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Democratic Authority From the Outside Looking In: States, Common Worlds and Wrongful Connections

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IN *THE CONSTITUTION OF EQUALITY*, Thomas Christiano takes on the question of why decisions that have been democratically arrived at should be treated as authoritative even if we do not agree with them.¹ A key element of that argument is the concept of a “common world”: a “world in which the fulfillment of all or nearly all of the fundamental interests of each person is connected with the fulfillment of all or nearly all of the fundamental interests of every other person.”² Christiano takes the connections between people produced by subjection to the same state as the paradigmatic case of a common world, and seems to assume that state-based common worlds take normative priority over common-world-like connections produced by other social and institutional structures. At times, being subjected to the same state seems to be constitutive of common worlds, so that not just the fact of interdependence, but also the fact of interdependence of the sort that subjection to the same state produces, is what generates the obligation to treat democratic decisions as authoritative.

This identification of the worlds created by states and other groupings is not necessary to the function that common worlds perform in Christiano’s argument. And there are good reasons for resisting such identification. These reasons become most apparent when we consider the issue of permanent minorities. The problems that permanent minorities face typically reflect ongoing injustice in the terms of their incorporation into the common world produced by the state.

However, if Christiano does not identify common worlds with the worlds produced by subjection to the same state, he must grapple with where and how to draw common worlds’ boundaries, and what to say about the possibility of multiple and overlapping common worlds whose democratically produced demands conflict. But Christiano has to answer these questions anyway. States’ capacity to produce and maintain common worlds depends on an international institutional context that accepts and reinforces exclusive jurisdiction with respect to a territory and population. This international context raises the questions of whether state-based groupings ought to be privileged in this way, how boundaries must be drawn for such privilege to be defensible, and what the proper relationship is between decisions by state-based and other groupings. *The Constitution of Equality* offers interesting resources for grappling with these questions. But we must be willing to think beyond the state.

¹ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press: 2008).

² Christiano, *op. cit.*, p. 80.

Common Worlds

Christiano argues that one of the main purposes of the state is “to establish justice in its laws and policies among the members of the society.”³ We members of society are compelled as a matter of morality to accede to the state’s role in this regard in virtue of our having a common world. The fact that our most fundamental interests are connected to the fundamental interests of every other member establishes a duty on each of our parts to govern our pursuit and fulfillment of these interests by shared decision-making processes. The fact of a common world establishes duties of inclusion.

But what, precisely, are these common worlds, and where do they originate? In particular, what is the relationship between common worlds and the boundaries of states? We can imagine the entire population of a state being connected to one another in such a way that we would describe them as having a common world, and using their state as a vehicle for that common world’s regulation. In such a case, Christiano’s view tells us that the necessity of ensuring that their state functions to establish justice constrains the manner in which the population may use the state for such regulation, and that one of these constraints is that the population’s decision-making mechanisms must be democratic.

However, subjection to the same state in and of itself does not ensure that individuals’ interests are connected to one another such that “the fulfillment of all or nearly all of the fundamental interests of each person are connected with the fulfillment of all or nearly all of the fundamental interests of every other person.”⁴ Actual states are comprised of a number of populations integrated into an overarching administrative structure – and connected to one another’s interests via this structure – in systematically different ways. States’ integration of individuals into administrative structures that connect their interests is group-differentiated, and so how a person’s interests are connected to the interests of others reflects group membership in systematic ways. This phenomenon has been most extensively discussed with respect to women – where it has been observed that legal and institutional structures often adopt a male point of view – and linguistic, cultural and religious minorities, where it has been observed that some form of cultural and moral point of view is intrinsic to state functions such as education, public health and income support.⁵

Group-differentiated integration produces systematic differences in individuals’ relations to the state. These differences may be innocent: They may

³ Christiano, *op. cit.*, p. 76.

⁴ Christiano, *op. cit.*, p. 80.

