

Negotiating Our Interdependence: A Theory of Political Legitimacy and Territorial Decolonization

By

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Abstract

In Canada, a multitude of Indigenous and non-Indigenous governments claim the authority to govern their own territories and the people who live there. This condition poses fundamental questions for political philosophy concerning the distribution of rights to land and political jurisdiction in cases where the present use and control of land is the result of historical dispossession and injustice, and where distinct peoples (1) partially geographically, socially, and politically overlap, and (2) significantly diverge in ways of life, political and legal orders, and philosophical traditions. In dialogue with Indigenous political philosophy, I analyze this domain through a focus on individual interests in occupancy and collective self-determination. I argue that respect for the collective self-determination of settler and Indigenous peoples and recognition of their interdependency requires the construction of a cooperative federal system through the non-dominated negotiation of treaties that fairly and harmoniously balance the interests of unique occupancy groups in peoplehood and territory. This is a conception of political association for settler and Indigenous peoples premised upon respect for self-determination and inherent territorial rights, the nature of interdependent identities, and the possibilities for a mutual provisioning of unique gifts that enriches the freedom and co-creativity of each member unit.

To realize this vision, I argue that we must attend to both procedural and substantive requirements on the legitimacy and fairness of treaty negotiation and rights distributions. Substantively, treaty negotiations must reflect fundamental principles of territorial legitimacy – that is, they must appropriately recognize the inherent territorial rights of Indigenous peoples over particular geographical domains. Moreover, decolonization agreements must recognize the scope of lands open to restitution, considering facts about land use and human agency; the limits of supersession; wrongdoing and liability to harm; and proportionality

analysis. Procedurally, legitimate treaty agreements must be negotiated with the legitimate representatives of the people for whom the agreements are made, and these agreements must enshrine political procedures and institutions that protect the political agency interests of the members of the people. We must understand representative intergovernmental negotiations within a broader system of citizen deliberation and contestation if treaty negotiations are to promote collective self-determination and avoid domination.

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Introduction

Description of problem

This dissertation argues for a philosophical theory of political legitimacy and territorial decolonization in settler colonial contexts. I attempt to identify which considerations would justify the political rule of institutions in contexts marred by historical and enduring settler colonial injustices, and what kinds of processes, if any, would be able to construct legitimate institutions. As I illustrate below, a plausible theory in this domain must coherently address a set of interconnected questions concerning territory, self-determination, legitimate political authority, historical injustice, treaty-making, and domination that arise together in consideration of concrete contemporary cases. Below, I discuss one such case which poses all these questions. Although the dissertation itself does not focus exclusively on the Wet'suwet'en people, the case demonstrates that a theory in this domain must attempt to answer multiple intersecting questions together if it is to be coherent and action-guiding.

In February 2020, with the consent of five out of the six Wet'suwet'en band councils to a \$115 million agreement, but without the consent of the Wet'suwet'en hereditary chiefs (the leaders of the traditional Wet'suwet'en clan-based system of government), Coastal GasLink Inc. pushed on with plans to construct a gas pipeline across Wet'suwet'en territory (Barrera and Bellrichard, 2020). The Royal Canadian Mounted Police (RCMP) raid and destruction of several access-road blockades, which had been preventing construction crews from accessing the territory, provoked widespread civil disobedience across Canada. Protestors stood in solidarity with the Wet'suwet'en hereditary chiefs, who denied the authority of the band councils to

approve land use agreements regarding the Wet'suwet'en's off-reserve territory (Johnson, 2020). The protests most notably took the form of several railway blockades, including a blockade maintained by members of the Mohawk Nation at Tyendinaga outside of Belleville, Ontario. The blockades crippled Canada's national transportation network for several weeks by delaying the transportation of billions of dollars worth of goods, including propane to heat Quebec and the Atlantic provinces and other essential commodities, and by preventing the travel of hundreds of thousands of passengers along the vital Toronto to Montreal railway corridor (Tasker, 2020). The weeks-long blockades caused, at a minimum, tens of millions of dollars in economic costs and provoked a national political crisis in the House of Commons (Panetta, 2020). Throughout this crisis, Prime Minister Justin Trudeau repeatedly expressed the commitment of his government to finding a peaceful resolution to the blockades, as an alternative to force by the RCMP, while nonetheless denying his right as prime minister to direct an ongoing RCMP investigation (Berthiaume, 2020).

On March 1, 2020, the Government of Canada, Government of British Columbia and the Office of the Wet'suwet'en Hereditary Chiefs announced that they had come to a tentative agreement regarding a framework to settle the outstanding Wet'suwet'en land title claim, without having settled the underlying pipeline dispute (Brend, 2020). On May 14, 2020, the parties released a memorandum of understanding (MOU), signed by all parties. In the MOU, the Government of British Columbia and the Government of Canada recognize that "Wet'suwet'en rights and title are held by Wet'suwet'en Houses under their system of governance" and recognize "Aboriginal rights and title throughout the Yintah." Furthermore, all parties commit to the immediate commencement of negotiations concerning the transfer of jurisdictional authority to the Wet'suwet'en, with some jurisdictions to be held exclusively by the Wet'suwet'en house-based

system of government and with others shared between the federal, provincial and Wet'suwet'en governments (Crown-Indigenous Relations and Northern Affairs Canada, 2020). Progress under the framework agreement has been slow and Coastal GasLink continues its efforts to construct the pipeline through Wet'suwet'en territory (Canadian Press, 2021). As of the present, there have been multiple renewed efforts to prevent Coastal GasLink from drilling under the Wedzin Kwa (Morice River) by means of new blockades, sabotage of equipment, and resistance on the territory (Wilson, 2021). While the majority of the pipeline has now been completed, there has been no news of substantive success in intergovernmental negotiations.¹

The current political conflict and apparent stalemate is not without precedent. In 1997, the Wet'suwet'en and Gitksan peoples won an ambiguous legal victory in the Supreme Court of Canada in the precedent setting *Delgamukw* case. While the judgment clearly outlines the standards of proof for Aboriginal title as a sui generis common law right to exclusive occupation and use of the land by Indigenous peoples, and recognizes the admissibility of Indigenous oral knowledge and practices as evidence for establishing those rights, the Court deferred from concrete recognition of Wet'suwet'en title and self-government rights over their traditional lands, recommending a new trial due to evidentiary errors in the lower courts and due to the necessity of adjudicating the Wet'suwet'en and Gitksan claims separately if the claims were to

¹ In many ways, the on-going pipeline dispute reflects the history of Wet'suwet'en – state relations. Wet'suwet'en lands have been subjected to earlier pipelines, and Wet'suwet'en territory has been home to some of the most intensive logging in Canada for over fifty years, with little benefit to the community since the ascendancy of large commercial mills (Hoffman, 2019). Similarly, the growth of the settler commercial fishery over the decades has seriously eroded the traditional salmon runs which many Wet'suwet'en families depend. Worries about the man camps accompanying pipeline construction are also not without precedent. The epidemic of missing and murdered Indigenous women in Canada has struck the Wet'suwet'en community numerable times – the highway running throughout their lands is called “the Highway of Tears,” and most community members remember women who have been murdered or disappeared.

be considered on their merits. There has been no such trial. Instead, pursuant to recurrent recommendations within the *Delgamuukw* judgment that the fine-grained distribution of land and jurisdictional rights between Indigenous and non-Indigenous governments should primarily be accomplished through political negotiations, the Wet'suwet'en, under the leadership of the Wet'suwet'en hereditary chiefs, pursued over a decade of treaty negotiations with the Governments of Canada and British Columbia – amassing over ten million dollars in debt to the government while doing so. The Wet'suwet'en subsequently withdrew from the treaty negotiation process due to concerns that a finalized treaty agreement would require them to surrender any inherent rights not specified in the agreement. As we will see, this is one amongst a set of concerns with the contemporary treaty negotiation process, which contend that the process enables settler governments to unilaterally pressure Indigenous nations into accepting unfair agreements. The MOU constitutes only the most recent round of political negotiations between the Wet'suwet'en hereditary chiefs and the Canadian state.

The Wet'suwet'en case illuminates a set of interconnected philosophical questions concerning territorial rights, collective self-determination, political authority, treaty-making, historical injustice, and domination that must be resolved together if a theory is to provide a coherent and action-guiding account of political legitimacy in settler colonial contexts. These questions apply to all (Indigenous) nations, and equally to the Canadian state.

First and foremost, any theory of territorial legitimacy must directly provide an account of which moral considerations ground the right of a group of people to use and control a portion of the Earth's surface, air, subsurface and resources. For example, what is the value-based moral

justification for the Wet'suwet'en people's control over the land they claim? Why should the Wet'suwet'en have the right to approve or deny pipeline construction on the land they claim rather than some other group such as the citizens of British Columbia or Canada? Call this the *problem of territorial rights*. A theory of territorial legitimacy must also provide an account of the considerations that ground the right of a subset of a group's members to make binding decisions relating to the group's territory and occupants. Who has the authority to “speak on behalf of” a people, or to negotiate and legislate on behalf of a people? Directly related to this question are questions about democracy and the values underwriting legitimate claims to govern territory: are cyclical democratic elections of representatives necessary for political structures to legitimately rule a territory in the name of the people? Are democratically elected officials necessary for peoples to remain collectively self-determining under political structures? And how do democratic norms of popular participation, authorization, and contestation intersect with processes of decolonization more broadly, in a treaty negotiation process, for example? As concrete examples of these questions: Why do the Wet'suwet'en hereditary chiefs have the right to veto a pipeline across Wet'suwet'en territory even if the democratically elected Wet'suwet'en band councils approve it? And is popular authorization necessary for the ratification of a modern treaty agreement to reflect the shared will of an Indigenous people? Call these the *problem of political authority* and the *problem of democracy* respectively.

Additionally, we have questions about reparative justice and treaty negotiation under conditions of asymmetrical power. Settler colonial contexts are definitionally marred by a wide set of historical and enduring wrongdoings, and thus a theory of territorial legitimacy for these contexts must explain how and when a group and set of political institutions can justifiably make and

enforce law for populations suffering historical and enduring injustices such as the dispossession of territory. Accordingly, we must ascertain the appropriate remedy for the dispossession of Indigenous territory when settler populations have come to use Indigenous territories due to historical wrongdoing. What is owed by settlers in cases where they have prevented Indigenous peoples from accessing, using, or controlling a particular land to which Indigenous peoples have been historically attached—must settlers return these lands? Call this the *problem of restitution*. Finally, we have questions about the political negotiation of co-existence among distinct peoples sharing a political structure. How can Indigenous and settler peoples negotiate political structures to govern their relationships after histories of wrongdoing in ways that do not reify domination between and/or within peoples—and what form should these shared structures take? More concretely, how can contemporary treaty agreements between Indigenous peoples and the Canadian state avoid pressuring Indigenous peoples to accept unfair distributions of rights and obligations? Call this the *problem of treaty negotiation*.

This dissertation develops a normative political theory of territorial legitimacy and the decolonization of political authority in settler colonial contexts with a special focus on the Canadian case. Therefore, I attempt to provide a coherent and integrated account of each of these problems. A brief account of my basic terminology concerning settler colonial contexts, Indigenous peoples, and legitimacy should help clarify the question of the dissertation project.

Settler colonial contexts are characterized by the long-term unauthorized settlement of

Indigenous lands and the construction of political orders on those lands by settlers.² Within these contexts, Indigenous peoples are nations that have endured multi-generational subordination to settler political orders, resisting their annexation and assimilation to a dominating structure and culture, while suffering profound physical, social, psychological, cultural, and political harms.³ Legitimacy, as it is commonly taken, is the property of an institution or an agent in virtue of which it can justifiably exercise political power over an individual or group of individuals. A theory of territorial legitimacy identifies the facts or relations of an agent in virtue of which it can justifiably exercise political power over a specific geographical region and the people physically present on a territory. Correspondingly, a theory of territorial legitimacy for settler colonial contexts must account for the relevant facts defining these contexts, including the growth of multi-generational settler communities, the endurance of Indigenous political orders, and on-going on-the-ground Indigenous resistance to colonial domination. Thus, a theory of territorial legitimacy for settler colonial contexts identifies the facts or relations of an agent (or agents) in virtue of which it can justifiably exercise political power over a geographical region that has historically been settled without authorization and within which there are multigenerational settler communities at risk of dominating Indigenous communities that they have historically harmed, and often continue to harm in the present. In particular, this dissertation engages the Canadian settler colonial context, which presents unique fact sets and challenges for achieving legitimate political order. A theory of territorial decolonization for the

² Settlers are non-Indigenous populations. Settler colonialism requires the political organization of these populations and their intention to construct institutions that displace pre-existing Indigenous political institutions. See footnote 8 for a further elaboration of the definition of settler adopted here.

³ Indigenous political identities overlap with cultural and ethnic identities, and state-recognized legal status categories. This dissertation focuses on the political identities of Indigenous groups and examines these other categories (especially cultural identities) insofar as they are relevant to questions of political authority and the fair distribution of land rights.

Canadian context – or any settler colonial context – must identify these facts (or similar facts) and provide an account of how to achieve territorial legitimacy.

For the purposes of this work, I adopt a thinner conception of the concept of legitimacy than in some of the political philosophy literature which has engaged the question of political authority. For example, some philosophers believe that the legitimacy of the state is correlated with an obligation of citizens to obey the law. This duty is thought to be in addition to any first-order moral reasons a person might have (such as respect for natural rights, promises, or fairness) for taking a given course of action that might mirror legal directives. However, the theory offered here does not take a position on whether there is a content-independent duty of those physically present on a territory to obey the law of the legitimate state (Raz, 1986). I follow several scholars in thinking that the *concept* of political authority as such does not necessarily entail this obligation (Applbaum, 2019). Whether or not legitimacy in fact entails a content-independent duty to obey the law depends upon an argument that I do not fully provide here (Applbaum, 2019). Instead, on my usage, legitimacy is correlated with *the right of political institutions to make and enforce law on the territory*; and *the duty of territorial residents and outsiders to not interfere with the institutions for legislation and enforcement* (Stilz, 2019). Correspondingly, my aim is to demonstrate the reasons that could justify the exercise of political power by political institutions over a territory, namely their right to make law for the inhabitants of a place and the reasons grounding an obligation of third parties to respect these political institutions – that is, to not attempt to legislate in their place, or forcibly depose them. While some of my arguments may suggest conclusive reasons for citizens to adhere to the laws and policies of legitimate political institutions just by virtue of their legitimacy rather than the often overlapping first-order moral

reasons governing interpersonal conduct in a given context, I do not aim to show this comprehensively – that is, I do not aim to show there is any such obligation to obey the law, although there could be such an obligation either in particular contexts, or generally.⁴

Through an analysis of the interlocking problems outlined above, this dissertation argues for a vision for political legitimacy and territorial decolonization in settler colonial contexts that requires the construction of a complex multinational federal order of settler peoples and Indigenous peoples within which each exercises domains of exclusive and shared territorial jurisdiction over distinct and overlapping territories and jurisdictional remits. This view recognizes inherent Indigenous political authority, but also the possibility of settler political authority on the condition that settler peoples forgo domination and negotiate fair decolonization agreements with Indigenous people. This condition is not capable of being met through a single action or settlement. As I will argue, the achievement of territorial legitimacy in settler colonial contexts is accomplished through the consensual construction of a federation structured by the values of interdependent self-determination and fairness among a multiplicity of politically and culturally distinct peoples whose identities are engaged in a reciprocal, historical process of

⁴ Still, the dissertation does suggest certain considerations which might be deployed in such an argument. For example, if the members of peoples realize their political agency interests through the maintenance of political and legal orders that reflect their second-order reflective commitments concerning the exercise of political authority (Stilz, 2019), and the achievement of this political autonomy value requires that institutions succeed in the regulation of activities on the territory, and if the success of regulation depends upon uniform adherence, or one cannot be certain that one would undermines the success of regulation through defection, then there is a pro tanto reason, grounded in the political autonomy of fellow citizens, to follow the legal directives of the territorial institutions. Still, this argument is open to objection. It identifies a value that lends support to the proposition of political obligation as such, but: (1) not all regulations require universal adherence to achieve their objectives, and (2) it may not be that case that each citizen subject to political institutions has an obligation to their co-citizens to promote their political autonomy, even if following the law would, ipso facto, promote their political autonomy. It is possible here that other argumentative strategies could rescue the thesis of political obligation from these objections – such as the duty of fair play (Rawls, 1964), however that is beyond the scope of the present inquiry.

decolonization and partnership renewal. My approach is holistic in approaching the subject of territorial decolonization insofar as I aim to identify plural territorial and institutional contexts where political authority must be negotiated in the case of any given Indigenous nation. My overarching proposition is that we must center the distinctness and interconnections between these multiple questions in any deliberations over a unified plan for the decolonization of a particular Indigenous nation's territory if we are to achieve a legitimate, postcolonial, nation-to-nation relationship.⁵

In order to envision to the overarching structure of the theory developed here, it may be helpful to think about two distinct sets of values and principles for governing the construction and maintenance of a legitimate political order in the context of enduring settler colonial unfairness and domination.

First, there are principles concerning substantive territorial justice and the legitimacy of political rule. These concern fundamental elements in the justification of rights to territory, and include facts about the fairness of land use arrangements and the justification of jurisdictional rights divisions between groups with overlapping and competing claims. As we shall see, discerning the substantive justification of territorial arrangements involves identifying and successfully balancing the claims of settler and Indigenous groups to territorial rights in particular lands. As I argue in chapter 1, the right of a group to control a territory through its own political institutions

⁵ Throughout the dissertation, I use the term *territorial decolonization* as a synonym for the construction of legitimate territorial political institutions in contexts otherwise marked by (settler) colonialism. This is a moralized definition, insofar as it tracks facts about the requirements of territorial legitimacy rather than simply labelling any withdrawal of settler institutions from a territory as decolonization.

is justified by the group's legitimate occupancy of the region where they live, alongside the interests of the group members in collective self-determination. In cases of historical dispossession, the justification of political institutions requires us to interrogate fairness in the distribution of exclusive land and resources rights between groups – meaning that substantial restitution of territorial jurisdiction may be required to legitimate political authority in particular cases (chapter 2). However, there are also proportionality considerations concerning the assignment of jurisdictional rights in areas that must be co-managed, meaning that even in cases where exclusive Indigenous jurisdiction is not justified, other forms of shared jurisdiction may be justified (chapter 8). We must also consider the requirements of fairness in the procedures and principles of land management in shared territories, considering the differential impacts upon the distinct ways of life and value systems of Indigenous peoples and settlers under alternative regimes for land management (chapter 7).

It is the argument of this dissertation that we can discern substantive requirements of territorial legitimacy in settler colonial contexts from a recursive analysis of concrete cases alongside normative political theories of territory grounded in the occupancy rights and self-determination interests of peoples; however, as I discuss below, theory is limited in the extent to which it can specify the fine-grained requirements of territorial legitimacy in a particular case. In this regard, there are principles of procedural legitimacy, concerning the negotiated relationships between Indigenous and settler peoples within a multinational federal order. These principles involve developing an account of the value of political partnership between Indigenous and settler peoples – which I define in terms of the mutual empowerment of self-determination among peoples whose identities are mutually-referring (chapters 3 and 4). This also requires

interrogating the conditions for non-domination in nation-to-nation relationships (chapter 5), including non-domination in the negotiations between groups and within groups as they develop shared practices and institutions to realize the latent value of their federal political partnership (chapter 6).

While there may seem to be a clear conceptual division between substantive and procedural criteria for the legitimacy of territorial authority in decolonizing contexts, these two sets of principles do not come apart in practice and should be mutually informing in theories considering settler colonial contexts. As I discuss in chapter 6, the terms of a legitimate decolonization agreement between two peoples cannot be fully specified at the theoretical level through consideration of the fundamental elements of territorial rights theory, because decolonization requires negotiation within and between groups on account of choices that must be made among legitimate decolonization options that are underdetermined by theory. In other words, the legitimacy of a particular distribution of land and jurisdictional rights depends upon decisions, within the scope of fair options, made in the course of negotiations. So, in practice, the requirements of territorial legitimacy in a particular case are not entirely discernible in theory. Additionally, and here it is that we see procedural principles of territorial justice must be mutually informed by substantive principles: the arrangements that result from negotiations, even if there is the “legally” relevant form of consent, are not necessarily legitimate. Considering the asymmetry in bargaining power between Indigenous and settler nations negotiating under conditions of colonial domination, the settler state, during treaty negotiations, may insist upon reasoning from assumptions that fail to recognize fundamental principles of territorial justice. Domination as a concept in the context of political negotiation must track the substantive criteria

of fairness in the distribution of territorial authority, so that it can identify arbitrariness and interference in any processes that assigns territorial rights by reference to the kinds of legitimate outcomes that are unreasonably foreclosed by that very process. In this way, the theory under consideration is capable of illuminating sites of domination that arise under grounded power asymmetries, and which impede the realization of political legitimacy.

Because this dissertation aims to develop a theory for a broad range of cases of enduring colonial injustice, setting the stage for the argument outlined above requires us to examine the broader context of settler colonialism and the relevant literatures on territorial rights. Thus, in this introductory chapter, I discuss settler colonialism as a general type of case which presents unique challenges for a theory of territorial legitimacy, before returning to the particularity of the Canadian case with a brief outline of some central features of the history and status quo of Indigenous – settler relations in Canada. The features of the Canadian case deepen our appreciation of the questions posed by a consideration of settler colonialism as such and enhance our understanding of the problems, discussed above, for a theory of political legitimacy. Next, I consider the question of territorial legitimacy within the existing literature on territorial rights. The prevailing view, functionalism, is incapable of explaining basic considered convictions concerning the illegitimacy of territorial annexation and is likewise incapable of diagnosing settler colonialism to be wrong as such. This dissertation instead develops an empirically informed ecumenical approach to territorial legitimacy grounded in theories that center the collective self-determination of peoples, and the interests that underlie their members' occupancy rights (the right of individuals to live where they develop relationships and life plans). However, as I explain, further work must be done to bring these theories into dialogue with concrete cases

and the unique challenges they pose to build a coherent and informative account of the requirements of legitimacy in settler colonial contexts. Next, I discuss the goals, assumptions, and methods of the dissertation. To develop a coherent and informative theory, I combine grounded normative theory methods with the classic moral philosophy tool of reflective equilibrium. The introduction concludes with an overview of the problems and arguments considered throughout the dissertation; while I cannot myself claim to have developed a comprehensive theory, readers should engage each part of the dissertation with a mind to discerning how the considerations under examination fit within a more comprehensive account of territorial decolonization in settler colonial contexts.

Settler colonialism

While this dissertation focuses on territorial legitimacy in the Canadian context by developing a normative theory through recursive analysis of concrete cases and institutions from Canada, it is also of direct relevance to other contexts of settler colonial injustice.⁶ As I discuss below in the section on methodology, the choice to focus on a detailed analysis of concrete cases and institutions is methodologically significant. An ungrounded treatment of the question that exclusively adopted typical methods in moral and political philosophy would face severe shortcomings, not least of which would be ignorance of the complex, interconnected institutional

⁶ This dissertation considers the problematic of decolonization in light of specific political, legal, and geographical facts about Canada, such as the multiplicity of Indigenous peoples, the histories and contemporary claims of those peoples, our existing constitutional federal order, and patterns of contemporary group land use. As I will demonstrate throughout, these sorts of facts are of relevance to considering what territorial legitimacy would require in any particular case, and here I most often consider the Canadian case.

frameworks that already exist with the state-described purpose of implementing recognition and respect for Indigenous rights to land and political power. Such an ungrounded approach could only be of limited relevance to the context at hand – and likely other contexts where there are complex common law Indigenous rights regimes and political negotiation processes already. Thus, it is a central assumption of this dissertation that a theory of legitimacy for settler colonial contexts such as Canada must consider existing cases, political institutions, and practices if it is to provide an informative and plausible theory. Nonetheless, the argument should also be relevance more broadly, and may provide considerations for negotiating decolonization agreements in the United States, Australia, and New Zealand insofar as those cases bear fundamental factual similarities to Canada that demand attention from the perspective of political legitimacy.⁷ I discuss these overlapping similarities before grounding discussion in the Canadian case.

What Canada, the United States, Australia, and New Zealand have in common is a history of settler colonialism marked by historical and enduring colonial injustices. Each of these is also a multi-generational case, resulting in a sizeable contemporary settler majority within the territory who descend from the original settlers and later waves of immigrants. While colonialism generally is a form of political domination between groups (see Moore, 2016; Valentini, 2015; Ypi, 2013), settler colonialism is distinguished from other forms of colonialism insofar as the aim is to construct permanent settler communities on the territory of the dominated group (Moore, 2016, 2019; Wolfe, 2006). In settler colonialism, settlers unilaterally claim Indigenous

⁷ Dimensions of the argument here should also apply to other cases involving conflict between Indigenous and non-Indigenous populations in other places, insofar as those cases involve inter-generational settlement by outside groups.

land, and intentionally disrupt and displace the political orders of Indigenous peoples, subjecting Indigenous peoples to the territorial political institutions of the settlers without their consent. This form of domination is often accompanied by other forms of harm: genocide, physical violence, sexual assault, forcible displacement, racialized discrimination, systematic underfunding, environmental destruction, and coercive assimilation perpetrated against the members of Indigenous communities. These forms of wrongdoing are often perpetrated by individuals, with complicity by their governments and officials, and by states themselves, often in consort with churches, corporations, and civil society organizations (see for example: Truth and Reconciliation Commission of Canada, 2015). As is well observed, these processes, while having historical roots, continue on in evolving forms (Wolfe, 2006), and have resulted in an array of psychological, social, economic, and political crises for Indigenous communities in the present (Ladner, 2009; Truth and Reconciliation Commission of Canada, 2015).

While each of the harms listed above is unique, and requires rectification in its own right, the dispossession of Indigenous peoples and the usurpation of their political authority is at root of these historical and enduring processes of harm. The broader class of harm was often inflicted while securing control over land or in an effort to maintain control over land. In Patrick Wolfe's terms, they constitute part of the logic of "elimination" by means of which the settler state attempts to erase the counterclaim of the original inhabitants, either by destroying their bodies, or by assimilating them into dominant structures (2006). As is increasingly observed, the dispossession of Indigenous peoples of land and political authority is itself is a serious wrong. In fact, it is the *essential* wrong of settler colonialism as such, insofar as these manifold other wrongs are *contingent* in any given case of settler colonial domination (Moore, 2016; 2019). This

is not to downplay the extent or gravity of these other forms of wrongdoing, nor to eschew the importance of sui generis reparative obligations of the state to repair the harm. However, it is to identify a unique form of wrong, and to inquire into the implications for the legitimacy of political institutions in the context of situations structured by this wrong. In other words, the question about the taking of land must be appropriately accounted for in a theory of political legitimacy for settler colonial contexts in addition to any discussion of reparations for these other harms (James, 2018; Tuck and Yang, 2012). Considering that political legitimacy is precisely the right of political institutions to make and enforce law for a particular land, the dispossession of Indigenous peoples of territory (the geographical domain for the exercise of political authority) is a central concern for legitimacy theory in settler colonial contexts.

In light of the essential wrongdoing of settler colonialism, we must inquire into the conditions of territorial legitimacy with a mind to the historical process that led to contemporary configurations of power, and the present-day rights and interests of residents. While we have not yet identified a theory to deliberate about these features, they must be reckoned with in any plausible account.

The contemporary situation is complex: there is a multiplicity of (sometimes partly geographically) overlapping settler and Indigenous communities within Canada. These communities diverge in languages, worldviews, political identifications, political systems, and ways of life. In many cases, Indigenous communities have been, and continue to be, unilaterally constrained from accessing, using, and governing their traditional lands. Individual Indigenous persons have correspondingly been prevented from maintaining the place-based relationships

central to their social, political, and ontological systems, and from pursuing a course of options that is meaningful to them from within their cultural framework (Kymlicka, 1989, 1995; Mills, 2016, 2019; Nine, 2022, pp. 104-24). Within this context, despite prolonged attempts by the state at the cultural assimilation of Indigenous people and the elimination of nationhood, Indigenous difference has never been erased. Indigenous communities continue to fight for their right to exist as nations, and Indigenous people resist the settler state's claim to authority over them through a myriad of personal and collective struggles (Alfred, 1999, 2005; Hendrix, 2019; Simpson 2011, 2017). And as argued by Indigenous philosophers and legal theorists, Indigenous peoples continue to maintain their own legal traditions and political systems to regulate their own lives on their own territories according to their distinctive legal and evaluative traditions (Borrows 2010, 2016, 2016; Mills, 2016, 2019; Napoleon, 2007). On the other side, there are now many generations of non-Indigenous persons, some the descendants of original settlers, others more recent immigrants or refugees, who live on the traditional territories of Indigenous peoples.⁸ Most of these people have not chosen to join a settler colonial project, but nonetheless rely upon continued residency to meet their basic needs, maintain relationships, and pursue their own life plans. These groups, too, have robust political traditions, cultural practices, and identities; they differentiate themselves from both Indigenous and other non-Indigenous nations and claim the right to govern themselves and the lands where they live.⁹ For these people, there

⁸ For the purposes of this dissertation, I will use the term "settler" to refer to all Canadian citizens and permanent residents who are both (1) not Indigenous, and (2) who are neither first-generation refugees, nor their descendants if they have a right of return. Thus "settlers" include first generation immigrants, and the descendants of earlier waves of migration. The concept of a refugee should be interpreted more broadly than the current international definition to account for those who do not voluntarily leave their country of origin but who are not subject to political persecution. The precise moralized definition and its conditions of application are debated. See, for example: Shacknove, 1985.

⁹ For example, the majority of both English and French speaking Canadians differentiate themselves from the Americans – they do not identify as American, nor would they endorse the annexation of Canadian territory into the

is no meaningful alternative to continued residency in “Canada,” posing deep questions about the requirements of a legitimate political order.¹⁰

While there has arguably been progress in the recognition of Indigenous land and self-government rights in Canada over the last fifty years, this “progress” is uneven, unstable, and contested. In this respect, it is important to observe that the mechanisms for resolving territorial conflict between Indigenous peoples and the Canadian state are not clearly functioning to produce legitimate outcomes today. While the Canadian state now recognizes a form of Indigenous land rights, through recognition of Aboriginal title, and has renewed the negotiation of treaties after several decades of refusing to negotiate with Indigenous peoples, there are significant questions as to the integrity and fairness of these processes.

The Canadian courts have issued a series of judgments progressively recognizing the existence of a sui generis common law right of Aboriginal Title since the Calder case of 1973. These rights entitle Indigenous peoples as collective agents to the exclusive benefit of their title lands, on the condition that they use the land in a way which is not inconsistent with the enjoyment of the land by future generations of the group. While the recognition of Aboriginal title has initiated a new

American state. The Quebecois, on the other hand, differentiate themselves from the English-speaking Canadians and the Americans, and seek robust forms of self-government as well. A theory of territorial legitimacy must account for these facts.

¹⁰ As I show within this work, non-Indigenous persons also have rights to access the spaces within which they constitute their life plans (they have individual occupancy rights), and together they may justifiably claim territorial rights as communities (they have the right of self-determination). Nonetheless, the legitimacy of settler political institutions, as I hope to show, is greatly circumscribed compared to the status quo, and contingent on fulfilling reciprocal obligations to Indigenous communities.

period of negotiation between the Canadian state and Indigenous groups, the weight of this legal right is undermined by the wide variety of public purposes for which the Government may justifiably infringe it— including, paradigmatically settler colonial projects such as forestry, mining, industry, and the settlement of foreign populations to give effect to these purposes (*Delgamuukw*, 1997). The effectiveness of the recognition of abstract Aboriginal title rights is furthermore undermined by their ambiguous geographical scope under law in any given case, and the primary political process for the negotiation of clarity. Few Indigenous groups have achieved positive recognition of their own Aboriginal title rights through litigation in the courts – an expensive and time-consuming process which places the burden of proof upon the Indigenous group to prove the existence of their Aboriginal title rights in a particular place. This fact is not lost on the courts, which direct Indigenous groups and settler governments to negotiate recognition of Aboriginal title rights, and other rights, including rights to self-government, through political agreements (modern treaties). While this dissertation is in broad agreement that an ideal solution to territorial decolonization is through political negotiation, it recommends a highly cautious approach on the basis of the domination endemic within the current process.

The modern treaty process was initiated through the ratification of the first modern treaty in 1975: the *James Bay and Northern Quebec Agreement*. In total, there have been 26 modern treaties ratified since 1975 and dozens more Indigenous communities are currently at some stage of negotiation within the process (Crown-Indigenous Relations and Northern Affairs Canada, 2023a). Although Indigenous self-government agreements are often negotiated after the finalization of a land claim agreement, these negotiated settlements together involve the concrete specifications of treaty settlement lands’ size and geographical locations; Indigenous

governments' specific, federally and provincially recognized jurisdictional powers with respect to those lands; settler governments' responsibilities, e.g. for the provision of services; regimes for co-management of shared territories and resources; and monetary/ capital transfers (Crown-Indigenous Relations and Northern Affairs Canada, 2023a, 2023b). In short, modern treaty agreements substantively modify the structure of Indigenous governments and procedures, specify the jurisdictional powers of those governments, and specify distinct categories of lands over which those governments have powers. These include exclusive jurisdictional rights over matters pertaining to internal affairs, and lands that are categorized as the exclusive jurisdiction and/or property of the group.¹¹ These also include environmental co-management rights, to be exercised by unique political institutions such as land or water co-management boards to which settler governments also send an equal number of representatives, over much larger territorial domains (White, 2020).

