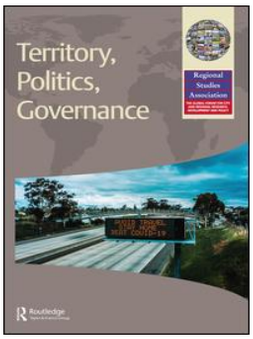

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The settler-rights backlash: understanding liberal challenges to Indigenous self-determination

Aaron John Spitzer

ABSTRACT

In the archetypal settler-colonial states of the United States, Canada, Australia and New Zealand, Indigenous peoples have joined the 'rights revolution', pressing for self-determination. They have been met by a 'settler-rights backlash', contraposing settler and Indigenous rights. This article makes two contributions. First, it presents a scoping study of settler-rights challenges in Anglo-settler states, revealing the extent and means of the settler backlash. Second, working within mainstream Anglo-settler political theory, it theorizes settler-rights challenges, exploring what liberal principles settlers invoke, what Indigenous protections they impugn, and what contrapositions of rights ensue. This article shows settlers invoke the liberal principle of universalism to impugn Indigenous sovereignty, the liberal principle of individualism to impugn differentiated citizenship, and the liberal principle of egalitarianism to impugn Indigenous decision-making and territorial control. In doing so, this article reveals the normative dynamics and internal contradictions of settler-rights challenges. By showing the extent, dynamics and contradictions of such challenges, it is hoped to help public decision-makers better understand and resolve them.

KEYWORDS

Indigenous; self-determination; liberal theory; rights; territory; mobility; voting; settler colonialism

HISTORY Received 15 June 2021; in revised form 22 March 2022

INTRODUCTION

In recent decades, the 'rights revolution' has transformed democracy across the globe. Where once democratic politics was about interest groups competing for legislative priority, it increasingly centres on claimants asserting rights – not just in parliaments but in courts, referenda, electoral districting processes, treaty negotiations, constitutional conventions, and so forth. The rights revolution has seen rights mobilized by a range of political actors, most obviously women and minorities. Often, these mobilizations have been met by countervailing rights appeals, including in the name of free speech, religious liberty and the rights of the unborn. In this manner, the rights revolution has seen rights not just mobilized, but contraposed.

In the archetypal settler-colonial states of New Zealand, Australia, Canada and the United States, Indigenous peoples have joined the rights revolution. In those states, exogenous settlers established and maintain colonial societies on Indigenous homelands, denying Native autonomy

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and territory not just through violence and deceit but also through 'the juridical obliteration of the tribe' – the dissolution of Indigenous sovereignty through settler law. Now Indigenous peoples, invoking the right of collective self-determination, press to be treated anew as sovereign polities with authority over Native lands and lives.

Their efforts have enjoyed some success. In the Anglo-settler states, numerous Indigenous groups have won land-claim settlements and/or enhanced political autonomy. Yet settlers, still resident in Indigenous homelands, retain keen interests in property, natural resources, mobility and political participation. To protect these interests, settlers have counter-mobilized, challenging Indigenous self-determination. They have done so in part through constitutional litigation and equal-rights law. This effort has been called the 'settler-rights backlash'.

The settler-rights backlash is vexing because it contraposes rights. It has thus received some academic attention, particularly by US law scholars, and particularly concerning settler rhetoric and settler legal arguments vis-à-vis US Indian Law. Less study has been devoted to identifying settler-backlash challenges beyond the United States, or to understanding them beyond the law, unpuzzling their normative claims, consequences and contradictions.

This article aims to fill these two gaps, adding breadth and depth to our understanding of the settler backlash, by addressing two salient-yet-unanswered questions. First, to what degree have settlers used liberal rights to combat Indigenous protections, both in the famously rights-focused United States and in the other Anglo-settler states? And second, how have settlers done so: What liberal principles do settlers appeal to, what Indigenous protections do they challenge, and what are the moral quandaries that ensue?

I address the first of these questions using a scoping study considering scores of potential backlash cases, analysing them to weed out false positives, and thereby producing a catalogue of settler-rights challenges in the four Anglo-settler states. I address the second of these questions by examining these challenges through political theories of liberalism and self-determination – the idioms of mainstream public decision-making in Anglo-settler states. Working within this mainstream tradition, I taxonomize each backlash case according to two factors, the sort of liberal principles invoked by settlers and the kind of Indigenous protections they impugn. Doing so shines light on the extent, normative dynamics and internal contradictions of settler-backlash challenges, hopefully helping judges, elected officials, voters, and other decision-makers better understand and resolve them.

The remainder of the paper is structured as follows. In the next section, I review the existing literature concerning the rights revolution, the rise of Indigenous rights and the settler-rights backlash. The third section addresses the first of the two aforementioned scholarly gaps, discussing my scoping survey and analysis gauging the extent of the settler-rights backlash in the Anglo-settler states. The fourth section addresses the second gap, providing examples of, and using normative political theory to understand, the kinds of rights-claims settlers make, the sort of Indigenous protections settlers target, and the normative contrapositions that result. The fifth section sums up.

THE RIGHTS REVOLUTION, INDIGENOUS-RIGHTS CAMPAIGNS AND THE SETTLER BACKLASH

Rights are entitlements – for example, to perform or not perform certain acts, or to receive or not receive certain kinds of treatment (Wenar, 2021). Rights as a general concept are ancient and universal, having likely existed in some form across human cultures throughout history. However, the specific understandings of rights that undergird today's Westphalian liberal-democratic state system, including the Anglo-settler states, are considered to have sprung from the European Enlightenment (Hunt, 2007; Weitz, 2015). Those understandings belong to two often-overlapping schools of rights-theorizing. The first school, focusing on the rights of individuals, is

liberalism, pioneered by Hobbes and Locke and elaborated down the centuries by the likes of Mill and Rawls. Liberalism is arguably the world's dominant political philosophy, shaping political and legal norms within democratic states. Liberal theory draws on an array of liberal principles, key among them three that will be discussed in detail in this article – the principles of individualism, egalitarianism and universalism (Kukathas, 1992, p. 108).

Whereas liberalism champions the rights of individuals, the second school of rights-theorizing underlying Westphalian liberal democracy focuses on the rights of groups, most fundamentally the right of collective self-determination. Collective self-determination is the right of a group to chart its own political course. This is the right most commonly cited to justify Westphalian statehood as well as the kind of substate authority exhibited by federal subunits, consociational *demoi*, autonomous territories and so forth. The moral basis of this right is variously attributed to, for example, nationalist principles (Gellner, 1983; Walzer, 1983), or to the right of individuals to collectivize via a social contract, or to the interest of individuals to be secure in their own culture (Kymlicka, 1995). Whatever its justification, the right of self-determination seems to imply several corollary normative precepts, four of which I will highlight in this article: differentiated citizenship, sovereignty, decision-making capacity and territorial control.

These two theories of rights – liberal individual rights and the right of collective self-determination – have both been widely criticized. Marx (2011) suggested liberalism promotes selfishness and social alienation, protecting the bourgeoisie. The conservative Edmund Burke felt the opposite, condemning liberalism for disrupting traditional beliefs, loyalties and hierarchies (Ball et al., 2019). Feminists such as Carol Gilligan (Gilligan, 1982) maintain rights amplify the 'masculine voice' vis-à-vis female 'ethics of care'. Critical race theorists note that liberalism blossomed during – and argue it facilitated – the global expansion of slavery, colonization and genocide. Students of Indigenous law, such as Napoleon and Friedland (2016), see liberal constitutionalism as hostile to legal pluralism, crowding out Native legal orders. Similarly, much criticism has been levelled at collective self-determination. Cosmopolitans (Waldron, 1991), libertarians (Kukathas, 1992) and some liberals (Barry, 2001) argue that groups are temporary, strategic, often elite constructs and thus are not owed moral rights. Other scholars see self-determination, at least in its Westphalian manifestations, as harmful to minorities, including migrants (Carens, 2013), women (MacKinnon, 1989) and Natives (Clastres, 2020).

