

*The Nature of Rights and the History of Empire**Duncan Ivison*

## I

This chapter is a study in the globalization of the history of British political thought. What do I mean by ‘globalization’ in this context? If the history of British political thought has been deconstructed into something more than the history of English political thought – and the idea of ‘political thought’ itself into more than just explicitly political treatises, speeches or pamphlets<sup>1</sup> – then what happens when we extend this multi-centred approach beyond the edges of the British Isles to the settler-colonial contexts of North America and Australasia, for example? British political discourse, now a complex of discourses as opposed to one, engages with and becomes part of a new bundle of discourses that includes but is not reducible to either English or British political thought.

To illustrate this approach, I shall consider the genesis and afterlife of one strand of the discourse of rights. The language of rights – especially that of ‘subjective rights’ or, as we call them today, individual rights – was one of the most powerful and influential modes of political discourse to emerge in the early-modern period. Historians of rights have pointed out that although the emergence of subjective rights in the seventeenth century is closely associated with attempts at limiting the authority of states, this legacy is somewhat ambiguous.<sup>2</sup> First of all, rights discourse was used to justify *submission* to authority as much as limits against it, insofar as it entailed the discretion of individuals to submit absolutely. Secondly, there are deep connections between the language of rights and processes of state-formation,<sup>3</sup> and especially the link between the

<sup>1</sup> See O’Brien, in this volume.

<sup>2</sup> Tuck 1979; 1993; 1999; Haakonssen 1996; Haakonssen 2001; Foucault 2003.

<sup>3</sup> Tuck 1999; Armitage 2000; Braddick 2000.

emergence of the 'modern' idea of natural rights and European expansionism.<sup>4</sup> For Richard Tuck, the autonomous rights-bearing agent at the heart of liberal individualism is a product of seventeenth-century theorizing about the nature of the autonomous state acting in the international sphere. The sovereign individual is the 'traditional cousin of the sovereign state', argues Tuck, and especially the aggressive, violent, and minimally constrained relative described by Hugo Grotius, Thomas Hobbes, John Locke and Emer de Vattel.<sup>5</sup> Thus the connection between liberalism and imperialism, on this reading, is not merely chronological or historical but metaphysical. The analogy between the sovereign state and the sovereign individual acting on the basis of their natural rights, constrained by the recognition of the basic rights of others (but not much more than that) represents an influential vision of liberal freedom. This minimalist account of freedom represents only one vision, however, and Tuck's account of the pre-history of liberal rights has to be balanced against other conceptions, including more emancipatory ones.<sup>6</sup>

My aim in this chapter is thus to take the complexity of our histories of rights as seriously as the nature of rights themselves. Let me say immediately that the point is not to satisfy our sense of moral superiority by smugly pointing out the prejudices found in arguments made over three hundred years ago. We have more than our own share of problems and prejudices to deal with. Rather, in coming to grips with this history, and especially how early-modern political theorists struggled with the extension and application of natural rights to the 'New World', we may learn something about our own struggles to extend human rights beyond the boundaries of the state system of which Grotius, Hobbes, Locke and Vattel were among the key intellectual architects.

## II

But first, let me summarize some of the key claims involved in the repositioning of the history of the emergence of the language of subjective rights in seventeenth-century British political thought from the mainly domestic and intra-European stage to the global stage.

<sup>4</sup> Tuck 1987, pp. 99–122; Tuck 1994, pp. 159–70; Mills 1997.

<sup>5</sup> Tuck 1999, pp. 14–15, 84, 195–6, 226, 233–4; Schneewind 1998, pp. 3, 483.

<sup>6</sup> Compare Ivison 1997; Muthu 2003; Pitts 2005.

Amongst the cluster of philosophical and political problems which the great sixteenth- and seventeenth-century rights theorists struggled with, one of the most important was dealing with social and cultural difference, both within their own communities (after the Wars of Religion) and beyond (between competing European powers and between them and the indigenous peoples they encountered in these lands). One influential strategy that emerged, pioneered by Hugo Grotius, was to try and identify a minimal set of propositions that, whatever else one believed, one must accept if any kind of human society was to be possible.<sup>7</sup> The belief in the right to self-preservation (and correlative to that, the right to defend oneself), the cornerstone of 'modern' natural law theory, was a universal claim in just this sense. The aim was to minimize the objective content of both natural morality as well as religion, in order to minimize the scope for contestation and thus civil and international conflict. The natural ethics of Grotius then, on this interpretation, was not intended to be a comprehensive account of man's moral life, but rather – especially in the international context – to be the basis for 'inter-national or inter-cultural negotiation, by providing the common ground upon which the rival and conflicting cultures could meet'.<sup>8</sup> The thought was that the law of nature and the law of nations could be bridged on the basis of a minimalist core of morality observable by all rational creatures, whatever their cultural or religious beliefs. But this in itself said little about the conduct or quality of such negotiations and interactions, or who exactly would be accorded the appropriate standing such that they could be said to possess these fundamental rights in the first place. The famous Spanish debates in the sixteenth century over the status of Aboriginal peoples made that very clear.<sup>9</sup> Francisco de Vitoria, for example, was able to ascribe natural rights to the American Indians in virtue of their shared humanity and evidence of their civic life but, at the same time, justify declaring war on them if they barred his fellow Spaniards from travelling and trading on their lands, as a violation of the natural right of 'commerce'.<sup>10</sup> Even Las Casas, who defended the Amerindians against various brutalizing aspects of Spanish imperialism, still thought the overall project was justified, given the cultural inferiority of the Amerindians and their need for Christianity.