While the treaty process might seem to be an improvement upon non-recognition of Aboriginal title rights, the Indian Act, and the band council system, the extent to which this is an improvement is debated. There are significant procedural worries about the treaty process and the upshots of the process for the substantive fairness of agreements. The federal government possesses a veto on all treaty negotiations (insofar as treaties only become “law” through an Act of Parliament) posing significant questions about the substantive fairness of the agreements. The federal government possesses immensely more power and resources going into negotiations,

¹¹ While this dissertation makes a fundamental distinction between territory, as the geographical domain of the exercise of political authority, and property, as a specific bundle of rights within a particular legal order, it is important to observe that a major component of many contemporary comprehensive land claim agreements (modern treaties) is the modification of some lands held previously under Aboriginal title to fee simple property owned collectively by the Aboriginal group, often through a band development corporation.

while often having far fewer incentives to finalize a treaty as compared with Indigenous nations whose fate – recognition of territorial rights and collective wellbeing – hang on these decades-long negotiations (Alfred, 2001, Alcantara, 2013). On the substantive side, it is worth observing that modern treaties largely adhere to the same form and content (adjusted for population size, etc.) despite the plurality of languages, lands, customs, and worldviews maintained by Indigenous peoples. Not only does the process of decades-long negotiation itself substantively risk altering the social, cultural, and political identities of participant Indigenous groups (Nadasdy, 2003, 2017; Hendrix, 2019; Turner, 2006), but the negotiated agreement risks ignoring the unique circumstances, needs, and aspirations of Indigenous communities as they recover from colonial damages and articulate renewed visions for their own resurgent futures. These facts have led some Indigenous nations, such as the Wet’suwet’en people, to leave the treaty negotiation process altogether and pursue alternative modes of interaction with the state. They have also led to calls by Indigenous theorists that Indigenous nations eschew a battle for settler state recognition and instead focus on cultural and political resurgence from within (Coulthard, 2014; Simpson, 2017).

Territorial rights theory

As we have seen from the initial analysis of the Wet’suwet’en case, the fundamental question a theory of political legitimacy must answer concerns the grounding of jurisdictional rights over a particular territory. Much of the conflict between settler and Indigenous peoples concerns conflicting claims to use and govern lands, and unclarity concerning the justification of territorial rights must be resolved to develop a theory of political legitimacy for settler colonial contexts.

Moreover, the answer to this question must be consistent with a battery of related problems that arise in decolonizing settler colonial contexts for the justification of territorial authority, such as the relationship between groups and political institutions; democracy and self-determination; historical dispossession; treaties; and domination between groups. These questions are brought into stark relief in Canadian Indigenous – settler relations, where there are contested claims to political authority over lands, and jurisdictional powers, by Indigenous and settler peoples. However, there is significant disagreement about how to account for the relevant facts in the contemporary political philosophy of territorial rights – theorists disagree significantly about which facts ground the moral property of legitimacy, or alternatively, which facts justify the exercise of rights over territory by political institutions.

The contemporary analytical political philosophy literature on territorial rights has been defined by the attempt to provide an account of the value(s) that justify the control of a political agent over a particular territory (Armstrong, 2015, 2017; Espejo Ochoa, 2014, 2016, 2020; Kolers, 2009, 2012; Miller, 2007, 2012, 2019; Mancilla, 2016, 2018, 2020, 2021; Moore, 2014, 2015, 2019, 2020, 2021; Nine, 2008, 2012, 2022; Simmons, 2001, 2016; Stilz, 2011, 2019). By “control,” authors mean the right of an agent – such as a nation, people, or state – to make and enforce law for a territory, the right to control entrance and exit from a territory, and the right to control the extraction and use of natural resources on a territory. Legitimate authority is thought to, minimally, entitle the agent to make and enforce law on the territory, and to render it immune from foreign interferences – but, as discussed, does not necessarily imply a duty of citizens to obey the law (Applbaum, 2019; Stilz, 2019).

Much of the contemporary Western philosophical literature on territorial rights has been concerned with displacing the prevailing *functionalist* view, which contends that *states* have rights to make and enforce law on a territory if (and because) they maintain a minimally just institutionalized system for the specification and enforcement of human rights (Buchanan, 2004; Kant, 1996; Stilz, 2011). Functionalist theories contend that states, understood as organized political systems upholding the rule of law through their coercive power to enforce obedience from populations, are necessary to specify, protect, and uphold human rights. Because the specification and protection of human rights is necessary to protect individual human wellbeing and agency, states are justified in exercising political authority over the land that they maintain legal order. As I discuss at greater length in the first chapter, functionalism has severe problems as an account of political legitimacy generally, and for the problem domain of this dissertation. While functionalism can account for the justification of political power over citizens in the abstract, in terms of the necessity of some political and legal order for the specification and protection of basic human rights, it does not provide a principled explanation for why political institutions have authority with respect to particular geographical regions.

The limits of the functionalist theory are particularly salient in settler colonial contexts. While some functionalist approaches may judge settler state claims to authority over Indigenous peoples and territories to be illegitimate, this judgment according to functionalism is contingent, and the theory avoids grappling directly with the question of land and the self-determination of peoples. In short, the functionalist theory misses something deeply important to our considered moral judgments about settler colonialism. This is the intuition of most people that settler colonialism, like other forms of annexation, would be wrong regardless of whether the annexing

power treated the citizens of the annexed territory equally and with respect for their basic individual rights, including their rights to equal political participation (Moore, 2015; Stilz, 2019).

If we seek to develop a theory of legitimacy for complex intergenerational settler colonial cases, we will need to adopt a better theory of territorial legitimacy. In this regard, much of this dissertation develops a position grounded in the self-determination of peoples (Moore, 2015; Stilz, 2019). On this view, the provision of justice is one criterion among others in the assignment of territorial rights – a fundamentally unjust set of political institutions lacks political authority. As I will argue, these theories can provide a principled account of where to draw territorial boundaries, by focusing on the occupancy regions within which the citizens of states live; moreover, they can explain the wrongness of territorial annexation (and colonialism), by reference to the self-determination interests of the members of groups sharing political identities.¹²

¹² Of vital significance to this project, we depend upon shared national, linguistic, and cultural contexts for the development and exercise of our agency, and these are constituted by interconnected webs of relationships among interdependent agents. As described by Kymlicka, culture as a set of interconnected relationships and practices provides the context of significance within which human agents can make meaningful choices and pursue meaningful activities (1995). We make choices against a cultural background of meanings, and rely upon access to cultural spaces, relationships, and institutions in order to exercise the corresponding plans, projects, and meanings. Moreover, humans may come to identify with the relationships and practices of public political cooperation structuring public life where they live (Moore, 2015). They may develop “national identities” which deeply structure how they think of themselves (Miller, 1995), or otherwise maintain shared commitments to uphold shared political structures as a reflection of their considered judgements about how they should rule themselves together (Stilz, 2019). As I will argue throughout this dissertation, interests of these kinds are paramount in developing a theory of territorial legitimacy for settler colonial contexts; specifically, we must foreground the connection between groups’ culturally specific practices, individuals’ occupancy interests in particular places, and the interests of members of peoples in collective self-determination, in order to provide an account of a legitimate territorial decolonization process.

However, while this family of theories is an improvement on functionalism and taken up throughout the dissertation, the general question about what justifies political authority in a place – which applies to any geographical context – is complicated further by the facts defining settler colonial contexts and the interrelated questions that arise in the consideration of concrete cases within these contexts. For example, much of the land governed by the Canadian state and used by settlers today was “acquired” forcefully, in the absence of a treaty, in violation of treaty, or through neglect of Indigenous understandings of treaty. However, there are established non-Indigenous communities whose members depend upon continued access and use of the land for subsistence and to maintain meaningful lives. This poses deep questions about the legitimacy of settler political institutions, insofar as the geographical base of these institutions may be morally mandatory restitution to dispossessed Indigenous peoples. Within territorial rights theory there is disagreement about how to account for these facts.

On the paradigmatic “backwards-looking” theory of territorial rights advanced by A. John Simmons, a political community’s claim to territorial rights is only acquired legitimately through the uncoerced consent of the members to submit themselves and their property to political authority (2016). Individual persons acquire rights to property in land, including the right to bequeath it, just in case they initially justly acquired property from the commons, or they acquired the property right through an uncoerced exchange with someone who initially legitimately acquired title (2016). On these theories, the territorial rights of states are fundamentally compromised if they have acquired their territorial base without the consent of citizens – the state is not legitimate with respect to lands it has acquired through historical dispossession. The state has an obligation, flowing from historical injustice, to return

dispossessed lands or seek consent and agreement anew for their incorporation into the state. Contrariwise, theories of territorial rights grounded in the occupancy interests of peoples often implicitly or explicitly adopt a version of the *supersession hypothesis*, which contends that rights to restitution of wrongfully acquired goods can fade with fundamental changes in circumstances which create new patterns of need and dependence upon access to particular lands among territorialized populations (Waldron, 1992; Moore, 2015; Stilz, 2019). On these theories, while first-generation settlers may have an obligation to leave the lands upon which they have settled, those in the second generation and beyond (the children of settlers) may come to blamelessly depend upon continued use of originally wrongfully acquired territories and may develop rights to continue their residency within these regions, thus limiting Indigenous rights to restitution.

A theory of territorial rights for settler colonial contexts must directly engage these arguments in order to ascertain the requirements for legitimate political authority over land. As I will show, the historical title theory and occupancy-based theory suffer from some of the same flaws and omissions. Attention to variations in land use patterns throughout different case types, and other underlying moral facts of relevance such as individual liability to removal, and proportionality in the distribution of harms, can make a significant difference to the justification of rights over land – including rights to restitution – in ways unconsidered or largely neglected by contemporary territorial rights theory.

Similarly, territorial rights theory must grapple with the particularity of Indigenous peoples' ways of life, evaluative systems, and political institutions if it is to be contextually relevant and not self-defeating in offering an action-guiding theory. This grounded work has largely been

neglected by contemporary theorists of territory in the liberal tradition.

Indigenous peoples maintain their own culturally embedded and place-centric conceptions of political morality, corresponding to unique forms of political and legal institutions, and these perspectives significantly differ from the assumptions of liberal theory and associated settler political and legal forms (Alfred, 1999, 2005; Coulthard, 2014; Mills, 2016, 2017, 2019; Napoleon, 2011; Turner, 2006). While this dissertation is rooted in theories of territory genealogically related to the liberal tradition, it is vital to meaningfully engage Indigenous perspectives and institutions. One reason for this engagement flows from a concern for the political autonomy of persons, which is at the heart of the theory of collective self-determination. On occupancy and self-determination theories of territorial rights, humans are capable of achieving a unique form of freedom by contributing to political institutions that reflect their values and political commitments. Thus, the justification of political authority is deeply contextual, depending on facts about populations' identities, normative beliefs, and political commitments. However, as discussed in the analysis of the Wet'suwet'en case, there are several puzzles here from the perspective of Western political philosophy. Can the clan-based hereditary system of government maintained by the Wet'suwet'en, for example, promote the collective self-determination of Indigenous citizens? How is this possible considering that Wet'suwet'en citizens do not get a "vote" on their clan leaders? And more broadly, how can institutions of political authority – including federal state arrangements and treaty negotiation processes including settler and Indigenous peoples – promote the collective self-determination of multiple peoples with territorial rights, rather than constitute mere domination of one according to the political traditions and worldviews of the other? As I will show, Indigenous values and political

institutions must be reckoned with, on multiple levels, if arrangements of territorial authority among settler and Indigenous peoples are to be legitimate.¹³

In summary, settler colonialism paradigmatically involves the denial of Indigenous people's rights to territory, and the prevailing view of the territorial rights – functionalism – is incapable of clearly diagnosing this, and related forms of annexation, as a wrong. However, our considered convictions do lead us to believe they are wrong, and it is the primary wrong identified by Indigenous peoples and scholars of settler colonialism. If we seek to develop a theory of legitimacy for complex intergenerational settler colonial cases, we will need to adopt a better theory of territorial legitimacy. In this regard, much of this dissertation develops a position grounded in the occupancy rights and self-determination of peoples (Moore, 2015; Stiliz, 2019). This theory is an improvement on functionalism, and capable of explaining the wrong of territorial annexation. Nonetheless, because the existing territorial rights literature has not considered cases such as Canada in fine-grained detail and the set of interconnected facts and problems that arise in those cases, we will need to bring this general theory of territorial legitimacy into dialogue with the specific features of the Canadian to generate a compelling theory of legitimacy. Below, in the discussion of methodology, I show how this task will be pursued by combining the methods of grounded normative theory and reflective equilibrium.

¹³ As I hope to demonstrate in this work, intercultural dialogue on basic philosophical and legal concepts is not only possible, but necessary, on a liberal theory of territorial rights grounded in collective self-determination. If we aim to make headway on understanding the possibility of legitimate political authority in intergenerational settler colonial cases involving Indigenous and settler peoples, we must create space for Indigenous voices and build institutions that substantively reflect Indigenous values.

Methodology

While methodology in political philosophy often goes unexamined, the political, contextual, and interdisciplinary nature of the project requires that I explain my theoretical commitments. I begin by discussing my positionality as a scholar in relationship to settler colonial issues. I then outline the interdisciplinary nature of the project, its theoretical goals, the necessary theoretical scope of a project of this kind, as well as the corresponding epistemic limits of this theoretical scope. Finally, I describe in greater detail two methodological tools of the research project: grounded normative theory, and reflective equilibrium. I argue that my methodology may be usefully summarized as *grounded reflective equilibrium*. Throughout, I try to draw attention to the strengths and limits of the methodological approach I have adopted.

Positionality

The nature of the subject I undertake necessitates that I explain my positionality and motivations. Indigenous relations in Canada are highly politicized, and I would like to explain where I come from and what led me to undertake this study. I also do this with the knowledge that it is common within many Indigenous traditions to introduce yourself by introducing your relations. I agree that you can learn a lot about someone, and their work, by learning where they come from and their relations.

I am a non-Indigenous (settler) citizen of Canada. I was born and raised in Orillia (Ontario), a small city between Lake Couchiching and Lake Simcoe. This is the territory of the Anishinaabeg.

My ancestors settled on Manitoulin Island (Ontario), in Parry Sound (Ontario), and on the prairies of Saskatchewan over several waves, from the early 1800s to the 1920s, from England, Scotland, Ireland, and Finland. I was raised by my paternal grandparents in Orillia and spent many summers in the forests near Parry Sound where my grandmother's father had farmed, hunted, fished, and trapped for a living. My grandmother's grandparents had lived a similar life, while my grandfather had been raised by more recent immigrants in a Finnish farming community on the prairies during the 1940s. It is these stories I grew up hearing most. My mother's side of my family is more opaque to me: my mother, greatly troubled, disappeared when I was a young child, and I later learned she had been sent to a (non-Indigenous) state-run boarding school during her youth and had in later life received compensation for abuse she suffered there. I owe much to my grandparents, who, despite not having much money, provided love and a stable home environment before I began my studies at the University of Toronto and continued on at Queen's.

My interest in Indigenous politics started towards the end of my undergraduate degree in philosophy, and continued throughout my Master's degree and into my PhD at Queen's University (Kingston, Ontario). This was driven simultaneously by philosophical curiosity, and personal resonance as a Canadian citizen during the time of the *Truth and Reconciliation Commission of Canada*. As I hope to demonstrate within this dissertation, issues of political legitimacy in settler colonial contexts are philosophically rich and demanding. The functionalist and Rawlsian paradigms with which I began my studies in political philosophy proved unsuited to providing guidance in this domain; and, as I have indicated above, the extent of interconnected philosophical problems demands a novel and integrated project that has not yet been undertaken

within political theory. However, philosophical guidance is precisely what is necessary for a context like Canada, where so many (settlers) are attached to their identity as Canadian, and yet are unprepared to meaningfully interrogate the foundational violence of the Canadian state. It was this position that I once occupied myself; however, reconciling the commitment to a legitimate Canada with the histories and enduring structures of colonialism became an important question for me personally, insofar as it was a matter of philosophical depth and integrity as a citizen of Canada with the aforementioned attachments. As I have indicated, this work is incomplete, however I hope to show that theoretical and political progress is possible.

Theoretical goals, scope, and limits

The methodology and theoretical scope of this dissertation are unique for political philosophy. While I am trained as an analytical political philosopher, and adopt methods from within that tradition, I draw from a wide range of sources, including contemporary analytical political philosophy, Indigenous political theory, law, political science, and anthropology. My aim is to provide an ecumenical account of territorial legitimacy within settler – Indigenous contexts, a theory that should be acceptable to a broad range of Indigenous and settler political philosophers, policymakers, legal specialists, and activists. This is a normative theory, insofar as it directly engages questions of political morality and develops a general theory that is prescriptive in nature. Rather than simply documenting or analyzing relevant facts, structures, and processes in the domain of Indigenous – settler relations, it aims to develop an account of the reasons and principles that ground the rights and obligations of groups and also to provide guidance in cases of conflicting claims to land and political authority.

The goal of the dissertation is not to make specific policy recommendations or fine-grained judgments about the rights and obligations of particular groups. The identification and consideration of all the concrete facts of relevance in a particular case are necessarily beyond the scope of a single work of political philosophy. Moreover, because there are many Indigenous nations within Canada with their own unique histories, lands, and identities, it would be impossible for any single theorist to provide a full account of the requirements of legitimacy in the relationships between settler and Indigenous peoples and the state in Canada. Instead, I hope to demonstrate an approach to thinking about legitimacy within the Canadian context that can guide deliberation through the details of particular cases for the purposes of developing legitimate political institutions and partnerships between groups.¹⁴

In order to develop a plausible account of the requirements of political legitimacy in political associations including settler and Indigenous peoples, it is necessary to adopt a wider scope of analysis than traditional works of political philosophy. The theory developed here considers a wide range of systematically interconnected issues including territory, land use, ways of life, democracy, constitutionalism, federalism, treaty negotiation, representation, historical injustice, restitution, cultural (in)commensurability, and ecological value. The scope of this dissertation is both a strength and a limit. It is a strength, because a plausible account of territorial legitimacy in settler colonial contexts must consider each of these concepts, in application to concrete cases, if

¹⁴ Legitimacy in settler colonial contexts requires a nation-to-nation approach to treaty-making, entailing a fine-grained analysis of political, social, and geographical facts in particular cases alongside iterated intra- and inter-communal deliberations and negotiations if those negotiations are to result in fair and non-dominated agreements for the distribution of rights. What should be certain from this analysis is that territorial legitimacy in specific contexts requires a highly contextualized approach that is responsive to a set of interconnected issues concerning groups and their temporally extended relationships to land and one another.

it is to develop a plausible account of the requirements of legitimacy. This is because a theory of territorial legitimacy must grapple with a wide-ranging set of distinctive claims and interests of groups and justify in sufficient detail complex institutional structures for the division of territory and jurisdictional authority between them if it is to withstand objections, present a coherent model of territorial decolonization, and prove informative for political practice.

On the other hand, the scope of this dissertation is also a limit of the theory, because consideration of a broad range of concepts limits the amount of attention that can be paid to any one of them at a single time, and, regrettably, limits the extent to which one can consider the nuanced claims and arguments that are often offered in a plurality of concrete contexts of grounded contestation pertaining to each concept. Thus, I do not claim that this theory achieves theoretical comprehensiveness: there are certainly many more dimensions of the relationship between settler and Indigenous peoples in settler colonial contexts that must be considered to provide a comprehensive account of the requirements of legitimacy than I am able to analyze here. However, I do not see these facts as decisive shortcomings of the theory, but rather as the inevitable limits of any attempt at developing a general theory in this domain; for the reasons I have described, a theory of territorial legitimacy for a particular state context like Canada is necessarily incomplete. I invite other philosophers to take up the work of theorizing issues of territorial justice in settler colonial contexts in this spirit.

Reflective Equilibrium and Grounded Normative Theory

My project combines the traditional philosophical method of reflective equilibrium with the methodological commitments of an emerging school of thought within political theory, Grounded Normative Theory (GNT). Thus, my project aims for a balance between normative philosophical reasoning about general principles which must coherently apply across different cases, and attention to the case-based particularity of the real-world contexts for which a theory is required in the formulation of these principles. In this section, I discuss the method of reflective equilibrium before outlining how I combine this method with the theoretical commitments of GNT. As I explain, I have deployed reflective equilibrium alongside a grounded and recursive consideration of cases to develop normative theory that is detailed and contextually relevant, and which realizes the GNT values of comprehensiveness, recursivity, epistemological inclusion, and accountability.

Reflective equilibrium is a tool for generating justifiable moral beliefs and theories (Rawls, 1971). As a method, reflective equilibrium centres the dynamic interplay between concrete moral judgments about particular cases and moral principles of general application. Central to the method of reflective equilibrium is the construction of a coherent set of general moral principles that explain and justify the diverse kinds of judgements that we need to make in concrete cases in moral and political life (Rawls, 1971, pp. 17-19). The specification of a moral principle aims to identify, and specify with precision, an underlying value, or specific balance of values, that is at issue in the case, and describes how these evaluative considerations support our deeply held general commitments, or intuitive case-based judgments that we may be inclined to make. Such considered convictions and case-based judgments might be themselves more or less general and

pertain to the rightness, wrongness, (un)fairness, or (il)legitimacy of an institution, policy, or action, for example. And principles explaining these judgments might build on evaluative considerations at varying levels of generality such as: equality, autonomy, wellbeing, democratic equality, human rights, or the reliance we solicit by using moral conventions like promising, to name a few. Principles may be categorized as conclusive, insofar as they purport to identify conclusive reasons in favour of judgments of a certain kind to the exclusion of other considerations; or principles may be classified as *pro tanto*, insofar as they aim to identify weighty considerations that provide support for judgments of a specific kind on account of a specific fact, while nonetheless being acknowledged to be of a kind that can be potentially outweighed or defeated by other principles within the organized set. Central to the work of reflective equilibrium is the construction of a coherent set of such principles that fit our case-based intuitions and more general considered convictions. This involves the stipulation of new principles, jettisoning of old principles, and modification of the contextual scope of principles as we consider new cases, evidence, and arguments.

While it is easy to regard reflective equilibrium as primarily about the construction of a set of principles from the “raw evidence” of considered conviction and case-based judgments, the work of theory construction using the method of reflective equilibrium is bi-directional. In other words, theory and case-based judgments work alongside one another to generate a coherent whole rather than the reification of pre-theoretical intuitions (Rawls, 1971: pp. 42-46). Thus, the articulation of a set of principles may ultimately lead the theorist to revise their judgments in a particular case (or even their considered convictions). For example, if a principle coheres well or is entailed by a broader set of principles which already fit with the theorist’s considered

convictions and concrete judgments in a domain (better than contrary sets), and that principle conflicts with an outlier case-based intuition or considered conviction, the theorist might have reason to jettison the contradictory case-based judgment to maintain coherence in their beliefs (pp. 45-6). In other words, we might discover that we are incorrect about the rightness, wrongness, (un)fairness, or (il)legitimacy of a particular institution, policy, or action, upon reflection. And we will have an explanation, grounded in a coherent set of explanatory principles for explaining judgments of that kind, for why that is.

Reflective equilibrium, like GNT (as we will see below), must be understood to be an iterative and extended process that is never complete. The theorist always begins with a set of considered convictions and general principles, which they import into new cases or even new problem domains. Those cases or domains will inevitably yield intuitions about facts and conflicts that have not yet been fully analyzed in the construction of a body of moral beliefs and principles. Likewise, theorists might discover, upon sustained reflection on an established domain, alternative coherent principled explanations for considered convictions and case-based judgements, leading them to rethink earlier theoretical choices (Rawls, 1971: pp. 45-6). Or the discovery of a new domain which resists explanation according to established principles might lead to a systematic rethinking of assumptions within other domains of morality. While other intellectual virtues such as humility, charity, openness, attentiveness, perseverance, collaboration, accountability, and non-discrimination are certainly necessary for the generation of moral knowledge, from the perspective of reflective equilibrium: when both case-based judgements and moral theory construction are mutually supportive, provide sufficient guidance in the target domain of knowledge, and plausibly cohere with fundamental general principles within broader

domains of morality, we are justified in believing both the case-based judgment and the novel moral theory (however, we must always be prepared to revise and reconsider our theories).

Alongside reflective equilibrium, this dissertation deploys the principles of grounded normative theory in the development of a theory of territorial legitimacy for settler colonial contexts. As I discuss below, reflective equilibrium may be fully consistent with GNT, however not all theorists who deploy reflective equilibrium are grounded normative theorists. I explain how I deploy GNT after a brief discussion of this methodological fusion.

GNT is an emerging approach within political theory that responds to a growing call among theorists to ground political theory in a richer consideration of the concrete empirical contexts of social and political struggle than is common within political philosophy as a Western academic discipline. While several political philosophers have in fact already adopted approaches in the spirit of GNT, the task of formally articulating their shared assumptions and commitments as a unique and coherent method in normative political theory is more recent (Ackerly et. al, 2021). As Ackerly et. al write of GNT: “[t]his approach is marked by shared commitments to incorporating original empirical data or analysis in a recursive process of theory development striving for accountability to persons in empirical contexts” (2021, p. 3). Correspondingly, grounded normative theorists broadly exemplify four theoretical commitments in their work: comprehensiveness, recursivity, epistemological inclusion and epistemic accountability (p. 4). Adherence to these commitments enables theorists “to reach beyond the confines of their own considered judgments and extant literature to more directly engage with empirical contexts, including with the views and contextually specific knowledge of those engaged in political

contestation” (p. 4).

I here reproduce the relevant definitions of GNT’s theoretical commitments, before examining how GNT may (or may not) be combined with reflective equilibrium, and the extent to which this dissertation is an example of GNT:

(1) Comprehensiveness: grounded normative theorists use empirical methods to collect and/or analyze data to diversify, broaden, and deepen the range of insights, claims, interests, and actors considered in their development of normative arguments.

(2) Recursivity: grounded normative theorists work to incorporate empirical data into normative theorizing in a recursive process, in which normative claims are developed and revised through ongoing and accountable engagement with empirical data, and with empirical contexts and actors in qualitative field work.

(3) Attentiveness to Epistemological Inclusion: grounded normative theorists typically attend to the structural power of epistemology, including that some modes of generating knowledge obscure or silence some voices and exclude ways of knowing not prevalent in the main currents of normative political theory.

(4) Epistemic Accountability: GNT, especially when involving qualitative field research, typically gives attention to potential power imbalances in the conduct of research itself, i.e. between those engaged in political contestation and those who research it. In more solidaristic approaches, theorists foreground epistemic responsibility to ideas and persons disadvantaged in political struggles against exploitation, exclusion, oppression, and domination.

Ackerly et al., 2021, p. 5.

Reflective equilibrium is often deployed by moral philosophers to refine principles alongside abstract cases and thought experiments that artificially isolate morally relevant facts, enabling theorists to consider in fine-grained detail the specification and relationship between specific principles. In undertaking this practice, moral philosophers deploy abstract cases or hypothetical examples that, while having implications for reality, are explicitly *not* grounded in any particular empirical context; abstraction often enables theoretical precision. This broader moral

methodology, while often generative of insights in its own right, can stand in tension with the commitment of GNT if it is insufficiently attentive to real world contexts. As Ackerly et. al write:

The commitment to recursivity in grounded normative theory is distinct from more introspective processes specified in, for example, Rawlsian reflective equilibrium (1971/1999, pp. 40–46). It seeks through rounds of internal reflection to reach a stable equilibrium position on specific cases or questions between a theorist's own considered judgments and normative principles given in theoretical arguments. Grounded normative theory entails more direct and typically more systematic engagement with empirical contexts in the recursive process.

Ackerly et. al, 2021, p.9.

My dissertation project shares several methodological commitments with GNT, drawing a detailed consideration of empirical contexts into a recursive process with reflective equilibrium. While I do not engage in original data collection nor fieldwork, several chapters of the dissertation clearly undertake original analysis of (qualitative) empirical data (comprehensiveness); development of normative arguments and insights through a reciprocal dialogue between the data and normative theory (recursivity), and direct engagement with Indigenous theorists and arguments in the construction of the theory (epistemological inclusion). The project is also motivated by epistemic accountability – and, as I describe below, epistemic accountability has long-run dimensions. Below, I discuss the way in which I incorporate the methods of reflective equilibrium and GNT together within the dissertation.

As Ackerly at al. discuss, comprehensiveness in theory construction may be achieved by focusing “on analyzing existing data or textual resources for the development of normative claims” (2021: p. 6). This entails developing a richer presentation of concrete empirical contexts

than is typical within normative political philosophy, and the recursive return to those contexts in the development of normative propositions. Comprehensiveness and recursivity are best exemplified in this dissertation by the collection, reconstruction, and extended analysis of a wide range of empirical sources in the chapters engaging the Wet'suwet'en pipeline protests, the contemporary treaty process, and international bordering practices at Akwesasne and on the Mexican – American border. In these chapters, I draw together empirical data from multiple sources (political science, anthropology, government documents, news articles) in a novel analysis of the claims and interests of Indigenous groups as they are affected by the current configuration of territorial power. Then, exemplifying recursivity, I develop normative arguments about justified political authority structures and “hereditary” leadership institutions (chapter 1), and normative arguments about the justification of specific categories of Indigenous jurisdictional rights (in chapter 8), through a dialogue between the cases and the normative theories of territorial rights. The chapters engaging the concept of federalism and the treaty negotiation process (chapters 5 and 6) have also likewise been informed through an analysis of contemporary empirical sources, including government documents, empirical political science, and anthropological observations as they pertain to the Canadian Comprehensive Land Claims Process. Within these chapters, drawing the analytics from philosophical theory into recursive dialogue with empirical sources, I construct an account of the domination within current institutionalized processes for treaty negotiation and federalism, with a mind to providing a better normative theory of negotiation and federalism. These recursive empirical engagements challenge our assumptions about collective self-determination and enrich our understanding of the moral basis of specific jurisdictional rights, demonstrating the combined power of reflective equilibrium and grounded normative theory to yield insights in moral and political philosophy.

It is within the chapters discussing collective self-determination and territory (chapter 1), federalism (chapters 4 and 5), and land management and ecological value (chapter 7) that I am most transparently attentive to epistemological inclusion in this process. As Ackerly et. al write: “[e]pistemological inclusion is concerned with ways in which grounded normative theory typically strives to be inclusive of the ideas and direct insights, but also the ways of knowing and generating knowledge, of those engaged in political contestation” (2021, p. 11). Drawing on the work of Aaron Mills, James Sakej Youngblood Henderson, Leanne Simpson, Glen Sean Coulthard, and other Indigenous theorists, I develop my accounts of structural domination, Indigenous relationships to land, and the value of federal political partnerships, through an extended dialogue between liberal territorial rights theory and Indigenous conceptions of land, relationships, and treaty. The theory I develop is intended to meaningfully engage the political claims and perspectives of Indigenous political actors and theorists respectively. I hope to demonstrate that these views are vital to the solution to the problem, for reasons internal to collective self-determination theory (and thus as a matter of theoretical coherence), but also must be grappled with in their own right as plausible theories of political morality (epistemological inclusion).

The additional practice of recursivity within these chapters would involve continued empirical analysis, of both these particular cases in light of changing conditions, and new cases presenting distinctive considerations, with the goal of identifying the limits of the existing theory to account for relevant values, grounded struggles, and forms of domination. The further practices of epistemological inclusion would involve a form of recursivity as well: further engagement with Indigenous theorists for the purposes of checking my understanding of relevant Indigenous

values, concepts, claims, and arguments so far developed, and for illuminating further considerations of relevance to the project. Finally, as indicated in the quotation of above, further epistemological inclusion on my part could involve heightened participation in Indigenous knowledge practices – such as land-based learning and community activism or participation – that challenge predominant (Western) epistemologies within the academy.

Still, not every chapter exemplifies these commitments as clearly. The chapter on restitution, while grounded in the history of Indigenous – settler relations in Canada, develops a set of principles that is developed from abstract cases in a way that is more at home within classic moral philosophy. This chapter might be an especially good candidate in the future for further comprehensiveness and recursivity, that is, heightened engagement with empirical research concerning conflicting occupancy-based claims between settler and Indigenous groups in the development of the normative theory constructed thus far. However, I take it that GNT's four theoretical commitments pertain as much to extended research programs incorporating many outputs over time as much as they pertain to any particular manuscript – indeed, recursivity and accountability suggest an iterated research program involving the significant evolution of outputs addressing the same issues over time by means of repeated engagements with new empirical data and sources about particular contexts. Because the theory I have offered here is necessarily incomplete, I will have opportunities in the future to recursively reconsider my normative arguments in light of further empirical research and analysis. I may also have the opportunity to expand the opportunities for comprehensiveness, epistemological inclusion and accountability more directly, by pursuing engagement with relevant Indigenous community leaders, negotiators, activists, and theorists – although that would involve a future, more directly collaborative,

iteration of this project in a different setting.

Finally, a word about epistemic accountability. Within the framework of GNT accountability is thought to be most relevant in projects including fieldwork because accountability is conceived as taking place within direct relationships between the researcher and the concrete actors embedded within an empirical context. As Ackerly et. al write: “[e]pistemic accountability addresses the more direct relationships between the researcher and those engaged in empirical investigations, in particular in field work (Ackerly, 2018, p. 241). It entails such concerns as attending to the risk of misrepresenting a group’s needs and desires when speaking ‘for’ them...” (2021, p. 12). While this dissertation does not engage in fieldwork nor otherwise generate novel empirical data, it is important to be clear about the limits of the perspective offered, and opportunities for accountability.

The dissertation does not claim to represent the political claims of particular Indigenous communities, nor to offer any fine-grained verdicts about their rights and obligations. Likewise, this dissertation does not offer legal arguments concerning particular communities. Instead, as I hope to make clear, the goal of the dissertation is to develop a way of thinking about the reciprocal rights and obligations of political communities in decolonizing settler colonial settings. To develop this framework, I have adopted a contextualist and grounded approach to normative theorizing. However, it is not my intention to “speak for” any particular community – I am not in an epistemic position to do that, nor am I authorized to do so. As I make clear within the chapters on negotiation (5 and 6), territorial decolonization will require iterated political dialogues within and between particular settler and Indigenous communities on multiple levels.

Thus, rather than making a conclusive claim about the desires, interests, or rights of any particular community, it is my intention to develop a theory to guide thinking about the requirements of legitimacy in Indigenous – settler relations.

In this regard, my perspective is rooted within settler (liberal) theories and an engagement with the grounded conditions of colonialism and Indigenous authors. However, because decolonization will require renewing forms of nation-to-nation partnership through forms that reflect the equality of peoples, it is my hope that this theory will contribute to discussions within settler societies about how to renew those relationships. My hope is that by adopting a genealogically liberal theory, alongside a grounded method, the project will produce arguments that motivate settler citizens, politicians, and policymakers to undertake the necessary political dialogue. At best, I can point to the kind of political work that has to be done, and the sorts of values that must be considered in grounded contexts. In this regard, I can also construct models of political institutional forms and justice-based theories for reconciling claims to land and authority in ways consistent with the equal self-determination of peoples while observing the normative limits of current institutional approaches. However, any theoretical vision is necessarily limited in its ability to generate concrete proposals for decolonizing particular territories, these must be informed by a deeper appreciation for the nuanced facts of particular contexts and political negotiations within those contexts.