⁵ On differences in the terms on which men and women are integrated into the state, see Patricia Smith, “Feminist Legal Critics: The Reluctant Radicals,” in *Radical Critiques of the Law*, S. Griffin and R. Moffatt, eds. (University Press of Kansas: 1997), pp. 143-161. On the inevitability of states adopting and reflecting a cultural perspective, see Will Kymlicka, *Politics in the Vernacular* (Oxford University Press: 2001), pp. 23-33.

be an unforeseen and unintended consequence of demographics, and they may not result in systematic differences in how individuals are connected to others that are morally problematic. But in many cases these differences are not innocent: They are deliberate attempts to produce connections between individuals that privilege and empower some groups and marginalize and disempower others. That the differences are often not innocent matters for Christiano's view because the connections they produce are the basis on which we find ourselves with obligations to include one another in our decision-making in the first place. Moral problems in the structures that produce connections between us puts into question whether these connections have a plausible claim to the moral standing Christiano affords them. Evidence that one or more dimensions of our lives are connected in ways that they ought not to be – that one or more dimensions of our lives are wrongfully connected – seems on the face of it to undermine the pull that the mere fact of such connections exerts.

When the common world produced by a state is rife with wrongful connections, the first priority would seem to be unwinding the web of wrongful connections and establishing different relationships and different connections between and within individuals and populations. Questions about what parties owe to one another in this process and how democratic decision-making may or must figure in the changes to be made are questions of transitional justice.

In this regard, it is telling that, although Christiano describes the situations of most indigenous peoples in a settler state such as Canada as “some of the clearer cases of persistent minorities in recent times,” such peoples’ situation is not adequately captured by his description of a persistent minority.⁶ Christiano describes cases of persistent minorities as typically exhibiting the following features:

a number of social groups that differ from one another in a highly salient way from the point of view of the members”; “[t]hese differences ... have significance for a wide variety of issues”; the preferences of these groups conflict such that compromise is necessary for each group “to get some of what they want”; and “[o]ne group or combination of groups ... may be able to dominate in majority rule without compromise.⁷

This description captures four important features of many indigenous peoples’ situations. However, what is usually most salient in explaining cases where an indigenous people consistently loses out in decision-making is not their numbers relative to settlers or the distinctiveness of their values and way of life, but the circumstances and structure of the people’s incorporation into the state. In Canada, for example, the legislation and administrative structures through which indigenous persons, their communities and their lands have been integrated into the federal system were explicitly designed to

⁶ Christiano, *op. cit.*, p. 289.

⁷ Christiano, *op. cit.*, p. 289.

dilute the number of indigenous persons living in their territories relative to settlers, reduce indigenous communities' capacity to engage directly with nearby settler communities, and undermine the viability of indigenous communal and life forms. Membership in indigenous communities was legally circumscribed and children removed from families in a concerted effort to depopulate indigenous communities.⁸ Potlatch was made a criminal offense in British Columbia in order to make it impossible for indigenous communal forms and way of life to co-exist alongside settler society.⁹ Education policy for indigenous children was deliberately structured to counter indigenous communities' success in maintaining their communal ties and way of life.¹⁰ What these examples show is that, although many indigenous peoples may well be persistent minorities in Christiano's sense, the explanation of what makes this the case is crucially important. Indigenous peoples do not find themselves persistent minorities; they have been positioned as persistent minorities for the express purpose of making it difficult for their members to exercise effective voice, maintain extensive and distinctive connections amongst themselves, and control the terms on which they are connected to settler society.

Oppressed Groups and Wrongful Connections

Christiano addresses the observation that people can find themselves part of a common world that has been "forged by the use of force and fraud" by noting that the fact of a common world is morally relevant regardless of origins, and that arbitrariness does not imply moral unimportance.¹¹ However the worry about connections between people that have been established by force and fraud is not that these connections are arbitrary, but it is that they have been established by a wrong. In established democracies such as Canada, Sweden, France and the United States – anywhere with a settler or imperial history – these wrongs originate not only in specific acts that states undertook, but also in the structures connecting people that have been put into place. So although we often talk about the role of force and fraud in the forging of modern states as though it were a question of historical injustice, the injustice is not a matter of history. It is something that continues to happen

⁸ Jennifer Henderson and Pauline Wakeham, "Colonial Reckoning, National Reconciliation? Aboriginal Peoples and the Culture of Redress in Canada," *ESC: English Studies in Canada* 35:1 (2009), 1-26. For a general overview of the history of the integration of indigenous peoples into the Canadian state, see Olivia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times, 3rd edition* (Oxford University Press, 2002).