<sup>7</sup> Tuck 1994; 1999; for critical discussions of Tuck's argument and alternative readings of Grotius, see Tierney 1997; Haakonssen 1996; Haakonssen 2001.

<sup>8</sup> Tuck 1994, p. 167. <sup>9</sup> See Pagden 1986. <sup>10</sup> Vitoria 1991, pp. 278–84.

Thus we arrive at a paradox about the nature of rights and empire. Natural rights did not merely coexist with imperialism, as if the latter was an unfortunate departure in practice from a basic acceptance of the moral equality of all human beings. Instead, they were actually used to justify imperialism. How could this be?

John Locke's place in this debate is instructive precisely because he works within a natural law framework that contains, at its heart, a strong presumption of equality.<sup>11</sup> It is true that his anti-essentialism about species in the *Essay* makes it seem as if who counts as a 'man', and thus eligible for the attribution of equality, will be mainly conventional, which means the boundaries of humanity could be drawn very narrowly indeed.<sup>12</sup> But Locke also makes it clear that, for moral purposes at least, all we need is the complex idea of a 'corporeal rational Creature; What the real Essence or other Qualities of that Creature are in this Case, is no way considered'.<sup>13</sup> It constitutes an 'immovable and unchangeable Idea'. So equality is associated with the real resemblance of corporeal rationality between beings; those beings who exhibit corporeal rationality are entitled to be seen and treated as equals, which for Locke means basically not being subject to the non-consensual control of others. But this raises another question; what is the threshold associated with these capacities? Lunatics and 'idiots' fall beneath the line,<sup>14</sup> but what about any others? There is considerable debate in the literature here, but the basic idea seems to be that men are equal in the sense that each has reason 'enough to lead them to the Knowledge of their Maker, and the sight of their own Duties'.<sup>15</sup> It does not follow, therefore, that not actually knowing God's law is grounds for falling below the line, since many of us do not and we will get there via different paths. The capacity for abstract thought is what is crucial, at least for moral purposes.<sup>16</sup> We are capable of relating to God's existence and thus to a law that is to govern us, and from that to a set of duties and rights that apply to our conduct, however difficult it might be to actually grasp it.

<sup>11</sup> Locke 1988, II.4, 6, 54.

<sup>12</sup> Locke 1979, III.6.26; IV.7.16; see Ayers 1993, II, pp. 65–90; Waldron 2002, pp. 62–82; Grant 1987; Bracken 1984, pp. 54–6.

<sup>13</sup> Locke 1979, III.II.16.

<sup>14</sup> Locke 1988, II.60.

<sup>15</sup> Locke 1979, p. 45. That it is 'men' who are equal should also be taken literally, since although Locke thinks the natural rights of men and women block absolutism in the political sphere, there is a 'Foundation in nature' for the legal subjection of women to their husbands (cf. Locke 1988, II.65 with I.47).

<sup>16</sup> Locke 1979, III.II.16.

## III

Do indigenous peoples fall below the threshold for corporeal moral agency, according to Locke? Is the appropriation of their lands, or the subjugation of their forms of government possible because they are not owed basic equal respect in the first place? Much depends on what one thinks follows from the notion of 'equal respect'. Today we often associate equal respect with respect not only for individuals, but sometimes the cultures and ways of life they construct and value, either as a product of their freedom or as a necessary condition for its realization.<sup>17</sup> Does Locke offer any intimations of such an argument in the *Two Treatises* (or elsewhere)? Hardly. But is his argument for possession based on denying the indigenous inhabitants of the Americas *any* attribution of equality? He does refer to indigenous peoples in the *First Treatise* at one point as 'irrational and untaught'<sup>18</sup> (a passage I shall return to in a moment), but does this entail that they are incapable of possessing natural rights?

We now have a sophisticated account of both the domestic and international context in which Locke made his arguments concerning property and civil society in the *Two Treatises*.<sup>19</sup> The basic structure of these Lockean arguments goes something like this. First, Locke ties ownership of property very closely to labour and to use. And labour is linked in relation to land and to cultivation: 'As much Land as a man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property'.<sup>20</sup> Thus if someone simply roams over unimproved land, or grazes his flock over it, he secures no property in the land he uses. This clearly entailed that, beyond the animals they catch, or the crops they sow, the indigenous peoples of America had no genuine property in their territories, and thus could not exclude Europeans from them, or demand negotiations over land use. It is no coincidence that Locke's point of comparison in discussing the difference between productive and unproductive practices to do with land is with Amerindian societies – wherein a 'King of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in England'.<sup>21</sup> The argument

<sup>17</sup> See for example Kymlicka 1995.

<sup>18</sup> Locke 1988, 1.58.

<sup>19</sup> Armitage 2004b; Keene 2002; Tuck 1999; Tully 1993a; Tully 1979; Wootton 1993.

<sup>20</sup> Locke 1988, 11.32.

<sup>21</sup> Locke 1988, 11.41. On the background to Chapter v, see Tully 1993a; Tully 1993b; Arneil 1996; Armitage 2004b.

is a general one about increased productivity through the efficient use of land (reflecting his reading and translation of Pierre Nicole,<sup>22</sup> among other things), but its specific application to America has striking consequences.