Despite these criticisms, liberal individual rights, along with the right of collective self-determination, not only continue to frame the existing state system but have in recent decades become even more central to politics. Tate and Vallinder call this centring the 'judicialization of politics' (Tate & Vallinder, 1995, p. 13). Hirschl terms it the 'trend toward juristocracy' (Hirschl, 2004, p. 6). Epp, most famously, dubs it 'the rights revolution' (Epp, 1998). The rights revolution has transformed politics not just in the notoriously rights-focused United States but globally. It has expanded the arena of politics to encompass the courts, empowering – some say enthroning – judges. It has altered political standards, processes and language, for example deemphasizing coalition-building, popular sovereignty and parliamentary supremacy in favour of more absolutist ideals (e.g., justice), means (litigation) and rhetoric ('duties', 'entitlements'). It may even have revised the answer to that core political question, 'who gets what and how', with new minority-rights campaigns competing for attention with – and arguably thriving vis-à-vis – older struggles for economic redistribution (Ignatieff, 2008).

The rights revolution began on the left, when progressives turned to the courts to secure inclusion for marginalized groups. After that tactic succeeded, the revolution spread across the political spectrum. Now even conservatives employ litigation, equal-rights legislation and rights-talk – often to parry rights-claims from the left. This conservative embrace of rights has been termed a 'constitutional backlash' (Kennedy, 2020, p. 116). In the United States, the backlash has seen conservative rights-claimants sue to thwart gun control, gay marriage and affirmative action (Keck, 2014). Internationally, conservatives now brandish religious rights to

challenge secular freedoms, cite the 'right to life' to block abortion and deploy cultural rights to defend the unequal treatment of women (Bob, 2012). Moreover, as this article will show, the conservative rights backlash has squared off against Indigenous peoples, using rights to defend settler colonialism.

Settler colonialism is the phenomenon that, over the past half-millennium, converted the whole of the Western Hemisphere, and parts of the Australo-Pacific, Africa, Russia and Scandinavia, from Indigenous- to settler-controlled domains. These places had long been home to thousands of Indigenous polities and legal orders. Then came the tide of European settlers, displacing the original inhabitants and founding 'a new colonial society on the expropriated land base' (Wolfe, 2006). This transformation was most stark, and thus has come to be seen as archetypal, in the four 'Anglo-settler' states, the United States, Canada, Australia and New Zealand.

In those Anglo-settler states, settler colonialism advanced through diverse means. Most controversial, even at the time, were expulsions and exterminations – the US Indian Removals and Indian Wars, Canada's war against the Métis and 'clearing of the Plains' (Daschuk, 2013), the New Zealand Wars, and Australia's frontier massacres, committed well into the 1900s (Pedersen & Phillpot, 2018). More innocuous, yet perhaps even more effective, has been the settler erasure of Indigenous peoples not physically but constitutionally. McHugh terms this erasure 'the juridical obliteration of the tribe' (McHugh, 2008, p. 67). Where once settlers may have considered Indigenous peoples to be foreign collectives with their own Native territories and populi, 'they' have now by law been absorbed into 'us', their homelands and bodies politic dissolved into the settler imperium.

Examples of such juridical obliteration abound. From the outset, colonizers deemed Australia *terra nullius*, devoid of Indigenous sovereigns. Meanwhile, in the United States, Canada and New Zealand, Indigenous nationhood, though initially presupposed, soon came under attack (McHugh, 2008, p. 49). From 1887 to 1934, the United States alienated millions of acres of Indian lands; in 1924 it proclaimed Indians to be American citizens; from the 1940s to 1960s it 'terminated' more than 100 tribes. In Canada, the 1876 Indian Act reclassified hundreds of sovereign First Nations as federal wards, while, through an array of treaties, it swallowed their lands. In New Zealand, officials confiscated extensive Maori territory in the 1800s (Winter, 2013) and then, in 1967, removed protections from, and incentivized alienation of, remaining Maori lands. Hence, by 1970, in all four Anglo-settler states, Indigenous individuals were state citizens, state-recognized Indigenous lands were few and fragmented, and tribes, if recognized at all, were no longer considered foreign but rather domestic.

This juridical obliteration was said to be not just an inevitable consequence of Manifest Destiny, but beneficial to Natives themselves. Stamping out tribalism would save Indigenous souls and uplift them from poverty. It would also emancipate them politically, endowing them with liberal-democratic values such as freedom, equality and individual rights. In the United States, policies such as reserve-land allotment (Hoxie, 1984), tribal termination (Wilkinson & Biggs, 1977, p. 156), and the imposition of American citizenship (Porter, 1999) were justified as providing Native Americans with equal rights. The most notorious allotment policy, the Dawes Act, was even hailed as the 'Indians' Magna Carta' (Hoxie, 1984, p. 70). Likewise, in Canada, the 1969 White Paper, which sought to annul Indigenous peoples' legal status, was said to set them 'free – free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians' (Chrétien, 1969).

Of course, Indigenous peoples resisted these attacks on their sovereignty. At first, they did so largely through war, evasion and negotiation. More recently, they have joined the rights revolution (Gover, 2015; Winter, 2013). Citing historical pacts, inherent rights, international law, constitutional provisions and liberal understandings of justice, they have embraced litigation and rights-talk to contest their legal erasure. In doing so, they have campaigned for (re)recognition

as *de jure* autonomous polities, owed collective self-determination, territorial title and authority, and control of traditional resources (Hixson, 2016, p. 172).

This Indigenous-rights movement has produced noteworthy successes. All four Anglo-settler states have been chastened by court rulings acknowledging the survival of Native land title and, often, distinct Native political status (McHugh, 2008). The United States, which once honoured tribal sovereignty mostly in the breach, has conceded important powers to tribes. Canada now recognizes Indigenous peoples as constitutionally protected polities entitled to land-claims and self-government. New Zealand guarantees parliamentary seats to Maori and recognizes certain Indigenous property rights and co-management powers. Even recalcitrant Australia admits to certain Indigenous land rights. Hence, in the wake of the rights revolution, Anglo-settler states today encompass some '1,500 officially recognized tribal entities exercising various forms of territorial self-government' (Gover, 2015, p. 357).

Yet despite these successes, or indeed because of them, Native peoples continue to encounter opposition. In recent decades this opposition has been spearheaded especially by settler activist organizations, often representing fishers, ranchers, loggers, miners, non-Native residents of reservations and property owners affected by Indigenous land-claims. In the United States, Canada and New Zealand, researchers, journalists and human-rights watchdogs have documented the rise and coordinated activities of these organizations, variously deeming them an 'anti-treaty', 'anti-sovereignty', or 'anti-Indian' movement, a 'white backlash', or a 'settler backlash' (e.g., Goldberg, 1998; Grossman, 2003; Johansen, 2004; Mackey, 2005; Montana Human Rights Network, 2018; Rÿser, 1992; Smith & Mayhew, 2013; Toole & Kaufmann, 2000; O'Malley & Kidman, 2018).

Settler-backlash groups share similar demands: for Indigenous power over settlers to be limited, historic treaties narrowly interpreted, land claims rejected, tribal authority transferred to settler governments and so forth. Settler-backlash groups also share common language, championing liberal principles while decrying Indigenous protections as divisive, inegalitarian, even racist. For example, Goldberg observes that the anti-treaty movement 'cloaks itself in the populist rhetoric of "equality", "democracy", and "civil rights"' while accusing Indigenous-rights actors of 'apartheid' and 'ethnic cleansing' (Goldberg, 1998, p. 6). Underscoring such rhetoric are the names settler organizations adopt, foregrounding values such as equality and universalism: the American Interstate Congress for Equal Rights and Responsibilities, Sportsmen Protecting Every American's Right, the Citizens for Equal Rights Alliance, the Canadian Foundation for Individual Rights and Equality, the One New Zealand Foundation and Australia's One Nation Party, to name just a few examples.