In summary, in this dissertation I aim for reflective equilibrium on the principles of territorial legitimacy for Canada as a settler colonial context. To do this, I aim as much as possible to recursively consider cases and contexts from Canada, and I deploy reflective equilibrium

alongside these grounded cases and struggles in order to develop a theory. Thus, my methodology might be described as *grounded reflective equilibrium*. I have already canvassed our intuitions concerning the wrongness of settler colonialism, and the grounding of that wrong in facts having to do with the dispossession of Indigenous territory and usurpation of Indigenous political authority—these are the considered convictions, or, more minimally, initial case-based intuitions, with which we begin this study. What remains to be done is to develop a theory that can fully explain these intuitions by explaining how the principles behind them – yet to be identified – cohere with each other and broader principles of political morality. We must develop a richer account that not only identifies the wrong but also provides guidance in the development of legitimate institutions where our case-based judgments are less clear, such as in multi-generational settler colonial contexts mired by evolving structures of domination. I do this by considering several grounded contexts of the problem, including both particular cases and particular domains of political practice, which I analyze throughout the dissertation in dialogue with territorial rights theory in an effort to generate a coherent moral theory.

Chapter outlines

Part One: Indigenous Territorial Rights and Territorial Restitution

A theory of political legitimacy for settler colonial contexts must provide an account of the fundamental facts and values that justify the jurisdictional rights of groups, and the particular institutions maintained by groups, over land. Thus, the first part of the dissertation examines contemporary theories of territorial rights and their application to settler colonial cases. I set out

the mechanics of the theory of occupancy and self-determination that is adopted throughout the dissertation, establishing the moral grounding of Indigenous rights to territory and settler obligations to make substantial restitution. I build on these fundamental arguments in subsequent parts of the dissertation.

The first chapter considers contemporary theories of territorial rights in relation to Indigenous claims to territory through an examination of the Wet'suwet'en people's struggle for territorial control over their traditional homeland. The Wet'suwet'en case is especially vexing for normative theory because it involves analytically distinguishing contradictory claims to authority over land both *between* groups, and between institutions *within* groups. In the Wet'suwet'en case, the former aspect concerns the contradictory claims of the Canadian state and the Wet'suwet'en people to control the disputed territory; while the latter aspect involves interrogating the contradictory claims of the Wet'suwet'en band councils and precolonial hereditary governance system to make regulations on behalf of the group. The chapter builds on the critique of functionalism outlined in the introduction by presenting an alternative general theory of territorial legitimacy grounded in the value of the self-determination of peoples. First, I show that this theory judges that the Wet'suwet'en people have territorial rights over their traditional homeland: the members of the Wet'suwet'en people constitute an occupancy group with rights to reside upon and use the lands where they live and maintain their place-based practices; and together, they constitute a people, individually comprised of members with political autonomy interests in collective self-rule. Next, I argue that, pursuant to collective self-determination theory of territorial rights, the legitimate representatives of the Wet'suwet'en people must reflect the people's shared will; institutions of political authority must promote the political autonomy

interest at the heart of the theory in order for them to legitimately exercise power. After analyzing the traditional governance system of the Wet'suwet'en people, I argue that there is nothing in principle preventing the traditional political system from reflecting the shared will of the Wet'suwet'en people (as I argue, electoral democracy is not always necessary for collective self-determination). I illustrate several reasons why hereditary leaders could reflect the shared will of Wet'suwet'en people better than alternative political authorities, while demonstrating that the political authority of any Wet'suwet'en governance system depends upon the actual endorsement of Wet'suwet'en people themselves.

As we saw in the first chapter, territorial rights are justified by considerations of occupancy and self-determination – however it is somewhat unclear how we should identify the borders of Indigenous territories considering the fundamental facts of settler colonialism, including the historical dispossession of territory, and the reliance of settlers upon particular resources and lands (a fact centered in the “supersession” hypothesis). Accordingly, the second chapter develops a normative framework to identify lands settlers should pay as restitution with special attention to hard cases of conflicting occupancy interests between settler and Indigenous groups. I argue that more restitution of *exclusive* territorial jurisdiction to Indigenous peoples than is recognized by contemporary theorists of territory is morally required in settler colonial contexts. Specifically, I argue that to accurately analyze claims to restitution in Indigenous – settler contexts, we must adopt a case-based approach that: (1) is attentive to currently existing patterns of land use by the members of settler and Indigenous groups in the particular geographical region under examination; (2) ascertains the relative weight of the specific (fungible and non-fungible) interests of settler and Indigenous persons that depend upon these and prospective Indigenous

and settler uses of land; and (3) considers a variety of intersecting moral considerations that may limit settler occupancy rights by discounting or defeating the moral weight of settler occupancy interests in particular cases – these include contextual considerations about individual moral liability to mandatory removals, the lesser evil of removals of those without moral liability in some cases, and the duty to disgorge the benefits of injustice. The upshot of this analysis should be the presentation of a more nuanced and case-based approach for evaluating Indigenous claims to restitution.

Part Two: Federalism, Treaty Negotiation, and Non-Domination

The second part of the dissertation, which runs from chapter 3 to 6, considers the value of federalism as an institutional design option for contexts involving settler and Indigenous peoples. Federalism is often offered as a preferred route for securing the self-determination of Indigenous peoples as compared with options that sever the territorial integrity of states, yet it is unclear why federalism should be regarded as a valuable form of political organization for (Indigenous) nations with territorial rights, and how federal states with settler majority populations can avoid dominating Indigenous peoples. On my view, federalism is a valuable institutional mechanism for enabling self-determination – however we require the correct conception of it, informed by both settler and Indigenous theories, in order to develop an adequate account of political legitimacy and territorial decolonization for settler colonial contexts.

Chapter 3 begins with an analysis of four potential explanations of the value of federal arrangements over centralized alternatives: administrative efficiency, citizen preference

maximization, non-domination by the central government, and stability. I argue that each of these theories fails to capture considerations of salience for institutional design in federal contexts. In particular, a plausible account of the value of federalism in multinational cases must make reference to the territorial rights of multiple self-determining nations in its explanation of the reason to adopt a federal structure if it is to help solve the problem of specifying the conditions of legitimacy in Indigenous - settler contexts. In the second part of the chapter, I consider a view that explains the value of federalism in terms of fairly recognizing a diversity of political identities within a political order. I argue that this view, while initially plausible, insufficiently attends to core problems confronting any multinational federation. First, while the view explains the value of federalism vis-à-vis centralized alternatives, it fails to explain the value of federal association over secession. This is because it gives an inadequate account of fairness in recognition of identities once we consider the possible imbalances of power and institutional recognition between majority and minority national populations in federal states – each of whom possess inherent rights to territory and self-determination. Secondly, the view neglects to consider the distribution of territorial authority within federations: it does not give us an account of how federations ought to distribute manifold jurisdictional rights over land and the people who inhabit it in light of the territorial self-determination interests of the constituent nations, leaving the view open to the charge that it gives no account of how to avoid inter-group domination in the politics of a multinational federal state.

In chapter 4, I construct an alternative vision for thinking about the value and practice of federalism in settler – Indigenous political associations. I begin by considering James Tully’s diversity-aware alternative to thinking about political belonging grounded in an intercultural

dialogue between nations, which itself is in a bidirectional causal relationship with a shared federal identity. I argue that this vision presents us with a unique way of thinking about the value and practice of belonging in federal states. I then proceed to take up Tully's call for dialogue, by reconstructing Aaron Mill's view of Anishinaabe constitutionalism. I do this for two reasons. First, I undertake this engagement because it reveals fundamental Anishinaabe norms of politics which must find expression in a federal design if it is to avoid alienating Anishinaabe people and promote their collective self-determination— which is a requirement of political legitimacy as argued in the first chapter. Second, I do this because Anishinaabe views substantively add to our understanding of the value of federalism in multinational cases generally. With these views on the table, we will have provided an answer that fits the first desideratum for an adequate theory of multinational federalism in settler – Indigenous contexts, namely a plausible account of the value of federalism that explains the positive value of federalism over both centralized alternatives, and secessions.

In chapter 5, I return to the second desideratum: the institutional realization of non-domination in the relationships between groups with reason to politically associate together in institutional networks that enable both self-rule and shared rule. First, I outline a general conception of domination, with particular focus on how domination applies to the relationships between national groups in multinational states. I argue that there are three relevant levels of domination: domination of minority group members in the federal demos, inter-group domination at an institutional level, and cultural domination. I proceed to examine how these concepts track the position of Indigenous peoples in the Canadian state. Next, picking up on the Anishinaabe view of politics, I demonstrate an Anishinaabe view of treaty relationships as a solution to this problem. I then articulate the severe limitations of the present system to implement these

values—without significant revision to the current process for negotiating treaties, the values underlying federal association are not realized. Finally, I outline a vision for treaty federalism, based upon the principles within Tully’s view (reflected in *the Royal Commission on Aboriginal Peoples*, 1996) and Indigenous conceptions of treaty. This view has the potential to re-orient us in our political relationships, in order to overcome the domination endemic within them, and achieve the latent value of federalism for settler and Indigenous peoples. In turn, we will be on our way to offering a theory that is responsive to the second desideratum of an adequate theory of federalism for Indigenous – settler contexts.

In the sixth chapter, I address the upshots of the foregoing analysis in a proposal for thinking about the negotiation of treaties in a multinational federation. While the previous chapter centred the ideals of mutual recognition, continuity, and consent in the relationships between peoples, there is ambiguity as to the meaning of “consent” when addressing the relationships between *groups*. Thus, this section begins with an analysis of the concept of *national* consent and argues that this language game tracks a complex set of relationships between the members of a people, their governmental representatives, and an international agreement. The purpose of this discussion is to delineate the outline of a procedure for negotiating treaties that realizes non-domination and the values of interdependency for both nations and their members.

Correspondingly, I argue that a central challenge for achieving the ideal of interdependent self-determination among peoples is to design layered and place-based multilogues to negotiate treaties. These multilogues will occur on multiple levels within a federation and will necessarily be accompanied by intra-group processes of deliberation and consultation among negotiating representatives and their constituents. For treaty negotiation to realize the value of self-

determination for Indigenous peoples undertaking robust changes to the structure of their political world, it is necessary to design a process that regulates the relationship between elite negotiation processes, community deliberation, and referenda, in such a way as to meaningfully promote community self-determination. In this part of the dissertation I also discuss, in greater detail, the problem of inter-governmental assistance within federations, developing a set of principles for ascertaining whether and when the inter-regional burdens of reciprocal cooperation (in Anishinaabe terms, mutual gifting) in federalism are fair, and the upshots for the legitimacy of political associations between settler and Indigenous peoples.

Part Three: Shared Territories and Co-Management

The third part of the dissertation considers two applied areas that arise upon consideration of shared territories within multinational federations. As we saw in the first part of the dissertation, Indigenous and settler groups are self-determining nations with claims to territorial rights. These include rights to the restitution of territory, enabling Indigenous peoples to make and enforce law through their own institutions and value systems where they form a majority. In the second part of the dissertation, we considered the concept of federalism, and developed an account of its value for self-determining peoples with territorial rights. As we saw, provided they are negotiated without domination, federal arrangements can give institutionalized expression to the bonds of identity and kinship between groups, and function to reciprocally foster constituent nations' self-determination in a process that simultaneously decolonizes territory. This part of the dissertation works with the vision constructed thus far and moves away from the consideration of domains of exclusive jurisdictional control. In some regions, settler and Indigenous populations will

systematically and robustly overlap in their occupancy and political interests, and there will be questions about how to apportion jurisdiction between groups in these circumstances; moreover, where jurisdiction is fundamentally shared, there are questions as to how the principles by which it is exercised can avoid alienating culturally distinct peoples. While there are innumerable cases and questions to be considered in this domain, here I consider two, demonstrating that the theory developed thus far, in dialogue with grounded cases, can make further normative progress.

In chapter 7, I consider Indigenous – settler land co-management boards and the challenges that have been documented by scholars concerning the incorporation of Indigenous perspectives into these land management processes. I argue that we can make progress on the impasse by conceptualizing the goal for land management policy as that of securing the political autonomy interests of two or more distinct peoples under unified institutions that manage a shared territory. Correspondingly I consider liberal conceptions of land and argue that while these theories often claim to be neutral, they privilege Western ways of life and lifeways by refusing to recognize the intrinsic value of the natural world. I argue that this is an unreasonable *and* unfair position for the purposes of land management. Not only do we have shared and convergent reasons to recognize the intrinsic value of land, the upshots of processes that fail to reflect natural value support the lifestyles of some groups at the expense of others. Thus, I argue that on a liberal theory, neutrality about fundamental ontology should be downstream of recognition of the intrinsic value of the Earth. In the third section, I discuss the Anishinaabe relational conception of our relationship to the natural world, a view called the Earthway (alternatively: the Giftway). I argue that while this conception avoids the issues with the instrumental liberal conception, there are some elements that may be unacceptable to settler ontologies and lifeways for full inclusion on a

shared framework for land management, at least prior to significant and long-run cultural exchange and dialogue. I conclude the with the proposal that we can model the intrinsic value of the Earth for co-management purposes as a mild conservative bias in favour of healthy ecosystems, on top of the more familiar human-centric instrumental reasons for protecting the environment.

In chapter 8, I consider cases where Indigenous peoples straddle the borders of two or more settler states or regions. As my primary examples, I discuss the Mohawks of Akwesasne, whose territory straddles Ontario, Quebec, and New York State, and the Tohono O’Odham, whose territory straddles Arizona and Sonora, Mexico. Building on the theory of occupancy interests developed in the earlier chapters, I argue that Indigenous peoples in these regions have special rights to cross borders, and also to co-manage border policy (including the location of ports of entry, and “reporting-in requirements”). Moreover, I demonstrate that Indigenous groups in this situation have a right to form an integrated cross-border jurisdictional unit that intersects with the settler political jurisdictions (states or provinces) in a more complex form of multinational structure than anticipated in the foregoing chapters. Thus, this chapter of the dissertation extends considerations of territorial legitimacy beyond the confines of a single settler state and develops an argument about the assignment of territorial rights in cases where Indigenous occupancy and political interests in a place overlap with multiple settler political units. This is also of relevance to the more procedural criteria of legitimacy in treaty negotiation – insofar as it goes further to identify the “who” in negotiation.

Chapter 1: Collective Self-Determination, Territory, and the Wet'suwet'en Case

As discussed in the Introduction, the conflict between the Canadian state and the Wet'suwet'en hereditary chiefs over the construction of the Coastal GasLink (LNG Canada) pipeline through the Wet'suwet'en people's homeland poses fundamental questions for a theory of political legitimacy. In this chapter, I will consider several of these questions. These questions apply to all (Indigenous) nations, and equally to the Canadian state. First, what moral considerations ground the right of a group to use and control a portion of the Earth's surface, air, subsurface and resources? For example, what is the value-based moral justification for the Wet'suwet'en people's control over the land they claim? As an example of this right to control, why should the Wet'suwet'en have the right to approve or deny pipeline construction on the land they claim? This is the *problem of territorial rights*. Second, what considerations ground the right of a subset of a group's members to make binding decisions relating to the group's territory and occupants? Who has the authority to "speak on behalf of" the Wet'suwet'en or, more concretely, to negotiate and legislate on behalf of the Wet'suwet'en people? As an example of this right: Why do the Wet'suwet'en hereditary chiefs have the right to veto a pipeline across Wet'suwet'en territory even if the Wet'suwet'en band councils approve it? This is the *problem of political authority*. This case also poses the *problem of democracy* in relationship to political authority (although we will also consider it elsewhere). That, what is the relationship between democratic voting, political participation, and contestation to the legitimacy of structures of territorial political power?

These problems find application in many other cases of (Indigenous) territorial claims when there are conflicting claims between groups, and conflicting claims to political authority within a nation. Thus, if we cannot provide a consistent answer to these questions, then from a moral and legal perspective, the MOU between the Canadian government and the Wet'suwet'en hereditary chiefs, and the future relationships between Canada and many other Indigenous nations, are in danger of being carried out in an ad hoc or arbitrary manner. Was the accord between the hereditary chiefs and the Canadian government simply the result of contingent power relations internal to the Wet'suwet'en nation combined with pragmatic factors that the Canadian government faced relating to the blockades? Or is there a principled explanation that constitutes a consistent answer to the problem of territory and problem of political authority?

In addition to their intrinsic significance to a theory of political legitimacy, a solution to these questions is required to provide the foundation for considering downstream questions about the impact of historical injustice on political legitimacy, and the role of treaty-making in legitimate relationships between settler and Indigenous peoples. With a clearer understanding of the moral foundations for territorial rights, we will be positioned to consider the problems of restitution of territorial rights in cases of historical injustice. We will also be positioned to evaluate political structures for their domination of Indigenous self-determination, insofar as this chapter will demonstrate the fundamental connection between territorial rights and self-determination of peoples. Answering these questions will give us a coherent and integrated theory of political legitimacy and territorial decolonization for settler colonial contexts.

I demonstrate a plausible solution to these problems by adopting a theory of territorial rights grounded in the value of collective self-determination. In the first part of the chapter, I introduce

the philosophical concept of territorial rights and outline the justificatory values at the heart of the collective self-determination theory: these are the place-based relationships of group members, grounding individual residency rights to the land the group claims as its territory, and the political autonomy interests of group members in maintaining their own institutions, grounding the territorial rights of the people to collectively control their land. In the second part of the chapter, I examine the Wet'suwet'en people's patterns of land use and their house-based system of governance. I argue that the Wet'suwet'en people meet the criteria required on the collective self-determination theory to successfully claim territorial rights. In the third part of the chapter, I discuss the relationship between institutions of hereditary political authority and the values underlying the collective self-determination theory. I consider the objection that collective self-determination requires electoral democracy, thus disqualifying “hereditary” leaders from exercising territorial rights on behalf of the people. I argue that this objection is mistaken from within the parameters of collective self-determination theory. Finally, I consider the argument that there are multiple conflicting yet legitimate institutions of Wet'suwet'en political authority: namely, the house-based system and band councils. I argue that while this is possible, settlers do not have the epistemic access to claim it.

1.1 What grounds claims to territorial rights?

In this section, I unpack the philosophical concept of territorial rights, and outline the dominant theory, functionalism. As I will show, functionalism suffers from serious flaws as an account of territorial political authority. I use this discussion to motivate an alternative theory of territorial rights grounded in considerations of occupancy and self-determination. While it is distinct from

Indigenous conceptions of politics, the theory offered here is complementary to Indigenous arguments for recognition of their rights to govern land and maintain place-based ways of life.

Territorial rights are usually conceived of as a bundle of rights and powers to make and enforce law for a territory, control entrance and exit from a territory, and control the extraction and distribution of natural resources from a territory (Miller, 2012; Moore, 2014, 2015; Nine, 2008, 2012, 2022; Simmons, 2001, 2016; Stilz, 2011, 2019). For an agent—such as a people or their state—to have territorial rights is for it to have a morally justified claim against competing agents such that other agents must not interfere with the exercise of these powers of territorially demarcated jurisdiction. A theory of territorial rights must explain what value is achieved through the exercise of these jurisdictional powers and must furthermore explain what justifies the exercise of these jurisdictional powers over a particular geographically delimited region of the Earth (Miller, 2012; Moore, 2014, 2015; Nine, 2008, 2012, 2022; Simmons, 2016; Stilz, 2011, 2019).

There are several competing theories of territorial rights in the contemporary literature.

Functionalist theories of territorial rights ground the rights of *states* to make and enforce law over a territory in the value of basic justice (Buchanan, 2004; Stilz, 2011; Ypi, 2012). According to functionalist theories, the state is necessary for securing the basic human rights of a population. Functionalist theories contend that the state's exercise of power to make and enforce law for a territory is justified if it passes a threshold for maintaining institutions of basic justice on the territory. While protecting basic justice is necessary for legitimacy, as I will explain below the problem with functionalist theories is that they do not settle the problem of borders, and they license foreign rule in cases where we have settled intuitions to the contrary, such as in cases of

colonialism, annexation or failed states (Moore, 2014; Moore, 2015: 89–111; Moore, 2016, 2019; Stilz, 2011: 590; Stiltz, 2019: 90–93). Provided we have more than two basically just states, the functionalist theory cannot itself explain how to delimit the geographical area for the exercise of territorial rights, and this becomes especially relevant in cases of conflict. The functionalist theory will leave the resolution of conflicts up to the status quo insofar as it will judge that the state that is in fact maintaining institutions of basic justice over a territory is the legitimate territorial rights-holder (Moore 2014; Moore, 2015: 89–111).

One prominent version of functionalism owes its genesis to Kantian theories and contends that the state is necessary to authoritatively specify and protect human rights – in turn securing the freedom as independence of human beings.¹⁵ The foundational thought on Kantian theories is that human beings have an inherent right to freedom from interference by others– a right to direct their own actions according to their own judgment (Kant, 1996). Correspondingly, people have a right to be free from other persons determining their action through their own private judgments (Kant, 1996). This is thought to have two implications for people in the state of nature – that is, in the absence of a state. Firstly, in the absence of a state, we will conflict in our private interpretations of the scope of our reciprocal freedom; using our own judgment, we will disagree about the limits of our reciprocal rights to property, for example, when we live in proximity and use adjacent lands (Stilz, 2011). Correspondingly, without a public political authority, or an entity with the special standing to authoritatively define our rights, we will subject one another to our own private interpretations of right. This is a condition where people mutually undermine

¹⁵ I do not claim to authoritatively reconstruct Kant’s view here, but a view in the Kantian spirit that is widely shared by functionalists.

one another's inherent right to freedom by exercising their own private judgment in their treatment of others and their interests without a common authority to clarify their rights and obligations (Kant, 1996; Stilz, 2011). Secondly, and just as significantly, in a state of nature, we will be fundamentally dependent on others' private wills for the enjoyment of our rights. Without a coercive authority structured to uphold rights, to protect them from violation or secure compensation in the event of wrongdoing, the enjoyment of our rights is deeply contingent on the will of other people to respect our rights. Within a state of nature, we all recognize this mutual vulnerability, and lack the mutual assurance that we will comply with natural rights even when we can clearly see their contours (Kant, 1996; Stilz, 2011). This subjection to the judgment and will of other persons is a condition of reciprocal domination, insofar as each is vulnerable to the discretion (and arbitrary inference) of the other.

According to Kant then, we require a state with the power to coercively uphold a public system of rights in order to prevent the problem of unilateral private interpretation of our rights, and to secure our rights from the problem of mutual assurance. Only a state – or an organized political system structured by the rule of law – can claim the standing to promulgate rules that decisively clarify our mutual rights and obligations. This is because only such a state claims to represent all those subject to it equally, giving each a reason to comply with its dictates in light of the problem of unilateral interpretation. While Kant was not necessarily a proponent of democracy, functionalism is easily paired with democratic theory to reinforce the idea that only a state has the standing to insist upon its interpretation of right to the exclusion of the private judgment of citizens. It is only by deferring to a decision-making procedure that includes all territorial residents as equals in the process for formulating legal standards for conduct that the residents of

a territory can avoid the problem of unilateral interpretation or subjection to the private judgment of any one of them (or some of them). A democratic decision-making procedure for the specification of rights respects the natural equality of each person as an autonomous judge by including them in the necessary process of clarifying reciprocal rights. As such, the state, as the reflection of citizens' judgment for solving the problem of unilateral interpretation, and unlike individual private judges, has the standing to insist upon a specific interpretation of the requirements of right (Kant, 1996; Stilz, 2011). Moreover, the state can be configured to regulate itself to consistently uphold clear standards for interpersonal conduct (the rule of law), providing the basis for an expectation of coercive interference by the state when legal standards have been violated. This justifiable expectation of coercion in the case of violation of public standards for conduct helps to resolve the problem of mutual assurance that others will comply with the demands of right, relieving us of the condition of mutual domination; moreover, it helps to preserve recognition of our rights even when they have been violated, by securing punishment and compensation that upholds our moral equality (Herman, 2022). Thus, on Kantian and neo-Kantian views, the exercise of political power by states is justified by reference to the necessity of a state for overcoming the problems of unilateral interpretation of rights and mutual assurance of respect for rights. Overcoming these problems is necessary for the reciprocal enjoyment of human rights and freedom, and thus we have a natural duty to form a state. Such a state, in order to exercise its requisite functions, must have territorial rights – the right to make and enforce laws, including rules about natural resource use, and immigration.

This functionalist view is widely regarded as the prevailing theory of legitimacy: it offers a theory about the reasons why political authority is justified, making fundamental reference to the

basic rights of people living in proximity and the necessity of a state for clarifying and upholding those rights.¹⁶ It also provides reason to believe that there is an obligation to obey the law.

However, it has been documented to have severe problems as a theory of territorial legitimacy (see for example: Miller, 2012; Moore, 2015; Stilz, 2019).¹⁷

One of the greatest flaws of functionalism is that it cannot solve the *annexation objection*.

Functionalists cannot explain why an aggressor state lacks legitimate political authority with respect to an annexed territory and population (Moore, 2015). If an aggressor state incorporates the citizens of an annexed territory into the aggressor state and maintains a minimally just legal order for upholding human rights, functionalism deems the state to be legitimate just because the annexing state can solve the general problems of unilateral interpretation and mutual assurance. While functionalist theories may be able to ground a prohibition on annexation *ex ante*, out of concern for the risk posed by military intervention to the enjoyment of human rights by the territorial population subject to annexation, once an annexation is completed, the theory judges that the current provider of a minimally just legal order has political authority. Moreover, a theory of political legitimacy grounded purely in functionalist criteria could not explain why a threatened state should not accede to initial demands for its surrender in advance of any armed conflict, provided the annexing state credibly promises to maintain a legitimate political order for

¹⁶ The Kantian theory is an example of a functionalist theory. Alternative functionalist theories, which otherwise center the specification and enforcement of basic individual rights in the justification of political authority fall prey to the same objections below.

¹⁷ Many Canadian lawyers, policymakers, and judges, for example, insist that the legitimacy of Canada as a state flows from the fact that it is a rule of law constitutional order instantiating respect for human rights, and proceed to interpret the law on the basis of the settler constitution. These background assumptions about legitimacy structure the way that jurists reason about Aboriginal law.

those it will subject to its authority and will refrain from violence in the take-over (Rodin, 2002). Considering that legitimate political authority entails an obligation to not interfere with the exercise of political authority, functionalism excludes the right to rebellion of annexed peoples, and fails to account for the perverse incentive to forcefully acquire territory through illicit means such as the conditional threat of force (Moore, 2015).

It is important to clarify that the functionalist position, even when pared with democratic inclusion as a basic human right, cannot clearly explain what is wrong with annexation. For example, because annexing states may incorporate the members of annexed territories as equal citizens within a new larger state form, functionalism cannot explain, for example, what was wrong with the French colonial annexation of Algeria (Stilz, 2015). Similarly, it could not explain what would be wrong with the American claim to political authority over the territory of Canada after a hypothetical annexation, provided the United States included the residents of Canada as equal citizens within the American constitutional framework. While there have been recent attempts to rescue functionalism from the annexation objection (Motchoulski, 2022), it is not clear that they can succeed without making reference to values beyond the functionalist position (Hill, 2023).

The limits of the functionalist theory are particularly salient in settler colonial contexts. While some functionalist approaches may judge settler state claims to authority over Indigenous peoples and territories to be illegitimate, this judgment is contingent and avoids grappling with the question of land. According to functionalist theories, provided Indigenous peoples are included as equal democratic citizens within colonial states, and those states uphold a minimally

just system of basic individual rights, those states are legitimate. Correspondingly, provided those conditions are met, the exercise of political authority by the state would be justifiable, and Indigenous peoples would have an obligation to not interfere with the legislation and enforcement of law on their traditional territories. However, on these grounds, it is worth observing that by functionalist criteria the legitimacy of settler colonial states is in question. For much of its history, Canada excluded Indigenous people from the franchise, denying them equal political participation (Elections Canada, 2023). Moreover, Indigenous people continue to be subject to race-based discrimination, environmental injustice, and other forms of wrongful harm either by states or with their complicity (Alfred, 2023; McGregor, 2018). It may also be the case that Indigenous peoples have not been paid sufficient reparations for historical violations of their basic human rights and that these rights to reparation are partly constitutive of the bundle of rights states must maintain for legitimacy (Winter, 2014). Thus, by the criteria of functionalism, the legitimacy of settler colonial states is in question depending upon the empirical facts of particular cases and the “threshold” of injustice necessary to disrupt the legitimacy of a state. Much depends upon the extent of injustice one judges to be consistent with a continued right of a state to make and enforce law for a territory, thereby (imperfectly) solving the problems of unilateral interpretation and mutual assurance (or otherwise imperfectly upholding human rights norms) for those subject to its authority.¹⁸

Nonetheless, the functionalist theory misses something deeply important to our considered moral

¹⁸ The exact location of this “threshold” would, on such a theory, determine the state’s legitimacy vis-à-vis Indigenous peoples. For example, some degree or level of injustice is often thought to be compatible with state legitimacy on contemporary theories. So, it is possible on some functionalist theories for states to be legitimate even if they have perpetrated some degree of harm or unfairness against internal populations. See for example: Wellman, 2023.

judgments about settler colonialism, and in so doing renders settler colonialism only contingently wrong. This is the intuition that settler colonialism, like other forms of annexation, would be wrong regardless of whether the annexing power treated the citizens of the annexed territory equally and with respect for their individual rights (Stilz, 2015). Settler colonial projects often try to justify themselves in terms of “benign” or even “benevolent colonialism” – as providing a political and legal system that is either on par with, or improves the wellbeing of original inhabitants, their access to democracy, and/or the security of their individual rights. However, we do not think that these considerations would be sufficient to justify the claim to authority of the American state in the hypothetical annexation of Canada, nor Germany in an Austrian annexation, and thus we must inquire into what other value(s) beyond functionalism could ground legitimate political authority over a territory. While the functionalist account may capture *one* requirement for justification of territorial political authority – insofar as a political order that did not provide a minimally adequate legal framework for the specification and upholding of rights may not have the right to make and enforce law for a territory in the face of the counterclaim by an agent much better equipped to do so – it necessarily ignores other relevant dimensions. If we believe that annexing states lack legitimacy with respect to annexed territories, even if they maintain a basic legal order upholding human rights for the annexed inhabitants, functionalism is a non-starter as a theory of territorial rights.

Contrastingly, theories of territorial rights grounded in collective self-determination contend that under the right conditions, a special value in addition to basic justice is achieved in the relationship between individuals and the institutions of territorial governance that exercise political power over them. Anna Stilz and Margaret Moore each argue that this value (discussed

below) justifies a group's right to control a particular territory through its own political institutions provided two other independent conditions are in place. First, as with functionalism, the political institutions of the group must protect basic justice on the territory (Moore, 2015, p. 51; Stilz, 2019, pp. 117, 157). Second, the group claiming territorial rights must be composed of members who possess individual residency rights to the land claimed by the group or the right to make their life where they reside (Moore, 2015, pp. 36–46; Stilz, 2019, pp. 34–85).

Many scholars of territorial rights embrace some version of Walzer's claim that for a state or government to have the right to enforce law on a territory, there must be a kind of fit between the common life of the people and the political institutions exercising power over them (1980). As Walzer says: “First, then, a state is legitimate or not depending upon the ‘fit’ of government and community, that is, the degree to which the government actually represents the political life of its people” (1980, p.214). Recent theories of collective self-determination express this “fit” through the concept of political autonomy and the social conditions and political structures that enable it. According to these theories, robust human autonomy partly depends on exercising freedom through relationships in the political realm (Moore, 2015; Stilz, 2019). Political autonomy, unlike more passive forms of freedom such as freedom from external constraint, is the active freedom to co-author the social and political world with one's fellow citizens through relationships of cooperation that one reflectively endorses (Stilz, 2015: p. 8, pp. 16–17).

For Moore, political autonomy of this kind can usefully be understood as (1) a relationship-dependent good, and (2) as an agency good (Moore, 2015: pp. 62–65). Relationship-dependent goods are goods that are constituted in a relationship between two or more people and which are

essentially impossible to realize outside of the relationship (64). Moore argues that it is impossible, for example, to realize the good of parent–child intimacy constituted by the bond between a parent and her child, outside of the relationship between the parent and her child (2015, p. 64). Agency goods, on the other hand, are goods that inhere in specific forms of human activity. For example, many of us think that there is something intrinsically good about leading our lives according to our own informed and reflective judgments about what is good or worth doing, provided we fulfill our obligations to others (2015, p. 65). In the context of human lives in groups, special agency goods “are achieved by shared activities and by co-creating the rules and practices that govern the collective conditions of their lives” (2015, p. 64). Moore argues that by acting together, free from external domination, people sharing a political identity oriented toward maintaining a political project of territorial self-rule are able to be “more autonomous—or experience a different (collective) dimension of autonomy than is involved in most liberal accounts of autonomy” (2015, p. 65). This good is particular to the political relationships among the residents of the territory who share the political identity, as well as active, consisting in long-run jointly intentional activities contributing to the maintenance of a basically just political order on the territory that expresses the people's shared political identity.

Stilz's argument for the value of political autonomy centres on the fact of pervasive coercion in the political realm. For Stilz, individual autonomy is fundamentally “a person's ability to freely conduct her life on the basis of her own judgements and values” (2019, pp. 104–5). Stilz observes that states impose an inescapable and pervasive web of threats and requirements on the individual (2019, p.107). Coercion or force threatens autonomy because it “deprives the coerced of self-directed agency, substituting the coercer's judgements for her own” (2019, p. 107). State

power thus poses significant risk of subjective alienation, or severely diminished individual autonomy, due to its inescapable, comprehensive and coercive nature—that is to say, its capacity to prevent us from being able to live according to values, commitments and desires that we endorse upon reflection for reasons that we authentically affirm (2019, p. 107). Stilz's solution to the problem of alienation builds on the idea that sometimes there is a kind of “correspondence” possible between citizens’ moral and evaluative judgments about the proper structure and operation of their political institutions and the structure and operation of political institutions themselves (2019, pp. 104–11, 119–27). Stilz writes that when the state rules and utilizes coercion in such a way that “reflects subjects’ own judgements as to how, and by whom they should be governed, they are enabled to relate in a distinctive way to their state and to the constraints it imposes on them” (2019, p. 107). Stilz writes that under these conditions, “the state is no longer an overwhelming, alien power, but rather a tool that allows her to more effectively carry out commitments that are her own” (2019, p. 107).