The second crucial argument Locke makes is that the Indian 'Nations', as he refers to them, 'exercise very little Dominion, and have but a very modest Sovereignty'.<sup>23</sup> What societies they do have are not *civil* societies, and they remain, for all intents and purposes, in a state of nature (especially with regard to other European nations). Locke's argument here is sometimes assimilated with the 'four-stages' stadial theory of human history — linked especially with Adam Smith — whereby humanity progresses from wandering tribes or families to settled, commercial societies. I think this assimilation is somewhat premature, however crucial the stadial theory is to understanding European/indigenous relations.<sup>24</sup> But Locke certainly does associate the 'Indian nations' with a pre-agricultural, nomadic existence, which entailed a limited set of desires and modes of interaction (and conflict) characteristic of more settled, agriculturally developed societies, and thus without the complex social and political institutions he assumed grew up around agriculture and monetarized exchange. For Locke, sovereignty is derived from the consent of members of civil society to incorporate themselves into a collective body — a people — and then be bound by majority will, exercised through a government justified on the grounds of protecting their natural rights.<sup>25</sup> To be sovereign, in other words, a collection of individuals, families or tribes — what Hobbes would call a 'multitude' — has to be converted into a people. Sovereigns can recognize and make treaties with each other and declare war, but the Indian nations, at least on their own, cannot. They can be acted on but lack the moral and political agency to be counted as genuine political actors themselves. (It is important to note, however, that the British Crown did, in fact, engage in treaty-making with various indigenous nations throughout the seventeenth and eighteenth centuries.)<sup>26</sup>

<sup>22</sup> See Locke 1993, p. 107; Ivison 1997, p. 120.

<sup>23</sup> Locke 1988, II.108; see also II.36. As Laslett points out, the discussion here mixes quasi-anthropological and biblical history freely, as Locke draws analogies between the 'Kings of the Indians in America' and the early kings of Israel.

<sup>24</sup> See Meek 1976; Haakonssen 1981, ch. 7; Pocock 1999; Pitts 2005, pp. 25–58; cf. Hont 1987.

<sup>25</sup> Locke 1988, II.95–8.

<sup>26</sup> Williams 1997; Slattery 1991.

Although the history of European-indigenous relations in the early-modern period is a complex and multi-faceted matter, this ‘agriculturalist’ justification of property rights was absolutely central to international and domestic law in colonial contexts well into the nineteenth century.<sup>27</sup> Even in Australia, for example, where only a tiny fraction of the country was under cultivation – or ever could be – the *Sydney Herald* declared (in 1838) that for the Aborigines, ‘[t]his vast country was to them a common – they bestowed no labour upon the land – their ownership, their right, was nothing more than that of the Emu or the Kangaroo’. The settlers had a ‘perfect right’, the *Herald* continued, to take possession of the land, ‘under the Divine Authority, by which man was commanded to go forth and people, till the land’.<sup>28</sup> The language and culture of ‘improvement’, among other things, was what was supposed to distinguish British imperialism from others (especially the Spanish). Productivity was valued over religious conversion and cultural assimilation. And the flexibility of the common law, in theory at least, was supposed to help coordinate the customs and norms of Aboriginal peoples with the newly introduced European law.

It is important to see the moral argument Locke was appealing to. The emphasis on labour follows from Locke’s understanding of human beings as rational creatures and yet dependent upon God. God commands us to labour, not just for the sake of it, but because it is the most appropriate mode of our supporting and sustaining his creation: ‘God commanded, and [man’s] Wants forced him to labour’.<sup>29</sup> We need to appropriate to fulfil our duties to God, and labour is the natural mode of appropriation.<sup>30</sup> Moreover, God gave the Earth to mankind to produce ‘the greatest conveniences of life’.<sup>31</sup> It turns out that, with the introduction of money and the division of labour that occurs, ‘improvement’ helps produce more conveniences than in any other system, especially one in which land is left vacant. Cultivation and industry does not merely produce more stuff, but more opportunities for people to labour, and thus greater opportunities for more people to preserve themselves and serve God.

<sup>27</sup> See especially Vattel 1916, I.vii, pp. 76–8; II.vii, pp. 326–7; for more background see Weaver 2003; Keal 2003; Armitage 2000; Pagden, 1995.

<sup>28</sup> Cited in Karsten 2002, p. 257; see also Reynolds 1992, pp. 74–6.

<sup>29</sup> Locke 1988, II.35, II.42.

<sup>30</sup> Locke 1988, II.26; see also I.86.

<sup>31</sup> Locke 1988, II.34.

Now it is true, as Jeremy Waldron has emphasized, that these are *arguments* and not merely assertions, and that someone who seeks to justify their claims to someone else at least thinks they are entitled to a justification. Locke has at least produced an argument that *purports* to respect equality and to treat the Native Americans as persons.<sup>32</sup> But here I think a powerful set of intuitions associated in contemporary moral and political philosophy with the link between egalitarianism and the demand for mutual justification are in danger of being read back into Locke.<sup>33</sup> For although it is true that Locke's arguments were indeed intended to compel the agreement of Amerindians, in fact, their validity did not depend on their actual (or even counterfactual) consent. Failure to recognize the natural duties that flowed from the right of self-preservation — namely, refusal to cede their lands, allow settlement or use them more productively — legitimated the use of coercive force against them.<sup>34</sup> The centrality of the language of war with regard to relations between settlers and indigenous peoples in North America (and elsewhere), is a striking feature of this literature in the seventeenth century.<sup>35</sup> Nor, *pace* Waldron, was there any genuine option to 'co-exist side-by-side with European agriculture',<sup>36</sup> since, as we have seen, any recognition of the mutual capacity of both indigenous peoples and European settlers to determine coordinate rights of jurisdiction was explicitly denied by Locke (although he had once been attracted to a more explicitly contractual account of the nature of property).<sup>37</sup>

It might seem at this stage that any attribution of basic equality to indigenous people is barely self-evident in this discussion in the *Two Treatises*. Certainly the attribution of any form of collective right — either natural or positive — to indigenous *peoples* is absent. But what about his writings on toleration? Locke is very clear in the *Letter Concerning Toleration* (as well as in the *Fundamental Constitutions of Carolina*) that 'Not even Americans are to be punished either in body or in goods, for not embracing our faith and worship. If they are persuaded that they please God in observing the rites of their own country . . . they are to be

<sup>32</sup> Waldron 2002, pp. 168–9.