But the settler backlash does more than just talk about liberal principles. It enacts and litigates them, championing 'color blind' legislation and enjoining judges to strike down Indigenous protections that seem to treat settlers unjustly. Law scholars such as Gover (2014, 2015) and McHugh (2004, 2008) have discussed how Indigenous protections, hinging as they do on group difference, can be vulnerable to non-discrimination complaints. This vulnerability has been confirmed by detailed studies of specific US settler lawsuits, contesting, for example, Kānaka Maoli sovereignty in Hawaii (Rohrer, 2016) and Cayuga land-title in New York (Wolkin & Nevins, 2018). A few legal scholars have even examined US settler lawsuits more phenomenologically, revealing their shared constitutional logic. In this vein, Berger (2010, 2013, 2019) has shown that US settler-activists frame tribal sovereignty as race-based and thus offensive to the Constitution's guarantee of equal protection of the laws. Blackhawk finds much the same, hence observing that in the United States, 'rights are feared in Indian Country rather than sought' (Blackhawk, 2019, p. 1796).

This article builds on the work of the aforementioned scholars to enrich our understanding of the settler-rights backlash. First, I set out to better gauge the extent of the backlash, by ascertaining the existence of, and documenting, additional Indigenous/settler rights-clashes in both the

United States and other Anglo-settler states. Next, I strive to make sense of such clashes, to facilitate their just resolution. Doing so requires stepping outside legal scholarship, using the political theories of liberalism and self-determination to map and typologize the precise sorts of rights-claims settlers make, the specific Indigenous protections they impugn and the normative contrapositions that ensue.

DOCUMENTING THE EXTENT OF THE SETTLER BACKLASH

As noted, academic scholarship on the settler-rights backlash has consisted largely of single-case legal studies examining settler lawsuits in the United States, supplemented by some noteworthy meso-level studies pointing out commonalities among these US challenges, describing their legal logic and contextualizing them in US Indian Law. To add breadth to this literature, this article explores whether additional settler-backlash cases can be found in the United States, and whether the backlash has reached Canada, Australia or New Zealand.

This is done in two parts. First, I present my scoping study on scores of possible settler-backlash cases in the four Anglo-settler states. I define 'possible cases' as political or legal challenges to Indigenous protections that potentially hinged on settler-rights claims. Consideration was given not just to court challenges but also challenges levelled through other means, thus appearing in various political arenas (legislatures, executive departments, constitutional conventions, intergovernmental fora) and playing out in diverse processes (referenda, plebiscites, electoral reapportionments, land co-management processes). The scoping study was limited to challenges since 1970 – roughly the dawn of the Indigenous rights revolution. The scoping study was wide-ranging but hardly exhaustive; many potential cases were likely overlooked.

Having gathered these data, my second step was to see if the possible cases were indeed settler-backlash challenges. Many, it turned out, were not. Some, though featuring settler-rights talk, ultimately seemed not to hinge on constitutional questions. Some of these turned out to be primarily procedural challenges, contesting *how* Indigenous protections had been enacted. Others were empirical challenges, disputing the facts upon which Indigenous protections had been grounded. Conversely, some of the contests explored in the scoping study, while indeed hinging on constitutional questions, were found not to centrally involve settlers: Instead, both the plaintiffs and defendants were Indigenous.

All the above cases were thus discarded. What remained was a not-insubstantial catalogue of confirmed settler-rights backlash cases. A selection of that catalogue, limited to the challenges discussed in this article, is detailed in Table 1. As the first column confirms, settlers have indeed joined the rights revolution in the United States, employing rights-claims and equal-rights law to challenge Indigenous protections. Moreover, the catalogue reveals that the settler-rights backlash extends beyond the United States, with settlers brandishing rights to battle Indigenous protections in Canada, Australia and New Zealand.

MAKING SENSE OF THE SETTLER BACKLASH

Having better discerned the extent of the settler-rights backlash, my second goal was to make sense of, and reveal any internal contradictions within, backlash challenges. To do this, each backlash case was examined through the lens of the theories of liberalism and self-determination,[1] the idioms of official decision-making in the Anglo-settler states. This was done to help Anglo-settler-state decision-makers, including judges, elected officials, and voters, better understand and more justly resolve backlash conflicts.

Examination of each backlash challenge proceeded in three steps, mapping the sorts of rights-claims settlers made, the kinds of Indigenous protections they impugned, and the ways political norms were thus contraposed. Doing this was sometimes difficult, as many of the settler-backlash

Table 1. Selected settler-rights challenges to Indigenous protections in Anglo-settler states.

State	Case	Liberal principle invoked	Indigenous protection impugned
Australia	*Opposition to land-permits* (1974)	Egalitarian mobility	Territorial border control
	The NT Statehood Convention (1998)	Universalistic authority	Sovereignty
		Egalitarian mobility	Territorial border control
	Bruch v. Commonwealth (2002)	Individualism	Group differentiation
		Egalitarianism	
Canada	*NWT Government opposition to Dene Declaration* (1977)	Individualism	Group differentiation
	Friends of Democracy v. NWT (1999)	Egalitarian voting rights	Decision-making
	Campbell v. British Columbia (2000)	Universalistic authority	Sovereignty
		Egalitarian voting rights	Decision-making
	BC Treaty referendum (2002)	Universalistic authority	Sovereignty
	Nacho Nyak Dun v. Yukon (2005)	Universalistic authority	Sovereignty
	R. v. Kapp (2008)	Egalitarian resource use	Territorial resource control
New Zealand	*Amaltal Fishing v. Nelson Polytechnic* (1996)	Individualism	Group differentiation
		Egalitarianism	
	Principles of the Treaty of Waitangi Deletion Bill (2007)	Individualism	Group differentiation
United States	*Morton v. Mancari* (1974)	Individualism	Group differentiation
		Egalitarianism	
	Oliphant v. Squamish Indian Tribe (1978)	Universalistic authority	Sovereignty
	Washington ballot measure on treaty fishing rights (1984)	Individualism	Group differentiation
	Wisconsin Walleye Wars (1987–91)	Egalitarian resource use	Territorial resource control
	Wabol v. Villacrusis (1990)	Egalitarian property rights	Territorial non-alienation
	Alaska v. Venetie Tribal Government (1998)	Universalistic authority	Sovereignty
	Rice v. Cayetano (2000)	Egalitarian voting rights	Decision-making
	Davis v. Guam (2017)	Egalitarian voting rights	Decision-making
	Brackeen v. Zinke (2018)	Individualism	Group differentiation

challenges were in fact long-running, multi-front battles, fought in a range of political arenas by settlers whose claims were often diverse, protean and inexplicit. Still, three common categories of settler rights-claims, appealing to three core liberal values, were discerned: universalism, individualism and egalitarianism. The third column of Table 1 identifies which of these three values were predominantly invoked in each rights-challenge.

These values were commonly cited to impugn what will further be shown to be four classes of Indigenous protections: sovereignty, differentiated citizenship, decision-making and territorial control. The fourth column of Table 1 identifies which of these four protections were predominantly targeted in each rights-challenge. This section first discusses generally these liberal

principles and Indigenous protections, then uses examples from settler-backlash challenges to highlight the ways in which these principles and protections were brought into conflict.