As mentioned above, both Moore and Stilz tie the exercise of jurisdiction by a group to a particular territory through the group members’ permissible occupancy of the territory. In making this connection, theories of territorial rights grounded in the occupancy rights of the members of a people are able to connect political institutions to territory in a principled way, unlike the functionalist theory which defers to existing state boundaries provided the relevant states maintain minimally just institutions. The geographical scope of political power is established through showing a normative connection between the *members* of the people (who maintain political institutions by which they exercise collective self-determination), and the land on which the members of the people depend to maintain their personal relationships and located

life plans. In order for a group to have the right to self-determine through political institutions with a particular geographical scope of authority, group members must possess the right to lead their lives where they reside, and to not be displaced by others.

Accordingly, residency rights are justified by the necessity of secure access to place to maintain morally valuable relationships (such as friendship, family and associational relationships), and located life plans such as vocational, economic and religious pursuits that are tied to a specific place (Moore, 2015, pp. 36–46; Stilz, 2019, pp. 34–85). Both Moore and Stilz observe that we have welfare and autonomy-based reasons to respect the background expectation of agents to secure residency: as human agents we plan our lives against the expectation of secure access to the location of our relationships and plans. Provided we have not wrongfully displaced others from where we have developed place-based interests of these kinds, residency rights protect the background expectations of continued use and access that structure our agency. These residency interests ground the obligations of others to not deprive us of continued access to our relationships. Together, the individual members of a group with residency rights possess group occupancy rights over the domain of their shared life, delimiting the geographical scope of their collective political authority (Moore, 2015).

By centring the independent rights of the members of groups to reside in certain lands, and showing an important normative connection between those persons and particular political institutions (the achievement of political autonomy), self-determination theory can provide reasons for drawing the geographical boundaries of political authority in specific ways. The geographical delimitation of territorial rights must track the occupancy rights of the people.

Moreover, because the theory centres the political autonomy interests of citizens, which are achieved through participation in particular political institutions and relationships, the theory is not vulnerable to the annexation objection. Aggressor states lack political authority with respect to annexed populations and territories because they repress the collective self-determination of peoples. Even if an annexing state incorporates the members of an annexed territory within its political order on equal terms, this fails to achieve the collective dimension of autonomy that we are capable of achieving when we maintain institutions with those whom we share valued identities and commitments (Moore, 2015; Stilz, 2019).

While it would be impossible to provide a comprehensive analysis of how the proposed theory intersects with Indigenous conceptions of land, due to the plurality of Indigenous nations and their worldviews, here I indicate some possible areas of broad agreement and tension. After noting the possibility of significant disagreement between settler and Indigenous worldviews, I argue that residency and political autonomy considerations can explain groups' rights-grounding interests in place without assuming robust convergence in worldviews by focusing on basic features of humans' place-based relationships. Moreover, I argue that the collective self-determination theory explains why unique place-rooted ethical and ontological conceptions appropriately structure Indigenous peoples' political institutions.

Although there are significant differences in Indigenous theories of human relationships to the natural world, there are also partial convergences between some theorists' conceptions. For example, as Glen Coulthard explains from a Dene perspective, land is a "*system of reciprocal relations and obligations*" between natural beings (2014, p. 13). Similarly, according to

Anishinaabe perspectives, we are enmeshed in interdependent relationships of reciprocal obligation with each natural entity. These obligations include political (treaty) responsibilities to salmon, deer or moose nations, as well as obligations flowing from kinship relationships with all of creation (Craft, 2019; Simpson, 2017). This is a view shared by many Wet'suwet'en people, who conceive of the natural world in terms of interdependent relationships between living elements, special relationships with salmon and animal peoples, and reciprocal obligations of kinship (Morin, 2011, pp. 4, 50, 70; Mills, 2019, p. 320). As Mélanie Morin writes from a Wet'suwet'en perspective: "Our oral history reflects our view that the world is as one, with no divisions between the spirit, animal, and human worlds. All three exist at the same time... It is all part of a whole; just as the land is part of the people, the people also belong to the land" (2011, p. 6).

By contrast, both Moore and Stilz conceive of the connections between people and place as composed of relationships between agents sharing place-shaped needs and projects, overlapping associational, family and professional ties, and interconnected life plans. This view is significantly different than seeing our interest in land entirely in terms of land as a natural resource. However, it is important to point out that Moore and Stilz do not include plants and animals as agents to whom are owed obligations within the framework for occupancy rights and collective self-determination interests. Similarly, they do not conceptualize our moral relationships with others fundamentally in terms of an evaluative framework of reciprocal kinship obligations that extend to all the world.

I do not here take a position on whether such disagreements are insuperable or whether there is a superior conception. By focusing on place-based relationships, the theory of residency and

political autonomy interests renders many of our interests in place mutually intelligible for the purposes of grounding rights to land and political self-determination without requiring a resolution to deeper ethical and ontological disagreements. The theory conceives of place-based interests more adequately than a narrower construal centring human resource interests in land (conceived, for example, in terms of basic needs satisfaction). Moore and Stilz observe that by living in a place, we also develop overlapping located life plans and relationship-dependent interests localized in that place. By centring our non-substitutable relationships to place, settler and Indigenous people may be able to agree that, in addition to needs satisfaction, human place-based interests include rooted life plans and valuable relationships among residents, even if the moral and legal frameworks for articulating the norms for our relationships diverge. Indeed, our ways of thinking about relationships to the natural world may be deeply rooted in our distinct political and legal traditions. Nonetheless, these political traditions are significant for our political autonomy and are thus recognized as morally significant by the proposed theory.

As discussed above, Indigenous worldviews may take the form of relational frameworks that significantly diverge from settlers' worldviews—for example, in their conceptions of animal agency and reciprocal kinship obligations. A concern for collective self-determination can explain why distinct peoples have a right to maintain these and similar political and legal traditions in the formal structure of their political and legal institutions. The significance of these unique evaluative conceptions for Indigenous collective self-determination is illuminated by Glen Coulthard and Leanne Simpson's concept of grounded normativity. As Simpson explains, grounded normativity is “the systems of ethics that are continuously generated by a relationship with a particular place, with land, through the Indigenous processes and knowledges that make

up Indigenous life” (Simpson, 2016, p. 22). The collective self-determination theory implies that if groups’ authoritative stories, political institutions and legal practices instantiate unique fundamental values for social life developed in this way, then members are at risk of alienation if their social world is instead managed by institutions structured by other groups’ values. As Stilz (2019) argues, self-directed agency under law depends upon the fit between an agent’s evaluative conceptions and the structure of their political institutions. However, evaluative conceptions may diverge significantly given the concrete history of groups’ place-based relationships, as members theorize and negotiate their shared reality together. And as Coulthard and Simpson write: “Our relationship to the land itself generates the processes, practices, and knowledges that inform our political systems, and through which *we practice solidarity*” (2016, p. 254; emphasis in original). Thus, because peoples’ political histories of living together in and with a place may generate unique shared evaluative conceptions for their political institutions, and because political autonomy depends upon a fit between these conceptions and institutions, the political autonomy of Indigenous and settler peoples depends on their ability to freely structure their own territorial political institutions by their respective evaluative traditions.

1.2 How does the collective self-determination theory apply to the Wet’suwet’en people and the Yintah?

1.2a Wet’suwet’en land use

At the time of *Delgamuukw v. British Columbia* (Supreme Court of Canada, 1997), the Wet’suwet’en population numbered between 1,500 and 2,000 people living on their historical

homeland encompassing 22,000 square kilometres in the interior of the Province of British Columbia. The Court reports that there were 30,000 non-Indigenous inhabitants within the 58,000 square kilometres making up the combined territories claimed by the Gitksan and Wet'suwet'en hereditary chiefs on behalf of their houses (at para. 7-9).

Traditionally, the Wet'suwet'en came together from their dispersed house territories to hold feasts at Dizkle, Kyah Wiget (Witset) and Tse Kya (Hagwilget) on the Bulkley River in the summer (Mills, 1994, p. 38). A large summer population at Kyah Wiget was possible due to the abundance of salmon in the Bulkley, which would also be smoked or dried for the winter (Mills, 1994, p. 40). During the winter, the people would disperse across the broader territory in their house groups to hunt and fish, before attending to the oolichan trade with the neighbouring Nisga'a and Gitksan in the early spring, returning to their summer fishing villages on the Bulkley River in summer and harvesting berries in the late summer and autumn (Daly, 2005, pp. 108–55; Mills, 1994, p. 39). Archaeological evidence suggests that the Wet'suwet'en and Gitksan peoples and their ancestors have seasonally occupied the summer villages for several thousand years (Daly, 2005, pp. 126–27; Mills, 1994, p. 88).

While the traditional cyclical way of life of summer settlement and return to the winter fishing houses on the house territories has subsided somewhat in favour of more permanent settlements, many Wet'suwet'en still rely on the land for subsistence in a mixed gathering/wage-labour economy and otherwise retain strong ties to their house territories in addition to their homes in the villages now “on reserve” (Daly, 2005, pp. 108–55, 157, 173–78; Mills, 1994, pp. 20–21, 114, 119). Deep connections to house territories are maintained through a variety of land-based activities including living and working on the territory; fishing, hunting and trapping; harvesting

plants and berries; smoking fish; preparing food and skins; culture camps; walking and hiking the land; prayer and ceremony; teaching children to hunt, trap, and forage; discussing the history, house territorial boundaries, and law relating to the land; and so on. The Wet'suwet'en people depend on secure access to their territories to pursue these and other intrinsically place-based projects and non-substitutable relationships. Thus, since the Wet'suwet'en have also not wrongfully displaced prior inhabitants, they possess residency rights. These rights provide the basis for their collective claim to control the geographical locale of their place-based relationships and interests through political institutions that they maintain together and that realize their interests in political autonomy.

1.2b Wet'suwet'en political institutions

The Wet'suwet'en have a long history of managing the conditions of their common life through their traditional house and clan-based system of governance. The Wet'suwet'en people are a matrilineal society: clan membership and land use rights pass through the mother's side such that, inter alia, one never automatically inherits one's father's rights to use land and never his specific matrilineal title (Mills, 1994, p. 102). There are five Wet'suwet'en clans (Laksilyu: Small Frog; Gilseyhu: Big Frog; Gitdumden: Wolf/Bear; Tsayu: Beaver; Laksamshu: Fireweed), and within each clan are several houses (Mills, 1994, pp. 114–15).

Members of houses regard themselves as close relatives who can trace their lineage to a common ancestor, while members of clans regard themselves as more distant relatives (Mills, 1994, p. 107). The highest feast names (“hereditary” titles) corresponding to leadership positions within

the house system are those of the house chiefs, followed by house subchiefs, then the heirs to the house chiefs, and then the heirs of the subchiefs (Mills, 1994, p. 113). Through the house and clan system, the Wet'suwet'en have traditionally managed and co-ordinated use of their whole territory among discrete subterritories traditionally connected to each house (Mills, 1994, p. 38).

The central traditional governance institution of the Wet'suwet'en is the bahlat, otherwise known as feast or potlatch. The bahlat constitutes a forum where the boundaries between territories are reiterated; the territorial authority of chiefs is reaffirmed; land use rights and other disputes are gradually settled through multiple public exchanges over time; and titles, rights of ownership and authority are passed along through established protocols and communal witnessing (Mills, 1994, pp. 43, 70). All members of the community are allowed to attend feasts (Mills, 1994, p. 45).

There are several types of feast meeting. Here I can only briefly describe some protocols of some feasts.

The *all-clan meeting* serves the function of reaffirming house territorial boundaries, recognizing individual permissions of passage and use of other houses' territories and negotiating disputes over infringement of rights between house groups (Mills, 1994, pp. 44–60). At these meetings, disputes over use rights are gradually resolved over time through speeches by chiefs and those who remember the history of the land, dialogue and reciprocal exchange of gifts (Daly, 2005, pp. 31–47; Mills, 1994, pp. 44–60). Relations with foreign nations (such as Canada) and oil companies (such as Enbridge and Coastal GasLink) are also discussed through a variety of clan-based meetings and feasts.

At the *funeral feast* of a chief with title over land, the deceased chief's successor is named. At a *headstone feast*, approximately one year later, the name, robes and crests of the deceased chief, along with ownership and authority over the house territory, is passed on to the chief's successor (Mills, 1994, p. 65). House chiefs usually appoint an heir before their death, who must host the headstone potlatch in order to assume title lest their claim lapse (Mills, 1994, pp. 66, 117). In the absence of an heir, or in event of a lapsed claim, the chiefs from the other houses of the clan nominate a successor who must host the requisite potlatch to inherit the traditional name, crests and territorial authority of the deceased chief (Mills, p. 66). Mills reports that while sons and daughters of the house chiefs are most often conferred titles and chosen as heirs, the Wet'suwet'en do not have a "closed class system"; rather, "the head chiefs choose their heir from all possible candidates in their house" (Mills, 1994, p. 117). All Wet'suwet'en children are carefully trained to learn the oral history of their people's relationship to the land, animals and other nations and, in turn, the traditional mechanisms of self-government, in part through feast attendance and walking the land with relatives (Mills, 1994, pp. 74, 117). More distant relatives of the house chief may be given titles and signalled as heirs based on their responsiveness to training and their individual responsibility (Mills, 1994, pp. 116–17).

Mills recounts that to assume title or a hereditary name, in part due to the financial costs of the transition through the feast system, "a person must have the full moral and economic support of his or her clan, his or her father's clan, and his or her spouse's clan" (1994, p. 67). This point is echoed by anthropologist Richard Daly who stresses that given the considerable financial costs and labour involved in maintaining the feast system, along with the demanding, ongoing and reciprocal/competitive gift exchange economy in which it is embedded, it is necessary for leaders to have the full support of their clan and that of their relatives in other clans (which relatives, in

which other clans and houses, depending on the specific feast and its protocols for sharing the burden of labour and resources) if they are to be able to attain and maintain their status (Daly, 2005, pp. 57–106, 194–208). As Daly reports: “A chief’s de facto standing is always in a state of flux, although it becomes increasingly consolidated over time through the proper hosting of feasts” (201). Similarly, Daly reports that the consolidation of power beyond house groups is frowned upon by Wet’suwet’en and Gitksan people, who have “an extreme sensitivity to issues involving personal dominance” (2005, p. 204). Chiefs are often challenged by members of their own matrilineal houses, whose own statuses do not depend on the chief (2005, p. 202).

Thus, while the Wet’suwet’en house-based system of traditional governance is not democratic in the Western sense with its focus on strict election cycles and the equal formal decision-making authority of citizens (for example, each citizen receives one equally weighted vote at each election, where the results are determined by majority voting), the house-based system decentralizes political power among clans and houses while requiring significant and ongoing intra- and inter-house co-ordination. Moreover, it requires the active and ongoing support and participation of clan members to successfully function over time as a procedure for political decision making and dispute resolution.

In addition to the feast cycle, the house chiefs manage a large administrative structure with several departments and programs (Office of the Wet’suwet’en, 2020a). In 2018 the office had approximately 40 full-time employees throughout several departments, including Administration, Human and Social Services, Natural Resources, and Fisheries and Wildlife (Office of the Wet’suwet’en, 2020b). Along with work on the Wet’suwet’en title claim, treaty politics and

review of land/resource development proposals, the office manages several community-based programs including a frontline outreach program for Wet'suwet'en people in several British Columbia cities, an early childhood development program and several programs related to Wet'suwet'en law, constitution drafting, criminal justice and alternatives to the Canadian judicial system (Office of the Wet'suwet'en, 2020c). The Office of the Wet'suwet'en is not to be confused with any of the Wet'suwet'en band council governments.

1.2c Bringing it all together: How does the collective self-determination theory evaluate the Wet'suwet'en people's territorial claim?

To summarize the collective self-determination theory of territorial rights:

A group must satisfy all of the following conditions to successfully claim territorial rights over a particular territory.

(1) Basic justice. The group must be willing and capable of providing “the standard package” of basic human rights, including civil, political, cultural and subsistence rights for all residents, which Stilz observes are the preconditions for authentic reflective endorsement in any society (Patten, 2014, p. 150; Stilz, 2019, p. 117). In the event the group cannot maintain all basic functions of a state through its own political institutions, this condition may be satisfied by the group sharing some responsibilities with another group or the wider state (Moore, 2015, pp. 47–52; Stilz, 2019, pp. 136–38).

(2) Individual residency rights. The group claiming territorial rights must be composed of

members with individually legitimate claims to reside upon the lands that they collectively claim as their territory (Moore, 2015: pp. 36–46; Stilz, 2019: pp. 34–85).

(3) Collective self-determination. (a) The group members must reasonably reflectively endorse their intention to cooperate with the others in the activity of maintaining the social and political world through their own political institutions on the territory they claim (Stilz, 2019, p. 117). (b) There should be an objective public history of political cooperation by the group claiming territorial rights (Moore, 2015, pp. 50–54). (c) The group must form a territorial majority on the lands that they claim (Moore, 2015, pp. 118–22). (d) Internal minorities dissenting from the territorial institutions ought to be accorded similar rights to territorial self-rule if they satisfy conditions 1, 2, 3a, 3b and 3c themselves.

I will now apply each of the conditions required to successfully claim territorial rights to the Wet'suwet'en people:

(1) The Wet'suwet'en, like the Gitksan, maintain a “comprehensive, non-state, decentralized legal order” premised upon formal dialogue for seeking individual consent and public legal norms for the co-ordination of self-directed interaction in groups (Napoleon, 2010, pp. 46, 58; Napoleon, September 2020, personal correspondence). The legitimacy of any Wet'suwet'en government, like all governments, depends on its respect for basic human rights. The Wet'suwet'en people, for as long as they remain committed to protecting the human rights of everyone on their territory through their political institutions, are candidates for territorial rights.

I do not believe this condition is especially challenging for Indigenous peoples. We should not assume Indigenous peoples do not strive to govern themselves according to the standards of international legitimacy such as embodied in the United Nations covenants on human rights. Indigenous peoples often strive to meet similar ideals for reasons internal to their own worldviews and philosophies. As discussed in the first section, Indigenous conceptions of land, which often stress the reciprocal interdependence of the health and well-being of people, land and animals, embody an underlying ethos of mutual responsibility and mutual aid sufficient to protect subsistence rights (Coulthard, 2014; Craft, 2013; Simpson, 2017). This is an ethos materialized in the gift-giving practices of the coastal potlatch system, the robust sharing practices of Indigenous hunters and fishers, and the responsibility of chiefs to steward the well-being of the people (Mills, 1994, pp. 56, 63; Weiss, 2019, pp. 140–41). Similarly, Indigenous philosophies often stress non-interference with others' judgment in pursuit of a good life while regulating human conduct through law (Borrows, 2016; Napoleon, 2013). Indigenous nations can demonstrate a practical convergence on human rights practices without adopting the prevailing liberal theories underpinning Western human rights discourses.

(2) The Wet'suwet'en have occupied their homeland for millennia. As discussed above, the Wet'suwet'en depend on secure access to their homes, communities, fishing places, hunting ranges, berry-picking grounds and other places in order to live out reasonable life plans that they individually affirm, that realize their basic human needs and capabilities, and that allow them to attend to their relationships and obligations. Therefore, the members of the Wet'suwet'en people have residency rights to their homeland.

(3a)–(3b) In order to manage their relationships among themselves, relationships to land and

relationships to outsiders, the historic Wet'suwet'en political system and legal order has survived the continuous efforts of colonial authorities to abolish it. Despite the contact-era Durieu system of Christian theocracy, Indian Act efforts at national division and assimilation through the imposition of six band council governments, and the prohibition of the potlatch by the Canadian government between 1885 and 1951, feasts and traditional governance activities continue to be well attended (Antonia Mills, July 2020, personal correspondence). Similarly, despite the genocidal Canadian residential schools, systematic underfunding of services, and historic and ongoing territorial rights violations, the members of the community at Witsset continue to extensively support their house and clan system and a contemporary Wet'suwet'en way of life that balances participation in the settler labour economy with economic reliance on and enjoyment of the seasonal round of hunting, fishing and gathering on house territories (Daly, 2005, pp. 128–29). Consider also the long-run *Delgamuukw* campaign in the Supreme Court, the anti-pipeline campaign, and the success today of the Office of the Wet'suwet'en in managing a plethora of social programs. All of these facts provide evidence that Wet'suwet'en people strongly reflectively desire to govern themselves according to their own institutions and values, that they have demonstrated an objective public history of political cooperation, and that they have the collective capacity to maintain political institutions.

(3c) There is some demarcation of traditional Wet'suwet'en land, in which the majority of the people who reside there and/or depend upon the land to pursue their life plans are Wet'suwet'en. Here, the Wet'suwet'en people have legitimate territorial jurisdiction over those legal jurisdictions that they claim exclusively as their own and that they are capable of exercising in accordance with human rights. On these lands, the Wet'suwet'en are also entitled to exercise

shared jurisdiction in areas they would prefer to manage in consensual collaboration with some combination of the federal government, provincial government or other First Nations governments. In jurisdictional areas over which the Wet'suwet'en would prefer exclusive jurisdiction but lack capacity to exercise exclusive jurisdiction due to shortfalls of institutional resources (such as money, equipment or training), we should not overlook the fact that Canada likely possesses extensive *sui generis reparative* obligations for systematic historical territorial rights violations. In substance, Canada's corrective or reparative obligations may require Canada to help the Wet'suwet'en (through resource transfers, for example) to exercise these further jurisdictions they would claim.

(3d) To my knowledge, there are no non-Wet'suwet'en groups of sufficient size with residency rights in the area I have described in (3c) that meet conditions 1, 2, 3a, 3b and 3c. Settlers form local majorities in cities, towns and villages that are not included in (3c), and there they are entitled to incorporation within the Canadian state and the jurisdiction of provincial and federal political institutions (provided the conditions for territorial rights are met by settler institutions). In areas of extensive population overlap or overlap in distinct uses by settlers and Indigenous people that are both vital for the individual well-being and autonomy of settlers and Indigenous people, the collective self-determination theory recommends mutually consensual territorial co-management regimes maintained by an evolving treaty framework.

Therefore, as the Wet'suwet'en satisfy conditions (1)–(3d), the Wet'suwet'en possess territorial rights to their traditional homeland according to the collective self-determination theory of territorial rights. The Wet'suwet'en possess inherent rights, flowing from their relationships to

one another and to their land, to manage their territory through their own political institutions.

1.3 The democratic objection

The objection contends that whether or not the Wet'suwet'en people satisfy the conditions for territorial rights, the historic governance institutions cannot exercise these rights on behalf of the Wet'suwet'en people because “hereditary” political authority is inconsistent with the moral reasons for recognizing territorial rights of groups in the first place (political autonomy through correspondence, as discussed above). Instead of directly engaging with the much wider debate about the value of democracy, I will show why the realization of the value of *collective self-determination* by a group does not always require them to maintain democratic decision-making procedures to exercise their territorial rights.

From the perspective of collective self-determination theory, what fundamentally matters to the realization of autonomy under political institutions is each individual's reasonable reflective endorsement of their participation within jointly intentional relationships of social and political cooperation that help maintain the political system administering a public conception of justice on the territory. Thus, if members of political systems premised upon hereditary decision-making procedures reasonably reflectively endorse their intentions to sustain those systems, then each can properly view themselves as actively engaged in maintaining their social and political world when they cooperate with fellow citizens to maintain their state or governance system.

To venture a few culturally specific examples: Wet'suwet'en people who participate in potlaches

and feasts by preparing food, contributing money or making speeches; or who settle disputes regarding ownership and land use rights through the feast system and Wet'suwet'en law; or who go to community or clan-based political consultations or information sessions about development proposals; or who meet to discuss politics, form citizens' coalitions, or question their leaders; or who heed the call of their elders to defend their land-based way of life from invasion by pipeline companies—all can be understood as working together to maintain their own social and political world. Provided those so acting reflectively endorse this jointly intentional cooperation to maintain the system, they will be able to relate to coercive elements of their legal system as extensions of their own will and to otherwise view the social and political world as a non-alienating co-construction that reflects their own values, commitments, and priorities.

Still, the democratic objector might be unconvinced. In democracy, the objector might contend, individuals are related to the selection of the laws, policies and practices of the state insofar as they have a formally equal input in selecting the leaders who determine those laws, policies and practices. However, in hereditary systems, only those selected to be the leaders have the formal power to make decisions, and citizens do not necessarily have an equal say in who becomes a leader. Insofar as autonomy consists in leading life in accordance with one's own informed judgments, then only democracy promotes the realization of a social and political world that citizens can identify with and properly view as their own co-construction, because only then are citizens' judgments and actions, through voting for leaders who legislate, related to the selection of the laws, policies and practices that place requirements on them (in turn, threatening autonomy, as discussed in the first section).

My response to the democratic objection relies upon Anna Stilz's rejoinder to skepticism about the possibility of political autonomy even under electoral/democratic decision-making procedures. Stilz observes that given the pervasive disagreement over values and state objectives that characterizes modern pluralistic democracies, it seems difficult to imagine that there could be consensus among the majority of citizens of any state as to how the state should operate in terms of specific first-order laws, policies and practices (2019, p. 108). Consider policy areas such as property rights, taxation, redistribution, healthcare and gun control. On perhaps the majority of specific issues that matter to them, citizens will be outvoted by their co-citizens on their preferred choices and forced to live under the dis-preferred policy, posing the problem that citizens are “ruled by the majority” rather than their own judgments (2019, p. 106). How does territorial self-rule further individual autonomy under conditions of pervasive disagreement and out-voting?

To address this skepticism with the possibility of political autonomy under democratic institutions, Stilz introduces a fundamental distinction between first-order and second-order correspondence. The shared intention among citizens to cooperate with one another—for example, the intention to act together—which enables correspondence between individual evaluative judgments and the operation of the state through citizens’ jointly intentional action, is said to be a shared intention to support specific institutions structured by second-order values (2019, pp. 108–9). In other words, the correspondence required for political autonomy under law pertains to citizens’ second-order values and the institutions that govern them, rather than first-order values, such as specific policy preferences.

For example, those who affirm their cooperation within the Canadian state are arguably committed to some overlapping set of second-order values, including constitutionalism, judicial review, federalism, parliamentary democracy at the federal and provincial levels, and the division of powers (specific institutions), as well as liberal freedoms, equality, affirmative action, official bilingualism, multiculturalism and multinationalism (specific procedural and substantive values to structure those institutions and deliberation within them), where these institutions are maintained collectively by those fitting the legal definition of “Canadian citizens” (a specific set of co-cooperators). Stilz's argument suggests that as long as Canadians affirm cooperation with one another to maintain institutions structured by these or similar second-order values, then they are able to relate to particular Canadian laws, policies and practices as reflective of their fundamental commitments and of their own collective making. Thus, even if the group to which one is committed departs from one's own first-order judgments in enacting some policy, since one values the collective enterprise itself (one intends to support specific institutions, structured by specific second-order values, maintained by specific co-cooperators), Stilz says “there is an important, second-order sense in which my priorities are reflected in those decisions” (2019, p. 109).

Notably, this second-order level, in the case of Wet'suwet'en people, could include the institution of the house-based system of land rights, Wet'suwet'en law and bahlat political decision making (specific institutions) and the exercising of power in light of values found within Wet'suwet'en law—such as respect for individual consent, clans and houses and the land; reciprocal gift-giving; special respect for salmon and animal nations, water and forests; respect for ancestors and spiritual beings; and so on (specific political values)—where these institutions are

maintained by the willing cooperation of Wet'suwet'en people (specific co-cooperators). If the relevant individual endorsement attitudes are indeed actually in place, it is through willing participation in the jointly intentional practices that sustain the house-based system of government structured by Wet'suwet'en legal and political values that Wet'suwet'en people co-author their social and political world.

It is important to distinguish Indigenous clan-based governance institutions, exemplified in this chapter by the Wet'suwet'en historic governance system, from caste systems. Caste systems distribute basic rights, resources and opportunities for meaningful political participation in unequal ways on the basis of differential caste statuses usually assigned at birth. On the theory I advance here, caste systems are illegitimate vis-à-vis those who are disadvantaged by hierarchy. Caste systems often intentionally undermine the basic rights of subordinated groups or leave subordinated groups systematically vulnerable to violence, eliminating legitimacy on the first condition for territorial rights. Of equal importance, caste societies, by denying civil rights and/or equal social standing to subordinated groups, preclude the conditions for reflective endorsement of political cooperation by subordinated members and/ or otherwise prevent meaningful participation in the deliberative activities at the heart of self-determination. By denying social standing and political voice to subordinated members, castes deny adequate participation in the deliberative practices at the heart of collective self-rule, eroding the sense in which caste members can meaningfully engage in collective authorship of a shared political world that reflects shared political commitments.

The historic Wet'suwet'en governance system is not a caste system. Members of different houses

and clans do not occupy superior and inferior social statuses affecting access to basic rights, opportunities or political participation. Non-chiefs are not social inferiors to chiefs but instead are vital contributors to the upkeep of the overall system. All Wet'suwet'en members are able to participate meaningfully in public deliberation and are integral to the continued power of chiefs and the success of clan-based political decisions. The Wet'suwet'en are a people with robust norms of horizontal contestation, accountability and open public deliberation. As part of a small and largely face-to-face community, Wet'suwet'en citizens may be able to participate more effectively in meaningful public deliberation and political contestation than citizens of large and anonymous societies practising representative democracy with fixed election cycles.

Thus, the democratic objection is misguided. It conceives of collective self-determination in such a way as to eliminate the value of both democratic political institutions for settlers and “hereditary” institutions for the Wet'suwet'en people. Routine electoral democracy is valued by most settler Canadians but not because it enables them to somehow have control over first-order laws, policies and practices and to, in turn, achieve first-order correspondence. Therefore, the democratic objection does not, in fact, challenge the political authority of Wet'suwet'en hereditary institutions on the grounds that cyclical electoral political authority structures are necessary for collective self-determination. In principle, the Wet'suwet'en may exercise their territorial rights through their traditional governance system. Indeed, the historic system of political authority may be the best system for Wet'suwet'en people to realize correspondence between their political institutions and their fundamental commitments and values because it may best reflect their shared values for political cooperation, in turn enabling them to access important relationship-dependent agency goods and promoting their individual autonomy under

law.

1.3a Conflicting claims to political authority and the problem of epistemic access

One reason the recent pipeline issue has been so challenging is that Wet'suwet'en people could endorse both the band councils and the historic system as decision-making procedures to enable collective control over their territory. For example, it is possible that Wet'suwet'en people could come to reflectively endorse a multi-tier system that incorporates electoral democracy at some level exercising some jurisdictions, in conjunction with the historic system at another level exercising other jurisdictions.

It is worth reiterating that the band councils were imposed by the settler state to replace the feast system, to fragment and municipalize nations and to assimilate Indigenous peoples into the settler state. On the self-determination theory, the imposition was without any Wet'suwet'en authority and certainly violated their territorial rights by changing the jurisdictional scope, procedural form and membership of their political institutions without their free, prior and informed consent. However, the institutions themselves may have developed some authority over time, perhaps as some form of limited and local municipal governments within a larger Wet'suwet'en national system. This would be possible if the majority of Wet'suwet'en people now freely reflectively value some components of electoral democracy as a procedural form for making *some* political decisions. Thus, one way to interpret the competing claims to authority would be that there is a colonially induced constitutional conflict internal to the Wet'suwet'en nation. On this view, while the Wet'suwet'en people have territorial rights, it is indeterminate

within the Wet'suwet'en political order itself which institution has specific jurisdiction over land use, resource development or foreign affairs.

However, the patterns of endorsement and second-order evaluative judgments of Wet'suwet'en people, which are essential to the justification of specific political authority structures governing specific jurisdictions on the collective self-determination view, are not readily accessible to settlers. Nor can these be inferred immediately based on data about public attendance at feasts, for which there might be nonpolitical reasons to attend, such as the desire to enjoy cultural goods. Nonetheless, taken too far, this idea risks ignoring the argument that the feast is a complex social, political and legal practice whose primary social meaning is the assertion, negotiation and consensual recognition of political and legal claims through entrenched Wet'suwet'en customary law. The Wet'suwet'en maintain this political and legal system through hard work and personal sacrifices despite colonial domination and the presence of political alternatives in the form of the band council governments. So the survival of the feast system through the colonial onslaught does provide outsiders with evidence for Wet'suwet'en reflective endorsement of that institution of political and legal authority and the fundamental second-order values it uniquely best realizes; however, attendance rates are not themselves conclusive evidence that the historic system uniquely best reflects the people's fundamental commitments and values.

Participation in band council elections provides even less evidence about individual attitudes of reflective endorsement. While voting in a band council election could, for various reasons at various times, be believed to be the right thing to do by various Wet'suwet'en people, this does

not indicate reflective endorsement of the band council system or reflective endorsement of a band council component in the Wet'suwet'en governance system. Instead, participation in the band council system could be resented as an illegitimately compelled necessity to receive recognition as a people, reparations for past injustice, basic services or essential resources from the dominant settler state institutions. Similarly, a failure to vote in a band council election does not necessarily indicate a lack of endorsement of a band council component in the governmental system, as there are many reasons why individuals fail to vote in elections. So outsiders cannot easily interpret mere participation in bands councils as clear evidence of endorsement, as participation may be the result of background coercion and domination by the settler state. Notably, this critique that background domination renders participation an unclear sign of consent applies to the treaty process itself (Alfred, 2001; Nadasdy, 2003; Coulthard, 2014; Hendrix, 2019, pp. 78–86).

While the actual endorsement attitudes and the fundamental political values of Wet'suwet'en people are not immediately knowable by outsiders, the patterns of endorsement and values of the Wet'suwet'en people are likely to be known by members of the people out on the land freely engaging with one another in political conversations about their reasons for supporting potlatches, or for voting in band council elections, or otherwise discussing their shared values as a people going forward. Thus, there may be no question among the majority of Wet'suwet'en people themselves about which institution is, in fact, an authority on this issue—or an authority at all—insofar as they know what the majority of Wet'suwet'en people do, in fact, value.

The extent of asymmetrical access to Wet'suwet'en values and norms is not necessarily

permanent. The complicated process of recording the Anuk Nu'at'en (inherent Wet'suwet'en law) and drafting a written Wet'suwet'en Constitution has been ongoing for several years. This process has culminated in a draft Wet'suwet'en Constitution, which is being reviewed internally by clan members (Office of the Wet'suwet'en, 2021, p. 2). This community-driven work, flowing out of the clan system and community dialogue, may rearticulate inherent Wet'suwet'en legal understandings and may help outsiders better understand the relationship between Wet'suwet'en political institutions, such as the clans, hereditary chiefs, band councils and feasts.