<sup>33</sup> On the connection between equality and mutual justification see Rawls 1971; Rawls 1993; Scanlon 1998.

<sup>34</sup> Locke 1988, II.8, 9, 16; also I.130.

<sup>35</sup> See especially Tuck 1999.

<sup>36</sup> Waldron 2002, p. 169.

<sup>37</sup> See Locke 1997, pp. 268, 180; for more detail on how Lockean arguments were deployed against treaty-based relations in colonial America, see Tully 1993a, pp. 267–78; Armitage 2004b.



left unto God and themselves'.<sup>38</sup> He then goes on to provide a startling genealogy of the consequences of settlement, in which after a point when the settlers and inhabitants 'all joyn together and grow up into one Body of People', a magistrate 'becomes a Christian, and by that means their Party becomes the most powerful. Then immediately all Compacts are to be broken, all Civil Rights to be violated, that Idolatry may be extirpated . . . And unless these innocent Pagans, strict Observers of the Rules of Equity and the Law of Nature . . . forsake their ancient Religion, and embrace a new and strange one, they are to be turned out of the Lands and Possessions of their Forefathers, and perhaps deprived of Life'.<sup>39</sup> The dangers of using civil power to promote religious orthodoxy are the same 'both in America and Europe': how 'easily the pretence of Religion, and of the care of Souls, serves for a Cloak to Covetousness, Rapine and Ambition'.<sup>40</sup> There is a similar almost Rousseauian moment in the First *Treatise*. Following a sensationalist account of indigenous cannibalism taken from the *Commentarios Reales* of Garcilaso de la Vega, intended as part of a rebuttal of Filmer's assertions concerning natural paternal authority, he suggests that the 'Woods and Forests, where the irrational untaught Inhabitants keep right by following Nature, are fitter to give us Rules, than Cities and Palaces, where those that call themselves Civil and Rational, go out of their way, by the authority of Example'.<sup>41</sup> Locke is obviously concerned about the alliance between religious enthusiasm and temporal power, not only because magistrates are often incompetent when it comes to promoting true belief, but also tend to corruption.

Locke's argument for toleration is often said to rest mainly on his distinction between public and private, or at least between the domain of the magistrate and that of the church. But this distinction, central as it is to modern liberalism, is perhaps too blunt for making sense of Locke's own arguments. For one thing, Locke calls for the pursuit of religious freedom with 'charitable care'; 'every man has commission to admonish, exhort, convince another of error, and *by reasoning* draw him into truth' (my emphasis). He also insists that toleration entails a change in the behaviour of citizens and churches, as much as it does constraints on the magistrate. Thus it is not enough that 'Ecclesiastical men abstain from Violence and Rapine', but also 'admonish [their] Hearers of the Duties of Peace, and Good-will towards all men . . . [they] ought

<sup>38</sup> Locke 1983, p. 43.

<sup>39</sup> Locke 1983, p. 43.

<sup>40</sup> Locke 1983, p. 43.

<sup>41</sup> Locke 1988, 1.58

industriously to exhort all men, whether private Persons or Magistrates to Charity, Meekness and Toleration . . . and diligently endeavour to allay and temper all that Heat, and unreasonable averseness of the mind, which either any mans fiery Zeal for his own Sect . . . has kindled against Dissenters'.<sup>42</sup> Locke is not merely drawing a distinction between public and private here, but also offering a possible mode of interaction between different religious groups, one based on a form of public reasoning rather than force. In this sense his account of toleration is more 'political' than it is often given credit for, in the sense that Locke is here looking for a way of shaping disagreement rather than simply privatizing it.

But only just. For the main purpose of the *Letter* was to provide Locke's thoughts on the 'mutual Toleration of *Christians* in their different Professions of Religion'.<sup>43</sup> Atheists were clearly beyond the pale, since they could not be trusted to uphold the basic 'Bonds of Humane Society', given the crucial roles that contract and promise play in Locke's argument, and the deep theological structure underpinning it. The argument concerning toleration also clearly presupposes that the boundaries concerning the nature of *civil* interests are relatively fixed, and about which there is little scope for reasonable disagreement, although Locke's theory of resistance does mean the magistrate is subject to the countervailing threat of resistance if he is judged to have violated them (i.e. the 'life, liberty, health' and property of his subjects)<sup>44</sup> — the justification of which is ultimately up to the people to decide. So it goes without saying that *Locke's* argument for toleration is not addressed to the kind of pluralism we find in multicultural societies today — of life-styles, cultural and ethnic groups, religious sects, linguistic groups, migrants — however much a *Lockean* argument could be made that radically expanded freedom of conscience from religious matters to matters of public morality more generally.<sup>45</sup> And so although the basic premise of equality implicit in Locke's theory of religious toleration is indeed extended to indigenous peoples, it has limited political consequences. Their faith, or perhaps even the lack thereof, cannot be grounds for denying them their liberty. But their failure to put their lands under cultivation, and their lack of proper political institutions, mean that they lack both *imperium* and *dominium* over their traditional territories.

<sup>42</sup> Locke 1983, p. 34.