⁹ Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against Potlatch on the Northwest Coast* (Douglas & MacIntyre Publishing: 1990), Tina Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol and Rhetoric in British Columbia, 1884-1951," *Canadian Historical Review* 73:2 (1992), 125-166.

¹⁰ Bradford Morse, "Government Responses to the Indian Residential Schools Settlement in Canada: Implications for Australia," *Australia International Law Review* 12:1 (2008), 41-44.

¹¹ Christiano, *op cit.*, p. 82.

as long as the problematic state structures remain in place. The problem of force and fraud is not a problem of acts perpetrated in the distant past by people unrelated to us. It is a problem that began in the past; has become entrenched in the structures, legal regimes and functional conception of the state; continues over time; and so is ongoing.¹² Against this background it seems strange and problematic to say that people who have participated in or benefited from the state's oppressive structures may claim equal standing in the decision-making by groups who have been marginalized and exploited.

Most of us would say that there is a moral difference between being linked to another person by an arbitrary chain of events, and being linked to her because she or someone else who has the means to impose upon you has decided you are going to be so linked, regardless of your wishes or interests. Specifically, we think that the fact that someone is wronged in the process by which a connection is established between herself and others is relevant to whether and how those others may use the connection as grounds for holding her to have duties toward them. For example, few of us would say that people who have been colonized have a duty to engage either their colonizers or those who have benefited from colonization in democratic decision-making regarding the manner and extent of decolonization. This is not because we think the colonized have an interest in establishing a protective sphere within which to make decisions about their decolonization; it is because we think both the colonizers and those who have benefited from the colonizers' successful application of power have no right to a say in how decolonization proceeds. The injustice of the circumstances under which the interests of the colonizers, and those their colonization benefited, became intertwined with the interests of the colonized is taken by most of us to negate any claim that the deep connection that now exists establishes a moral duty to include colonizers and beneficiaries of colonization in subsequent decision-making.¹³

It is possible within this description of wrongful connections that some of those to whom connections are wrongfully established may be neither perpetrators nor beneficiaries of the wrong. This, I assume, is the scenario that Christiano takes to obtain with respect to most indigenous peoples. When a person to whom others have been wrongfully connected neither perpetrates nor benefits from the connection but may be harmed if the connection is ignored, the fact of a common world seems to be morally relevant despite the wrongful origins. The person to whom the members of a

¹² On this, see John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning and Democracy," *University of Toronto Law Journal* 47:4 (1997), 417-448; Jeff Cornthassel and Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions and Indigenous Self-Determination in Australia, Canada, Guatemala and Peru," *Human Rights Review* 9:4 (July/September 2008).

¹³ For a discussion of why such an asymmetry in power between wrongdoers and wronged might be morally appropriate, see Claudia Card's discussion of forgiveness in *The Atrocity Paradigm* (Oxford University Press: 2002), pp. 166-211.

wronged group now find themselves connected is innocent, and having been subject to wrongs themselves does not license the constituents of a wronged group to wrong others in their turn.

However in order to think of a group whose constituents have been wrongly connected to an innocent as wronging him when they refuse to include him in their decision-making, it must be the case that the fact of his innocence is enough to negate our worries about whether he is entitled to be included. Yet it is not at all obvious that innocence of the wrong that establishes a connection is in itself enough to restore the moral presumption in favor of inclusion in decision-making. There seems something perverse in the idea that people who have been subject to injustice may find themselves not only wronged, but now subject to constraints in their dealings with others because of connections created by the wrong they have suffered. We might legitimately ask why *they*, the wronged, should be expected to bear the burdens of limiting the spillover effects of the wrongs they have suffered. These spillover effects are a piece of bad luck. The question is: Whose bad luck should it be? If we say that the fact that a connection is wrongful is irrelevant to whether it may be a subsequent source of claims, we make it bad luck for the wronged. Yet surely the wronged have borne enough bad luck in this situation. Why not make it bad luck for the innocent bystander?