As noted previously, liberal theorists identify three key liberal principles: universalism, individualism and egalitarianism (Kukathas, 1992, p. 108). Universalism holds there is just one sort of collective rights-bearer, the polity as a whole; thus, within the polity, groups lack rights *qua* group. Individualism, meanwhile, holds that within the polity, the irreducible moral unit is the individual; hence laws should treat individuals in a manner that is 'difference blind' and not prescriptively categorize them by race, class, gender, etc. (Kymlicka, 1989, p. 140). Egalitarianism, finally, holds that within the polity, all individuals are moral equals and should be treated as such, enjoying legal parity vis-à-vis one another (Kymlicka, 1989, p. 140).

Self-determination, again, holds that peoples are collective rights-bearing units and may thus freely choose their political status. Self-determination seems to imply other, corollary normative precepts, four of which are highlighted here. One is differentiated citizenship – the idea that only certain individuals have a right to be included in any given political collective, while the rest may be justly excluded. A second corollary of self-determination is sovereignty, the right of a collective to hold legitimate governing authority. A third is decision-making, the right of a collective to make choices so as to meaningfully exercise its governing authority. A fourth is territorial control – the collective's right to own, govern and regulate access to its land and resources.

Of course, self-determination and all four of its above-mentioned corollary precepts are possibly illiberal. Hinging as their do on collectivism, exclusion and difference, they stand in an uneasy relationship with, or even in contradistinction to, liberal universalism, individualism and egalitarianism (Spitzer, 2021). It is this awkward and possibly oppositional relationship that, in my view, the Anglo-settler rights backlash seeks to problematize.

Moreover, in the United States, Canada, Australia and New Zealand, settler-backlash claims problematize Indigenous protections not haphazardly, but logically. Clear patterns are apparent, with particular of the liberal values aimed at particular of the Indigenous protections in a manner that logically problematizes each sort of protection. I discern three categories of such logical contrapositions. In the first contraposition, the liberal principle of universalism is employed to challenge Indigenous sovereignty. In the second, the liberal principle of individualism is used to challenge differentiated citizenship. In the third, the liberal principle of egalitarianism is used to challenge Indigenous decision-making and territorial control. The following subsections explore these three contrapositions in turn, starting with settler challenges that pit universalism against Indigenous sovereignty.

Liberal universalism versus Indigenous sovereignty

Universalism is the liberal principle 'affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms' (Gray, 1995, p. xii). Universalism holds that groups are not politically primordial – they do not bear rights *qua* group. Rather, the only rights-bearing collective is the whole, which is in turn the sole and irreducible source of sovereignty. Applied to the Anglo-settler context, universalism posits that the overarching settler-state populous is the only legitimate demos, that all sovereignty emanates from that demos, that the state embodies and exercises sovereignty in care of that demos, and that it does so indivisibly and completely.

As noted, settler challenges that invoke the principle of liberal universalism function to impugn Indigenous sovereignty. Some such challenges impugn Indigenous sovereignty totally while others do so only partially. In the case of 'total' challenges, universalistic rules and principles are said to totally preclude the existence of Indigenous *demoi* and/or of Indigenous sovereignty separate from that of the encompassing settler state. In more limited, 'partial' settler universalism-challenges, universalistic rules and principles are invoked to restrict either the scope of

Indigenous sovereignty, meaning the range of competencies under Indigenous jurisdiction, or to limit the domain of Indigenous sovereignty, meaning its geographic ambit.

Total challenges, which problematize the very possibility of Indigenous sovereignty, appear in all four Anglo-settlers states. These challenges have come by means of settlers lawsuits as well as public referenda, constitutional conventions and legislative campaigns. They all take largely the same shape, with settlers asserting that 'We, the people' are morally indivisible, that the sovereignty of the state is exhaustive and inalienable, that Indigenous peoples neither retain nor may regain any sovereignty they once might have had, and that if they act otherwise they wrongfully usurp state authority.

A good example of such total challenges is the conflict that led to the lawsuit *Campbell v. B.C.*, decided in the Canadian province of British Columbia (BC) in 2000. There, provincial opposition leaders contested the legality of the Nisga'a Treaty, which established one of the country's first Indigenous 'self-governments'. The suit argued that Nisga'a sovereignty contravened 'the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the Provinces' by Canada's Constitution. Though the BC Supreme Court disagreed (Campbell, 2000), the argument endured. In 2002 the same leaders, by then in charge of the provincial government, held the BC Treaty Referendum, inviting voters to critique various Indigenous protections (Eisenberg, 1998). At the urging of First Nations, many voters boycotted the referendum, but of those who participated an overwhelming majority denounced Indigenous sovereignty, supporting the statement that 'Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia' (Elections BC, 2002, p. 2).

Similar total challenges to Indigenous sovereignty have been levelled elsewhere in the Anglo-settler world. In 1998, leaders of Australia's Northern Territory, as part of a campaign to achieve statehood, held a convention to draft a state constitution. Though Indigenous people comprised 30% of the territory's population – the highest of any Australian jurisdiction – only 17% of convention seats went to Indigenous stakeholders. Key Indigenous groups, seeing the statehood effort as a means to dismantle federally guaranteed Indigenous protections, condemned the proceedings. (One Indigenous leader later stated, 'The rallying cry of "Statehood!" has long been the first sound in a battle to defeat our rights'; Yunupingu, 2003). Indeed, the convention resounded with liberal appeals. One of the many universalistic resolutions approved by delegates was that the new constitution, 'to preserve the indissoluble nature of the Northern Territory, not include a specific clause relating to Aboriginal self-determination' (NT Government, 1998a, p. 106). In protest, all but one Indigenous delegate walked out, and Indigenous groups hosted alternate conventions, resolving that any new state constitution must affirm their 'inherent right to self-government' (Cockram, 1998). As noted, the more limited, partial sort of settler universalism challenges allege that Indigenous sovereignty, though perhaps existent, is constrained in domain and/or in scope. The most famous such partial challenge was the 1978 US Supreme Court case *Oliphant v. Suquamish Indian Tribe.* In that case, a settler resident of the Port Madison Indian Reservation in Washington State was arrested by tribal police and charged with assault. He sued, arguing the tribe lacked criminal jurisdiction over non-Indians. The high court agreed, finding that criminal jurisdiction was among the 'inherent limitations on tribal powers that stem from their incorporation into the United States'. Justice Thurgood Marshall dissented, maintaining that, '[i]n the absence of affirmative withdrawal by treaty or statute', tribal sovereignty implies criminal jurisdiction over settlers (Barsh & Henderson, 1978).

Similarly partial challenges have impugned not just Indigenous criminal jurisdiction, but other Indigenous powers – for example, to lay taxes or manage public lands. Regarding the former, in the 1998 case *Alaska v. Native Village of Venetie*, the US Supreme Court forbid an Alaskan tribe from taxing settler-owned businesses on Native land, holding that taxation was a reserved right of the state and federal governments, and that any tribal claim to such authority

had been implicitly dissolved by the Alaska Native Claims Settlement Act (Alaska, 1998). Settlers were less successful in the 2017 case *First Nation of Nacho Nyak Dun v. Yukon*, when the Supreme Court of Canada held that recommendations issued by an Indigenous environmental co-management board could not be side-stepped by the Yukon Territory Government (First Nation, 2017), despite the Yukon's premier insisting that, 'When it comes to public land, it should be the publicly, democratically-elected government that should be able to have the final say' (CBC, 2015).

Liberal individualism versus Indigenous group difference

I now move on to the second common settler-backlash contraposition, pitting liberal individualism against Indigenous group difference. In liberal political theory, individualism again is the principle that the irreducible rights-bearing unit is the individual (Kymlicka, 1989, p. 140). Per this principle, the state should not prescriptively categorize individuals based on their traits or identity (their race, class, gender, religion, etc.) but rather should treat them in a manner that is 'difference blind'. Applied to the Anglo-settler context, individualism posits that settlers and Indigenous persons should not be legally distinct. To permit otherwise, individualists argue, would affirm the discredited notion of 'separate but equal'. It would also cause 'expressive' or 'stigmatic' harms, doing damage even in the absence of unequal treatment (Healy, 2006). These expressive harms might be of a social nature, stoking dangerous divisions, or of an individual nature, wounding the dignity of anyone classed by group.