<sup>43</sup> Locke 1983, p. 23 (my emphasis).

<sup>44</sup> Locke 1983, p. 26.

<sup>45</sup> See for example Rawls 1993.

It is sometimes suggested that Locke's natural rights argument offers a powerful resource for indigenous peoples today, once we remove his prejudice against their land-holding practices and forms of civil government.<sup>46</sup> And so a rejection of Lockean arguments for denying indigenous peoples' land claims seems to yield a Lockean premise for recognizing them — namely, first occupancy. The indigeneity of first peoples — that they are 'tangata whenua', in the Maori phrase, 'people of the land' — is coupled with a principle of first occupancy that yields a claim for the restoration of their traditional lands, or significant compensation in lieu. Although Locke is talking about individual rights to property, presumably legitimate forms of collective property could be accounted for in the same fashion.

The problems with this approach, however, are considerable.<sup>47</sup> First of all, there are problems with the principle of first occupancy itself. Many of those who might support indigenous peoples' claims for land would probably not be happy with adopting an historical entitlement approach to property rights more generally, since it severely constrains the scope of distributive justice. Second, and more importantly, it is not clear the principle of first occupancy as it is elaborated by Locke — and by his latter-day followers<sup>48</sup> — sits easily with the political theories of indigenous peoples themselves, at least as I understand them. Although they have sought to use the common law to protect their property interests, it is not clear the dominant modes of occupancy and use therein best explain or help justify indigenous peoples' conceptions of property.<sup>49</sup> The natural rights approach essentially extends the conception of agency articulated by Grotius, Hobbes and Locke — one linked to the notion of sovereignty and a spatial metaphor of an inviolable sphere or boundary of non-interference — to the rights of indigenous peoples. It is not that indigenous peoples and their supporters do not often refer to the importance of prior occupancy for consideration of their claims; they do, and some version of it plays an important role in the contemporary jurisprudence of native title.<sup>50</sup> But it does not follow that Locke's account best captures the interests at stake. Also, it is one thing to explain ownership, but another to explain jurisdiction. Locke's argument struggles to explain the latter. And yet the wider and more important claim indigenous peoples are making refers to

<sup>46</sup> See Simmons 1995.

<sup>47</sup> Waldron 2003.

<sup>48</sup> Nozick 1974; Simmons 1992.

<sup>49</sup> But cf. Pocock 1992.

<sup>50</sup> See especially McNeil 1989.

self-government, and flowing from this to their standing in international custom and law. We need a more complex, multi-centred account of not only the history of international and constitutional law in these contexts, but of our regulative conceptions of political legitimacy too.

## IV

What lessons then can be drawn from the connections between this Lockean language of rights, toleration and empire? What does this history of rights teach us about our theories of rights?

One of the most intriguing and potentially controversial claims made by proponents of the ‘new history’ of political thought emerging from the path-breaking studies of Quentin Skinner and others, was that a specific way of doing the history of political thought could contribute to addressing the paradoxes and antinomies thrown up in contemporary debates over the nature of rights and freedom.<sup>51</sup> For example, James Tully, in a review of Richard Tuck’s *Natural Rights Theories* (1979), wrote that Tuck’s history of natural rights offered a potential solution to a problem bedevilling contemporary debates about the nature of rights. The conclusion of Tuck’s survey, Tully argued, was that the concept of a right is fundamentally ambiguous between different modes, and thus that various combinations thereof are possible in ways that many contemporary philosophers tend to rule out by conceptual fiat. Even more, Tully argued, ‘once we know that a right can be used in such and such a way, the way out is to ask “*why* it is being used in such and such a way”’ (quoting Tuck).<sup>52</sup> The answer will involve excavating a complex combination of the existing linguistic and normative resources available to the theorist, as well as the practical and political circumstances they find themselves in and responding to. The point is not that we should substitute history for theory, but that history provides a critical resource for surveying the uses of various concepts and theories over time, and especially the conflicts and choices that were made around the concepts and values we now take for granted.

One paradox subject to sustained scrutiny in recent years has been the idea of ‘citizen’s rights’. Some argue that the very idea is paradoxical, since the language of rights was articulated precisely in order to defend the moral claims of individuals *against* the positive order of the *civitas*. As Annabel Brett has summarized it, a ‘negative locution’ (rights) is used

<sup>51</sup> See Skinner 2002a.

<sup>52</sup> Tully 1981.

to fill out a ‘positive concept of belonging’ (citizenship), and the application of the former threatens to hollow out the latter.<sup>53</sup> Thus Brett interprets Locke as offering an ‘essentialist notion of extra-civic humanity’ with rights founded on the possession of reason, which put a ‘natural limit on what kinds of political arrangements were legitimate’. Rights, according to this view, are mainly defensive and ‘purely negative’, dictating when a wrong is done but not any prescription for a ‘moral life together with others in a society, nor any prescription concerning religion’ except some kind of belief in God. Even his use of the republican language of liberty against arbitrary government or tyranny, Brett argues, ‘amounts to little more than a common protection of individual private rights’.<sup>54</sup>

On the other hand, others have argued that Locke does, in fact, offer a potent combination of natural law and republican arguments — a “‘constitution-enforcing” conception of rights’ — in which the people subject their rulers to the rule of law through the threat and practice of resistance.<sup>55</sup> According to this reading, rights can promote republican forms of civic liberty, however much they may be compatible with non-republican forms of government.<sup>56</sup> Liberty as non-interference may indeed remain the primary moral good of such a society, but the range of what counts as a constraint on a citizen’s liberty is expanded to include living in a state of dependence upon others. And thus various forms of non-arbitrary ‘interferences’ — for example, to do with enforcing the rule of law, or ensuring people have the capacities to make effective choices and decisions about their ends — may be required, either from the state or other social and political actors.<sup>57</sup>

We have been examining yet another possible paradox in relation to Lockean rights, this time not only as a means of criticizing *imperium*, but also justifying it. Thus, Locke’s influence on Thomas Jefferson’s drafting of the *Declaration of Independence* extends not only to the language of natural rights, but also to the fact that the American indigenous peoples were denied ‘the separate and equal station to which the Laws of Nature and of Nature’s God entitle[d] them’ claimed by the American ‘people’ against the *imperium* of the British Crown.<sup>58</sup>

<sup>53</sup> Brett 2003, p. 100.