The Case of Indigenous Peoples

This brings us back to indigenous peoples. What, precisely, is my relationship as a settler to a member of the Saanich First Nations, the group of indigenous communities in whose territory the University of Victoria is located? According to Christiano, a member of one of the Saanich First Nations and I are both parties to a common world, but she finds herself in a permanent minority with respect to decision-making about that common world and I do not. This description leaves out what I have suggested above is the most crucial element of our relationship: that its origins and structure are wrongful. Members of Saanich communities are connected to me because they have been forced to share decision-making regarding a wide range of issues over which they previously exercised sole jurisdiction. They were not forced to share decision-making as a consequence of connections between themselves and settlers; the connections are the consequence of being forced to share decision-making. Given this fact, the moral problem I and other members of the permanent majority confront is not that we consistently agree amongst ourselves in ways that make it difficult for people from Saanich First Nations to exercise effective voice. The problem is that we, the permanent majority, seem to have no reasonable grounds on which to insist that our views even be taken into account by members of the Saanich First Nations. What, other

than our privileged connection to the state, makes us expect that our views will carry the day?¹⁴

The issue here is not whether members of the Saanich First Nations need a protected sphere, nor is it that their decision-making will always be in the minority if the unit of decision-making includes people outside of their communities. The issue is whether there is anything other than power behind my claim to be included on equal terms in decisions about land use within Saanich First Nations territory. When I say to people in Saanich communities, “Residential construction impacts the economy and environment of the entire region and through this it impacts my fundamental interests!,” why is it not within their rights to reply: “I can see that this is true, but what is that to us? We are not the ones who tied your interests to our decision-making; why should we bear the costs of your being impacted by us?”

Christiano’s characterization of indigenous peoples as permanent minorities treats the entire population of Canada as the presumptively justified jurisdictional boundary for all parts of Canada unless special considerations can be adduced to justify adopting a different jurisdictional boundary for a particular region or issue. However, Saanich communities used, lived on and participated in communal governance regimes with respect to specific territories in British Columbia long before there was a Canadian state. In Christiano’s terms, these communities had a common world long before the annexation of their territory by the Canadian state, and this common world and the use, occupation and governance that produce it persist to the present day. This previously existing common world establishes as plausible a claim for members of the Saanich communities to exercise exclusive decision-making, which claim would establish no right for outsiders such as myself to interfere with their decision-making. If the members of Saanich First Nations now find themselves a permanent minority in decisions about how their land is used, then this is a double injustice: These communities have been forced to include people in their decision-making who have no right to be included, and subsequent to the inclusion of these others, the communities’ members – who ought, properly speaking, to be in control of the decision-making – are deprived of effective influence over what is decided.

At the heart of this is the question of whether it is in fact accurate to describe myself and members of the Saanich First Nations as parties to a single common world. A succession of governments in Canada has established policy regimes and pursued legal strategies specifically designed to connect the interests of people in Saanich communities with people outside of the those communities on terms that insulate nonmembers from decision-making and priorities in Saanich communities and erode the ability of people within Saanich communities to resist the decision-making and priorities of nonmembers.

¹⁴ For discussion of this as a problem about proper jurisdictional authority, see Margaret Moore, “Internal minorities and indigenous self-determination,” in *Minorities within Minorities*, A. Eisenberg and J. Spinner-Halev, eds. (Cambridge: 2005), pp. 271-293.

The result is a deep asymmetry in the extent to which these groups' (people in Saanich communities and people outside of Saanich communities) fundamental interests are linked through the institutions of the Canadian state. Rather than being subgroups within Canadian society, indigenous communities such as the Saanich First Nations have been treated, and now seem to stand in relation to settlers, as external groups – groups from whom Canadian society is distinct and with whom Canadian society engages strategically for purposes intended to suit and benefit the majority of Canadians. The problem of consistently overriding and undermining indigenous communities' decisions in favor of priorities and values of the majority of the population of the state appears in this scenario to be different from the problem of permanent minorities. It appears to be the problem of imperialism and colonization.