Unlike settler challenges based on liberal universalism, which impugn the notion of Indigenous collective rights, individualism-based challenges impugn the legality of differentiated citizenship for individuals. If Indigenous individuals may not hold differentiated 'Native status', they cannot participate in, nor enjoy benefits of, collective self-determination. Settler individualism-based challenges too can be either total or partial. In this case, total challenges argue that Native status is not a protected political classification (such as being, say, a resident of New York for the purposes of voting, taxation, or in-state university tuition) but rather is an invidious, race-based classification (liked being designated 'colored' or 'white' in the US 'Jim Crow' era). Meanwhile, partial challenges are narrower, arguing that while Native status may sometimes be a legitimate political classification, the particular Indigenous protections under challenge are overinclusive, according Native status to, and thus invidiously racializing, individuals who are not owed that status, because they do not belong to a recognized tribe.

This article finds that total individualism-based challenges are levelled mostly by means of public declarations of principle: constitutional preambles, formal resolutions, ballot-measure statements, explanatory notes appended to legislation and so forth. For example, in Canada, following the Dene Nation's 1976 call for 'independence and self-determination' (Coulthard, 2014), the Government of the Northwest Territories issued a public response condemning the idea as 'something that has always been abhorrent to Canadians and violates our history – separating people according to race' (GNWT, 1977, p. 47). When voters in the US state of Washington considered a 1984 ballot measure to restrict Native fishing rights, the formal statement in favour of the measure, printed in the official voting pamphlet, proclaimed, 'There cannot be two classes of citizens in America' (Office of the Secretary of State, 1984). And, in New Zealand in 2005, when opposition leaders introduced the Principles of the Treaty of Waitangi Deletion Bill, they stated in the explanatory note that Maori rights had 'set one group of New Zealanders against another. The world watched with horror last century as South Africa went down a destructive path of separate development and it would be tragic indeed for New Zealand to follow' (McHugh, 2008, p. 42).

The second, narrower sort of individualism-based challenges, partial challenges, are often levelled by means of lawsuits. This happens mainly in the United States, where settlers often call for individual Indigenous protections to undergo 'strict scrutiny' – the most rigorous standard

of judicial review, reserved for racial and other 'suspect classifications'. Most often, settlers combine 'suspect classification' claims with discrimination claims, decrying not merely the act of dividing Natives and settlers into separate groups but also then subjecting settlers to purported 'second-class treatment'. Such treatment violates not just individualism but also liberal egalitarianism, so will be discussed with other egalitarianism challenges in the following subsection. Here I will highlight only those settler challenges that hinge on classification alone, thus appealing purely to liberal individualism. Foremost among them are a recent series of challenges to the US Indian Child Welfare Act (ICWA).

Congress passed the ICWA in 1978 in response to what it called 'cultural genocide' (US Senate, 1974, p. 3) – the longstanding, often officially sanctioned practice of placing Native children in settler-run orphanages, foster homes and boarding schools. The ICWA largely prohibited settlers from adopting Native children, prompting a barrage of settler-backlash challenges. Many were dismissed for lack of standing, as the would-be adoptive parents could not show that they had suffered discriminatory, inegalitarian harm. However, in the 2018 case *Brackeen v. Zinke*, a Texas district court found portions of the ICWA unconstitutional, not for being inegalitarian but rather for transgressing individualism, due to classing children by race. According to the court, the ICWA was illegal because its terms applied not just to children who were enrolled tribal members – a protected political class – but also to children who, by dint of their bloodlines, *might* qualify for such enrolment (Brackeen, 2018). Though that ruling was largely reversed on appeal, the case is expected to make its way to the US Supreme Court.

Liberal egalitarianism versus Indigenous decision-making and territorial control

Finally, I continue to the third class of settler-backlash challenges, contraposing egalitarianism and Indigenous decision-making and territorial control. In liberal political theory, egalitarianism again is the principle holding that all individuals are moral equals and should be treated as such, enjoying legal parity vis-à-vis one another (Kymlicka, 1989, p. 140). Applied to the Anglo-settler context, egalitarianism condemns both discrimination and favouritism based on Indigeneity, requiring instead that all state citizens, whether Native or settler, receive equal protection of the laws.

This study found that egalitarianism-based claims are by far the most common variety of settler-backlash challenges. This is likely in part because, unlike universalism claims, egalitarianism claims implicate not just liberal principles generally but individual rights specifically, alleging actionable harms to particular, identifiable people – people who have 'standing' as claimants. Further, unlike individualism challenges, egalitarian challenges allege harms that are not merely stigmatic – wounding settlers' dignity – but rather are substantive, subjecting settlers to clear and material disadvantage vis-à-vis their Native co-citizens. (Indeed, egalitarian-based claims seem especially prevalent in the United States and Canada, possibly because those two states, unlike Australia and New Zealand, have bills of rights, likely facilitating anti-discrimination challenges by aggrieved settlers.)

As noted above, these egalitarian-based claims are often levelled in lockstep with individualism-based claims, producing challenges that proceed in two stages. First, settlers condemn Indigenous protections as classing Natives and settlers by race. Next, settlers allege they have not merely been classed by race but, even worse, have been treated as *second*-class, suffering racial discrimination. Like other settler challenges, egalitarian-based challenges have been levelled through various means; however, they are especially prevalent as lawsuits. These lawsuits target a diverse array of purportedly discriminatory measures, including familiar foci of the broader anti-affirmative-action movement, such as non-white hiring, contracting and university-admission preferences. Three notable examples of such Indigenous-preference challenges are the 1974 US case *Morton v. Mancari*, the 1996 New Zealand case *Amaltal v. Nelson Polytechnic* and the 2002 Australian case *Bruch v. Commonwealth*.

More complexly, however, settler egalitarianism-based challenges often target protections that are uniquely Indigenous. These challenges appear in two varieties, relating to twin

components of self-determination: authority concerning people and authority concerning place. In the first, settlers cite voting rights to challenge the capacity of Indigenous *demoi* to engage in decision-making. In the second, settlers cite land, resource and mobility rights to contest Indigenous protections concerning territorial control. These two sorts of challenges will be discussed in turn.

Egalitarian voting rights versus Indigenous decision-making

A common variety of settler-backlash challenges are those appealing to the right of political participation – the most sacrosanct democratic right. In such challenges, settlers charge their voting rights are abridged by processes protecting Indigenous decision-making. If successful, such challenges may disrupt Indigenous decision-making and thus constrain Native self-determination. They appear to do so in one of two ways. First and most obviously, settler voting-rights challenges may block either Indigenous decision-making processes or the implementation of Indigenous-made decisions. Second and more insidiously, such challenges may insert settlers into Indigenous decision-making processes such that the decisions become controlled by settlers.

I found settler voting-rights challenges to be common in the United States but to also appear in all other Anglo-settler jurisdictions. I moreover found them to vary both in the kind of voting-rights violation they alleged and the sort of Indigenous decision-making protection they targeted. Concerning the former, some settler voting-rights challenges alleged the outright denial of settlers' right to vote, while others alleged the denial of an *equal* vote – asserting, for example, that settlers' 'voting power' was diluted by electoral malapportionment. Meanwhile, concerning the kind of Indigenous decision-making protection under challenge, some backlash cases targeted Indigenous decision-making protections that were relatively narrow in domain and/or scope, for example challenging 'reserved' Native seats on wildlife management boards, while other challenges targeted mechanisms that were far more momentous, relating to comprehensive territorial self-rule – even fully fledged independence. I begin with an example of the latter.