<sup>54</sup> Brett 2003, pp. 110–11.

<sup>55</sup> Tully 1993a pp. 259–61; Skinner 1998, pp. 18–21, 55.

<sup>56</sup> Skinner 1998, p. 55, n. 177.

<sup>57</sup> Skinner 1998, pp. 84–5; Pettit 1997.

<sup>58</sup> From the first paragraph of the *Declaration*.

It seems clear then that in order to define the nature and scope of rights, claims have to be made about the nature of persons, and particularly about those qualities or powers to which the rights refer, or are intended to protect. This means drawing a distinction between those who are eligible for rights and those who are not, and between those who display and are capable of exercising the relevant powers and capacities and those who are not. Second, all theories about rights ultimately depend on claims about the wider purpose of rights and how they fit into more general conceptions of moral and political order and human sociability. In both instances, the filling out of claims about the subjective rights of persons against arbitrary treatment by the state (and their fellow citizens) provides ample room for the introduction of thicker constraints on who is eligible to claim certain rights, and ultimately, what kind of society the language and practice of rights is meant to promote and protect. As Sankar Muthu has put it (echoing Hannah Arendt), no sooner had the Inca or Iroquois been granted a minimal humanity, as against being classified as an Aristotelian natural slave, 'than the privileges and protections of such a classification were abrogated'.<sup>59</sup> The more natural and less cultured the account of human agency, the easier it was to depict their societies and *mores* as radically different and then as either uncivilized and requiring improvement, or debased and subject to punishment or control according to natural law.

Hence the apparent paradox of moral universalism: that is, how universalistic premises applied to politics (for example, that 'all Men by Nature are equal'),<sup>60</sup> can end up justifying particularistic and exclusive practices and institutions.<sup>61</sup> Thus, as Uday Mehta has put it, 'what is concealed behind the endorsement of these universal capacities are the specific cultural and psychological conditions woven in as preconditions for the actualization of these capacities', and that these can often be discriminatory against racial and cultural minorities, amongst others.<sup>62</sup> As we saw above, it was a basic tenet of early-modern natural jurisprudence that although the individual played a crucial role in the foundation of civil society, 'he' (again, usually always meant literally) was also under-developed outside of it. Humanization comes with appropriation, social interaction, norms and culture; the state of nature denotes precisely the absence of these conditions. The problem lies in what is

<sup>59</sup> Muthu 2003, p. 273.

<sup>60</sup> Locke 1988, II.4, II.116–19.

<sup>61</sup> Mehta 1997, p. 60.

<sup>62</sup> Mehta 1997, pp. 61–2; Arneil 1996, pp. 210–11.

said to count (or not) as an appropriate set of institutions and norms for a properly human life. Locke naturalized the relation between labour and property in such a way that it excluded other forms of use and occupation, and by implication, a more historicized approach to human culture. This converted cultural and societal differences into hierarchical differences, and opened up a gap between 'egalitarian interpersonal morality and inegalitarian political and international morality'.<sup>63</sup> A theory of human development over time need not include claims about the moral or cognitive superiority of the societies occupying one stage compared to another, as arguably Adam Smith's did not.<sup>64</sup> But by the end of the eighteenth century, and certainly by the nineteenth, it almost always did.

One thing that was occurring was the complicated unravelling of the law of nature from the law of nations, which is increasingly conceptualized as obligatory between *Christian* nations, and as the product of interaction between *states* (especially after the Treaties of Westphalia and the various responses to the French Revolution). This intermingling of the civilizational standard and positivism in international law arguably continues to shape our understanding of the universalizability of rights today.<sup>65</sup> First of all, once international law begins to be associated mainly with the reason of states, then non-state actors, such as indigenous peoples, have even less standing in the system than what little they had before. For example, between 1600–1800, literally hundreds of treaties were signed between various Aboriginal nations and British and French authorities. How these treaties are understood will depend importantly on the political and legal authorities considered relevant. Are they international treaties between equal sovereign entities? Or are they a species of domestic contract or statute imposed by a legitimate political authority on its citizens?<sup>66</sup> However much middle ground may have been carved out between indigenous nations and European powers on the ground in various parts of North America between 1600 and 1800, it was clear that by the nineteenth century it was rapidly disappearing, and the residual sovereignty of Aboriginal peoples was either flatly denied, ignored, or subsumed under 'domestic dependent' status. This meant that it was hard to see (public) international law as anything but the

<sup>63</sup> Parekh 1995, p. 92.

<sup>64</sup> See the excellent discussion in Pitts 2005, ch. 2; and Haakonssen 1981, ch. 7.

<sup>65</sup> Gong 1984; Keene 2002; Anghie 2004.

<sup>66</sup> Slattery 1991, p. 684; Williams 1997.

law of a broad but still culturally specific civilization, as opposed to an emergent set of genuinely global – or at least cross-cultural – public norms.