While community-driven referendums do provide significant evidence of collective aspirations, and it would render any government illegitimate to stifle the free assembly and deliberation of residents about their shared future, settler-imposed referendums may be manipulated by the background political, economic and legal context structuring Indigenous–state relations at a given time and may otherwise fail to reflect long-run aspirations for self-determination if taken prematurely. For example, by making recognition of negotiating authority or recognition of further self-government rights contingent on a referendum, the Canadian government could place Wet'suwet'en citizens in a position where they are pressured to prematurely modify their political system in order to achieve specific goals, such as economic development or robust self-government, when there was some alternative downstream of internal politics that would, in the long run, better reflect Wet'suwet'en aspirations *and* achieve moderate consensus about the division of authority. Indigenous legal processes and deliberation driven by community debate and citizen contestation may be able to better rebuild political unity and foster self-determination in communities where colonialism has both sowed division between those who work in different institutions and fragmented nations sharing language, land and laws into multiple legally distinct

bands.

Respect for Wet'suwet'en self-determination requires assurance of respect for Wet'suwet'en territorial rights irrespective of the results of sustained internal politics concerning the precise constitutional structure of Wet'suwet'en society going forward or the specific legal determinations of Wet'suwet'en political authorities within their spheres of territorial jurisdiction. Eventually, a referendum on a codified constitution may be necessary for reasons internal to Wet'suwet'en law. However, it would further dominate the Wet'suwet'en for the Canadian state to unilaterally impose a referendum on political authority, potentially warping the work of Wet'suwet'en legal processes, deliberation and reunification efforts, in order to bring immediate economic certainty for pipeline companies. Nor should the Canadian government expect the Wet'suwet'en Constitution to necessarily mirror other Indigenous constitutions in the region, such as the Nisga'a Constitution. Wet'suwet'en law, like the land and law of any people, is not substitutable for that of another.

Conclusion

I have argued that on the collective self-determination theory, the Wet'suwet'en people possess territorial rights to their homeland—rights that are grounded in a special kind of agency good for the members of the people. Moreover, I have argued that on the same theory, we can see the contours of the justification for the political authority of their historic house-based system of government as the specific structural mechanism for the exercise of territorial rights. As I have demonstrated, the justification for group rights of control over land is closely connected to the

justification for the specific political authority structure that makes and enforces law for the occupants of the territory. In each case, the justification for rights flows from the value of political autonomy for the group members. Finally, my analysis should demonstrate reasons why the house-based authority structure could best promote the political autonomy of Wet'suwet'en people compared to alternatives—namely, the fact that the historic system could best instantiate the fundamental reflective commitments of Wet'suwet'en people.

Chapter 2: Reparative Justice and Territorial Restitution

It is now commonly recognized that settlers live and work on Indigenous territories. Public lectures and cultural events in Canada often begin with an acknowledgment of the First Nation(s) upon whose traditional territory the event takes place. As Murray Sinclair persuasively argues, such land acknowledgements cannot simply recognize that Indigenous peoples once historically had rights and interests in land but that now, after settler wrongdoing, they no longer have any such rights or interests (2021). Indeed, Indigenous theorists contend that Indigenous peoples are not cultural, ethnic, or religious minorities, but nations that maintain political structures and possess inherent territorial jurisdiction over lands settler states wrongfully govern (Corntassel, 2009; Starblanket, 2019; Turner, 2006). In this light, while many non-Indigenous theorists of territorial rights recognize that the primary wrong of settler colonialism consists in the annexation of Indigenous territories and the subjection of Indigenous peoples to alien political structures, we nonetheless require an explanation of what it means for Indigenous peoples to have rights to land that are controlled by settlers today. Does the existence of Indigenous territorial rights mean that settlers must give back the land their states historically took from Indigenous peoples? How much restitution is required by the recognition of Indigenous territorial rights?

The history of settler colonialism is one of a continual succession of wrongdoings, resulting in a broad array of harms to Indigenous peoples that have endured into the present. Within the literature on corrective justice, it is relatively uncontroversial that intentional acts of wrongdoing place perpetrators under reparative obligations to compensate victims (Aristotle, 1980; Weinrib,

1992). This is often thought to be done with the aim of restoring the agency and wellbeing of victims to the level they would have been had the wrongdoing not occurred (Butt, 2009; Waldron, 1992). As I will show in this chapter, we have reason to believe that many of the territorial holdings of contemporary North American states were acquired illegitimately. Furthermore, it is commonplace to regard the identity of those states (as corporate agents) as enduring through time, grounding the potential reparative obligations of states on the basis of historical wrongdoing (Butt, 2009; List and Pettit, 2011; Luoma and Moore, 2023; Miller, 2007; Thompson, 2002). Building on the last chapter, which established an argument for inherent Indigenous territorial rights, this chapter assumes that the non-consensual taking of Indigenous territories is wrong, and that wrongful taking puts wrongdoers under a pro tanto obligation to rectify that wrong. It then goes on to examine the implications for settler territorial holdings in the present. While there are certainly other forms of harm and wrongdoing that are relevant to the assignment of reparative obligations to settler states, this chapter specifically addresses territorial restitution as a dimension of political legitimacy. As I will show, while the theory of territorial rights developed in the last chapter might be thought to be presentist in its evaluation of political claims to territory through its focus on the occupancy and self-determination interests of contemporary populations, nonetheless, facts about historical wrongdoing, the persistence of colonial structures, and reparative justice can be successfully integrated with this theory to construct an account of political legitimacy for decolonizing settler colonial contexts.

The current view among progressive theories of territory, which recognize Indigenous peoplehood and rights to self-determination, is one of recognition of Indigenous territorial autonomy over reserves and limited territorial heartlands, accompanied by justifiable

supersession or downsizing requirements on historic Indigenous holdings. Many philosophers have accepted the *supersession hypothesis*, which contends that claims to restitution of wrongfully taken lands may be defeated by the present needs and interests of contemporary populations (Moore, 2015; Stilz, 2019; Waldron, 1992). It might be thought that more backwards-looking, historical rights theories of territory would judge differently. However, these theories similarly contend that while the historical taking of territory was wrong and burdens the legitimacy of the state today, the victims of territorial injustice are nonetheless under *a duty to downsize* their historical holdings grounded in the human rights of newcomers to an equal opportunity to access the Earth (Simmons, 2016). Thus, contemporary theories of territorial rights appear to seriously limit the scope of mandatory territorial restitution in settler states. Certainly, settlers do have weighty interests in living, working, and pursuing decent lives on Indigenous territories. However, we must ask, how constrained is the territorial scope of required restitution by present (settler) inhabitants' interests on a plausible theory of territorial rights?

In light of this question some theorists have proposed that changing circumstances in Indigenous – settler cases only ground forms of partial supersession, in turn arguing for partial restitution of rights in land, such as rights to collect rent for traditional territories, rights to determine land use policy, and rights to limited autonomy in the event that exclusive restitution is impossible (Meyer and Waligore, 2022; Montero, 2022; Reibold, 2022). Others have proposed that while changing circumstances may defeat claims to restitution, they do not necessarily defeat claims to reparations or symbolic compensation (Harrison, 2021). While these accounts are plausible, without further specification of their conditions of application, they are insufficient to account for the correct balance of moral claims in specific cases of settlement – indeed, in some cases,

restitution of *exclusive jurisdiction* in whole or in part over traditional territory may be justified, while in others, some composite of “exclusive” and “partial” restitution of jurisdictional rights over distinct subsets of a particular traditional territory may be appropriate. Which form of restitution for which portion of territory depends upon a close analysis of case-based facts, discussion of which has largely been neglected in the literature on Indigenous territorial restitution in favour of an over generalized consideration of the position of Indigenous peoples in contemporary states.

In this chapter I develop a normative framework to identify lands settlers should pay as restitution with special attention to hard cases of conflicting occupancy interests between settler and Indigenous groups. Accordingly, I argue that more restitution of *exclusive* territorial jurisdiction to Indigenous peoples than is recognized by contemporary theorists of territory is morally required in settler colonial contexts. Specifically, I argue that to accurately analyze claims to restitution in Indigenous – settler contexts, we must adopt a case-based approach that: (1) is attentive to currently existing patterns of land use by the members of settler and Indigenous groups in the particular geographical region under examination; (2) ascertains the relative weight of the specific (fungible and non-fungible) interests of settler and Indigenous persons that depend upon these and prospective Indigenous and settler uses of land; and (3) considers a variety of intersecting moral considerations that may limit settler occupancy rights by discounting or defeating the moral weight of settler occupancy interests in particular cases – these include contextual considerations about individual liability to mandatory removals, the lesser evil of removal, and the duty to disgorge the benefits of injustice. The upshot of this analysis should be the presentation of a more nuanced and case-based approach for evaluating Indigenous claims to

restitution.

2.1 A brief history of Indigenous – settler relations in Canada

A theory of territorial legitimacy for settler colonial contexts must partly be a reparative theory, insofar as a theory of territorial legitimacy for settler colonial contexts definitionally responds to contexts deeply marred by enduring injustice and domination and attempts to specify the conditions under which political power could be justified in light of the wrongdoing that has structured the past and the present. Thus, a theory of legitimacy must identify forms of political wrongdoing that compromise the justification of political order and propose structures that avoid and appropriately ameliorate these wrongs. In this section, I will provide a brief survey of the history of Indigenous – settler relations in Canada from contact to the present. This history demonstrates the complexity of the current institutional situation, and the interconnected histories and structures which together function to displace Indigenous people from their territories and to prevent their exercise of self-government as nations. These histories also provide an account of a wide set of other wrongs perpetrated by the settler state – including many of the shortfalls of physical, psychological, social, cultural, and economic wellbeing that Indigenous people grapple with in the present. With this brief “history of the present” in place, we will be positioned to consider the question of political legitimacy and territorial restitution in settler colonial contexts in greater detail. As I hope to make clear, any theory of reparative justice for settler colonial contexts must consider in contextual detail the interweaving policies and institutions that have (and continue) to perpetuate harms against Indigenous people and dominate Indigenous nations. With a more fine-grained vision of the wrongdoings, what they are, their

effects, and how they have been (and continue to be) perpetrated, a theory of political legitimacy for settler colonial contexts can provide concrete guidance.

In many ways, the history of Indigenous – settler relationships in North America is a history of treaties: treaties made, treaties broken, treaty-making abandoned, and treaty-making resumed.

There have been many waves of treaty-making during the history of colonial settlement in North America, and each has reflected changing social, economic, and political circumstances. Some of the earliest agreements between Indigenous peoples (such as the Anishinaabe and Haudenosaunee of the North American Northeast) and settlers during the 17th century may be described as *commercial compacts*, although these were not simply contractual exchanges (Miller, 2009, pp. 3-32; Promislow, 2010). Within pre-colonial Indigenous social orders premised upon the logic of kinship, the development of relationships of kinship according to Indigenous customs (through inter-marriage and adoption) was central to building trade and social relationships between Indigenous communities and European fur traders. Similarly, early settler traders learned that in order to be successful they would have to adopt Indigenous political protocols prior to the trade itself, including the smoking of the sacred pipe, involving the Creator in a binding relationship, and gift exchange, embedding the relationship within a broader set of social and political understandings. During this period, settlers also learned the use of wampum as mnemonic device for international communication and solemn commitment (Miller, 2009, pp. 40-42, 50, 82). As Miller writes of this period:

The trade ceremonies in which Hudson's Bay Company representatives engaged with First Nations were remarkable both for their extent and their alignment with First Nations' beliefs and practices. The whole string of events and practices – the fur-trade protocol – constituted the commercial compact. In other words, the relationship established in this way was the treaty.

As British and French colonial settlements grew throughout the Northeast, relationships between Indigenous peoples and settlers became more overtly political and focused on military alliances and the construction of peaceful relationships after military opposition. Early treaties of especial importance during this period include the Peace and Friendship Treaties, negotiated by the Crown in the Atlantic region with several nations, including the Mi'kmaq, between 1726-1779 (Miller, 2009, pp. 33-65). Many of the nations participating in the Peace and Friendship treaties had been at war with the British through military alliances with the French, and the terms of individual treaties reflect the changing balancing of military power during the waves of British – French conflict. Unlike later treaties (including the *Upper Canada Land “Surrenders”* and *Numbered Treaties*), there is no discussion of the cession of land in the written or oral records of the Peace and Friendship Treaties (Battiste, 2016; Crown-Indigenous Relations and Northern Affairs Canada, 2010; Miller, 2009, pp. 35-65). And notably, after the American Revolution, governments refused to enforce them, although they did agree to small reserve lands – often on unfertile land incapable of supporting much life. As a demonstration of the continuity of historic periods and present domination, it is illuminating to observe that the moderate livelihoods clause within the Peace and Friendship treaties, entitling signatory nations to commercially fish for a moderate livelihood income, has been the source of decades of contention – precipitating arson of Mi'kmaw fisheries, harassment, arrests, and resistance in Nova Scotia within the last two years, alongside contestation between settler and Indigenous governments about the authority to approve fisheries licenses (Grant, 2020).

The Government of Canada's position on the Peace and Friendship treaties acknowledges their contemporary legal significance by suggesting a determinate interpretation of their meaning regarding hunting, fishing, and harvesting rights:

The most important of the treaty's provisions dealt with land. On the one hand, the Mi'kmaq and Maliseet agreed not to molest His Majesty's subject in their settlements 'already made or lawfully to be made.' By this clause, both communities formally accepted the legality of existing settlements. They also agreed that the British might establish future settlements, though such settlements could only be made 'lawfully.'... In the reciprocal portion of the treaty, the British agreed not to molest the communities' fishing, hunting, planting and 'other lawful activities. ' Though the treaty did not define the location or size of such fishing, hunting, and planting grounds, we would assume that such grounds lay outside the 'existing settlements.' We would also assume that these grounds were ones that were used by the Mi'kmaq and Maliseet at the time the treaty was signed at 1726.

Crown-Indigenous Relations and Northern Affairs Canada, 2010.

Perhaps the most important treaty of the early colonial period was the Royal Proclamation (1763) which was accompanied by the Treaty of Niagara (1764). Issued by King George the III after the fall of New France, the Royal Proclamation placed several restrictions on settlement, recognizing Indigenous territorial rights and the necessity of treaties to authorize European settlement (Miller, 2009, pp. 66-72). Notably, the Royal Proclamation: forbade encroachment of Indigenous territories, recognizing Indigenous rights to lands not ceded to the Crown; forbade settlement west of the Appalachian Mountains, creating a large "Indian territory" (a partial cause of American Revolution); forbade purchase of Indigenous territories by private individuals; and mandated nation-to-nation agreements between the Crown and Indigenous peoples to permit settlement in areas not covered by treaties. The Royal Proclamation remains a central Canadian constitutional text, referred to both in the written Constitution Act of 1982 and Supreme Court judgments such as *Delgamuukw*. J.R Miller suggests that the motivation of the Crown in

promulgating the Royal Proclamation should be understood in terms of its background context, reflecting the rise in fraudulent land dealings during the 18th century:

Britain was aware that there were good reasons why First Nations should be concerned about their lands. The Proclamation noted that ‘great Frauds and Abuses have been committed in the purchasing Lands of the Indians..’... The phrase ‘great Frauds and Abuses’ was an allusion to a favourite trick of colonial land companies and former entrepreneurs who by dubious means obtained a deed from some member or members of an Indian community—perhaps by the use of inducements such as bribery and alcohol – and then claimed the document was sufficient title the lands. Needless to say, such trickery had caused anger, and sometimes violence, against non-Natives in Indian country.

Miller, 2009, p. 70.

After the declaration of the Royal Proclamation, Indian Superintendent William Johnson promulgated knowledge of the Proclamation and organized a massive conference at Fort Niagara. 2000 Indigenous leaders from 24 nations attended, culminating in the presentation of a Covenant Chain belt by William Johnson. The Treaty of Niagara was viewed as Indigenous “ratification” of the Proclamation which was ambiguous about Indigenous autonomy (Borrows, 1998, p. 155). Anishinaabe legal scholars John Borrows writes that: “When Johnson had finished speaking, a two-row wampum belt was used by First Nation peoples to reflect their understanding of the treaty of Niagara and the words of the Royal Proclamation” (Borrows, 1998, p. 163). Wampum, as discussed above, is a sacred mnemonic device used by Indigenous peoples prior to contact to record political agreements. There are several wampum belts relevant to Canadian Indigenous – settler relations, including the Covenant Chain, and the Two Row Wampum. Borrows, in the paper discussed above, quotes Robert A. William Jr. to clarify the meaning of the Two Row Wampum:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs, and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

Williams, 1986, p. 291.

As we shall see, the meanings inherent within the Two Row Wampum have not been the ethos adopted by the Canadian government in much of its history of dealings with Indigenous peoples.

After the American Revolution, with the swell of loyalists arriving from the former British Colonies south of the border, the British Government saw need for the acquisition of further lands and pursued this through a series of agreements with the Mississauga people for lands on the north shore of Lake Ontario (Miller, 2009, p. 79-87). From the perspective of the British, these were one-time payments of goods in exchange for land surrenders. Miller's work suggests the motive of the Mississauga people in accepting these agreements was to protect themselves from the threat of American expansionism (p. 81). However, in light of the Royal Proclamation, and Indigenous understandings of the meaning of the Two-Row Wampum Belts, we have reason to doubt that a self-governing people would permanently cede lands for a one-time payment. Not only does the very concept of *land surrender* sit uneasily with Indigenous ontologies which do not regard land as something to be owned (Mills, 2017), as we will see throughout this dissertation, people(s) have important land-based practices and attachments, central to their wellbeing and autonomy, that cannot clearly always be monetarily compensated (Miller, 2012;

Moore, 2015; Nine, 2022; Stilz, 2019). It is not certain, in other words, that understanding treaties solely as land surrender documents fits with Indigenous customs and ways, as the Two Row Wampum suggests must be appreciated in legitimate relationships between settler and Indigenous peoples.

Unlike the original Upper Canada Land Treaties, later pre-confederation treaties, such as subsequent rounds of the Upper Canada Treaties, and the Huron Robinson Treaties, explicitly contain clauses for the protection of Indigenous land interests and provide for annual payments in compensation for lost land and resource interests. The Huron Robinson Treaty (1850) promised an annual cash payment to each member of the signatory nations an annual payment indexed to the value of the natural resource development in the region. The annuity was originally approximately \$1.60/ person and raised to \$4 in 1874. It has since not been raised – and this has been the source of an on-going legal battle in Courts. At the time of writing this dissertation, the Government of Canada, Government of Ontario, and the Huron Robinson Treaty signatory First Nations have announced a tentative agreement for \$10 billion in compensation for the failure to raise the rate of annuities (Dufour, 2023a); however, the Government of Ontario is continuing an appeal to the Supreme Court of Canada (Dufour, 2023b).

The final phase of treaty making before the modern period was initiated after the Confederation of Canada, with the intention of opening up settlement in the West. The Numbered Treaties (1-11) provided for the payments of goods, reserve lands, assurances of hunting and fishing rights, and assurances of continued self-governance rights; however, the oral terms and written terms of these treaties diverge (Craft, 2013). Notably the written texts and negotiations often included use

of metaphors of kinship by Crown representatives, which suggest a determinate set of obligations of mutual care and protection within Indigenous cultures, and representatives voluntarily adhered to Indigenous ceremonial and legal practices such as smoking of the peace pipe, and the ceremonial exchange of gifts, which function to create special standing obligations of gratitude and reciprocity within Indigenous law (Craft, 2013). Indigenous lawyers suggest verbal discussions, negotiations, and promises between Crown and Indigenous representatives should be understood as significant to the meaning of the Numbered Treaties. As equal nations with verbal practices of treaty-making and specific legal customs of their own, it would be arbitrary to deny that Indigenous people's interpretations of treaties are less authoritative as compared with the Canadian state and British conventions. However, the Crown has persistently interpreted treaties as rigid land surrenders, rather than as more complex forms of intergovernmental agreement creating forms of partnership whose principles are embodied by the Two Row Wampum (and the Covenant Chain Wampum).

After 1923 and the conclusion of the numbered treaties, the Government of Canada ceased the policy of treaty-making (Miller, pp. 222-249). By this time, racist stereotyping and beliefs in progressive "civilizational stages" and the superiority of "modern" European culture had become the norm (Tully, 2008, p. 227). Indigenous peoples were no longer conceived of as self-governing nations but as backward ethnic or cultural groups subject to the authority of the modern Canadian state. Much of the policy of this period is explicitly assimilatory, regarding Indigenous cultures and political orders as fundamentally of the past, and in the process of inevitably being superseded by modernity (Weiss, 2018). It is worth noting that until 1951, there was a legal prohibition on Indigenous peoples' hiring lawyers to take the Government to court

for recognition of land rights. Consequently, resource development and settlement often proceeded on Indigenous lands without Indigenous consent, and treaties were violated without the possibility of legal recourse to the courts. These processes, alongside settler regulation, placed traditional Indigenous livelihoods and cherished cultural practices, such as hunting, trapping, fishing, and foraging under significant pressure, culminating in disproportionate levels of Indigenous poverty and alienation.

A policy of overarching significance during this period and into the present is the Indian Act, which remains the central piece of Federal Government legislation for the regulation of Indigenous peoples in the absence of a modern treaty agreement. Originally promulgated in 1876, the Indian Act gradually gained force and scope as particular Indigenous nations were forced to comply (Lawrence, 2012; Pasternak, 2017). The Indian Act required Indigenous nations to adopt Western-style governance institutions including a Chief and Councillors and Western-style elections. Traditional governance systems (including those with whom the Crown had made treaties) were no longer clearly recognized as authorities. This is a continued source of colonially induced conflict between Indigenous peoples and the Canadian state, and also within Indigenous peoples themselves. For example, as I discussed in the last chapter, the failure of the Canadian state and industry to receive consent from the Wet'suwet'en hereditary chiefs for the construction of a pipeline through Wet'suwet'en territory led to waves of resistance, including standoffs with the RCMP, the sabotage of equipment, and a weekslong closure of national rail lines. The resistance continues today as the pipeline construction unfolds. More broadly, the Indian Act provides for exceedingly narrow authority, and only over small reserve lands – which were progressively eroded by settlement in contravention to treaty agreement and oral promises. Band

councils are limited to the exercise of a small set of municipal powers, which are effectively exercised at leisure of the federal settler government department responsible for administering Indigenous affairs (*Indian Act*, 1985).

Concurrently with the lapse of treaty relationships and imposition of the Indian Act, the federal government maintained a policy of residential schooling of Indigenous children in partnership with religious organizations such as the Roman Catholic Church and Anglican Church of Canada. 150,000 Indigenous children attended residential schools from the 1880s onward, with the last federally funded residential school closing in 1997. As part of the policy, children were forcibly removed from their families, denied access to their culture, and punished for speaking Indigenous languages (Truth and Reconciliation Commission of Canada, 2015a, 2015b). Attendance at the schools left Indigenous people ill-equipped for both life in their own communities and participation in the settler capitalist economy. Along with the intentional destruction of Indigenous cultures as such, there was rampant physical, sexual, and emotional abuse committed against Indigenous children within the residential schools, which figured prominently in Canada's *Truth and Reconciliation Commission* report on the residential schools, and the subsequent national dialogue (Truth and Reconciliation Commission of Canada, 2015a, 2015b). Thousands of children died within the residential schools' system, mostly from disease in overcrowded and undernourished conditions, leading to the discovery of thousands of unmarked graves throughout Canada during a nationwide campaign in 2021 (Eneas, 2021). The residential schools policy was perhaps the most genocidal policy of the Canadian government, insofar as it functioned to erode the bonds of family, community, and nationhood integral to Indigenous peoples. The legacies of the residential schools are staggering and have been credited

as being the genesis of inter-generational cycles of mental health issues, alienation, substance use disorders, abuse, and poverty within Indigenous communities (Truth and Reconciliation Commission of Canada, 2015c).

It would be impossible to understand the relevant contemporary socioeconomic facts concerning Indigenous peoples in Canada in the present, such as lower levels of educational attainment as compared with non-Indigenous populations (Statistics Canada, 2011), lower levels of income as compared with non-Indigenous populations in Canada (Statistics Canada, 2021), the epidemic of missing and murdered Indigenous women (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019), frequent boil water advisories and environmental contamination in Indigenous communities (Indigenous Services Canada, 2023), or the staggering over-representation of Indigenous people within Canada's prison system (Statistics Canada, 2023) without a discussion of the violation of Indigenous land rights, the lapse in treaty relationships, the imposition of the Indian Act, and enforced attendance at residential schools. This history of Canadian Indigenous – settler relations is not separable from the present circumstances which call out for rectification. Each of these policies functioned (and in many cases continues to function) to harm generations of Indigenous community members, subjecting them to various forms of physical and psychological harm and the denial of opportunities to practice Indigenous languages and ways of life. These have had knock-on effects on subsequent generations' physical and psychological wellbeing; family lives; access to land; access to culture; self-government rights; and relative levels of education, income, and wealth. Moreover, as I have suggested, there has all along the way been Indigenous resistance to these policies – and that resistance continues today. Indigenous nations continue to demand recognition of their rights as

nations, demanding respect for historical treaty agreements; the right to maintain place-based forms of life; the right to regulate their lands and communities; and the right to maintain their own culturally informed systems of government to regulate those lands.

Growing social and political recognition of human rights norms over the last half century has resulted in significant public acknowledgement, commemoration, and compensation paid by the Canadian state for harms perpetrated against the victims of racist and abusive laws, policies, and practices, such as those who suffered within the residential schools system.¹⁹ However, the contemporary mechanisms for resolving territorial conflict and rectifying historic territorial injustices between Indigenous peoples and the Canadian state are not clearly functioning to produce legitimate outcomes concerning historic and on-going territorial injustices, which are arguably at the root of a broader array of harm-producing processes (Wolfe, 2006). Indigenous peoples continue to be constrained in their access, use, and control over of traditional lands. And while the Canadian state now recognizes a form of Indigenous land rights in the form of Aboriginal title, and has renewed the negotiation of treaties, there are significant questions as to the integrity and fairness of these processes flowing from the relative power of settler governments within Canada's constitutional order. The procedural issues with these processes will be addressed in chapters 5 and 6. This chapter instead turns to the justification of rights to restitution, as a form of reparative justice, for historical and on-going violations of territorial rights. As I will show, there are important considerations counting against the complete

¹⁹ These forms of reparation are necessary in their own right – as responses to the physical, sexual, psychological, and cultural harms perpetrated against individual persons and communities by the state and private actors. However, it is the argument of this chapter that insufficient attention has been paid to the widespread territorial wrongdoing at the heart of settler colonial political projects, and that the rectification of these wrongs requires a separate analysis in light of the considerations that justify rights to territory.

restoration of territory to the status *ex quo ante*, that is, to the distribution prior to the start of historical wrongdoing; however, both paradigmatic backwards-looking and forwards-looking theorist have failed to consider the extent of restitution that may be owed to ameliorate the harms of colonialism.

2.2 Territorial rights theory and restitution

In the contemporary philosophical literature, territorial rights are usually conceived of as a bundle of rights and powers to make and enforce law for a territory, control entrance and exit from a territory, and control the extraction and distribution of natural resources from a territory (Miller, 2007, 2012; Moore, 2014, 2015; Nine, 2008, 2022; Simmons, 2001, 2016; Stilz, 2011, 2019). As argued in the last chapter, the key challenge for a theory of territorial rights is to explain why a particular political agent (such as a nation, people, or their state) has some such bundle of rights with respect to a particular geographical region. Different theories of territorial rights place different forward-looking and backward-looking requirements on the justification of territorial claims and thus would seem to judge claims to restitution differently. Here I contrast justificatory theories centred in present-day occupancy and collective self-determination with more backwards-looking views grounded in historical entitlement. I argue that, perhaps counterintuitively, these theories generate largely the same results when evaluating restitution claims, and neither theory has yet sufficiently specified the kinds of lands open to territorial restitution in contemporary colonial contexts.

Theories of territorial rights grounded in the value of collective self-determination explain the

rights of *peoples* to control territory by reference to value of the relationship-dependent goods maintained by people sharing a political identity when they govern themselves together. On these theories, group rights to control territory are grounded in the protection of individuals' interests in secure occupancy, along with individual interests in political agency. While the former value grounds residency rights of individuals to continued access and use of the locale where they live their lives, the latter value, under specific conditions, grounds the rights of a people to govern the occupancy region of its members through its own institutions (Moore, 2015; Stilz, 2015, 2019).

The central idea of occupancy rights is that in living with a place, people develop thick interlocking webs of relationships in and with the place, including relations of friendship, family, economic ties to resources and fellow group members, and associational ties (in religion, sport, education, and so forth). Individuals require secure access to the places they engage in these activities in order to plan and live out lives that they can endorse upon reflection. In addition, the residents of a territory, because they may share values and identities, have mutual political autonomy interests in jointly maintaining independent political structures to govern the places that they live their lives together (Moore, 2015, pp. 36-46; Stilz, 2019, pp. 34-85). By having rights of territorial control, nations can protect and coordinate their members' place-based relationships and ways of life through political institutions and values that are endorsed by members. This enables members to experience themselves as co-authors of the political structure regulating their interests through law (Moore, 2015, pp. 62-65; Stilz, 2015, pp. 8, 16-17).

Provided that the members of the group have occupancy rights (Moore, 2015, pp. 36-46; Stilz, 2019, pp. 34-85) and maintain practices required for the protection of basic rights on their territory (Moore, 2015, p. 51; Stilz, 2019, pp. 117, 157) then the shared reflective endorsement

by the members of the group to cooperate to maintain specific political institutions grounds the group right to control their territory through those institutions (Stilz, 2019). On this view, both Indigenous peoples, and contemporary sovereign states, are candidates for territorial rights.

As these theories require that the group members *legitimately reside* where they live, there is one fundamentally backward-looking requirement on the justification of group territorial rights, namely that the individual group members must not have violated the residency rights of prior inhabitants by settling. Any interpretation of this condition in colonial contexts is bound to be controversial. Notably, both Moore and Stilz contend that second-generation settlers and beyond (the children and grandchildren of original settlers) have residency rights. Correspondingly, because they possess residency rights, they may claim territorial rights provided they will maintain basic justice on the territory (Moore, 2015: 148, 151; Stilz, 2019, p. 60). While those who *choose* to wrongly settle on the land of another people do *not* acquire rights to not be removed and rights to return (e.g. *residency rights*), it would be wrong to displace the descendants of the original settlers because they have weighty interests in continued occupancy that they have not wrongfully acquired—in short, contemporary settlers have done nothing to forfeit their rights to occupancy and self-determination.

In both the normative structure for explaining rights land in terms of central relational interests in land *and* practical verdicts about corrective justice, the Moore – Stilz view on occupancy rights bears significant similarity to Jeremy Waldron’s theory of rights supersession. According to Jeremy Waldron, the claims of victims (and their descendants) to *restitution* for historic losses of lands and resources are sometimes defeated by the needs of present-day populations to continued

access and use of originally wrongfully appropriated resources (Waldron, 1992). Waldron makes, roughly, two arguments for the possibility of justifiable supersession. First, that if property rights are grounded in the centrality of an object to an agent's life plans, then if the original possessor is dispossessed and modifies their life plans to centre around new sources of needs-satisfaction and wellbeing, then the object fails to remain central to their life plans and the subject ceases to possess property in the object. Second, Waldron argues that if it is not legitimate to originally appropriate land from the commons when it deprives people of the capacity to meet their basic needs and some other division would better do so, then we are hard-pressed to find a reason to not redistribute land and resource rights at some time downstream of an initially legitimate appropriation, if this is necessary for people to meet their basic needs due to changes in circumstances that have transpired in the intervening period. This argument implies that even if there was wrongdoing in the past that deprived people of lands or resources to which they were legitimately entitled, if the circumstances have changed such the wrongdoers have become reliant upon those lands or resources for the satisfaction of their needs and life plans, then descendants of wrongdoers now possess rights to the lands and resources, blocking claims to *restitution* of the wrongfully taken land.²⁰

Both Moore and Stilz suggest that the needs and central interests of settlers limit the scope of morally permissible restitution. Moore writes of settler descendants: "morally significant relationships between people and place are likely to develop over time, and these affect the appropriate corrective justice remedy" (2015, p. 139; see also: Stilz, 2019, chps. 2, 3). While

²⁰ It is worth observing that this is consistent with victims having claims to recognition, compensation, co-management and/or non-territorial power sharing even if their claim to *full restitution* of a particular sub-territory is defeated.

Moore recognizes that the corrective justice ideal for theft of land or property is restitution and thus defends Indigenous territorial autonomy over reserves and heartlands, she observes that restitution is not always possible in settler colonial cases due to the interests of the descendants of settlers. She writes: “In cases of multigenerational injustices, where the beneficiaries were born in the contested territory, and themselves have residency or occupancy rights, it would be too great a sacrifice of their own lives to restore the status quo ante, but at the minimum, compensation and apology are required out of respect for the moral equality of the original rights-holders and to make amends for the wrong done to them” (2015, p. 150).

Likewise, Stilz writes of those born among wrongful settlers: “the fact that they cannot be held responsible for the place of their birth means that once their life plans are established, second-generation settlers will have legitimate occupancy rights in the area” (2019, p. 77). And while Stilz is prepared to justify some rights infringement of second-generation settlers in cases “where the second-generation is small,” she believes that there are cases where the second-generation population is large and entrenched and “it may not be appropriate to repatriate *any* settlers” (p. 78).²¹ For Stilz the original occupants continue to possess occupancy rights, however they will have to share the territory with the newcomers and this sharing “will often involve populations who wish to use the territory’s resource in incompatible ways. In such cases, each side will have to make concessions in their way of life to allow those on the other side to enjoy at least core elements of their social and cultural practices” (2019, p. 78).

²¹ Notably, Stilz does not provide a formal defense of the view that the rights infringements of small second-generation settler groups are justified in order to further decolonization goals. Note also that she writes about the size of the settler group, but does not explicitly formulate this in terms of *relative* size (e.g. to the size of the group of people harmed by colonization). My view offers a deontological normative justification for rights infringement, and the importance of *relative* size to the normative justification in particular cases.