Democratic Decision-Making from an Outsider's Point of View

If in fact the relationship between indigenous communities and the Canadian state is one of colonization, this obviously undermines the authority of Canada's democratic institutions for indigenous communities, so that members of Saanich and other First Nations have no duties to respect Canadian institutions' decision-making. But what about the authority of this decision-making for *me* on the inside of the Canadian state? Does the injustice of Canada's relationship with indigenous peoples also undermine the democratic authority of its institutions and decision-making for me? This brings us back to the questions of where the boundaries of common worlds fall, what people who are party to discrete common worlds owe to one another, and what the grounds are on which they owe it.

For those wrongfully integrated into a state, the state seems most accurately described not as a vehicle for governing a common world but as an alien, external mechanism through which they and their communities are managed. It seems odd in such a situation to describe those falling under the state's aegis as all sharing a single common world. Instead, there seems to be more than one common world within a single state. There is a world common to those privileged or served by the state, and the world – or worlds – of everyone else. These worlds of the privileged and of others undoubtedly overlap, and we may wish to say that these together constitute a common world of the state. However something crucially important would be lost were we to emphasize only the state-based common world, and ignore the separate worlds within it that an oppressive state creates.

But if there are non-state common worlds, we must address the question of how these normatively relate to state-based ones. And we must consider the question of whether common worlds can spill over and cross the boundaries of states. We might think that individuals may participate in more than one common world – so that it is possible for a multiplicity of common worlds to exist within the same state – but insist that the fact of sharing a state necessarily establishes a common world encompassing the entire state's

population. On this model, the common world created by a state is like a container within which nestle all the common worlds of the individuals that the state encompasses. I suspect that this is Christiano's view. But we need not follow him in this for the concept of a common world to be useful and informative in thinking through why democratically arrived-at decisions ought to be authoritative for those within a decision-making community. But suppose, for the sake of argument, that we can sort people into discrete, mutually exclusive common worlds that correspond to the boundaries of their states. If this is the case, there seems to be little motivation or duty from the principle of public equality either to develop or to defer to democratic decision-making across different sets of people. Discrete, mutually exclusive sets of people would have no *de facto* mutuality compelling them, as a moral matter, to include one another in their decisions. Consequently, democratic authority at both the international and supranational levels would have to be justified differently from democratic authority within a single society. (Interestingly, Christiano's concept of a common world may be useful and informative for thinking through what such a justification might look like. More on this follows below.)

At the very minimum, Christiano must tell us much more about the boundaries of common worlds, and how these establish proper spheres of decision-making. Common worlds do not have clear points of origin, and it is not obvious at a particular historical moment who is and is not linked by circumstances. Common worlds, even understood as worlds existing within states, are in a continuous process of emergence, evolution and disintegration. Moreover, the act of making decisions about a world is one factor in its perpetuation or erosion. This makes the prospect of wrongful integrative structures and forced inclusion in decision-making even more problematic, and it brings us back to the importance of clarifying the relationship between common worlds and worlds produced by subjection to the same state. If I am right that the structure of most actual states is such that it makes more sense to think of them as comprised of multiple common worlds, not one, then the paradigm case for democratic theorizing is not national democracies as these have traditionally been conceived, but as supranational democracies such as the European Union.

We may come to the appropriateness of supranational democracies as a model for thinking through democratic authority in any case, for actual states are in their very nature international entities. To be a state is to have a specific form of legal personality under international law: As Ian Brownlie and Malcolm Shaw both note, the capacity to function as a state in relation to other states is as central to statehood as the presence of an effective government.¹⁵ This international dimension of statehood is important for two rea-

¹⁵ Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press: 1998), pp. 69, 77; Malcolm Shaw, *International Law*, 4th ed. (Cambridge University Press: 1997), pp. 141, 143. For an instructive discussion of the external dimension of statehood, see Karen Knop's

sons. First, the standing and privileges conferred by international legal regimes on a government are crucial to its capacity to establish and maintain the sorts of connections between fundamental interests that make for a common world, and their attendant obligations to engage in democratic decision-making, in the first place. States are able to create common worlds (and in so doing obligate individuals to make decisions together) because of political and legal structures at the international level that protect and empower them.¹⁶ Second, the sorts of connections between fundamental interests that make for a common world do not in most cases arise spontaneously but have been actively cultivated and maintained by state officials in order to facilitate and secure the state's administrative capacity.¹⁷ Typically, then, the presence of a state does not co-evolve with the development of a common world in Christiano's sense; it precedes and motivates that development.