This blurring between nature and culture in rights discourse is perhaps best exemplified by the *Déclaration des droits de l'homme*, which also returns us to the paradox of 'citizen's rights'; that is, the welding together of a negative locution with a positive conception of belonging.<sup>67</sup> The 'rights of man' still *sound* like natural rights – 'natural inalienable and sacred to man' – and yet they are declared in the name of a sovereign people, 'constituted in a national assembly'. Moreover the most basic rights are civil and political rights and, as Anthony Pagden points out, seem to 'derive from the status of their holders as citizens ... and can only have any meaning, within the context not merely of civil society but of a society constituted as a nation'.<sup>68</sup> They could only be made intelligible in the terms of a specific political order, and thus were 'increasingly useless as a notion in international or intercultural relations'.<sup>69</sup> The conclusion to be drawn from this, argues Pagden (echoing many others) is clear: what we think of today as the international law of human rights, are 'cultural artefacts masquerading as universal, immutable values'. It follows that if 'we wish to assert any belief in the universal we have to begin by declaring our willingness to assume, and to defend, at least some of the values of a highly specific way of life' – basically, those found in a liberal democratic state.<sup>70</sup> Thus, for example, Pagden argues, 'a liberal democratic Islamic state is an oxymoron', and the changes required to enable the kinds of freedoms associated with the international law of human rights 'can only come about from outside Islam'.<sup>71</sup>

I hope (and think) Pagden is wrong about this *particular* case, but he is raising an important point. Our modern conception of human rights, embodied in documents such as the *Universal Declaration of Human Rights* that emerged in the aftermath of the Second World War, are often said to be the modern analogue of early-modern natural rights. But the analogy is imprecise at best, deeply misleading at worst. For one thing, modern human rights presuppose a whole range of modern social and political institutions, and have been shaped by an emerging set of global political structures and dangers since 1945. Taken as a

<sup>67</sup> Scott 1996; Pagden 2003.

<sup>68</sup> Pagden 2003, p. 189.

<sup>69</sup> Pagden 2003, p. 190.

<sup>70</sup> Pagden 2003, pp. 172–3.

<sup>71</sup> Pagden 2003, p. 199.



whole, they also aspire to do much more than secure the bare liberty and security of the person, and look much broader and richer than the Grotian framework we examined above.

For some, the mere fact that our conception of the international law of human rights originated in a distinctive cultural context and ethical tradition is enough to suggest that its accessibility and acceptability to those embracing other comprehensive ethical traditions will be severely limited. And it is a familiar charge today that the discourse of human rights, when conjoined to a justification of armed intervention or pre-emptive war – a prominent feature of early-modern natural law discourse that is once again prominent in an age of the ‘war on terror’ – is simply an extension of the imperial ‘standard of civilization’ in a new guise. An even sharper version of this critique is a variation on Marx’s argument against liberal rights in ‘On the Jewish Question’: human rights were born not only in the aftermath of World War II, but also in light of the globalization of neo-liberal economic institutions. This explains, so this argument goes, the emphasis in extant international law and practice on political and civil rights over social and economic equality. The broader point is that human rights are entwined with the very relations of power against which they are supposed to provide critical leverage.

These are powerful criticisms. But they are ultimately too reductive and posit, I think, a far too simplistic picture of the relation between the practice of human rights as it is developing amid social and cultural pluralism, as well as in relation to concerns about global poverty and economic inequality. The criticisms lead in two broad directions. First, they might entail simply rejecting human rights in general as a vacuous form of moral theorizing, and limit appeals to rights to those which are embedded in a legally enforceable framework.<sup>72</sup> But this underestimates the aspirational and imaginative appeal of human rights claims. Rights are valuable sometimes just because they are unenforceable by ordinary legal and political means, as a way of drawing attention to the purported unacceptability of those circumstances. Moreover, although plagued by the self-important rhetoric of human rights lawyers and activists who assume international law exists just because they say so, the demand for human rights has emerged in part because of the kinds of social, political and economic challenges people actually face in the world today – whether in the north, south, east or west. So another

<sup>72</sup> See Geuss 2001, pp. 138–52; James 2003b.

direction this critical approach might lead us is to try and craft a practice of human rights that takes cultural and ethical differences seriously, and that is sensitive to the history of imperial expansion and intervention (both in the distant and more recent past) that shapes the beliefs and attitudes of so many people in the world today. One way to do so is to take the value of toleration seriously as a principle of international law and governance. But this only serves to dramatize what is a fundamental tension when thinking about the foundations of international law today; between a principled respect for, and recognition of, the collective agency or self-determination of peoples and states and individual human rights. This is partly because this tension is written into the various international Treaties, Declarations and norms that make up the complex of modern human rights instruments today (e.g. Article 1 of the *UN Charter*; and Article 27 of the *Optional Protocol of the Convention on International Civil and Political Rights*). These treaties and norms emerged out of inter-state negotiations, after all. But the issues at stake are fundamentally normative as well. How can a principle of toleration be reconciled with a commitment to human rights? How can we both accept the idea of the existence of a global basic structure that suggests the need for some form of transnational distributive justice, and yet recognize the equality and value of the collective agency of states and peoples?

An influential strand of recent work on global justice denies that there is any such tension, since the moral significance of states or peoples is entirely derivative from their contribution to achieving justice.<sup>73</sup> Although the details of the theory of justice to which these arguments appeal vary, they all place a significant emphasis on individual autonomy. Thus self-determination and the right to non-intervention are owed to states or peoples only on the grounds that observing them contributes to the realization of individual autonomy. It might be that there are pragmatic or prudential reasons to adhere loosely to principles of non-intervention and self-determination, but not any principled ones. The best understanding of our commitment to human rights dissolves any principled tension between toleration and human rights. When states violate justice, toleration must yield to remediation and rectification.