The island of Guam was for millennia populated exclusively by the Indigenous Chamorro people. Spain asserted authority over Guam in the 16th century before ceding control to the United States in 1898. Since the Second World War, US settlers have reduced the Chamorro share of Guam's population from 99% to 37%. Also since the Second World War, the United Nations has listed Guam among territories owed self-determination. Beginning in the 1980s the Government of Guam sought to effectuate such self-determination, enrolling voters in a 'decolonization registry' in preparation for a plebiscite on possible independence from the United States. Enrolment in the registry was in effect limited to Chamorros. In the midst of this effort a settler, having been denied enrolment, filed *Davis v. Guam*, alleging 'audacious racial discrimination' contravening his right to vote under the Fifteenth Amendment of the US Constitution. In 2017, the US District Court of Guam ruled in his favour. The judge acknowledged 'the long history of colonization of this island and its people, and the desire of those colonized to have their right to self-determination. However, the court must also recognize the right of others who have made Guam their home' (Davis, 2017, p. 25). Appeals, including to the US Supreme Court, were denied.

Of course, most Indigenous decision-making protections aim to facilitate not outright independence but, at best, internal autonomy. Such protections are similarly vulnerable to settler voting-rights challenges. In a precursor case to *Davis*, in the 1990s many Native Hawaiians sought to achieve federally recognized tribal status. At the time, the largest and best-funded Native Hawaiian governing body was the Office of Hawaiian Affairs (OHA), a semi-autonomous state agency run by Native Hawaiian trustees to manage their lands and programmes (Parker, 2008, p. 207). When a settler was barred from participating in an election for OHA trustees, he filed *Rice v. Cayetano*, citing his Fifteenth Amendment right to vote. In 2000 the US Supreme Court found in his favour, stating that, because the OHA was not yet a recognized tribal

authority – and thus not a 'quasi-sovereign' – it could not legally exclude settlers. Justice John Paul Stevens dissented, writing, 'It is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government' (Rice, 2000, p. 535).

Again, some settler-voting rights challenges focus not on Indigenous self-rule but rather shared-rule. As noted, Canada's Northwest Territories faced overt settler/Indigenous conflict over Dene Nation demands for self-determination. This conflict came to a head in the 1990s, as the separation of the Inuit-dominated Nunavut Territory upended the ethnic balance in the rump Northwest Territories, threatening to minoritize Natives there. A widely proposed solution was consociational power-sharing, to provide Native overrepresentation in the Northwest Territories assembly (Dacks, 1995, p. 6). Following an electoral reapportionment that in effect assigned Natives a supermajority of assembly seats, however, settlers filed *Friends of Democracy v. NWT*, citing their Charter-protected right to 'effective representation'. The defendant, the territorial government, appealed for a 'solution which … could be the envy of any jurisdiction with a significant Aboriginal population' (Friends, 1999, p. 16). But in 1999, the territorial supreme court ordered the electoral map redrawn in settlers' favour. A 'constitutional crisis' (GNWT, 1999a, p. 66) ensued, with Indigenous leaders proclaiming, 'the imbalance we have always feared is upon us' (GNWT, 1999b) and fruitlessly appealing to the federal government to dissolve the territorial assembly.

Egalitarian land, resource and mobility rights versus Indigenous territorial control

An equally common – and perhaps even more politically explosive – variety of settler egalitarian-based challenges are those invoking property, natural-resource and mobility rights. In such challenges, settlers charge that their freedom to own, utilize, or access land or resources is abridged by discriminatory Indigenous territorial protections. These challenges, if successful, may limit or even thwart Indigenous ownership or control of their homeland territories. Such challenges were identified in all four Anglo-settler states, but were most prevalent in the United States and Canada, likely for the reasons noted above.

A prime example of a settler-rights challenge to Indigenous land-protection occurred in the Commonwealth of the Northern Mariana Islands (CNMI). Like its neighbour Guam, CNMI is both a US territory and a home to the Chamorro people. Due to 'the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands', the CNMI constitution bars land alienation to, and limits the duration of leases held by, those not 'of Northern Marianas descent' (Willens & Siemer, 1977, p. 1397). When a lease was voided for transgressing this provision, the settler lessee filed *Wabol v. Villacrusis*, alleging violation of the Fourteenth Amendment's guarantee of equal protection of the laws. A federal appeals court found otherwise, ruling in 1990 that, per the US Supreme Court's *Insular Cases* doctrine, striking down CNMI's land-alienation prohibition would be 'impractical and anomalous'. Wrote the court, 'The Bill of Rights was not … intended to operate as a genocide pact for diverse native cultures. … Its bold purpose was to protect minority rights, not to enforce homogeneity' (Wabol, 1990, p. 1462).

Meanwhile, examples abound of equal-rights challenges to Indigenous resource protections. Since the launch of the rights revolution, settlers and Natives have clashed over rights to hunt, herd and particularly to fish. Such settler fishing-rights challenges have occurred in the United States (e.g., the 1987–91 'Wisconsin Walleye Wars'; Lipsitz, 2008), in New Zealand (where resistance to Maori fishing rights has been implicated in a 'Pākehā backlash'; Hayward & Wheen, 2016, p. 6), and in Canada, as evidenced by the 2008 case *R. v. Kapp*. That case was sparked when the Canadian government issued exclusive salmon-harvesting licences to three Indigenous groups, the Musqueam Band, Tsleil-Waututh Nation and Tsawwassen First Nation. Settler fishers staged a protest fishery, were convicted of illegal fishing and sued, alleging racial

discrimination in contravention of the Charter's Section 15 guarantee of equality under the law. The Supreme Court of Canada disagreed, with the majority holding that the Native fishery was permissible as it had a 'remedial purpose', targeted those who are 'disadvantaged', and thus promoted substantive equality. Meanwhile, two justices issued a separate opinion, defending the exclusive fishery on overtly Indigenous grounds, maintaining it was shielded by the Charter's Section 25, which bars 'abrogation' of Indigenous rights (*R. v. Kapp*, 2008).

Finally, the least common settler egalitarian-based challenges are those invoking mobility rights to target Indigenous border protections. Such challenges appear most common in Australia, where in parts of the country Indigenous land claims have since the 1970s been paired with a permit system regulating non-Indigenous access. Egalitarian claims featured prominently in public deliberations surrounding the adoption of the permit system; for example, in its submissions to the Aboriginal Land Rights Commission, the Australian Mining Industry Council denounced putting Indigenous people 'in a position of privilege with response to other Australians' (ALRC, 1974, p. 106). Similar charges were levelled during the aforementioned 1998 Northern Territory statehood convention, where one delegate proclaimed,

> One quarter of the Northern Territory population, the Aboriginal quarter, now controls half the land area … while the three-quarters of the population who are not Aboriginal cannot enter their half without special permission. … It may not be politically correct to say so, but the present system is discrimination. (NT Government, 1998b, p. 21)

In 2007, Australia's federal government suspended elements of the permit system in the Northern Territory, citing, in part, the system's inconvenience to settlers (Perche, 2015).

CONCLUSIONS

Again, the rights revolution has seen rights not merely mobilized, but contraposed. Such is the case in the archetypal settler-colonial states, New Zealand, Australia, Canada and the United States. In those states, Indigenous peoples, having endured not just violence and expulsion but also 'juridical obliteration', have joined the rights revolution, pressing for renewed self-determination. Their efforts have been met – and their rights-claims problematized – by the countervailing settler-rights backlash.