We should observe that insofar as an Indigenous group's right *to maintain its way of life without concessions to outsiders' land use goals* is defeated by the moral value of the life plans of innocent second-generation settlers, then the Indigenous people's right *to exclusive territorial control* of the land has been superseded. The potential problem with a supersession view like this is that, without further specifications of real-world case types, it is too permissive of the wrongful taking of territory. Applied to settler - Indigenous contexts, it suggests that settlers who innocently use wrongly acquired Indigenous territories, have acquired rights in those territories *writ large*, defeating Indigenous claims to restitution in all places the innocent second-generation settler group claims or uses.²² However, this conclusion about settler rights is much too broad, suggesting that *all or most settler* claims to wrongfully taken territory are justified by their centrality to settler life plans or the requirements of settler need and thus that all Indigenous peoples uniformly have a duty to compromise on their ways of life. However, it is not obvious that all or most settler uses of territory constitute central life plans, nor that in aggregate the total bundle of settler life plans somehow defeats Indigenous claims to restitution in each place they claim. We require a case-based approach sensitive to the particular facts in order to generate a more perspicuous view of the normative terrain.

This suggests two desiderata for an adequate theory of Indigenous territorial restitution. First, we require a disambiguation of place-based needs and interests, their relative weights and importance, and what use of land they require. Second, we require a more careful analysis of contemporary demographic patterns and patterns of land use that actually obtain in contemporary

²² Here by restitution, I mean the recovery of exclusive territorial jurisdiction over wrongfully taken lands.

contexts. It is an empirical matter the extent and manner to which settlers rely upon specific claimed Indigenous (sub-)territories. Supersession arguments cannot justify all settler land claims *en masse* – whether that is taken to imply complete or partial supersession of Indigenous rights. Without analysis of these case-based facts, supersession arguments are in danger of licensing the failure to make morally mandatory restitutions – including the restoration of exclusive jurisdiction – when the requirements for supersession are not met in cases of wrongful taking.

For these reasons, the theories developed by Moore and Stilz, with their focus on contemporary persons' relationships in and with place, may on first look *seem* more permissive of the wrongful taking of territory than theories of territorial rights that treat national territory as a historical property entitlement that is only legitimately transferred through consent. On perhaps the most prominent “backwards-looking” theory of territorial rights, the broadly Lockean view maintained by John Simmons, purely historical facts about the subjection of groups and territories to state authority are directly relevant to states' territorial authority in the present (2016). Simmons distinguishes historical facts about the incorporation of lands under the states' authority from structural facts about how populations fare under current conditions – for example, facts about wellbeing, democratic inclusion, and the equal protection of rights (p. 50). For Simmons, states acquire legitimate authority over land by acquiring the consent of autonomous individuals to their rule, which implies subjection of their lands to state authority as well (chp. 6). Simmons claims that states lack full legitimacy with respect to lands whose occupants were forcibly historically incorporated into the state *because* they were at some time forcibly incorporated. The territorial authority of states with histories of wrongdoing may never be recovered without the consent of those to whom the land would have passed had wrongdoing not occurred, e.g., the

children of those forcibly historically incorporated (p. 51).

Thus, Simmons' theory might be taken to imply that all or most settler landholdings must be given back to Indigenous nations as restitution unless settlers reach an agreement with Indigenous nations as to compensation for historical wrongdoing and contemporary purchase. However, Simmons' theory does not in fact imply this—indeed, it is even in danger of overextending settler claims to land, much as the previous theory.

While Simmons does not accept “rights supersession,” he does embrace mandatory *downsizing* of historical holdings based on a right of all persons to fair access to available land and resources. Like Waldron's supersession idea, Simmons argues that “moral entitlements, are, indeed, sensitive to changing circumstances” (2016, p. 181). When land is appropriated, newcomers – fellow humans who lack other options for a decent life – are entitled to an appropriate share of the original appropriator's land, which puts owners under a duty to downsize their holdings (p. 182). Original owners have the “right to choose which portions of their holdings to relinquish,” which allows them to “keep the fair share of their original holdings to which they feel most attached, for instance, or in which they have invested the most labour” (p. 184). Simmons distinguishes this view from Waldron's by suggesting that property (territory) holdings are correctly understood as based on historical entitlement, while subject to a fair use proviso such that they not harm or unfairly disadvantage others. This is distinct from Waldron, whom he interprets as adopting an end-state principle (pattern view) of distribution (p. 183). Simmons takes his view to be superior to an end-state view because it can explain why Native Americans are entitled to *particularized shares* of the Earth, e.g. to *portions* of their own historic

territories rather than some other land (chapter 6, footnote 62).

The major limitation of Simmons' account is its under-specification of the metric for measuring equal access to the Earth: what counts as equal access? I would suggest that the only way Simmons could adequately maintain the equal access to territory proviso would be as an equal opportunity to engage in one's form of life with fellow occupancy group members. An alternative account of the metric might suggest that we should be interested in equalizing access to land of the same economic value. However, I argue that we should not adopt a Western ethnocentric conception of land use wherein the value of land is determined by what can be done with it on the global market in order to generate income and wealth, or some other highly contingent cultural vision of the way to live with others and shared places. If we are concerned with the fairness of territorial distribution – or alternately, not unfairly disadvantaging others with our holdings, we should instead attend to the occupancy interests of members of distinct occupancy groups – the forms of relationships, associations, and projects more broadly that people engage in as members of land-based communities – and re-distribute territory when it is necessary in order to allow people to live decent lives as members of distinct occupancy groups.²³ Without doing this, by assuming a Eurocentric capitalist metric for measuring access, the theory is at risk of licensing more harm, through downsizing, to Indigenous ways of life (and thus Indigenous persons) than would be necessary to protect settlers' way of life (and the needs and central life plans of settler persons). Perhaps paradoxically, Simmons' current view invites more downsizing than Jeremy Waldron, whose theory emphasizes the *needs* and the *central life*

²³ For the cases in this chapter, let us assume there is Indigenous unanimity on a distinct way of life from the settlers. Additional work is required to balance Indigenous claims to land for capitalist purposes or cases (largely the majority) where there are mixed ways of life.

plans of present inhabitants as opposed to fair shares of the Earth measured in indeterminate terms. However, with the suggested addition, Simmons' view is likely to offer very similar verdicts to Moore or Stilz's theories and must address the same sorts of case-based challenges.

As I go on to demonstrate, the texture of settler and Indigenous interests in land vary considerable from place to place depending on how land is used by each group. Likewise, we must attend to the temporal dimension of settlement: each of these theorists conceives of wrongful settlement as having occurred primarily in the past, yet "new lands" upon which Indigenous peoples rely are settled in the present. These case-based facts can significantly limit the successful application of the supersession hypothesis. The upshot of this discussion should be that, while apology and compensation remain important to the reparative justice of historical dispossession, territorial restitution is also more often necessary than is recognized.

2.3 Overlapping use and restitution

Case 1: Non-central settler use (provincial parks):

In Canada there many dozens of provincial and national parks that span hundreds, and in many cases, thousands of square kilometers. These parks were often established unilaterally by settler governments with conservation reasons in mind. The establishment of parks is often to the detriment of Indigenous land use because of the increased regulation of hunting, fishing, and other forms of land uses made by Indigenous peoples.²⁴ These cases are distinct from Crown

²⁴ These are not merely subsistence interests, but interests in maintaining a way of life that is uniquely reflectively endorsed by the people – in short, they are interests in what Anna Stilz calls located life plans and practice-dependent interests.

land, or lands owned by the government for future use, because there *is* widespread and relatively continuous settler use of the historic Indigenous territory rather than economic speculation.²⁵ And as with Crown lands, Indigenous nations have always resisted increased settler regulation of lands outlying reserves – often under threat of penalty – including in lands designated as national or provincial parks.

In these cases, Indigenous peoples have an interest in access, use, and control of land that is currently regulated to primarily enable settler uses of the land as a park. However, these settler uses do not plausibly trigger supersession of the Indigenous claim to restitution grounded in Indigenous need or unfulfilled central life plans. In the case of parks, the settler uses are not tied to settlers' basic needs, nor is the recreational use of any particular park often central to any particular settler citizens' life plans.²⁶ Settler use of provincial and national parks are primarily recreational, and reliance of parks for these reasons do not plausibly supersede claims to the land grounded in central Indigenous life plans incorporating land use for subsistence or the enjoyment of central life plans, because recreation as such is not central to a comprehensive plans of life, and thus should not defeat a more central Indigenous purpose in using the land. In short, the plans of settlers to visit a provincial or national park for hiking, swimming, or the enjoyment of nature are often peripheral plans when viewed from the perspective of an overall plan of life.

Provided the settlers do not require use of all national or provincial parks, or all the land

²⁵ If economic use or speculation of some parcel of Crown land (state owned land) is not central to the ability of settlers to satisfy their needs or place-based life plans, then the argument here should likewise apply to those lands.

²⁶ There are exceptions to this stylized presentation of settler interests in access to parks (some settlers may have more robust life plans in the region); thus, we should not overlook the fact that some sharing or mutual accommodation may be necessary in order to allow settler and Indigenous uses to co-exist. Nonetheless, it may be best to return a park or most of its land to the exclusive jurisdictional control of an Indigenous nation who can administer the lands while regulating settler access.

contained within the current boundaries of each, in order to lead lives that they can reflectively endorse, they do not have a central rights-grounding interest in the land. Thus, if we attend to the actual land use patterns and the relative weight of the interests at stake, we can see that mandatory restitution is needed, even when some innocent settlers have incorporated them to some extent into their life plans.

Case 2: Newly settled remote region (new mining venture):

In geographically large colonial states like Canada where the majority of the settler population is condensed in well-established cities and towns, the movement of people to remote regions can be expected to increase as climate change melts tundra, and global population growth increases demand for natural resources like timber and rare earth metals. We can thus expect new migration to remote regions lacking any previous or permanent settler settlement. The influx of resource workers and their families may be to regions where there is no significant settler presence and Indigenous peoples continue to maintain traditional practices over wide areas of land for hunting, fishing, gathering, and other cultural practices. Often the mining and timber industries will disrupt these practices, coercing Indigenous peoples to accept cash settlements and to otherwise assimilate their ways of life.

Provided they have alternatives for living minimally decent lives, settlers may be liable to suffer harm (to their residency interests) to force them to desist from their wrongfully harm-imposing activities (harm-threatening settlement). To say someone is liable to suffer a harm means that imposing the harm on them would not infringe or violate their rights in the circumstances, whereas in other, normal, circumstances, there would be a prohibition on treating the agent in

that way. By threatening harm to innocent others, an agent may forfeit their right not to be harmed in some manner that itself prevents their harming others. Liability to harm bears an internal relationship to proportionality: to say someone is liable to suffer a harm is always to say they are liable to a specific kind and quantity of harm imposed on them in order to prevent their threatening some specific interests of determinate others; to be liable to a specific harm, it is necessary that the defensive harm be proportionate to the good of defence (the prevention of the threat to innocents' specific interests) and that imposing a lesser amount of harm would be insufficient to protect the rights of those defended (McMahan, 2009).

In this case, unlike the descendants of settlers, the member of the mining community are 1st generation settlers who *choose to* engage in settlement that is wrongful, and thus they are liable to suffer the proportionate costs of saving those threatened by their actions. Liability to a particular harm tracks, inter alia, the decision to participate in a harm-imposing process. 1st generation settlers have chosen to engage in a harmful endeavour that deprives Indigenous peoples of central occupancy interests. Thus, these settlers can be removed without any moral objection insofar as they are choosing to engage in activities that wrongfully harms others. This consideration would justify settler governments in expropriating them, closing the mine, and mandating that the settlers only reside within the territory under the appropriate Indigenous land tenure system or that they otherwise return to the legitimate settler occupancy region.

While theorists like Moore and Simmons position the fact of territorial settlement in North America as having occurred in the past, a fact which sets the parameters for corrective justice discourse in terms of innocent second-generation settlers who are not liable to suffer the harms of

removal, I argue this does not automatically follow in every case of prospective restitution. In some cases, territorial colonization in North America is best conceived of as *new rather than enduring*. An adequate theory of restitution for settler – Indigenous cases must make careful distinctions between cases where those enjoying the benefits of injustice are descendants with limited responsibility for causing harm, as opposed to cases where the settlement is fresh, and the settlers are liable for the harm flowing from a recent settlement. This will significantly affect permissible restitution by the lights of existing theory: the interests of these settlers do not count against their mandatory removal, or at least, not without significant discounting.

2.4 Restitution of settler occupied lands and the lesser evil

Many cases are not nearly as simple as those above. Even with judicious drawing of territorial boundaries, there will often be pre-existing settler residents contained within any plausibly demarcated Indigenous territory. Sometimes, such settler groups, while relatively small within well-drawn boundaries, will pose a threat to the ability of the Indigenous nation to maintain its traditional practices and legal order. I argue that on traditional lands where there are isolated settler residents that significantly threaten Indigenous occupancy interests there may be a requirement of corrective justice to resettle these residents. To make this argument, I employ the framework of lesser evil justification in conjunction with a longer-term temporal framing of corrective justice programs. In so doing I hope to specify principled grounds for (some) infringements of settler residency rights, while simultaneously specifying mechanisms for reducing the impact on weighty settler interests.

The core of lesser evil justification is the idea that sometimes we confront situations, usually through the wrongdoing of others or conditions outside of our control, where despite any choice we make some harm will fall on some individual(s), yet we can choose to control where the harm falls. Lesser evil justification theories contend that sometimes we may infringe the rights of some in order to secure the rights of others in cases where harm is inevitable. Thus, in some non-ideal cases, deontic constraints (rights as side-constraints) give way to considerations of the good (the value of protecting many more persons' significantly weighty moral interests). As Rodin argues, in lesser evil justification, while we do compare the *magnitudes* of harm to persons across choices with a mind to choosing the world with the least harm, there are important non-consequentialist considerations that modify how we evaluate the goodness or badness of the states of affairs we might bring about (Rodin, 2011, 2017).

Many take the basic ratio of harm imposed to harm prevented to be 1 to 5 in cases where one would harm an innocent person as a *side-effect* of an action taken to defend the interests of those threatened by an imminent harm (Frowe, 2018). Thus, in contrast to other areas of deontological moral theory, lesser evil justification permits the aggregated sum of the interests of some people to justify infringing the rights of others. However, this does not collapse into consequentialism because the theory is structured around rich deontic conceptions of human agency. First, we do not think that just any interests may be aggregated while respecting the agency of everyone involved. Only very significant human interests plausibly trigger lesser evil justification. It would be degrading, or inadequately respect the agency of those involved, if the relatively weak human interests of many could aggregate to justify significant harm to the agency of one.

Moreover, as discussed, lesser evil justification requires that aggregations of the good to be achieved are *much greater* than the harm imposed. Most importantly, it strictly prohibits *using those harmed in the process as means*, e.g., prohibits instrumentalization.

In keeping with the doctrine of proportionality in lesser evil justification theory, I contend that: infringements of individual rights to residency and/or property to accomplish decolonization objectives must be motivated by serious goals concerning important features of human agency such as individual agents' occupancy and political self-determination interests; the specific infringements must be necessary, the least rights-restricting possible, and likely to accomplish those goals; and the harms must be proportionate in the sense that the value of the goals at stake must be much greater than the interests negatively affected, keeping in mind the factors which modify proportionality analysis such as doing vs. allowing, intending vs. foreseeing, excuses, justifications, and so forth (Rodin, 2011). I argue that these conditions are sometimes met when an Indigenous nation has compelling reasons for seeking to control a geographical region, but there are isolated non-Indigenous users who hold occupancy and/or property rights within the region and the exercise of their occupancy and/or property rights is incompatible with the maintenance of the way of life of the Indigenous nation upon whose traditional territory the settlers live.²⁷

²⁷ It is plausible that relocated settlers in lesser evil cases have rights to compensation as their rights are infringed. Moreover, in the Remote Mining Venture case, settlers may also have claims to compensation from their governments, despite their liability to suffer removal, because their problematic occupancy is partially explained by broader national processes. In short, it may be unfair in both cases to let the costs of decolonization fall solely on the relocated as opposed to a more equitable form of burden-sharing within the settler nation.

Case 3: Isolated settlers:

Consider the hypothetical case of a cluster of isolated farmers who live and graze their cattle in some pasturelands along a river in a remote region. Suppose that these farmers have situated their homesteads in a region significant to the grazing and migration of deer, moose, or caribou herds, the traditional diet staple of a nearby Indigenous nation. Suppose for the sake of argument, the settler use of the land is inconsistent with the Indigenous people maintaining a balanced diet through their own traditional institutions and way of life. The Indigenous people maintain political and legal institutions for the regulation of land use and would prohibit farming in the area claimed by settlers. And finally, suppose the population of the Indigenous nation significantly outnumbers that of the nearby settler community by, for example, 10:1. The farmers are unwilling to voluntarily leave, and no modification of their farming practices is possible to protect the caribou herds. However, if they remain, while the Indigenous people's subsistence needs are met through compensation, the traditional land use practices and the authority of their political institutions will continue to be eroded.²⁸

In this case it is important to observe that the settlers unintentionally harm by way of a side-effect of what in other circumstances would be a fully permissible action: living and working in the place one was born and socialized. As discussed in the previous section, because no one chooses to be born or socialized in a particular place, and the individual settlers do not choose to inflict harm but only choose to perform otherwise permissible daily activities that incidentally

²⁸ It should be observed that in many cases of (especially mass) agriculture, the participants are unlikely to have deep and non-fungible (rather than purely fungible economic) interests in maintaining such place-based practices. This example is thus intended to capture the smaller range of cases where settlers have deep vocational and relational attachments to a particular place.

cause harm by obstructing others from living out their own plans and modifying the environment in ways inconsistent with those plans, the specific individual settlers are not morally responsible for causing harm to Indigenous people's central interests. Having limited moral responsibility, settlers' liability to suffer defensive harm is limited. Mandatory relocation would impair settlers' occupancy rights, however, if we apply the model of lesser evil justification developed above, we can see the rights impairment constitutes a justifiable infringement.

Some infringements of settler occupancy rights are permissible in this case because: (1) the goals of decolonization are substantive, e.g., they concern the ability of an Indigenous nation to engage in practices central to the life plans of many, making Indigenous *occupancy interests*, at issue. Additionally, the members of the nation may have distinct shared *political autonomy* interests in collectively regulating the lands necessary for their material and cultural survival as a group through their own political and legal institutions – for the purposes of justification here I leave the latter interests to the side (either set of interests might do). (2) The measure (non-voluntary relocation) is necessary, because the settler occupancy rights are inconsistent with the foregoing and no other course of action could achieve the compelling goals; (3) the measure is proportionate: the aggregated sum of Indigenous interests is weightier than the settlers' because the Indigenous interest-holders *greatly outnumber* the settler interest-holders; moreover, the way in which defensive harm is caused to the settlers is as a side effect: settlers are not treated as means, which would make justification all the more difficult. Rather, settlers are harmed by the recognition and exercise of Indigenous jurisdiction exercised on behalf of the Indigenous supermajority, and thus are harmed merely as a proportionate side effect. Therefore, territorial restitution is required in the isolated settler case despite the presence of settler occupants and the

fact restitution will infringe their occupancy rights.

Case 4: Larger group of isolated settlers:

There may be cases where the settler group, although significantly smaller than the Indigenous group, is somewhat too large to justify any rights impairment given the demands of proportionality, even given the compelling interests at the heart of the corrective goals. I argue that in some such cases we can identify mechanisms for the realization of corrective justice goals that render redistribution of resources or alteration of institutional practices less burdensome on those affected by change. The lessening of the burden of institutional reform on settler residents adjusts the costs featuring in the proportionality analysis. In short, if we can design corrective strategies that lessen the costs on the duty-bearing group, then more redistribution of land for corrective reasons may be justified than would be justified in the absence of longer-term corrective strategies.

For example, Moore discusses how incorporating a grandfathering condition in changes to institutional policies can lessen the impact of the policy changes on individual interest holders, while simultaneously allowing longer-term revision to distributive patterns (2019). For Moore, institutions and social practices can give rise to legitimate expectations which must be satisfied to avoid significant impairments to our wellbeing and agency interests. Moore argues that sudden changes to rules or policies can create morally significant disruptions in expectations, as individuals have planned significantly based on the old policy, forgoing other opportunities, and thus their wellbeing may be thrown in jeopardy through no fault of their own by the new requirements. Moore argues that it is sometimes plausible that governments have a duty to

grandfather-in those who planned on the basis of the previous policy to the new framework, such that they possess permissions to continue under the previous policies.

In the cases we are envisioning, settlers have residency interests in retaining access and use of their homesteads. Not only are these pre-institutional moral rights, but these moral rights are also conventionalized in a particular form in the common law of property, giving rise to deep and determinate expectations concerning continued access, use, control, and so forth of the family homestead. In these cases, current residents, in comparison to their children or descendants, have very strong attachments to place. The current generation of homesteaders may have formed their life plans, including their vocational goals and most important relationships, with the expectation of continued occupancy of the homestead and its outlying region. These individuals would be significantly harmed by forced resettlement, even if they could pursue some of their projects elsewhere within the geographical domain of the settler occupancy group with whom they share broader features such as language, nationality, and social/ economic customs and practices.

However, the same need not be the case for their children, or potential newcomers. Decolonial policies of land restitution could *grandfather in* those unwilling to sell to the government, while placing restrictions on the transmission of property rights to children, along with restrictions on new internal migration to the region. Children of the current homesteaders, brought up in full knowledge of the necessity of relinquishing control of the homestead (e.g., full knowledge of a prohibition on their inheriting ownership), would not form the same non-substitutable life plans,

projects, and relationships concerning the homestead and community as their parents.²⁹ Thus, they would not develop weighty place-based relationships and agency interests that would count in the balance against restitution. Similarly, while there would be some limit on the freedom of settlers in outlying regions to migrate inwards, this limit is not very significant considering those seeking to migrate would have a sufficient array of other options for where to live among settler territories.

Insofar as we can expect some Indigenous populations to grow in number under conditions where the community land base is restricted in size, and new members of the Indigenous community will not have alternate options for residency within a broader context that enables them to maintain their political identities and cultural practices while the descendants of settler residents will have this option, then the gradual downsizing of settler attachments in such cases may be required to diminish the long-run harms of colonization. While restitution in such cases may not be permissibly accomplished immediately – current residents may already be attached and number too many – it could be accomplished in the longer-term in step with Indigenous resurgence, diminishing the overall harm of settler colonialism without impermissibly impairing settler rights.

²⁹ While he discusses it in somewhat different terms in a different context, this argument bears significant similarity to Kim Angell's (2021) argument that the nations that have perpetrated climate change should gradually modify their way of life and scale back their attachments to some of their land in order to facilitate the resettlement of displaced island nations.

2.5 Benefitting from injustice and settler property holdings

As we have seen, in some cases individual settlers do rely upon traditional Indigenous territories to satisfy their central and non-fungible interests in leading a decent life where they reside, and they are only minimally responsible for harming Indigenous interests. Thus, it would seem their uses of land must be given full weight in analysis of the case-based facts and the apportioning of rights to land. Here I will consider an additional basis for restitution of territory where there is not liability. When someone has blamelessly benefitted from injustice, they may be under an obligation to disgorge those benefits to those who were harmed by the injustice. In other words, benefitting from injustice considerations discount settlers' actual place-based interests in a portion of their holdings and may ground obligations to partially downsize their holdings. These arguments function independently of liability-based arguments and lesser evil justification, grounding *sui generis* obligations that may "stack" with the others in a particular case, ultimately justifying much more restitution of a particular Indigenous traditional territory than any of the relevant considerations alone.

Case 5: Crowded reserve and bloated settler landholdings:

Suppose that several settler properties lie adjacent to a reserve that has become too small to sustain the land use needs of the community. The population is growing and there is an inadequate land base to build additional homes, a new school, and other services. Suppose that an expanded reserve would benefit 50 people (children expected to stay in the community as they grow older), and there are 10 large settler properties (ranches) adjacent to it each sustaining the life plans of 15 people. Suppose that expropriating any one property would satisfy the basic

occupancy interests of the 50. The settler properties are comprised of historic homesteading families that have dwelled in the region for several generations raising cattle, and which together comprise a tight-knit community in conjunction with the nearby settler town. None in region wishes to leave the region or be uprooted, and for this reason any expropriation of their land would necessitate that the family move out of region significantly disrupting life plans.

Recall from above that theorists think that it is worse to foreseeably harm as a side-effect of an intentional action than to merely allow someone to be harmed by omission. Yet, numbers matter, and can affect our judgments about the permissibility of harming when we are confronted with choices of this kind. Recall that the 1:5 lesser evil justification ratio contends that the constraint on harming as a side-effect is outweighed by considerations of the good when approximately five times more lives will be improved than harmed. This ratio is not met in the case of any homesteading family in the case above, prohibiting the redistribution of their full property on deontological lesser evil grounds. I suggest that benefitting from injustice arguments, while they cannot justify the expropriation of any one property *directly*, can justify partial expropriation from the ten, at least 1/10th of each estate, without having to rely on any lesser evil justification.

Several scholars have observed that even if we are in no way morally responsible for causing unjust harm, we may have obligations to disgorge benefits if they have flowed to us from the process that caused unjust harm. A plausible way of reading these arguments is subjunctive: beneficiaries of injustice have a duty to disgorge resources up until the point they are in the condition that should have obtained between the parties were they to interact absent the wrongdoing (Butt, 2009, chp. 4). How might this work in complex intergenerational settlement

cases? The basic intuition here is that we are required to disgorge the benefits we have received from processes that caused wrongful harm, at least when there are descendants of the original victims who remain worse-off and vulnerable on account of the harm, to the point where we are subjectively no better off than we would have been had the injustice not occurred.³⁰

In discussions of counterfactual harm and benefit over multiple generations, a common objection is that those supposedly worse-off on account of an original wrongdoing in fact owe their lives to the wrongdoing – there would have been different people had the wrongdoing not occurred – and thus the descendants of the original victims have no complaint against others on the grounds that they were made worse off. However, we need not fall prey to the non-identity problem in specifying holdings in the counterfactual world. While it is the case that the identities of those in the actual world and the counterfactual world are different, we can attend to the holdings that the enduring *groups* would have had under the just interaction counterfactual, and then determine individual entitlements of typical citizens as downstream of the justifiable group holdings in conjunction with distributive justice considerations for distributing resources and wealth within groups.

Suppose that the counterfactual no wrongdoing world would have led to a world where settler communities and Indigenous communities co-existed while reciprocally respecting their territorial rights, a world with mutual exchange, mutual cultural evolution, and mutual adaptation (call this the harmonious world). In the most likely possible world fitting this description, that is,

³⁰ For this view of specifying the relevant counterfactual in terms of a just historic interaction baseline, see Butt, 2009.

in the world without territorial rights violations where settlement occurred consensually and through dialogue, it may not have been the case that settler population numbers in North America would have grown to the extent that they have today. Here, we might worry again about territorial rights theories which ignore the needs of present-day persons and assign shares to groups purely based on historical considerations such as legitimate acquisition. Indeed, if settler land holdings are strictly confined to the most likely world where no injustice occurred, then because the settler group would have required and would have been conferred a far smaller land base due to demographic considerations, settler land holdings in a rectified present would be inadequate for settlers to meet basic needs and occupancy interests.

Here we should consider Daniel Butt's argument (following Feinberg) that in specifying the relevant counterfactual for determining the extent of harm caused by a historic process, we need not attend to *the probabilistically most likely* counterfactual that would have arisen had the injustice not occurred, in this case the counterfactual where settlers never violated any Indigenous territorial rights and numbered, say, half of their current population.³¹ Instead, we should specify a moralized counterfactual world which avoids the problems with using the probabilistically most likely world: we can specify the counterfactual as *the most harmonious world where settlers nonetheless numbered 33 million people*. Then, with that counterfactual world in mind, we determine the extent of benefitting from injustice by attending to land holdings today compared to the land holdings that a relevantly similar type of contemporary citizen (city-dwelling professional, farmer, and so on) would hold in the counterfactually harmonious world. And the just land holdings of citizens of each type would be a function of the

³¹ For this point see Butt's discussion of Feinberg's taxi driver case (2009).

demands of distributive justice in the relevant counterfactual world under specific group land holdings, allowing us to compare the holdings of counterfactually relevant citizens to similar citizens in the actual world in order to determine their extent of benefitting from injustice.³²

Doubtless, this allows injustice to modify the content of the counterfactual world, as settlement very well might never have grown to its current extent in the world where settlers never violated Indigenous territorial rights. Nonetheless, we do not know this for certain, and this is the closest counterfactual world that we can posit without fundamental violence to human lives today.

Seeing as there are tens of millions of settlers who innocently rely upon traditional Indigenous territories for their survival, it seems appropriate to specify the counterfactual in this way for the purposes of assigning rights to land as it will recognize that they have morally equal fundamental interests in land as humans rather than ignoring their existence and legitimate interests due to their non-existence in the counterfactual world.

How does this framework apply to the case at hand? Quite simply – if we suppose that settler rancher’s landholdings today would be fractionally smaller in a world without the wrongdoing of settler colonialism, then we can expropriate portions of settler landholdings just to that extent even if the kind of use settlers make of the land is central to their innocently acquired life plans.

If settler economic enterprises such as farms and ranches would have been smaller in a world

³² In a world where settlers had not committed any injustice but had chosen to grow their populations to present sizes, they would have in so doing chosen relatively fewer resources per person in order to accommodate Indigenous interests and decision-making about their territory. We must hold settlers to this standard – it is the closest just world that is possible. Notably, this might resolve much of the force of the perverse incentives problem plaguing “forward-looking” theories of territorial rights. By limiting the legitimate holdings (the extent of wealth) of the descendants of original colonizers in this way, the incentive to wrongly acquire territory in order to pass it on one’s offspring in order to create for “them” a wealthier future than they might have had (at others’ expense) is diminished.

without wrongdoing with population numbers of the size we have today, we can reduce the size of landholdings in the present to make space for the victims of wrongdoing. So, the solution in *Crowded reserve* is to expropriate 1/10th of each settler property, assuming the landholdings would be at least 1/10th smaller and this does not affect settlers' basic interests.³³

Objection: Does lesser evil justification justify the expropriation of Indigenous land?

Theorists may worry that if settler land can be expropriated for Indigenous purposes, Indigenous land can be expropriated for settler purposes. The theory offered here does not justify the expropriation of Indigenous land for two reasons. The first reason is an asymmetry in harm: the harm to settlers caused by mandatory relocation or expropriation is often less than the harm to Indigenous persons of forced removal or expropriation. The second reason is that the intended objective in cases where settlers are expropriated is fundamentally distinct – and far more morally significant – than the operative reason in actual contemporary Aboriginal rights and title infringements (and those most often anticipated).

To see this, consider that settlers' place-based interests are sometimes somewhat less weighty in comparison to Indigenous place-based interests because they are less tethered to a particular place. Many settler life plans and interests are often multiply realizable in many different cities, towns, or regions. For example, in the settler removal cases I have discussed, there is likely to be a larger settler occupancy region wherein the settlers' language is spoken, and their preferred

³³ It may not be possible to do this given the layout of existing settler ranches. If so, I take it that one property could be redistributed in entirety, provided the other settlers are made to re-adjust their holdings to create a new plot for the expropriated rancher.

social, religious, legal, political, and economic institutions are maintained by the majority group. Indigenous people – whose nations are often small and localized – often have just the one option to access relationship-dependent goods of these kinds. Thus, removal for a settler harms fewer central interests than removal for an Indigenous person because it touches fewer central human social interests such as the intelligibility of social, economic, and political institutions. As such, the burden of justification for “removing” Indigenous persons is greater.

It also bears observation that most settler interests in impairing Indigenous territorial rights are economic, and not economic in the sense of providing for basic needs. For example, much of the exploitation of Indigenous territory is for the generation of greater profits for Canadian corporations or for multinational investors. The economic wellbeing of Canada is tied to extractive activities due to the choices of Canadian citizens and policymakers, and it is debatable whether this is in the long-run economic interest of the country or the only option for providing employment. Yet relative economic gain – as compared with the satisfaction of basic needs and the maintenance of our fundamental relationships and plans – is not the kind of good that can justify rights infringement in lesser evil justification. As I have argued, the goods at stake in lesser evil justification ought to touch to the core of human agency. Thus, lesser evil justification does not justify Indigenous removal or the circumscription of Indigenous control in most cases where Indigenous rights are impaired by settlers today.

Conclusion

I began this chapter by questioning the meaning of Indigenous land acknowledgements under present circumstances. As I have argued, the acknowledgment of Indigenous territorial rights must often be accompanied by settler restitution of territory. While theorists such as Moore and Stilz correctly identify weighty human interests in land possessed by settlers, they also tend to deny the possibility of full restitution by neglecting other relevant case-based considerations. Doubtless, there will indeed be lands for which restitution of exclusive jurisdiction is impermissible due to large settlements and central settler uses of land where there is not individual settler liability to removal and there exists no alternative for settlers to maintain their way of life. In those cases, we must look for other forms of corrective justice (partial restitution, power sharing, co-management, non-territorial autonomy, compensation, and so on) to satisfy Indigenous interests in land and self-determination. However, as I have argued, to ascertain the scope and kind of territorial restitution owed in a given case, we must balance distinct kinds of correctly weighted human interests in using a particular place, with attention to the number of those affected in respect of each kind of interest, the affected populations' liabilities and special duties, and their alternative options to achieve adequate interest satisfaction through relocation.

With this approach, we can see that claims to restitution are robustly heterogenous, and that remedies may exceed partial restitution depending on case-based facts concerning land and people. In some cases, Indigenous peoples already form clear territorial majorities maintaining uses of the territory that are central to their ways of life while competing settler interests are insufficient to supersede Indigenous interests in occupancy and jurisdiction. In other cases, those

that engage in new settlement are individually liable to removal for choosing to commit a fresh wrong. Yet, in older settlements where settlers possess occupancy rights, proportionality analysis may also permit mandatory removals of settlers as the lesser evil. Moreover, in larger settlements, longer-run decolonization strategies may achieve corrective justice goals by preventing the formation of place-grounded projects and relationships by new generations of settlers. Finally, individual settlers may be forced to reduce the size of their land holdings because they have benefitted systematically from a process which has dispossessed Indigenous groups of their land and allocated them to settlers. When evaluating a claim to restitution, we must keep each of these considerations in view in order to ascertain the correct remedy.