This suggests that not only the effectiveness of democratic decision-making but also the conditions that make such decision-making authoritative in the first place depend on international legal and political institutions and the actions and attitudes of other states. For example, if I live in rural Alberta, the existence and operation of international political and legal institutions limit my options for resisting decisions about resource extraction that I do not like and redirect my efforts to subvert such decisions back into the Canadian institutions. I may object to gas flaring¹⁸ as strenuously as I like within the bounds set by Canadian political and legal institutions, but if I act outside these bounds by directly interfering with a flaring site, the Canadian government will label me a criminal, and the governments of other countries will almost certainly treat me as such. I may try to take advantage of provisions in other countries' legal systems, such as the *Alien Tort Claims Act* in the U.S. But I will probably be required to show that I have exhausted all possibilities within Canadian institutions, and a U.S. court will be very reluctant to find that there has been a violation of international law if the company doing the flaring has gone through proper channels in Canada and been approved in

discussion of the *Western Sahara* case in *Diversity and Self-Determination in International Law* (Cambridge: 2002), pp. 110-159.

¹⁶ See for example Andrew Hurrell, "International Law and the Making and Unmaking of Boundaries" and "People and Boundaries: An 'Internationalized Public Law' Approach," in *States, Nations, Borders: The Ethics of Making Boundaries*, A. Buchanan and M. Moore, eds. (Cambridge University Press: 2003), pp. 275-297 and 298-316.

¹⁷ James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press: 1998).

¹⁸ Gas flaring is a controlled burn of excess natural gas in the course of oil production. The practice has become controversial in Alberta as ranchers and other people living in areas where flaring is common have reported deterioration in the health of their livestock and families that they blame on the flares. See "Alberta Proposes Study into oil 'flaring,'" CBC News, Nov. 10, 2000, http://www.cbc.ca/canada/story/1999/04/20/ab_oil990420.html; Stan Shewchuk, "Gas flaring: a mounting environmental concern in Western Canada," *Saskatchewan Business Magazine* 2002 (June/July), 21.

accordance with Canadian standards.¹⁹ In this, international institutions not only reinforce but also actively give shape to the authority of Canada's decision-making structures: They help to ensure that the Canadian government can make certain decisions stick.

Other states also influence the shape of a government's political and legal authority indirectly, through the practical ramifications of internal legal and political decisions. For example, if my fellow Canadians and I decide to decriminalize the growth and sale of marijuana, or even just to stop prosecuting and extraditing people for these activities, we will make it very difficult for people in the U.S. to sustain a policy regime that criminalizes marijuana possession. If people in the United States decide to allow widespread access to handguns within their territory, they will make it difficult for us in Canada to limit access to handguns within our territory. How people in other societies structure and govern their common lives – and whether and when we can count on them to respect and support our decisions – shapes our choices about the structure and governance of our own common life by influencing the feasibility of those choices, the tradeoffs they involve and whether we have to make a choice at all.

So democratic authority as a right to rule is not just about why those within a polity ought to defer to decisions that are democratically made; democratic authority is also about whether, when and for whom democratically made decisions should be accepted and facilitated by people outside that society. Yet why should people outside of a society be thought to have any duties regarding another society's decision-making? In particular, why think outsiders have duties to respect another society's decisions when these appear to be ill advised or impose costs that the outsiders are not inclined to accept? Christiano's argument from public equality speaks to why he, as a resident of the U.S., ought to respect the decisions that are democratically arrived at by his fellow residents as a body because he relates to them as an individual to other individuals. But to me, as an outsider, the outcomes of U.S. political processes do not appear as decisions of individuals that I relate to as another individual; they appear as decisions of a group that I relate to as an individual in some instances, and as a member of a different group in others. So what I respect when I accept or support U.S. policy regimes is the decision-making of Americans taken as a bunch. When I accept the outcomes of U.S. political processes and constrain my behavior in accordance with them, I do not uphold individual Americans' moral claim to participate in decision-making about their common world on equal terms; I uphold their