The danger of this approach — admittedly, for some, its primary virtue — is that it insists there is basically no difference between the standards of transnational justice and a liberal theory of justice.

<sup>73</sup> See Beitz 1979; Caney 2005. Cf. Buchanan 2004.

It presupposes that such an account can be given that is sufficiently determinate for international society, and that the best conception of human rights will feature as an important component of such a theory. However, a theory of rights cannot just ignore social and cultural difference, as if it were a regrettable feature of the world, but has to try and make sense of it and tell us something about how we should relate to each other given this diversity.<sup>74</sup> The point is not then that toleration itself is a foundational value for the justification of human rights, but that it is an appropriate response to the diversity of views about the good and the right that characterize both domestic and international political life. The basic thought is this: as the scope of our moral principles grows, so should our sense of the boundaries of reasonable disagreement, and the need to create institutions and practices within which it can be played out peacefully and without false expectations or impositions of consensus.

It is for something like these reasons, I think, that John Rawls and others have argued recently for a very different approach to justifying human rights as a way of thinking about the moral foundations of international law. And it has a Grotian ring to it. This approach involves appealing to a form of *moral* or *justificatory* minimalism; that human rights be justified in such a way that they can be acceptable to those within very different ethical traditions, including societies which have suffered domination in the past by those states most vocal in promoting human rights today. It is important to distinguish *justificatory* minimalism from what we might call *empirical* minimalism. The latter entails that human rights be grounded at the intersection between various actual religious and ethical traditions, as a kind of lowest common moral denominator between them. Although this might yield important constraints to do with prohibitions on torture or genocide, for example, it generates a far smaller set of basic rights than is assumed in current international practice. Actual agreement is far too strong a condition to impose on the justification of critical standards; it ties them too closely to those existing moralities, whatever their particular content, and presupposes they remain relatively static and immune to internal and external challenge and disruption.<sup>75</sup>

So justificatory minimalism need not imply minimalism about the *content* of human rights. It entails, roughly speaking, that the grounds

<sup>74</sup> Rawls 1993; Jones 2001.

<sup>75</sup> Beitz 2001, pp. 273–4; Cohen 2004, p. 200.

for human rights can be found not in a particular doctrine of individual autonomy or Lockean natural law, but in terms that are accessible from within the vantage points of various different moral and religious traditions. But at the same time, that the language of human rights discourse can help shape these local traditions and practices too, faced as they are with the challenges of the global political structure. To justify human rights in this sense is to accept that it is a *constructive* task; of constructing, in Joshua Cohen's helpful phrase, a 'shared terrain of argument' (and obligation) between different moral traditions and societies about the kind of standards suitable for holding political societies to account for their treatment of individuals and groups.<sup>76</sup> In fact, for these reasons talk of minimalism is misleading. We should aim for a common standard, not a minimal one.

What does this mean? 'Common' falls somewhere between comprehensive and minimalist and implies the ongoing activity of constructing a common point of view, not simply positing one. All rights regimes are culturally mediated in various ways. They rest on a structure of moral beliefs about the urgency or appropriateness of the interest in question to receive the institutional and political attention sought by identifying it as a 'right' in the first place. And so we need to explore much more carefully the dynamic relation between rights and social and cultural norms; the way rights not only reshape local norms and practices, but also how these in turn (for better or worse) shape the language of rights. Why is this important? If we want rights to be effectively enforceable claims — 'real freedoms', in other words — then we require effective institutions that can allocate and enforce the rights we care about. And we need people with the appropriate dispositions, attitudes, knowledge and resources to be able to make claims in the first place, and respond appropriately to those made by others.<sup>77</sup> We tend to associate these conditions above all with the well-defined authority and political and legal order of a state. And this is one reason why the state is far from dead, despite the claims of globalization enthusiasts. But it is also the case that the conditions required for realizing the effective enforceability of the most urgent interests of many people in the world today — including those basic civil, political and economic interests often associated with citizen's rights — will require collective action and institution-building across borders as much as within them.

<sup>76</sup> Cohen 2004, p. 195.

<sup>77</sup> James 2003b.

And the struggle to articulate the moral grounds of modern human rights, as well as to question the adequacy of existing human rights instruments and institutions is part of the process of trying to realize these conditions.

Michael Ignatieff has referred to arguments over human rights in these contexts as involving the construction of a kind of 'hybridized moral vernacular', not necessarily cut loose from liberalism, but not as dependent on it in the way critics suppose. He seems to mean this is a descriptive claim, which may well be overly optimistic. But I think it offers a potential normative vision too, and one that is well worth trying to spell out in greater detail.<sup>78</sup> Studying the development of the language of subjective rights in tandem with changing conceptions of the justification of empire between 1600 and 1800 helps us see the cluster of assumptions that surround rights claims; theories of rights always exist within broader discourses of state-formation, citizenship and international order. Taking the history of rights seriously helps us see both the possibilities – and crucially the constraints – this language offers us today, as we try to make sense of and respond to new conjunctions between rights and *imperium*.<sup>79</sup>

<sup>78</sup> Ignatieff 1999; Ivison 2006.

<sup>79</sup> I am grateful for the comments and advice I received from the participants in the Folger conference, and especially to David Armitage, Nicholas Canny, Kirstie McClure, Karen O'Brien, John Pocock and Quentin Skinner.