Chapter 3: The Value of Federalism in Indigenous - Settler Contexts

According to the Supreme Court of Canada, federalism is a basic principle of the Canadian constitutional order, along with democracy, constitutionalism and the rule of law, and respect for minority rights (*Reference re: Secession of Quebec*, 1998).³⁴ While Indigenous nations were never included as participants in the drafting of the *British North America Act* in 1867 (*Constitution Act*, 1867) – which laid out the constitutional structure of the Canadian state – Indigenous and non-Indigenous scholars, politicians, and public commissions have often called for the recognition of Indigenous nationhood as a “third order” of government within a Canadian political order premised upon historical and contemporary treaties and multinational federalism (Henderson 1994, 2002; Hueglin, 1994, 2000, 2003, 2013; Hylton and Belanger, 2008; Ladner, 2003, 2005, 2019; Mills, 2017; Peach and Rasmussen, 2005; Royal Commission on Aboriginal Peoples, 1996; Tully, 2008). Similarly, despite, never having been included as full participants in the constitutional talks leading up to the patriation of the constitution from Great Britain and the creation of the *Canadian Charter of Rights and Freedoms* (1982) and the *Constitution Act* (1982) – Aboriginal title and treaty rights were constitutionalized in S. 25 of the *Charter* and S. 35 of the *Constitution Act* in part due to Indigenous resistance and activism in response to exclusion from the constitutional dialogue. While Indigenous scholars, activists, and their allies have argued that

³⁴ While federalism is discussed in terms of a principle in the *Secession reference*, the *Constitution Act* also explicitly divides jurisdictional powers among provinces and a federal government in a paradigmatically federal structure. Presumably the federal principle provides for the interpretation of this and other constitutional documents in an explicitly federal way, e.g., to enable the interpretation of the division of powers and the wider Canadian constitutional order in the spirit of a federal arrangement (the meaning of “federalism” will be discussed further in this chapter– it is not clear that we have a clear understanding of the nature of federalism or what federalism normatively aims after – this is evaluative content one would expect to attend a normative principle in a complete theory of constitutional design).

S. 25 and S. 35 be interpreted to recognize an inherent right of Indigenous self-government, the Courts have not clearly articulated the scope of such inherent self-government rights – although it has been a policy of Canadian governments since 1995 to nominally recognize an inherent right of Aboriginal self-government in land claims and self-government negotiations (Crown-Indigenous Relations and Northern Affairs Canada, 2023a, 2023b; Starblanket, 2019, pp. 19-20).³⁵ It is also noteworthy that within the wider global context, international legal norms pertaining to Indigenous self-determination recognize inherent rights of Indigenous self-determination *within states* – implying rights to self-government within some kind of federal system.³⁶

These legal and political facts pose fundamental questions about the relationships between settler and Indigenous peoples in political associations. Specifically, they pose questions about the underlying justifications for and relationship between Indigenous self-government and federalism in settler and Indigenous relationships. If, as we have seen from the previous two

³⁵ The adoption of United Nations Declaration on the Rights of Indigenous Peoples into Canadian domestic law will challenge the Canadian status quo practice of constraining recognition of Aboriginal *self-government rights* to those confined within the Indian Act and those conferred by virtue of a self-government agreement – however it is too early to say how exactly the courts will do this or whether they will defer to the comprehensive land claims process.

³⁶ The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) explicitly notes that the right to self-determination should not be interpreted to impair the territorial integrity of states (Article 46). And while UNDRIP does not mention the word “federalism,” Article 4 states: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” This is in keeping with a “federal” interpretation of the self-determination rights of Indigenous peoples insofar as federalism paradigmatically enables local control over local matters while also providing for a state-level government to manage state-level affairs. It is not an argument of this chapter that Indigenous nations must always exercise their right to self-determination through federal association – I view that general principle as arbitrarily restrictive – however, I aim to provide an account of the value of federalism that could explain why federalism is preferable for Indigenous – settler relations in some contexts, provided certain conditions of fairness and non-domination are met. As it stands, from the perspective of ideal theory, UNDRIP is too restrictive of Indigenous self-determination, as these conditions are not always met; nor is federalism always clearly normatively preferable in every case (let alone obligatory) – even if federal arrangements could be fair and non-dominating.

chapters, Indigenous nations are self-determining peoples with inherent territorial rights and rights to restitution of territory, why would federalism be an appropriate institutional configuration for exercising these rights? Indeed – how should we conceive of mutually justifiable forms of political cooperation in the context of self-determining peoples with inherent rights of self-government within particular territories, especially when those peoples diverge in moral and political conceptions and ways of life – without privileging the viewpoint of one group over the others? In light of Indigenous and non-Indigenous critiques of colonialism as a form of political subjection that takes the form of territorial annexation and forcible inclusion of the nation’s members in the settler state (Pasternak, 2017; Turner, 2006; Wolfe, 2006), why should we think that federalism – which involves systematic political cooperation and sharing rule between governments, will not inevitably lead to further domination by the numerically dominant (settler) group? Indeed, prominent Indigenous theorists have argued precisely that settler domination in the contemporary period takes the form of incorporation of Indigenous nations within the settler state through asymmetrical forms of recognition, accommodation and federalism controlled by settler governments (Corntassel, 2008; Coulthard, 2014; Taiaiake, 2001; Starblanket, 2019; Turner, 2006).

The following four chapters will explore the normative reasons for political partnership between settler and Indigenous peoples in the construction of shared political associations, and the political process and structure by means of which the value of federalism for settler and Indigenous political relationships can be realized. I will argue for a philosophical theory of treaty federalism, or alternatively treaty constitutionalism (Ladner, 2019; Tully, 1995), premised upon mutual recognition of nationhood, intercultural dialogue, treaties, legal pluralism, and kinship.

More specifically, I will argue that the value of federalism for settler and Indigenous peoples can be understood in terms of the mutual empowerment of self-determining nations embedded in relations of interdependency. As I will demonstrate through engagement with Anishinaabe conceptions of constitutionalism, nations in federal structures should be understood to have fundamentally relational, mutually referring identities. Correspondingly, the relationships between nations may be valuable for their own sake, and integral to the self-determination of a self-determining people insofar as the relationship is itself a site for self-determination through mutual gifting (Mills, 2019). In offering this theory, I hope to reconcile the idea of self-determination underlying contemporary liberal theories of territorial rights with Anishinaabe conceptions of treaty and political belonging. We will see that self-determination need not imply the absence of relationships and interdependency; indeed, in treaty federations, the constituent nations realize their freedom partly through enabling the others to exercise their own reciprocal freedom, and the negotiation of interdependency forms the basis for the construction of a shared identity and kinship. Constitutionalism, as a way of entrenching complex political arrangements and legal instruments from unilateral settler government intervention into demarcated spheres of Indigenous jurisdiction is a useful structure and practice for maintaining legitimate settler – Indigenous relationships in a federal context; however, as I will argue, constitutionalism must also be accompanied by overlapping public intercultural discourses, an ethos of diversity awareness, and careful, continuous, intergovernmental negotiations if political associations comprised of Indigenous and settler nations are to ever achieve a stable and just distribution of jurisdictional powers and lands. Pursuant to this task, in chapter 6 I articulate several normative standards – including standards of fairness – for the distribution of jurisdictional powers between nations in multinational federations – standards that should guide intergovernmental

relationships.

To begin this endeavour, chapter 3 considers the question of the general value of federalism as an institutional design option within Western philosophical theories – that is, as an account of the value of federalism as a constitutional principle. After a brief discussion of the definition and institutional practice of federalism in Canada, I consider four initial potential explanations of the value of federal arrangements over centralized alternatives: administrative efficiency, citizen preference maximization, non-domination by the central government, and stability. I argue that while these considerations are often contextually salient, each of these theories fails to capture considerations of the over-riding significance for institutional design in a particular class of cases, namely in multinational contexts. As we have seen, peoples, such as Indigenous peoples, possess inherent territorial rights on account of their interests in occupancy and self-determination. While administrative efficiency, preference maximization, non-domination by the central government, and state stability might be central considerations for the design of a state wherein the citizenry shares a single national or political identity (or alternatively, in the design of regional or provincial institutions where the region itself is largely culturally, nationally, or politically homogenous), in cases of multinational diversity we must attend to the reality of national diversity. A plausible account of the value of federalism in multinational cases must make reference to the territorial rights of self-determining peoples in its explanation of the reason to adopt a federal structure, because a federal structure will affect the exercise of inherent rights of territorial jurisdiction. This the first desideratum of an adequate theory of federalism for states comprising settler and Indigenous *peoples*: that it articulate the value of federalism in a way consistent with multinational difference, and in such a way as is consistent with the inherent

territorial rights of self-determining peoples.

Some may argue that there is in fact a strand of philosophical theory that engages federalism in precisely these terms—namely as a mechanism for the recognition of national diversity. I do not deny this but argue that this strand of philosophical theory is seriously incomplete on account of its under-theorization of the interests in territorial self-determination of the component nations of a multinational federation. Thus, in the second part of the chapter, I consider a view, broadly based on the ideas of David Miller, Helder de Schutter, and Alan Patten, that explains the value of federalism in terms of fairly recognizing a diversity of political identities on a territory, what I call the “fairness in recognition of national identities view.” Given the above desideratum for a theory of the value of multinational federalism, this view is plausible. However, I argue it insufficiently attends to the core problems confronting any multinational federation. First, while the view explains the value of federalism vis-à-vis centralized alternatives: it fails to explain the value of federal association over secession (in those case where federalism is preferable to secession). By this light, it fails according to its own terms. However, this failure of explanation is especially significant once we consider the possible imbalances of power and institutional recognition between majority and minority national populations – each with inherent territorial rights and interests in self-determination through institutions– in federal states more closely. Second, and relatedly, the view does not give us an account of how federations ought to distribute jurisdictional rights and political competencies, leaving the view open to the charge that it gives no account of how to avoid inter-group domination in the politics of a federal state containing two or more peoples. I use the fairness in recognition view to articulate the non-domination consideration as a second desideratum of a plausible philosophical theory of

federalism for settler and Indigenous peoples. I also use the section as the opportunity to discuss some of the more concrete design options that federalism offers – including the composition and design of the federal legislative assembly and the federal executive cabinet. I argue these constitutional design options will form part of any plausible story in response to the two desiderata, but they are insufficient on their own to solve the problems for the fair distribution of recognition view.

I conclude the chapter with the argument that we would be mistaken in the efforts to offer a single value to capture the value of federalism for all cases where federalism is a justifiable institutional design. We ought to adopt a case-based approach to the value of federal design options wherein we recognize that the justifying value of federal institutional structures varies given facts about the populations to whom a justification is owed. A limitation of Western theories of federalism is that they have not adequately accounted for the territorial rights of constituent self-determining nations in multinational states.

3.1 Federalism: practice and definition

Federalism is a constitutional principle of the Canadian legal and political order, alongside other fundamental structuring principles such as the rule of law, protection of minority rights, and democracy. In the Canadian context, federalism structures the relationships between the provinces and federal government, pursuant to S. 91 and S. 92 of the *Constitution Act* (1867) which distributes jurisdictional powers among the distinct levels of government. As a constitutional principle in a legal system organized by the principle of constitutionalism and

constitutional supremacy (*Constitution Act*, 1982, S.52), federalism insulates the jurisdictional powers, and enactments of the provinces under their jurisdictional authority, from ordinary processes of federal legislation and repeal. For example, it is invalid as a matter of law for Parliament to overstep the federal division of jurisdictional powers and responsibilities in the constitution by legislating in the domain of provincial law. And under *constitutional supremacy*, the Supreme Court of Canada is empowered to invalidate legislation that conflicts with the constitution, including acts which conflict with the constitutionally entrenched federal distribution of powers. Because the Canadian state and political actors at all levels are robustly committed to acting in conformity with the rule of law understood in positive law terms – that is, commitment to the second-order rules structuring the Canadian legal order is strong among the official class of the state (Hart, 1961) – the Supreme Court exercises a significant degree of practical political power to uphold the federal system. This is not to say that changes to the distribution of powers or other components of the federal order are impossible. The Canadian constitution, for example, provides special procedures for its reform, requiring multiple majorities to consent to constitutional changes. However, the difficulties with passing ordinary legislation are amplified by the multiplication of legislative assemblies that must consent in order to modify the constitution. In order for a proposed constitutional change to become law, the federal parliament, federal senate, and at least 7 out of the 10 provinces, together representing at least 50% of the population, must agree to the change (*Constitution Act*, 1982, S. 42). This difficulty is amplified in proposed changes concerning the monarchy, the French and English languages, and the amendment formula itself: these require all ten provinces to agree (*Constitution Act*, 1982, S. 41). The result of this system of constitutionalized federalism is an enduring decentralized distribution of legislative and executive authority within the Canadian

state.

In this chapter, I investigate the underlying normative justification for adopting a federal organization of the state. This exercise might be thought to be important for several reasons. First, a coherent theory of constitutional law will require an explanation of the *value* of federalism – an explanation that coheres with other central elements of the political and legal order – in order to guide adjudication of constitutional claims. When a constitutional legal doctrine like federalism conflicts with another set of practices such as the protection of minorities or democracy in a given *case*, we will require some account of the underlying principles that explain those legal practices of federalism, democracy, and the protection of minorities in order to resolve the case. Resolution might occur by, for example, observing the limits of the value of one constitutional practice in the case at hand, or to otherwise develop a priority ordering of the relevant practices in the case, where the justification of that priority order is grounded in the coherence of the overall theory of constitutional law which explains the value of those practices in terms of well-defined principles that then can be contextually reasoned about. Moreover, and more important for our purposes, identifying the principles underlying the practice of federalism can be useful for adjudicating conflicts *between governments* within a federal state.³⁷

³⁷ Federalism is a practice involving the distribution of rights and responsibilities between governments in a political order. With the correct understanding of the relationship between the self-determination of groups, and federalism as constitutional principle, we can think about the mutual rights and obligations of the units comprising a federal state. Working towards an account of the value of federal practices is thus relevant to developing a normative theory of constitutional law necessary for constitutional adjudication (Dworkin, 1977; 1986). While I will at times gesture towards other political and legal practices, both *de facto* practices and those recommended by normative theory (such as other fundamental constitutional principles), I cannot provide a complete theory account of constitutionalism here– nor even to try to fully integrate these distinctive sets of practices through such a theory.

Secondly, many Indigenous claims for self-determination are either explicitly made in terms of federalism or assumed to be justified in the context of a broader federal order. Contemporary Indigenous treaties attain a constitutional status upon their ratification, and Indigenous lawyers have argued that the correct way to understand historical treaties is as constitutional documents that construct a multinational *federal* order (Henderson, 1994). This view is referred to alternatively as treaty constitutionalism (Ladner, 2019) or treaty federalism (Henderson, 1994, 2002; Hueglin, 1994, 2000, 2003, 2013; Tully, 2008). However, Indigenous peoples were not included in any of Canada’s major constitutional conferences, and their voices have been systematically excluded from political and legal discourse about the Canadian constitution (Turner, 2006). One objective of this chapter is thus to arrive at a normative explanation of the value of federalism which is sensitive to the conditions of Indigenous peoples in contemporary states, and which can provide guidance about the inclusion of Indigenous peoples as federal partners. In other words, why, and how, should settler and Indigenous peoples build federal partnerships between their nations, uniting under a shared constitutional order? Answering this question may be especially pressing if constitutional reform is not forthcoming through “normal” politics – Courts may be called upon to make judgments about the normative foundations of the constitutional order and its relationship to Indigenous peoples in order to generate a coherent theory of constitutional law given the developments of Canadian common law and the application of international law to the Canadian state. Interrogating the question of the values underlying federalism as a constitutional principle will provide guidance in this domain.

However, I aim to develop a coherent normative account of the value of *federalism* which may or may not cohere, ultimately, with the broader set of political and legal materials relevant to the development of a theory of constitutional adjudication. I leave this to future work and other theorists.

Before undertaking this analysis, it is important to have a rough definition of federalism. I adopt a normatively thin institutional definition of federalism. Federalism obtains wherever there is a political system that distributes political power in such a way as distinct groups of people simultaneously enjoy self-rule with respect to some jurisdictions and share rule with other groups with respect to other jurisdictions. This is usually given form through a territorialized distribution of powers between regional governments, representing a particular geographical space and possessing some legislative and executive powers over the people there, and the central government, exercising other legislative and executive power over the entire territory. With this general concept, we can theoretically imagine innumerable variations of distributions of powers and decision-procedures relating multiple territories and levels of government. Importantly, there is debate within the literature where devolved systems of government conferring autonomy upon regions within a state— such as Northern Ireland, Scotland, and Wales within the United Kingdom, constitute federal systems.³⁸ I will not directly discuss that debate here, while assuming that there is something unique about the stability of federalism when it is protected via the constitution, and that this stability of the decentralization of political powers among units is important for understanding the value or disvalue of federalism.

Considering the fact that existing real-world federations often combine multiple ethnic, cultural, or national groups, the literature on federalism is understandably tied to broader discussions of cultural and national diversity within states (Norman, 2006; Kymlicka; 1995, 1998, 2000;

³⁸ A major difference between these cases and the case of Canada is that federalism in Canada is, as discussed, entrenched within the Constitution. Contrarily, the autonomy of Northern Ireland, Scotland, and Wales, formally exists by virtue of a statute of Westminster Parliament, and their autonomy is therefore comparatively less secure within the United Kingdom constitutional system than Quebec's autonomy (for example) within the Canadian constitutional system.

Gagnon and Tully, 2001). Indeed, some federations, especially those with which we are concerned, are comprised of multiple national groups. As Tully says, “a ‘multinational society’ or ‘multinational democracy’ is a type of ‘free and democratic society’ that includes more than one ‘nation,’ or, more accurately, more than one ‘member’ of the society demands recognition as a nation or nations” (2007, p. 192). Tully, quoting the Supreme Court of Canada in the Secession Reference case, writes that multinational societies such as Canada are usually but not always *federations*, or societies in which “democratic self-government is distributed in such a way that citizens ‘participate concurrently in different collectivities’” (Tully, 2008, p. 194; *Reference re the Secession of Quebec*, 1998, S. 66). This form of cross-cutting federal polity is in distinction to confederal entities where the shared legislative authority is comprised of representatives delegated by regions rather than directly democratically elected by a cross-cutting federal demos in federal elections. Thus, in Canada, “the jurisdictions, modes of participation and representation, and the national and multinational identities of citizens overlap and are subject to negotiation” (Tully, 2008, p. 187). Within these contests, provinces, states, regions, and Indigenous peoples demand to “participate in different democratic institutions” (Tully, p. 150).

The challenge is to understand what value would inhere in political institutions fitting this general conception, which in turn should guide us in choosing institutional designs within the options we possess, or in interpreting the underlying goals and values of federalism in constitutional cases involving the conflict of governments within a federation.

Below, I canvass some alternative conceptions of federalism as an institutional design option and the value it might be thought to achieve vis-à-vis centralized state forms or state breakup through

secession. I argue that several possible theories of the value of federalism (administrative efficiency, citizen preferences, non-domination by the central government, and stability) specify considerations potentially of relevance to the design of political institutions insofar as they identify a feature sometimes achieved by federal designs that is of genuine value. However, I argue that these considerations by themselves do not adequately specify the conditions under which each kind of consideration should be paramount in our deliberations about the design of political institutions. We ought, instead, adopt an approach that recognizes that the primary value achieved by the institutional design of federalism depends on the case at hand, that is, depends on facts about the populations for which an institutional design is required. In multinational contexts, we should especially attend to the value of self-determination underlying demands for self-government and the territorial rights of the constituent groups, whereas in more mononational contexts the other considerations might be of paramount importance. In other words, in multinational cases, federal principles must give priority to considerations of national self-determination and be consistent with a theory of the value of federalism *for nations* with territorial rights.

3.2 Administrative efficiency

Within the contemporary literature there are many distinctive theories about the value achieved by federalism. On one theory stressing consequences, the division of a state into regions is said to be more efficient in terms of the expenditure of energy and resources in the administration of the functions of the state (Weinstock, 2001). This view may be tied to a concern for the wellbeing of citizens, assumed to be better served by lower program costs all else being equal.

And this view might contend that on-the-ground decision-making by a provincial agency or legislature can be more responsive to the regional needs of citizens and local events than a central agency or legislature.³⁹ This is because local authorities may have better knowledge of the geographical and social facts relevant to the application of laws and design of policies to meet the goals of the state as a whole in a particular region.

Supposing the state is concerned with water quality and the provision of fresh water to the citizenry, regional governments may be better positioned to consult stakeholders, conduct geographical surveys, monitor the construction and maintenance of water treatment plants, dams, and sanitation infrastructure, and regulate the resulting physical and social infrastructure of water management into the future for the benefit of citizens. By comparison, large bureaucracies at the centre tasked with all of these responsibilities for the entire state may be relatively inefficient, or otherwise uninformed about the conditions relevant to the application of laws, and so on, and thereby produce inferior policy. Locals, it may be presumed, are better motivated and more knowledgeable to ascertain the correct facts and put in place the best institutions to regulate local issues such as water and resource management (Weinstock, 2001; Nine, 2022). Thus, federalism, which distributes responsibilities such as these among governments, might be thought to be preferable to a model whereby these responsibilities are constitutionally entrenched in a central government because it lowers the costs of service administration and distributes the labour of policymaking in an epistemically superior way such that policy outcomes are of better quality for

³⁹ See Oates, 1994 for a discussion of the “congestion” that sometimes occurs in public service provision of some public goods (such as water, fire services, and sanitation) with higher numbers of users, and corresponding losses of efficiency. See also, Inman and Rubinfeld, 1997, p. 45-48 for a discussion of economic federalism along the lines of the “congestion” argument. In what follows, I discuss some of the reasons flowing from the “subsidiarity” literature in order to illuminate this broader claim about efficiency (in distinction to the congestion argument—although they are compatible, and potentially mutually-reinforcing).

the affected populations. This is the presumption often at the heart of the defense of the so-called *principle of subsidiarity*: the assumption that by default political powers and responsibilities ought to be exercised by those at the lowest level capable of exercising them, absent a significant gain in value by conferring the power to a higher level.

The subsidiarity approach centred on the efficiency of administration might very well be correct when it comes to a wide variety of governmental powers, and it stipulates important reasons in some contexts for investing responsibilities at the lower level. However, a theory that adopts subsidiarity to explain the value of federalism *generally* (across all cases where federalism is normatively choice-worthy) will suffer from the objection that the presumption in favour of the "lower level" may not in fact be justified in certain contexts where we think federalism is nonetheless justifiable. Put otherwise, it fails as an account of the value of federalism, because the value of administrative efficiency could pull in precisely the opposite direction when we might otherwise think the decentralization of powers is valuable.

For example, consider the case where education policy might be exercised at a marginally lower financial cost by a central government, or by a combined pan-regional government, and citizen complaints to school boards would be approximately equal in number under pan-regionalism as under local school boards. Yet the representatives of each region and the central government instead agree to maintain a federal structure distributing primary responsibilities for education policy to the regions. Or consider the case where public museums could be efficiently administered by a central state office for heritage, and where citizen complaints about exhibits could be marginally better responded to by policymakers and bureaucrats in the capital than by

regional counterparts. Suppose again the regions and central government nonetheless agreed upon a distribution of responsibility for public heritage to the regions. We do not intuitively think these are unjustifiable distributions of political responsibilities just because they are less economically efficient or marginally less responsive to individual citizen concerns.⁴⁰ The principle of subsidiarity, premised upon economic efficiency or responsiveness to citizen concerns, cannot be doing all the work here to explain the value of federalism because those values are not achieved vis-à-vis the comparator, a more centralized state. And in this case the purported explanation of federal value fails precisely to justify decentralization of policymaking with respect to jurisdictions (education, culture) which are paradigmatically invested in sub-state regions rather than the federal government in actual cases, and which we usually think are among the most significant jurisdictions to decentralize in order to enable regional control.⁴¹

3.3 Citizen choice through footvoting

An alternative approach to explaining the value of federalism can explain the concrete case above where decentralization of powers is administratively inefficient yet fails for other reasons as a general theory of the value of federal designs. So-called *footvoting* proposals suggest that federalism, by creating unique spaces for policy experimentation, creates opportunities for

⁴⁰ This is not to say that these are not important values, nor that a very serious shortfall in efficiency or citizen-responsiveness would not be a decisive reason to prefer investing responsibility in the central government. It is to say, however, that these cannot be the only values at play, because our intuition is not that it would be illegitimate to opt for a federal design even when these values pulled in the direction of a relatively centralist design. In what follows, I canvass proposals as to the additional reasons that must be in the balance.

⁴¹ Here I am assuming you will agree with this case-based intuition, however you might not. Either way, read on, as I will canvass other explanations of federalism's value that would suggest this distribution to be justified. Those principles might serve either as objections to your contrary intuition, or possible explanations of my intuition here. In the end, I will adopt a different view than those canvassed in this chapter.

increased citizen choice and preference satisfaction; alternatively, by decentralizing responsibility to regions, under conditions where citizens have free movement among them, pressure is exerted on provinces to align their policies with citizen preferences, ultimately creating better policy (Somin, 2011, 2017, 2020).

On this view, provincial authority with respect to a wide range of public jurisdictions allows each province to strike a distinct balance in the provision of social welfare benefits and taxation, and otherwise allows them to experiment with novel social norms or policies in a wide range of settings. By creating space for policy experimentation through a federal division of public responsibilities, states create the opportunity for novel solutions, the production of unique public goods, and distinctive balances of expenditures and taxation in public good provision. Since freedom of movement is a formal norm of federal states, and the costs of movement are relatively low compared to state exit, this provides additional choices for citizens about where to live and, because they have a multiplicity of options of where to live, increases their opportunities for preference satisfaction. Similarly, regions will be pressured to adopt better policies through the flight of citizens to regions with better policies, creating a net positive effect for citizens throughout a federation. A similar view, so-called Tiebout sorting, contends that having a multiplicity of regions with jurisdictional authority, alongside the freedom of citizens, for whom regions compete, to move to another region, pressures regions to align their policies with citizen preferences. We could see that under this proposal, a federal allocation of responsibilities with respect to public education or water management, for example, would be justified even if it were marginally less efficient or responsive in one region than another or as it would be under a more centralized design. By providing regions with the opportunity to

innovate, they might produce novel public goods as ancillary benefits of their approach to public management of resources or curriculum design, or otherwise pressure one another, through citizen flight, to adopt more efficient policies in the long-run. In the absence of multiple policy experiments we might not achieve knowledge of the options for citizen preference satisfaction or the most efficient means of satisfying citizen's needs and preferences (Somin, 2020).

Jacob Levy targets these theories of federalism in his own account of the value of federalism (2007). Levy argues footvoting proposals centring on increased choice and preference satisfaction for citizens are not apt to explain the size of existing federal units in federal states. A true concern for individual preference alignment would militate in favour of many more federal units in nearly every federal state than we in fact have, so that we could have a wider range of "menus" offering different packages of policy options to citizens. Relatively more federal units would allow more policy experimentation and a wider array of unique balances of expenditures and taxation (p. 461). Paradigmatic federal states such as the United States of America, Belgium, and Canada contain fewer regions than would be expected on this theory, and thus would be unjustifiable by the theory. Levy argues that theorists should instead attend to the real design of federations for guidance as to the value of federalism if they are to develop a plausible theory of federalism that explains the justification for the world of federal states as we find them. For Levy, it is implausible that footvoting proposals constitute a plausible theory of federalism for the real world, considering the stability of real world federations, and presumably, our intuitions as to the justifiability of their design.

We need not agree with Levy and might instead be content to rest with an ideal theory of

federalism, and the implication that existing arrangements fall short of that ideal for contingent historical reasons (giving us reasons for further decentralization). However, it is nonetheless illuminating to attend to the alternative value that Levy identifies from this engagement with real world federations. This value might be more compelling than the alternative account—preference maximization – which could fall prey to other objections anyway.⁴² I will suggest Levy’s account is not much more plausible, but points in the right direction. The preference-maximization view fails for additional reasons similar to why Levy’s view fails.

3.4 Checking central state power

Levy’s own approach builds on the intuition that political theories of federalism centring on the maximization of preference satisfaction through citizen choice are unable to explain the actual federal organizations of stable liberal democracies. This is a problem because we often intuit these states to be well-organized (at least vis-à-vis their settler populations) yet our theories are incapable of vindicating this intuition. As Levy writes:

⁴² I believe the central objection to this view, on its own terms, is that it treats all preferences as equally important. The discussion of preference satisfaction is not precise enough to capture some of the claims at issue in federalism. Admittedly, it is, *ceteris paribus*, good to satisfy non-objectionable preferences; thus, the fact an arrangement would, without cost, achieve better preference satisfaction is a *pro tanto* reason to favour that arrangement. However, it is not obvious that the diverse citizen “preferences” at stake in claims to a federal institutional design are all equally weighty. For example, while some citizens might have an interest in receiving specific publicly-funded goods such as opera or public radio, or, they might alternatively have an interest in relieving themselves of a higher tax burden because they have no desire for those public goods, others citizens may demand a federal design in order to enable them to participate in a regional demos whose public language matches their primary spoken language (thereby allowing them to participate on equal terms as deliberative citizens), or which facilitates the practice of their unique culture in various domains of life, or its transmission to their children. It is not obvious these latter claims are best described in terms of “preference satisfaction” rather than something more intimately connected to human agency and the possibility of flourishing. Indeed, without access to a context where one’s language is spoken, for example, one is likely to be systematically alienated from multiple spheres of human life (vocation, politics, civil society, and so on).

I proceed from the thought that the real at least might be rational, that if the stable practices of constitutional democracies do not fit with our normative theories that we should at least try to find a new theory... federalism as it exists offers genuine benefits that might well not be attainable with either the more unitary or the more radically decentralized institutions typically called for.

Levy, 2007, p. 460.

Thus, Levy proposes to attend to the structure of existing federations, noticing that they are often structured along ethnocultural lines, rather than by configurations that could be expected in ideal theory to achieve perfect preference alignment, and to ascertain what reasons we might have for adopting federal designs in the forms they actually take (2007, p. 459). One reason that the preference and competition views failed as an account of well-organized liberal democracies is precisely because these states are often structured along *ethnocultural* lines (p. 461). As Levy writes:

This (common) kind of federalism provides a special, and especially stark, case of the policy packaging that impedes either competition or sorting. If living in a province dominated by one's co-linguists trumps other considerations—and it often does—then the whole range of policies and laws other than language law is more or less taken out of competition. When ethnocultural identity is not just emotionally but also legally linked to political membership, mobility, and competition are shut down entirely. Non-Indians cannot join U.S. tribal reservations (they may become residents, but cannot subject themselves to general tribal jurisdiction or become tribe members), and Indians cannot create competing polities that share the same tribal identity. We could describe ethnocultural federalism as a special case of Tiebout sorting, where the preference for living with one's cultural fellows dominates other collective goods.... But this dominance impedes the sorts of decisions more commonly discussed under the Tiebout rubric.

Levy, 2007, p. 462.

There are at least two ways to interpret Levy's claim that ethnocultural federalism is not explicable on theories that centre citizen choice and preference satisfaction even when we adopt

the idea of a trumping preference for culture. First, this may be because a uniform trumping consideration among ethnocultural group members undermines the logic of maximizing citizen preferences through citizen choice in a *background competition among jurisdictional units*. Under situations where there is a trumping good such that citizens choose to live with their cultural group, states will not be incentivized to align their policies with citizen preferences from the pressures of citizen flight, because citizens will not exit so long as their trumping good is provided. So, the dynamics of citizen choice, exit, and inter-jurisdictional competition meant to explain the division of authority in federal states insofar as these drive policy alignments that maximize preferences are actually inert in states divided on ethnocultural lines. Yet those competition dynamics, including experimentation by regions, were precisely what was supposed to justify decentralization.

On a second interpretation, and perhaps the most pertinent, the real issue posed by so-called ethnocultural federalism is the fact that *further jurisdictional divisions providing the trumping good are possible, but not opted for, in the institutional design*. On this interpretation of the trumping good, it is not so much that the members of ethnocultural groups all wish to be united all together within a single jurisdictional unit, they merely wish to have reliable access to their culture – this is the trumping preference. On this view, Quebec, for example, might be able to be divided into two or more provinces where French speakers formed a sizable majority. If citizen choice and preference maximization were the goal of federalism, even with the trumping good idea, a unitary Quebec would be unjustifiable. The creation of additional provinces might be able to provide both the trumping good and allow additional inter-jurisdictional competition and/or citizen choice.

So, Levy rejects the interpretation of federalism as a system that achieves maximal preference satisfaction. Even if we think cultural membership is a good that trumps others in citizen choice, maximal preference satisfaction could be achieved by breaking up ethnocultural groups into multiple regions. It is important to note that this depends upon an interpretation of the “trumping preference” as not including the preference to be united with the cultural group in one province. If that *was* the content of the preference, then, even though the logic of inter-jurisdictional competition is no longer apt, ethnocultural federalism with minimal jurisdictional units would achieve a similar objective to that recommended by the footvoting proposal. While Levy does not embrace this idea, he does embrace an ethnocultural division of authority within existing federations, with an account that does not make fundamental reference to citizen choice or preference maximization.

Levy’s preferred account of the value of federalism is a bulwark theory, wherein a federal design is valuable because of the counterbalance provided by the provinces to central state power. For Levy, it is significant that provinces are divided on ethnocultural lines if the federal system is to achieve this counterbalance. The federal organization of the state into provinces along ethnocultural lines successfully divides citizen *loyalties* between the provinces and central government, resulting in a stable counterbalance to the threat posed by the central government’s tendency to unjustifiably increase its powers, which would in turn render citizens vulnerable to domination.⁴³ While normatively inert in themselves, ethnocultural attachments are psychologically strong, and capable of motivating action in defense of the ethnocultural group’s

⁴³ Notably, some theory of the tendency to centralization and vulnerability to domination has to be offered to fully motivate this account of the value of federalism as a bulwark – Levy discusses two (2007).

rights and privileges. On Levy's view, multiplying the number of provinces to fit with the aim of maximizing preference satisfaction would create polities that are insufficiently large, cohesive, or stable to pose a genuine counterbalance to the risk of central state domination.⁴⁴ In fact, a virtue of larger provinces on this view is that the costs of exit are somewhat larger than in very small provinces, helping to stabilize citizen residency, and their constitutional status prevents frequent changes to the composition of the demos. In combination with these considerations, ethnocultural attachments are more intense, enduring and stable than other kinds of attachments (such as vocational or recreational ties, for example), and thus are capable of motivating loyalty to a provincial government and a division of powers when the provincial boundaries are structured around the ethnocultural group. As Levy writes:

But we, at least, can ask the question: what will tend to encourage durable affective loyalty to the provinces? One answer is certainly ethnic or cultural differentiation among the provinces; and so ethnocultural federalism, puzzling for competition accounts of federalism, ceases to be so. Provided that provincial loyalty does not become so intense, or central loyalty so weak, as to encourage secession or civil war, the distinctively strong attachments that come with ethnocultural identifications may be a real *resource* for federalism rather than a problem for it.