In this article I sought to add breadth and depth to understandings of the settler-rights backlash, by addressing two salient-yet-unanswered questions. First, to what degree have settlers used rights to combat Indigenous protections, not just in the famously rights-focused United States, but in the other Anglo-settler states? And second, how have settlers done so: What rights have settlers asserted, what Indigenous protections have they challenged, and what are the normative contrapositions that ensue?

Adding breadth, I conducted a scoping survey of backlash cases, displaying that, in the wake of the Indigenous rights revolution, settlers too have operationalized rights, using them to challenge Indigenous decolonization in the Anglo-settler states – not merely in the United States, but in Canada, Australia and New Zealand as well. Further, I showed that settlers operationalize rights through a variety of means – not just through litigation but other political mechanisms and processes, including equal-rights legislation, referenda, constitutional conventions and more.

Adding depth to the literature on the settler backlash, I examined how settler-rights challenges work, stepping outside of legal scholarship to reveal something of their normative dynamics. I displayed that settler-rights challenges frequently invoke one or more of three key liberal principles, universalism, individualism and egalitarianism. I showed that these challenges in turn often impugn one or more of four corollaries of Indigenous self-determination: group differentiation, Indigenous sovereignty, Indigenous decision-making and Indigenous territorial

control. Finally, I showed that these principles and protections are often logically contraposed, with settler universalism-claims targeting Indigenous sovereignty, settler individualism-claims targeting group differentiation, and settler egalitarian-claims targeting Indigenous decision-making and territorial control.

Once again, my research was not exhaustive. I hope other scholars will add to my catalogue of settler-backlash challenges, not merely within the Anglo-settler states but in settler colonies beyond: In New Caledonia, the Sami traditional territories in Fennoscandia, Siberia, Latin America, parts of Africa, Israel, etc. Similarly, I invite revision of my normative typologization of settler-backlash cases. Certainly, there may be other – and even more helpful – ways of understanding the settler-rights backlash. Again, I conducted my normative analysis of settler-backlash cases through the lens of mainstream Anglo-settler thought, aiming to reveal the *internal* contradictions of the backlash and to communicate those contradictions to Anglo-settler-state decision-makers in their own idiom. However, settler-backlash cases could – likely should – also be analysed through the lens of theories critical of liberalism and self-determination, including Marxist, feminist, Indigenist and critical-race theories, to study the settler-rights backlash from without.

Other research avenues might be similarly fruitful. For example, only in very limited ways did I explore questions of causation, or of relationships between variables. I observed that Anglo-settler rights-claims have indeed been disproportionately common in the United States – likely because of the robust rights-culture there, backstopped by the 230-year-old Bill of Rights. (In second place came Canada, the only other Anglo-settler state with a Charter of Rights.), Too, I found egalitarian-based claims to be more common than universalism or individualism claims, and to be more frequently operationalized via lawsuits, assumedly because inegalitarian treatment uniquely gives aggrieved settler plaintiffs legal 'standing' in courts of justice. Beyond this, I did not study under what circumstances settlers are more likely to launch challenges, nor under what empirical conditions those challenges succeed or fail. Such examination might help decision-makers not merely understand but anticipate and thus head off settler/Indigenous conflicts, incrementally smoothing the rough journey toward some measure of settler-decolonization.

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No potential conflict of interest was reported by the author.

NOTE

1. In restricting my exploratory lens to theories of liberalism and self-determination, I have set to one side the aforementioned critiques of such theories levelled by scholars external to the Anglo-settler mainstream: thinkers in the Marxist, feminist, Indigenist and other traditions. I acknowledge that in making this choice I am in effect affirming settler moral and political values vis-à-vis those of subalterns, including Indigenous peoples. I hope the cost of doing this is outweighed by the benefit of critiquing the settler-rights backlash from *within* – of identifying its *internal* contradictions, and communicating those contradictions to settler-state decision-makers in the idiom they understand.

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REFERENCES

R. v. Kapp 2 S.C.R. 483, 2008 SCC 41. (2008).
Davis v. Guam 1:11-cv-00035 (D. Guam). (2017).
Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520. (1998).
Australia Land Rights Commission. (1974). *Second report*. Government of Australia.
Ball, T., Dagger, R., & O'Neill, D. I. (2019). *Political ideologies and the democratic ideal*. Routledge.
Barry, B. (2001). *Culture and equality: An egalitarian critique of multiculturalism*. Harvard University Press.
Barsh, R. L., & Henderson, J. Y. (1978). Betrayal: Oliphant v. Suquamish Indian Tribe and the hunting of the Snark. *Minnesota Law Review*, *63*(4), 609–640.
Berger, B. (2010). Reconciling equal protection and federal Indian Law. *California Law Review*, *98*(4), 1165–1198.
Berger, B. (2013). Race, descent and tribal citizenship. *California Law Review Circuit*, *4*, 23–37.
Berger, B. (2019). Savage equalities. *Washington Law Review*, *94*(2), 583–644.
Blackhawk, M. (2019). Federal Indian law as paradigm within public law. *Harvard Law Review*, *132*(7), 1787–1877.
Bob, C. (2012). *The global right wing and the clash of world politics*. Cambridge University Press.
Brackeen v. Zinke, 338 F. Supp. 3d 514. (2018).
Campbell, et al v. AG BC/AG Cda & Nisga'a Nation, et al, B.C.S.C. 1123. (2000).
Canadian Broadcasting Corporation (CBC). (2015, January 13). *Peel watershed: Darrell Pasloski explains reasons for appeal*. https://www.cbc.ca/news/canada/north/peel-watershed-darrell-pasloski-explains-reasons-for-appeal-1.2899452.
Carens, J. (2013). *The ethics of immigration*. Oxford University Press.
Chrétien, J. (1969). *Statement of the Government of Canada on Indian policy, 1969*. Government of Canada.
Clastres, P. (2020). *Society against the state: Essays in political anthropology*. Princeton University Press.
Cockram, P. (1998, September 7). The Kalkaringi Statement. *Barkly News Pictorial*.
Coulthard, G. S. (2014). *Red skin, white masks: Rejecting the colonial politics of recognition*. University of Minnesota Press.
Dacks, G. (1995). *Canadian Government and Aboriginal Peoples: The Northwest Territories. RCAP Notes*. Royal Commission on Aboriginal Peoples.
Daschuk, J. (2013). *Clearing the plains: Disease, politics of starvation and the loss of Aboriginal life*. University of Regina Press.
Eisenberg, A. (1998). Domination and political representation in Canada. In V. Strong-Boag, S. Grace, J. Anderson, & A. Eisenberg (Eds.), *Painting the maple* (pp. 37–52). UBC Press.
Elections BC. (2002). *Report of the chief electoral officer of the treaty negotiations referendum*. Province of British Columbia, Elections BC.
Epp, C. R. (1998). *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective*. University of Chicago Press.
First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58, 2 S.C.R. 576. (2017).
Friends of Democracy v. Northwest Territories (Commissioner) 4256 NWT SC. (1999).
Gellner, E. (1983). *Nations and nationalism*. Basil Blackwell.
Gilligan, C. (1982). *In a different voice*. Harvard University Press.
Goldberg, K. (1998). Anti-Indian movement on the rise in BC. *Canadian Dimension*, *32*(5), 6.
Gover, K. (2014). When tribalism meets liberalism: Human rights and Indigenous boundary problems in Canada. *University of Toronto Law Journal*, *64*(2), 206–242. https://doi.org/10.3138/utlj.0312
Gover, K. (2015). Settler–state political theory, 'CANZUS' and the UN declaration on the rights of Indigenous peoples. *European Journal of International Law*, *26*(2), 345–373. https://doi.org/10.1093/ejil/chv019
Government of the Northwest Territories. Legislative Assembly. (1977). *You've heard from the radical few … now hear from the moderate many*. Government of the Northwest Territories.