¹⁹ See *Sarei v. Rio Tinto* 550 F.3d 822 (9th Cir. 2008) and *Beanal v. Freeport-McMoran Inc.* 969 F.Supp. 362 (E.D. La 1997). In the former case, the majority held that courts must consider on a case-by-case basis whether the plaintiffs in an alien tort case must show they have exhausted domestic remedies. In the latter, the complaint was dismissed on grounds that the mining company's conduct (which included abuse of local people by security personnel and harmful environmental practices) constituted private actions of the sort not covered by international law.

moral claim to have the group's decisions treated as authoritative for members with regard to the matter at hand. I respect Americans' claims to have their group decision about whether or not marijuana seeds may be sent through the mail treated as authoritative for everyone within U.S. territory, even those who disagree with it – not Americans' claims to participate in the decision about mailing marijuana seeds – when I politely decline your request that I mail seeds across the border.

Yet what explains this expectation that individuals outside of a group, either in concert or as individuals, will treat decisions made at the level of the group as authoritative for constituents when these decisions are made democratically? The challenge here is not only to explain why outsiders must defer to the group, but also to explain why the fact that the group's decisions have been made democratically should be relevant to this deference. In this respect there is an argument from public equality that may serve, but it is not quite the argument that grounds deference to democracy from the inside. Decision-making procedures that instantiate the principle of public equality give people on the outside of a society a reason to treat the outcomes of those procedures as the products of a genuine exercise of collective decision-making. To reject those outcomes on the grounds that they are ill advised or do not reflect members' true preferences is to substitute someone else's judgment for that of the group. This treats the group as less capable of generating good decisions than groups whose decision-making is accepting. In the absence of a convincing argument as to why a particular set of people cannot be trusted to generate good decisions, such treatment will appear arbitrary. Instantiating the principle of public equality in their decision-making places the burden of proof with those who would pre-empt a group's judgment.

For example, my prime minister, as the representative of Canada's government, and I as an individual Canadian, recognize Barack Obama as the president of the United States rather than John McCain. In this, we treat the outcome of U.S. electoral mechanisms as the last word on Americans' group decision about who should occupy the office of president, and we defer to that decision – not just because this attitude has obvious strategic benefits for us, but also because we believe it would be unjust to Americans' to respond otherwise. We do not base our decision on Canadian public opinion, or the preferences of a subset of Americans who we consider especially well informed, or the opinions of U.S. policy experts about who the president should be. Instead, we take the outcome of the election as evidence that, as a group, Americans have decided that Barack Obama should be their president. And even if we sincerely believe that what Americans *really* want is for John McCain or Sarah Palin or some other public figure to be president or that, regardless of what they want, Americans will be better served by an administration set up by someone other than Mr. Obama, we defer to Americans' judgment in this regard, because to do otherwise would be to treat Americans as a group as less capable of making decisions than are Argenti-

neans or Australians or Israelis, or any of the other groups whose electoral outcomes we have accepted.

This brings us back to the question of whether I am bound to respect outcomes of democratic decision-making by those with whom I share a common world when that decision-making fails to treat people who fall outside the boundaries of our world as equally capable of deciding how to govern their common world? In particular, am I obligated to treat democratically produced decisions as authoritative when these undermine or disregard the democratic decision-making of another society? The discussion of public equality as it applies across groups suggests that I am not so obligated – that my obligation to abide by democratically produced decisions of my own society will run out when it comes up against the duty to respect the equality of persons in other societies. This is not yet an argument for developing democratic decision-making across common worlds, however. Nor is it yet an explanation of how I am to determine where the proper boundaries of other common worlds fall such that I can know whether my support of democratic decision-making within another state supports or violates the democratic decision-making of people within that state who participate in a common world.

