peoples'...does not imply the right to self-determination as that right is understood in international law" but that "[t]his position is not meant to prejudice the attainment of greater levels of autonomy for indigenous populations at the national level." (*Partial Revision*, Report IV(2A), p. 9.)

[lxxxvi]*Ibid*., preamble.

[lxxxvii]For more discussion, see Robert A. Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World", *Duke L. J.* (1990) 660 at 668-69:

> international human rights law and norms have come to assume a more authoritative and even constraining role on state actors in the world. Government assertions in the international community that abuses of its citizens' human rights are matters of exclusive domestic concern have become more difficult to sustain. Various formal and informal mechanisms have proven capable of ameliorating abusive state practices violative of international human rights instruments and standards. Wanton state violators of international legal norms often pay the price of increasing isolation. Vitally important economic and cultural exchange opportunities are often constricted by the international community in reaction to a sovereign state's human rights abuses of its citizens....[F]ew governments actively desire pariah status in the international community.

But see Robert Laurence, "Learning to Live With the Plenary Power of Congress Over the Indian Nations", 30 *Ariz. L. Rev.* 413 at 428 ("I have no faith in the ability of public international law to put bread on American Indian tables").

[lxxxviii]See text accompanying notes 4-15.

[lxxxix]Will Kymlicka, *Liberalism, Community, and Culture* (1989). For commentary, see C. Kukathas, "Are There Any Cultural Rights?" (1992) 20 *Political Theory* 105; Danley, "Liberalism, Aboriginal Rights, and Cultural Minorities"; Don Lenihan, "Liberalism and the Problem of Cultural Membership: A Critical Study of Kymlicka", 4 *Can. J. Law & Juris.* 401. For the view that "dividing power between a federal government and territorial sub-units with ethnically homogenous political majorities is an unlikely solution to ethnic nationalism, unless accompanied by laws and institutions that protect individual and minority rights, ensure each ethnic group adequate voice in national public life, and create direct citizen allegiance to the

regime as a whole", see Robert Howse and Karen Knop, "Federalism and the Limits of Ethnic Accommodation: A Canadian Perspective" *New Europe L. Rev.* (1993).

[xc]John Rawls, *A Theory of Justice* (1971).

[xci]Kymlicka, *Liberalism, Community, and Culture*, p. 187.

[xcii]Quoted in Jules Deschenes, *Proposal concerning a Definition of the term `Minority'*, UN Doc. E/CN.4/Sub.2/1985/31, para. 33.

[xciii]Two definitions of `minority' appear to be vying for international attention. The first is proposed by Special Rapporteur Capotorti: "[a minority is a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members─being nationals of the State─possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." (*Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Add.1-7.)

The second is proposed by Jules Deschenes: "[A minority is a] group of citizens of a state, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law." (*Proposal Concerning a Definition of the Term `Minority'*, UN Doc. E/CN.4/Sub.2/1985/31, para. 181.)

[xciv]These ideas are explored at greater length in Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples", 45 *Stanford L. Rev.* (1993) 1311. It should be emphasized that the principles of equality to which I refer apply to peoples, not individuals, and are normative, not legal, principles.

[xcv]See, for example, Aristotle, *Nichomachean Ethics*, vol. V, book 3, lines 1131a10-b15.

[xcvi]See, for example, Thomas Nagel, *Equality and Partiality* (1991), p. 12.

[xcvii]See, for example, Brian Slattery, "Aboriginal Sovereignty and Imperial Claims", 29 *Osgoode Hall L. J.* (1991) 681 (rights to life and to basic necessities ground right of self-government).