Government of the Northwest Territories. Legislative Assembly. (1999a). *Hansard, March 23*. Government of the Northwest Territories.

Government of the Northwest Territories. Legislative Assembly. (1999b). *Report on Bill 15*. Government of the Northwest Territories.

Gray, J. (1995). *Liberalism*. University of Minnesota Press.

Grossman, Z. (2003). Treaty rights and responding to anti-Indian activity. In B. Perry (Ed.), *Hate and bias crime* (pp. 203–210). Routledge.

Hayward, J., & Wheen, N. (2016). *The Waitangi tribunal*. Bridget Williams Books.

Healy, T. (2006). Stigmatic harm and standing. *Iowa Law Review*, *92*(2), 417–488.

Hirschl, R. (2004). Juristocracy – political, not juridical. *The Good Society*, *13*(3), 6–11. https://doi.org/10.1353/gso.2005.0020

Hixson, W. (2016). Adaptation, resistance and representation in the modern U.S. settler state. In E. Cavanagh, & L. Veracini (Eds.), *Routledge handbook of the history of settler colonialism* (pp. 189–204). Routledge.

Hoxie, F. (1984). *A final promise: The campaign to assimilate the Indians, 1880–1920*. Cambridge University Press.

Hunt, L. (2007). *Inventing human rights: A history*. W. W. Norton & Company.

Ignatieff, M. (2008). *The rights revolution*. House of Anansi.

Johansen, B. (2004). The new terminators: A guide to the anti-treaty movement. In B. Johansen (Ed.), *Enduring legacies: Native American treaties and contemporary controversies* (pp. 305–332). Praeger.

Keck, T. (2014). *Judicial politics in polarized times*. University of Chicago Press.

Kennedy, D. (2020). A political economy of contemporary legality. In P. F. Kjaer (Ed.), *Law of political economy* (pp. 89–124). Cambridge University Press.

Kukathas, C. (1992). Are there any cultural rights? *Political Theory*, *20*(1), 105–139. https://doi.org/10.1177/0090591792020001006

Kymlicka, W. (1989). *Liberalism, community and culture*. Oxford University Press.

Kymlicka, W. (1995). *Multicultural citizenship*. Clarendon.

Lipsitz, G. (2008). Walleye warriors and white identities: Native Americans' treaty rights, composite identities and social movements. *Ethnic and Racial Studies*, *31*(1), 101–122. https://doi.org/10.1080/01419870701538927

Mackey, E. (2005). Universal rights in conflict: 'Backlash' and 'benevolent resistance' to Indigenous land rights. *Anthropology Today*, *21*(2), 14–20. https://doi.org/10.1111/j.0268-540X.2005.00340.x

MacKinnon, C. (1989). *Towards a feminist theory of state*. Harvard University Press.

Marx, K. (2011). *Capital, volume one: A critique of political economy*. Dover.

McHugh, P. G. (2004). *Aboriginal societies and the common law: A history of sovereignty, status, and self-determination*. Oxford University Press.

McHugh, P. G. (2008). Treaty principles: Constitutional relations inside a conservative jurisprudence. *Victoria University of Wellington Law Review*, *39*(1), 39–72. https://doi.org/10.26686/vuwlr.v39i1.5453

Montana Human Rights Network. (2018). *The case for categorizing anti-Indian groups as hate groups*.

Napoleon, V., & Friedland, H. (2016). An inside job: Engaging with Indigenous legal traditions through stories. *McGill Law Journal*, *61*(4), 725–754. https://doi.org/10.7202/1038487ar

Northern Territory Government. (1998a). *Report of the statehood convention, vol. 1*. Government House.

Northern Territory Government. (1998b). *Report of the statehood convention, vol. 2*. Government House.

Office of the Secretary of State. (1984). *1984 voters and candidates pamphlet*. Office of the Secretary of State, State of Washington.

O'Malley, V., & Kidman, J. (2018). Settler colonial history, commemoration and white backlash: Remembering the New Zealand Wars. *Settler Colonial Studies*, *8*(3), 298–313. https://doi.org/10.1080/2201473X.2017.1279831

Parker, L. (2008). Alaska, Hawaii and agreements. In D. Fixico (Ed.), *Treaties with American Indians, vol. 1* (pp. 195–208). ABC Clio.

Pedersen, H., & Phillpot, S. (2018). North Australian history. In J. Russell-Smith (Ed.), *Sustainable land sector development in Northern Australia* (pp. 35–52). CRC Press.

Perche, D. E. (2015). *Land rich, dirt poor? Aboriginal land rights, policy failure and policy change from the colonial era to the Northern Territory intervention* [PhD diss.]. University of Sydney.

Porter, R. B. (1999). The demise of the Ongwehoweh and the rise of the Native Americans. *Harvard BlackLetter Law Journal*, *15*, 107–183.

Rice v. Cayetano 528 US 495. (2000).

Rohrer, J. (2016). *Staking claim: Settler colonialism and racialization in Hawai'i*. University of Arizona Press.

Rÿser, R. C. (1992). *Anti-Indian movement on the tribal frontier*. Center for World Indigenous Studies.

Smith, G., & Mayhew, C. (2013). Apocalypse now: The unrelenting assault on Morton v. Mancari. *The Federal Lawyer*, (April), 47–56.

Spitzer, A. J. (2021). Approaching the boundary problem: Self-determination, inclusion, and the unpuzzling of transboundary conflicts. *Journal of International Political Theory*, online. https://journals.sagepub.com/doi/full/10.1177/17550882211020386.

Tate, C. N., & Vallinder, T. (1995). *The global expansion of judicial power*. NYU Press.

Toole, K., & Kaufmann, C. (2000). *Drumming up resentment: The anti-Indian movement in Montana*. Montana Human Rights Network.

United States Senate. (1974). *Hearings before the subcommittee on Indian affairs, committee on interior and insular affairs*. United States Senate, 93rd Cong., 2d. Sess. April 8–9.

Wabol v. Villacrusis 958 F.2d 1450 (9th Cir.). (1990).

Waldron, J. (1991). Minority cultures and the cosmopolitan alternative. *University of Michigan Journal of Law Reform*, *25*(3–4), 751–793.

Walzer, M. (1983). *Spheres of justice*. Basic Books.

Weitz, E. D. (2015). Self-determination: How a German enlightenment idea became the slogan of national liberation and a human right. *The American Historical Review*, *120*(2), 462–496. https://doi.org/10.1093/ahr/120.2.462

Wenar, L. (2021). Rights. In E. N. Zalta (Ed.), *Stanford encyclopedia of philosophy*. plato.stanford.edu/archives/spr2021/entries/rights/

Wilkinson, C., & Biggs, E. (1977). The evolution of the termination policy. *American Indian Law Review*, *5*(1), 139–184. https://doi.org/10.2307/20068014

Willens, H., & Siemer, D. (1977). The constitution of the Northern Marianas Islands: Constitutional principles and innovation in a Pacific setting. *Georgetown Law Review*, *65*(6), 1373–1481.

Winter, S. (2013). Towards a unified theory of transitional justice. *International Journal of Transitional Justice*, *7*(2), 224–244. https://doi.org/10.1093/ijtj/ijt004

Wolfe, P. (2006). Settler colonialism and the elimination of the Native. *Journal of Genocide Research*, *8*(4), 387–409. https://doi.org/10.1080/14623520601056240

Wolkin, K., & Nevins, J. (2018). 'No sovereign nation, no reservation': Producing the new colonialism in Cayuga Count(r)y. *Territory, Politics, Governance*, *6*(1), 42–60. https://doi.org/10.1080/21622671.2016.1238318

Yunupingu, G. (2003, July 18). *Land rights, the Northern Territory and 'development' into the 21st century*. Charles Darwin University Seminar.