If we allow that people may participate in more than one common world, each of which generates duties to defer to democratically arrived-at decisions within its proper jurisdiction, then we will have the beginnings of a basis for using the principle of public equality to explain when state-based decision-making ought to be respected and when we ought instead to treat decision-making by non-state groups as authoritative. Accepting that people may participate in more than one common world allows us to treat states as comprised of multiple and overlapping common worlds, and so to treat the groups picked out by these common worlds as each having a moral claim to authoritative decision-making with respect to matters that are central to their common world.²⁰ In this model, the authoritativeness of decision-making at the level of the population of the entire state would not be the same for all groups, as whether or not there is a duty to defer to state-level decision-making on a particular matter would vary. Also, there is the possibility of overlapping and competing jurisdictions such that an individual may have obligations to defer to groups whose decision-making conflicts.

The moral claims that constrain the decision-making authority of institutions encompassing the entire state in such a model are collective, not individuated. The interest that grounds a group's claims to decision-making authority is the interest of individual members' in having decisions made by the

²⁰ This description is similar in many respects to S. James Anaya's explanation of the grounding of indigenous peoples' human rights to self-determination. See S. James Anaya, *Indigenous Peoples in International Law, 2nd edition* (Oxford University Press: 2004); Cindy Holder, "Self-Determination as a Basic Human Right: The Draft UN Declaration on the Rights of Indigenous Peoples," in *Minorities within Minorities: Equality, Rights and Diversity*, Avigail Eisenberg and Jeff Spinner-Halev, eds. (Cambridge University Press: 2004), pp 294-316.

non-state group rather than the state group. This interest is in part an interest in being able to compel fellow members to comply with the non-state group's decisions. So a non-state group's claim to authoritativeness within the scenario of multiple and overlapping common worlds is not grounded in an interest in being able to associate with others; it is grounded in an interest in being able to determine as a group the terms of their association. The boundaries of the group (and so who is associated) are set by the common world specific to them, and so membership is not voluntary. The interest, then, is in having the group determine *as a group* the rules that govern *other people* and not just an individual, even, and perhaps especially, when membership has not been chosen.

I am very comfortable with extensive protection of a non-state group's interests in excluding the state from its decision-making; in my view group self-determination is a basic human right.²¹ But is Christiano comfortable with such extensive protection? It depends on what he thinks about the possibility of non-state common worlds. Limits on the authoritativeness of non-state groups are often developed within liberal theories of democracy by reference to Will Kymlicka's distinction between internal restrictions (which involve intra-group restrictions on civil and political liberties), and external protections (which involve inter-group differentiation in rights and privileges *vis à vis* the state).²² However, as Kymlicka conceives of them, the civil and political liberties that play a crucial role in applying the distinction attach to individuals as participants in a state, the boundaries of which coincide, more or less, with the territorially defined jurisdictions recognized internationally. As Christiano conceives of them, in contrast, civil and political liberties attach to individuals as participants in a society, the boundaries of which are determined by the existence of a common world. If Christiano adopts a container model of common worlds and locates civil and political liberties at the level of the state, or if he denies that there can be non-state common worlds, then the external protections/internal restrictions distinction may be useful. However, if it is not plausible to deny the existence of non-state common worlds (and, for the record, I do not think it is plausible), and we are skeptical that these worlds will nest within one another as the container model proposes (and, for the record, I am skeptical), then Kymlicka's distinction will not be useful. For if civil and political liberties attach to individuals as members of groups that overlap, then protecting groups from external incursions into their decision-making may well involve placing restrictions on an individual's capacity to exercise the liberties that attach to her as a participant in another society.

²¹ Cindy Holder, "Self-Determination as a Universal Human Right," *Human Rights Review* 7:4 (July-September 2006), 5-18.

²² Will Kymlicka, *Multicultural Citizenship* (Oxford University Press: 1995), p. 36.

Conclusion

So where does all this leave us? The puzzles and difficulties I have noted in connection with Christiano's concept of a common world stem from his identification of the common worlds that establish duties of deference to democratic decision-making with the worlds created by subjection to a common state. States in the world are characterized by group-differentiated integration, wrongful connections and partial constitution by international political and legal structures. These facts make it important to clarify how the boundaries of common worlds should be drawn, what, if anything, ensures that these boundaries are mutually exclusive, and whether there are duties to establish and respect democratic decision-making across common worlds.

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