Levy, 2007, p. 466.

Thus, for Levy, the fact that federations are structured around cultural and ethnic cleavages is illuminating as to the purpose of federal design, however not for the reasons one might expect. In developing this account, Levy adopts Lord Acton's view that the design of federal units around

⁴⁴ It is also worth observing that the "rigidity" of federal distributions of jurisdictional power is ill-explained by the preference maximization view. If this were the case, it might be preferable to frequently change the jurisdictional remits and geographical domains of political authority. Levy's view aims to explain the rigidity of federalism through similar considerations as discussed here.

cultural, national, and linguistic cleavages is merely *instrumental* to reducing the of risk of domination by the central government (2007, p. 466). Entrenchment of governmental powers to provinces or groups with ethnocultural differences is likely to cultivate and maintain alternate loyalties among the population towards the provincial government that are relatively stable and powerful enough to create a genuine counterbalance to the central state's power and opportunity to dominate citizens (p. 466-7). In other words, for Levy, the federal designer should be concerned with cultural distinctiveness for purely instrumental reasons: cultural and ethnic difference are of no importance in themselves to the design of political institutions, but may furnish the grounds for loyalties that can be mobilized by provincial politicians to prevent central state domination. On this view, looking towards our paradigmatic federal states, with fewer and less flexible allocations of jurisdictional authority than proposed by Levy's opponents, we can see a justification that fits. The boundaries of existing sub-units capture cleavages that can be expected to be large enough and stable enough to pose a genuine counterbalance, through provincial loyalties of citizens, to the central state.

There are several serious problems with Levy's approach, most notably, it instrumentalizes the political identities of peoples, and ignores their moral claims to territorial jurisdiction and self-determination.

First, it should be observed that Levy's approach fails to take seriously the claims of Indigenous people and minority nations, and indeed misrecognizes the claims of national *majorities* as well. For example, Indigenous peoples and national minorities in federal states claim that their cultural, linguistic, and political distinctiveness is precisely what necessitates reform to existing

divisions of authority in order to achieve non-alienation, freedom, and self-determination. And these values are cited by minority nations that have achieved regional autonomy to explain their reasons for maintaining this form of self-rule in the face of threats of centralization. Additionally, these are the sorts of values most likely to be cited by the members of national majorities to resist (even bloodless) annexation by their neighbors (Rodin, 2002). To discount these values out of hand is to disrespect the claimants who contend that their non-alienation and self-determination as members of a cultural or national groups depends upon independent statehood or a federal design.

Correspondingly, Levy's approach ignores the territorial rights and self-determination interests of peoples, and is inconsistent with the theory of territorial legitimacy developed thus far throughout this dissertation. Groups such as Indigenous peoples are sometimes labelled as cultural or ethnic groups. This is not always an incorrect description, however in the context at hand it is the wrong kind of description. As we saw in the first chapter, Indigenous peoples often possess inherent territorial rights, or the rights to govern the lands upon which they live together as a group. There are significant political agency goods people can achieve when they exercise self-rule together with those whom they share a political identity. Insofar as people can work together with others to maintain institutions that better realize their shared reflective values for political cooperation than feasible alternatives, or alternatively, that express their shared and valued political and cultural frameworks, they are capable of relating to the political order as an extension of their collective agency rather than an imposed apparatus that rules them from above. In these cases, people intentionally cooperate in generating one political order rather than another for good reason – namely because it is an expression of their identity and fundamental evaluative

commitments, and the means by which they secure justice for a territory while living together in a place in a way consonant with their identity and shared values (Moore, 2015; Stilz, 2019).

Levy's theory does not address this argument directly in his arguments concerning federalism, however, as I have argued, it is central to the justification of political institutions over particular territories. Because federal governments claim domains of political authority over the territory of the federation as a whole, a theory of federalism for multinational contexts must grapple with the inherent rights of political jurisdiction over territory of the self-determining member units.

It should be observed as well that the reasons stated by the members of minority nations to defend their territorial jurisdiction do not merely track *preferences* in the ordinary sense. Secure cultural membership conceived in Kymlicka's terminology provides the context for secure individual agency: without it, choice is bereft of significance and access to the options we require for a meaningful plan of life is insecure (Kymlicka, 1995). Indeed, we might think that preferences themselves must be understood in terms of a background cultural context within which our choices have meaning – and in that sense, secure cultural membership is prior to the formation of meaningful preferences and autonomous choice. Similarly, political autonomy in the Moore – Stilz sense should be understood as the converse of sociopolitical alienation and arbitrary domination, as state of freedom in the political realm, rather than bare satisfaction of preferences. In short, there are intrinsic goods that can be achieved through self-government among the members of a political identity group, including increased political agency, non-alienation, and cultural freedom, as compared with institutional designs that pay no attention to political and cultural identities. While preference satisfaction is a good, it is not of the same order as non-alienation or agency. Federalism, as a system that distributes power among groups,

enabling groups to enjoy some degree of self-rule, better protects these cultural and political agency goods than centralized alternatives. Levy ignores this in his account.⁴⁵

By failing to grapple with the logic of political identity we misrecognize our fellow citizens. They are not merely the bearers of irrational ethnic and cultural attachments of no political significance, but members of cultural and national groups that demand recognition on account of their rights to self-determination and territory. Rather than subordinating these claims of identity difference to the goals of non-domination (conceived in terms of the risk posed by an otherwise unitary state towards its potentially, but for the counterfactual cultivation of difference under federalism, *politically* undifferentiated citizens), we should instead attend to the logic and normative weight of these values, and compare them with the other proposed values, in order to ascertain their role on a theory of institutional design. We owe this to our fellow citizens who make claims of identity-related difference in terms that we should, by now, be able to hear.

Levy comes closest to identifying the non-instrumental good of structuring polities around cultural or national membership in his discussion of cultural membership as a trumping good – as a preference that many citizens ordinarily rank above all other preferences (assuming, for example, the security of basic liberties and that basic needs are met). And here, Levy may be correct that the existing design of federations implies that maximal policy/ preference alignment is not *the full story* as to the relevant reasons for designing federations: citizens could realize the trumping good under designs that further multiplied the number of jurisdictions on ethnocultural

⁴⁵ This does still not explain the value of federalism over secession. This will centrally occupy me throughout the next sections of the chapter.

lines, thereby enabling both access to the trumping good and further choice among policies. This does not, however, defeat the idea that considerations of cultural and political identity should be paramount in the design of federations. Levy has not grappled with the significance of these goods, while acknowledging that citizens do *treat* them as deeply significant – a fact which his own instrumental account depends on. If we are indeed to defer to practice in theory construction in order to learn from practice in order to generate theories that reflect institutionalized knowledge,⁴⁶ and if we are also to take claims about political identity seriously, at best, Levy's analysis suggests that considerations pertaining to *mitigating the risk of central state domination* over regions have priority over *citizen preference maximization*, but only *provided that political identities have been recognized*. If this is true, then Levy may be correct that, if we have a range of institutional designs that appropriately recognize national minorities and Indigenous peoples, we ought to go with the arrangement that can be best expected to secure non-domination over an arrangement that maximizes citizen preference satisfaction. However, what is certain is that Levy has provided no argument that the recognition and protection of political and cultural identities should be secondary in institutional design to any of the other proposed explanations of the value of federalism which could guide institutional design. An alternative explanation of the design of some of the paradigmatic existing federations would be that they primarily aim to secure the recognition and protection of cultural identities or the self-determination of peoples.⁴⁷

⁴⁶ This surely must have limits, at risk of attempting to find good reason for the subordination of national minorities.

⁴⁷ The deference of normative theory to practice must have limits, however, at risk of trying to find values where there are none, reasons where there is only domination. Levy's style of argument is useful – taking seriously the idea that the political practices of paradigmatic federal states might have embedded within them some logic or value that is occluded by contemporary theory. And in fact, he has discovered something of value that is likely sometimes achieved by federal constitutions. However, there are limits to this form of deference: ultimately, some forms of political practice may be unjustifiable; and, more importantly, once we have discovered the array of possible values, we should return to justification, and compare the weights of the different values, consider whether they are consistently applied in practice, or whether practice is incoherent, and deliberate about what is all things considered justifiable, and so on.

And, once this is secure, they aim to secure non-domination from the federal government.

On the idea that considerations pertaining to *mitigating the risk of central state domination* over regions have priority over *citizen preference maximization provided that political and cultural identities have been recognized*, two more things remain to be said. First, we must observe that while Levy has identified a value through his careful investigation of practice, it is not at all obvious that we should ultimately defer to practice for guidance as to the relative normative weighting of considerations that have been revealed to be relevant to institutional design.

Existing practice may have gotten the weighting wrong or overemphasized the likelihood of federal domination in particular contexts. If this is true, then reducing the risk of domination may be further down the priority scale when it comes at the cost of preference satisfaction as a unique value for institutional design.

Similarly, it is not at all obvious that Levy is correct that we cannot or should not attempt to promote further satisfaction of preferences among cultural identity groups through institutional multiplication, even granting that reducing the risk of domination has normative priority over preference satisfaction. This is because Levy has not shown that cultural groups will not remain committed to a provincial configuration of power and jealously guard the rights of provinces from the centralizing aims of the federal government if they form majorities in two provinces rather than one. If the group is a minority within the state, it seems just as likely that they will be keen to defend the autonomy of their province and check the federal government from a concern to maintain access to special cultural and political goods within their province of residency; even

if these goods are provided in two provinces rather than one, residents will defend the protection of their national and cultural rights through defending the power of the province where they live, as it is the secure political power of the province of their residency upon which their access to national and cultural goods depends. If this is true, we can have multiplication of provinces (and inter-jurisdictional competition/ preference maximization) without any loss to the recognition of cultural and political identities, or the reduction of risk of federal domination.

Stepping back from the worry about instrumentalization of cultural and political identities and the failure to consider their relevance to the legitimacy of political institutions which claim authority over national territories, which I believe to be the deepest problem for Levy's account, there are additional problems with Levy's account of the value of federalism. Levy's theory fails to offer us a theory for the distribution of jurisdictional powers and competences and provides an unworkable model for federal politics.

While Levy's theory commits us to the distribution of sufficient powers to cultivate and maintain counter-loyalties to the central state, it is silent on how exactly we are decide upon the allocation of powers. If many divisions of power would sufficiently cultivate these counter-loyalties to the central state, how are we to otherwise decide upon the division of powers? Would just any division do just as well? This theory does not give us a justification for how to adjudicate (or otherwise imagine a process for adjudicating) conflicting claims among governments for powers—other, perhaps, than by a concession to one of the above views about the unique values that inhere in federalism. Yet, this is exactly what we need a theory of federalism as a constitutional design option to do, insofar as we need a theory that can lead constitutional

adjudication of disputes between federal units, at least in principle. Most importantly, this concern is amplified when we consider the inherent rights of peoples, within federations, to exercise territorial rights through their own institutions. If the members of federations actually possess inherent rights to self-determination over territories they legitimately occupy, what kind of process would be necessary for distributing powers to a federal level of government (or other level)? An adequate account of the value of federalism must grapple with this question.

Finally, we must recall that federalism is a form of government that, when implemented, requires inter-group political negotiation and cooperation, precisely among regional representatives and the federal government. It seems like Levy's theory is unworkable when we imagine it in practice, self-consciously motivating the conduct of political actors, insofar as we cannot imagine what intergovernmental discussions premised upon this logic of association (the development of conflicting loyalties among populations) would look like. As an ethos for intergovernmental relations, it seems like a recipe for acrimony and ultimately, disaster.

3.5 State stability

Before moving on to more plausible accounts, we can identify another possible view that centres the instrumental value of national recognition in federal designs, however upon closer look it is self-defeating. It is related to Levy's approach, insofar as it instrumentalizes recognition of identity-difference, but it centres a distinct value in the justification for instrumentalization. On this view, we ought to recognize minority claims to self-determination and cultural autonomy in order to preserve the stability of the state, specifically, its territorial integrity as an entity under

international law. I argue that giving priority to the stability of the state, and thereby instrumentalizing the claims of national and cultural difference in this way further misrecognizes claims. Levy's approach fails for an additional, fourth reason, illustrated by the failure of this theory.

For example, theorists like Norman and Tully have argued that national recognition through the federal constitutional design of the state would increase the stability of states containing multiple peoples (Norman, 2006; Tully, 2008; *Reference Re Secession of Quebec*, 1998). Recognition of substantial self-government rights and other demands is hypothesized to channel social and political energies away from recognition of the right of self-determination (and potentially secession), and into a renewed federal politics that can promote the fulfilment of mutual goals such as citizen wellbeing. Thus, those with a vested interest in the integrity of the state have an incentive to recognize jurisdictional powers of sub-state units: doing so is likely to appease demands for self-determination, which often take a secessionist form in the absence of sufficient recognition of group-based jurisdictional authority and other demands. On this view, neither theorists nor dominant state actors need *believe* that substate groups have inherent rights to jurisdictional authority flowing from their identities or histories in order to see reason to accede to demands for internal self-determination. Insofar as the subunit could provide services at approximately equal levels of quality and expense, without unacceptable violations of basic justice, and this would diminish the risk of state breakup or forms of disruptive politics, it may be reasonable to recognize rights to internal autonomy out of an interest for the stability of the state – which the theorist or political actor prioritizes for some reason or another (whether commendable or illicit).

Insofar as the argument builds on the intuition that recognition of demands for sub-state autonomy is more likely to pacify disruptive forms of politics, and that those forms of politics are often damaging to independent values such as the overall functioning of a decent state, this is a plausible argument. However, in keeping with the instrumentalist agenda, we can imagine policymakers or theorists who would adopt the proposed institutional design *merely* to increase the stability of the state or avoid those disruptive forms of politics. I suggest that this could potentially be a self-defeating position, as it would offer recognition to minority nations in bad faith and license an ethos that actually diminishes stability in multinational states. The proposal is in bad faith, because while it accedes to the demand for revision to the constitution (which is demanded on the basis of a claim about the group's national difference and what is required to avoid domination as a minority nation) it does so not because it accepts the reality of national or cultural difference and that this requires the form of recognition in question, but instead it accepts the demand because this is necessary for the stability of the state. In addition to misrecognition, this form of politics *instrumentalizes* the identities and concerns animating nations and their members by leveraging their beliefs about their membership in nations, the value of their cultural and national identities, and their social power as an aggregate of persons. To the national majority these minority claims may be counted merely as empirical social facts or minority group beliefs whose truth or falsity is irrelevant, but whose existence is of relevance to achieving the national majority's ultimate concern, e.g. state stability, through the strategy of constitutional recognition.

This form of instrumentalization renders the identities and values of the minority superfluous – they need not have these identities, and those identities need not have any value – for the

argument to run. All that is necessary is that the minority believe they possess an identity, and believe that it is of value and requires internal autonomy for its expression for the theorist or policy-maker to see reason to recognize substate autonomy. Again, this is a dangerous form of misrecognition likely to be the cause of minority resentment – the implication is that the minority’s beliefs about something of central importance to their identity are either incorrect or superfluous, but because of the (majority) interest at stake institutional recognition will be conferred anyway. However, it is plausibly the recognition of national differences (Gagnon and Tully, 2001; Norman, 2006; Tully, 2008) and the cultivation of a multinational shared identity of (national) diversity awareness (Tully, 2008), that in fact promotes the stability of the state by recognizing claims that would otherwise lead to secessionist agendas.

So, the argument that suggests we should adopt federal designs out of an instrumental concern for the stability of the state is self-defeating: the public instrumentalization of identities for the purposes of stability is unlikely to promote solidarity or a feeling of belonging to the state among the minority nations that make demands upon a national majority. They will justifiably not feel heard or respected because they will not be heard or respected. In turn, they will opt for secession if it is in a feasible option. Certainly, stability is a concern of importance to federal states, however this too requires downstream analysis in light of the appropriate recognition of political identities and the corresponding claims to self-determination and territory.

3.6 Fairness to identity groups

Several theorists, including David Miller (1995), Helder De Schutter (2011), and Alan Patten (2014) offer a more plausible account of our reasons for adopting federal arrangements over more central designs, or the alternative, always on the table when trying to specify the value of federation, of secession or independent statehood. Each theorist recognizes the importance of the recognition of national identities of citizens to their self-respect, which is plausibly a good of central significance to justice as it is a condition of confident individual agency in both social and political spheres. Federalism in these cases is said to be preferable to secession because of the impossibility of realizing the traditional formula of self-determination, namely “one people, one state” in the seceding region. In any proposed secession, there will be members of the national majority, and/or citizens that identify as much with the central state as with the minority regional identity, who would be left behind in a seceded minority region. Secession, according to these theorists, would fail to recognize the political identities of these people (Miller, 1995, chp. 3; Schutter, 2011; Patten, 2014, chp. 7). As De Schutter argues, secession would offer recognition and self-respect only to the identities of the seceding minority nation and not the members of the state-wide majority group within the seceding region (2011). Instead, Miller, Patten, and De Schutter argue that a fair distribution of recognition instead can be accomplished through a federal design, wherein the minority group achieves internal autonomy, of their region, alongside participation in a federal state. In this case, the minority identity is recognized, through the internal autonomy arrangement, and the political identities of those with allegiance primarily to the broader state are recognized as well, through the continued membership of the region within a federal state.

A possible problem with this position is that it may offer more recognition to the state-aligned members of the region than it does to the minority nation's members. The members of the federal majority group, within the predominately minority region, are recognized to be members of a group with an international legal personality. After all, these people often belong to a national group that constitutes a majority within the broader state, and thereby can collectively control, due to demographic reasons, the direction of federal-level policy making, e.g., federal jurisdiction. While no single member has the ability to change the direction of policy, they are a member of a group that in fact has the power to exercise changes in the direction of federal-level policy in accordance with public dialogue with those with whom they share an identity, within institutions they endorse, and according to shared political values (Stilz, 2019). Their identity is recognized as an identity with the ability to exercise its values in the deployment of federal and international level powers. The minority identity is not recognized in this way under internal autonomy; the minority is precisely a minority and likely to be out-voted continually on federal policies of significance to them if the majority meaningfully differs in goals regarding federal and international politics.

While it is true that those belonging to the national majority, left behind in a seceded minority region, would no longer live within a region that was part of the majority state, it is still nevertheless not true that they could not have recognition of their belonging to their own people, which is a people with the identity of international legal personality for that matter, under the secession policy. There are policies, post-secession, that could recognize the identities of those belonging to the majority identity group of the rump state who are residents of the seceded

region. Dual citizenship with accommodation for their unique position through ex-patriate voting and soft borders, for example, might allow them to participate in federal elections and thereby influence the direction of federal-level policy while also enabling them to retain social relationships with the group of which they continue to be a member across the border. While this is a diminished form of power compared to belonging to the national majority group in a federal state where one permanently resides – it is still nevertheless federal-level power and international recognition of their national group, in which they have rights of participation, something denied to the minority region’s identity under federalism.

Even in the absence of these special accommodations for national majority members in the case of secession, there would remain the fundamental asymmetry that there is still some proximate political space, to which the people had a right to resettle, and could do so without cultural friction, wherein they could jointly exercise the right of self-determination over regional and federal-level policies with those whom they share an identity.⁴⁸ For the members of the minority nation, this is not so. Their only hope of exercising federal level powers in this way is through secession, or some federal power-sharing arrangement. The latter, however, may be ineffective, depending on how small the minority group is vis-à-vis the citizens with the majority identity, who are themselves conceived of as an independent culturally differentiated nation. If the demographic ratio of minority to majority across the federal state was 1:50, for example, this might justify one or two cabinet ministers in a coalition government dominated by a state-wide

⁴⁸ The right of exit could be further enhanced through a cost-sharing agreement for the voluntary resettlement option between the rump state and seceding region in order to provide a genuine alternative to majority identity aligned citizens.

political party, however this may not go very far to ensure the minority identity is protected in executive or legislative action at the federal level.⁴⁹ Insofar as the members of the national majority have the option to control federal level policy through demographic superiority in the federation, and the members of the national minority do not, there is a problematic asymmetry in options from the perspective of fairness in recognition of national identities.

In expressing skepticism about the limits of power-sharing designs at the federal center to protect the interests of national minorities, I assume the principle of democracy places limits on the design of political institutions. On my view self-determination is a pro tanto justification for the design of institutions and thus it is of relevance in the design of the federal government of multinational states. Some deviations from the equal political power of citizen votes to determine representatives in the *federal* legislative assembly and executive branch (the case of P.E.I and the Atlantic provinces generally vis-à-vis Ontario and British Columbia, for example) can be justified out of concern for regional fairness and meaningful voice (Drake and Moore, 2019; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991); however, concerns for regional fairness and meaningful participation of historic, cultural, or national communities in politics does not provide an unlimited justification for the design of the federal assembly in the way that would

⁴⁹ Certainly, there are justifiable options for design of the federal government legislative and executive branches in such situations – and they will often be necessary to provide adequate recognition and protection of national minorities. However, my point here, is that by themselves, the possibility of such consociational devices is inadequate to explain the preference for federal association or the responsiveness of federal government to minority concerns in at least a range of cases where the federal government holds many constitutionally entrenched powers that could tread upon policies important to national minorities who are very small – and thus unable to exercise much meaningful consociational power – yet where the minority is large enough to secede. Along with formal political arrangements that recognize the significant collective political rights of groups in their legal structure, we equally require the right attitude towards federal politics, an ethos of multinational diversity awareness and intercultural respect shared by politicians and citizens in the context of a deliberative democracy, in order for these devices to respond to demands for recognition and to enable meaningful minority voice and input in federal institutions such as the federal government.

best realize this concern to the exclusion of the democratic self-respect of citizens with the majority identity. Concern for the self-determination of groups cannot be the *sole value* of the Canadian political order. As suggested by the Supreme Court of Canada we must also attend to democracy, federalism, and the rule of law and constitutionalism in our design of institutions – these are fundamental values of the Canadian constitutional order, and a theory of federalism for settler and Indigenous people should be responsive to this broader array of concerns (*Reference Re Secession of Quebec*, 1998). Here I suggest that we could not always justify the kind of power sharing necessary to protect minority difference through a multi-national federal cabinet without demeaning the principle of democracy, namely in cases where the minority was relatively exceedingly small and thus the costs to the principle of democracy in protecting minority self-determination through enhanced representation would be great. On my overall view, Indigenous self-determination of must be achieved through a broader constitutional toolkit, one which incorporates territorial autonomy, consociationalism, legal pluralism/ diverse constitutionalism, and a public ethos recognizing the interdependence of diverse identities.

This concern about the intrusion of the federal level on regions – or the concerns of national minorities – is further amplified in states where the federal government routinely interacts with sub-federal heads of jurisdiction through negotiated agreements, for example, as the federal government of Canada does through its use of the federal tax and spending power (Boucher, F., & Noël, 2021; Webber, 2018, p. 171-2). In Canada, the Constitution Act divides jurisdictional authority between the provinces and Federal government. While these divisions of authority do not create “watertight” compartments (Hueglin, 2013), insofar as there is often ambiguity about whether a specific governmental function rests under one head of jurisdiction or another, and

otherwise there is sometimes overlap of federal and provincial laws within the same concrete context because the objectives of the laws are reasonably distinct and pursued in accord with the respective jurisdictional divisions (the dual aspect doctrine), the federal and provincial government do possess some well-understood differentiations of power. Yet within the context of the division of powers, the federal government possesses the legal power to levy taxes for a broad array of purposes and to transfer funds to the provinces, while itself enjoying fewer fiscal responsibilities. In the 20th century, this has resulted in a situation where the Federal government will generate significant revenue and make deals with the provinces in order for them to receive money in addition to their own tax revenues. These deals often come with strings attached, insofar as the federal government offers funding to enable the province to exercise authority under its own proper head of jurisdiction on the condition that it exercise its power in a specific way. For example, the national healthcare system in Canada is the result of such an intergovernmental agreement between the provinces and Federal government, with the federal government insisting upon certain conditions such as the transferability of healthcare between the provinces in exchange for significant annual payments to provinces to maintain their respective healthcare systems.

The worry motivating this criticism of the fairness of recognition of national identities view is that within federal systems that accommodate minority nations through regional autonomy entrenched in a constitution, there are nevertheless practices at the federal level such as those discussed above that can significantly intrude upon the self-determination of the minority region if they are not sufficiently checked by some other element (Webber, 2018, p. 171-2). For example, while a region can refuse such a negotiated funding agreement with the federal

government, this may leave them with far fewer fiscal resources than other provinces or regions and the inability to maintain government services of the same quality for their citizens—creating significant pressure to accept the proposed agreement. As I have suggested above, and in the footnotes, it is unlikely that power-sharing through a culturally proportionate federal executive, ensuring a voice within the federal executive in the crafting of terms for such negotiated agreements, and guaranteed representation in the federal legislative assembly, is sufficient to eliminate the risk of intrusions upon the self-determination of constituent autonomous regions when they are very small. Very small nations – such as Indigenous peoples in Canada – are unlikely to leverage enough power to prevent unwanted interferences merely through their vote in parliament or cabinet, without a radical re-envisioning of the role of popular democracy in Canada’s federal institutions which re-distributed power in these institutions on group-based lines entirely unhinged from numerical proportionality.⁵⁰

To take stock of the option that I have entitled “fairness to national identities in multinational contexts,” the view is confronted with at least two problems.

⁵⁰ Certainly, power-sharing in the executive and enhanced minority representation within federal institutions do go some way to secure fairness in the development and application of federal law. By having an entrenched seat at the table, minority group politicians can force those within the dominant groups to listen to their views, commanding time and attention at cabinet meetings and in the legislative assembly, as well as within in the public press reporting on these meetings, promoting issue-based deliberation of the government and general public. And while a guaranteed seat on cabinet will have some direct effects on government through the exercise of ministerial power over a department by a member of the minority group, it will, perhaps more importantly, provide the minority group (and associated federal-level political organizations of the minority group, such as a national-level party apparatus) with an important insider’s view on the politics of the day from the perspective of the government. Combined with norms of deliberative reciprocity and public justification, a seat at the cabinet table will go some way to ensuring the federal level government will be responsive to minority concerns. Thus, we should not disregard the importance of ensuring minority voice in deliberations within the federal legislature and in cabinet through some power-sharing and mandated representation requirements. However, it is a central argument of this chapter that these instruments are insufficient by themselves to secure recognition of legitimate minority concerns and equal treatment by the state— we require the right background ethos towards diversity, especially towards Indigenous conceptions of politics, and the correct understanding of federal fairness for territorialized groups, especially Indigenous groups, in order that these instruments succeed in achieving fairness. We cannot rely upon consociational procedures alone to ensure justice in federal politics.

First, it does not plausibly explain why regional autonomy within a federation secures equal or adequate recognition of national identities for the members of minority national groups when those groups are conferred relatively fewer powers as compared to the powers effectively under the control of the national majority through their demographic supremacy within a federal legislature and the federal executive cabinet. This is a significant problem for the theory on its own terms, insofar as it is concerned with overcoming the seeming unfairness to majority identity citizens left behind in the secession of a majority-minority region. Additionally, as we have seen from the first part of this dissertation, peoples possess inherent rights to govern territory flowing from their legitimate territorial occupancy and their interests in self-determination. While federalism on the view under consideration secures some institutionalized self-rule for constituent groups out of a concern for recognition of their members' national identities as such, it does not fully account for populations' interests in territorial self-determination in such a way as to suggest federalism would be an adequate mechanism for giving expression to these interests. As we have seen, secession might better achieve equal recognition for the members of all concerned peoples, all things considered, in some multinational contexts, if perfectly equal recognition requires sameness in the territorial jurisdictional powers of national groups. Thus, fairness in the recognition of independent national identities – at least without further elaboration of how this is possible – may not be the primary value of federalism.

Second, and relatedly, considering the value of self-determination, the view is relatively agnostic on how we should think about the process for allocating powers between the constituent units of the federation and the federal government. It does not give us a model for thinking about what

would be a fair process for allocating powers between these two levels, and here the residual demographic supremacy of the national majority, which may control the distribution of powers, again suggests a problem of domination. The theory fails to explain how federal states can avoid the domination of minority nations' self-determination by much larger groups that might control the dominant formal negotiation process for allocating legal jurisdictional powers between the groups, or that might otherwise control a federal cabinet with informal powers to unfairly influence regional politics.

In short, the theory fails to explain the motivation for minority nations to belong to federal states – the logic of belonging (Mills, 2019); and how federal politics in multination states can avoid domination and ensure fairness – the practices of belonging appropriate to free and equal peoples.

3.7 A case-based approach to the justification of federal institutions

The discussion from the prior sections suggests that we should adopt a case-based approach to the value of federalism as a constitutional principle, and in particular that concerns about the self-determination of peoples should structure an inquiry into the value of federalism for self-determining peoples in multinational territorial contexts. Goals such as (1) increased efficiency of administration, (2) increased choice for citizens among policy options (3) reduced risk of political domination by an unchecked central government, and (4) stability of the state as an international legal entity, are relevant to the design of political structures and suggest some

specific benefits of federal designs over more central designs. Indeed, it seems difficult to resist the conclusion that some value is added by increased efficiency, increased citizen choice, reduced risk of central state domination, or reinforced stability of the state; and in territorial contexts where there is only one people there is little reason to think these should not figure in institutional design or constitutional interpretation of federal doctrines, where applicable. However, the central animating goals of federalism in a wide variety of actual cases, demonstrated by the claims and actions of member units in national discourses and political struggles, often concern the cultural and national diversity of the constituent groups (Kymlicka, 1995; Gagnon and Tully, 2001; Norman, 2006; Requejo, 2004). This is especially so in multinational states where groups make claims precisely to cultural protection and self-determination as nations. And, as I have argued, self-determination concerns are pressing enough to potentially outweigh the other values (1) – (4), or to otherwise reveal a singular focus on the other values as the theoretical explanation of the value of federal association to be misguided. The self-determination of peoples is central to the justification of institutions of political authority over particular geographical regions. Because Indigenous peoples are *peoples*, with inherent territorial rights, an adequate theory of federalism within these contexts requires that the value of federalism be consistent with their rights of self-determination. More specifically, the theory should explain what's valuable for self-determining peoples to join together in a federal order or maintain one.

Thus, theories focusing on (1) – (4) are not so much wrong about potential benefits of federalism or the identification of values that ought to be accounted for in the institutional design of federations, as incorrect about the relative priority of all these considerations for constitutional

design in federations where there is robust cultural, linguistic, and national difference. In other words, we should adopt a case-based approach towards the values that ought to animate a federal constitution, giving appropriate weight to the most pressing moral considerations for the actually affected populations in the case under consideration. Considerations (1) – (4) are relevant, but not so relevant as to displace the central animating concerns of federal politics in states where there is robust cultural and national difference. We should attend to these other values (1-4) in course, trying to realize them as best we might in institutional design, but we must give them their appropriate, subordinate, weight relative to self-determination when considering the design of a multinational federation.⁵¹ Failing to give priority to the value of collective self-determination within these contexts fails to explain the reasons that national groups, with weighty interests in collective identity and self-government, would, in the absence of domination, reasonably associate together in a shared political order. As we have seen, it also fails to give an account of federalism that is consistent with the theory of territorial legitimacy developed thus far.

Conclusion

This chapter started with the observation that federalism is often viewed as the preferred route for the exercise of Indigenous self-government. However, this position presents puzzles. As we have seen, Indigenous and settler peoples possess inherent territorial rights, entitling them to

⁵¹ These considerations might be of the most relevance in mononational states. For example, efficiency might be most relevant, in (mainland) France (excluding the overseas territories). Similarly, non-domination might be most important in explaining the division of jurisdictional authority among the settler states in the United States of America (although, I think, cultural distinctiveness exists there too).

territorial self-rule as nations. Thus, we have asked: what is valuable about the association of Indigenous and settler peoples in a shared federal political and constitutional order?

Correspondingly, the chapter has considered five potential explanations of the value of federalism as a constitutional design for multinational states. As we have seen, these may apply to some degree in the design or interpretation of federal norms in multinational states, but by themselves they fail to adequately capture fundamental animating concerns of such federations.

Administrative efficiency views fail to account for the value of federalism in multinational cases because they often militate precisely against jurisdictional rights for the lower level within a particular political order. This is inconsistent with our intuitions about regionalism generally, and conflicts with the theory of territorial legitimacy developed thus far, wherein jurisdictional rights are grounded in the collective self-determination interests of peoples – the “lower level” of multinational federations. Foot voting proposals likewise fail to give us a plausible account in multinational contexts. Not only do they fail to reflect the actually existing designs of federal states which draw stable jurisdictional boundaries around national or cultural groups rather than fluctuating to maximize preference satisfaction (as Levy observes), but they fail to account for the different priority orders of “preferences” within political justification. We should not view the determination of either cultural groups or peoples to exercise collective self-rule together as a policy preference of the kind centered in foot voting proposals, but as a shared judgment tracking facts central to the cultural and/or political agency of the members of nations.

Levy’s own account of the value of federalism, which better reflects the territorial boundaries suggested by our theory of legitimacy thus far, is also inadequate. By drawing jurisdictional

boundaries around ethnic and cultural groups for the purposes of cultivating loyalties counter to the central state, and thereby creating a bulwark against central state domination, Levy's account instrumentalizes the political identities of the members of the federation. This fails to take the identities and claims of minority nations and cultural groups seriously, instead treating them as data for the purposes of securing values of ultimate importance to the constitutional designer. This is true as well of the theory of federalism which instrumentalizes recognition of national identities to promote the territorial integrity of the state as an entity under international law. Each of these views fundamentally disrespects citizens by refusing to take their claims seriously.

Most deeply, Levy's account fails to grapple with the logic of territorial self-determination developed throughout the dissertation thus far. As I have argued, peoples have inherent territorial rights grounded in their status as peoples with legitimate occupancy claims. A theory of federalism for multinational contexts should be consistent with this, explaining the value of federal arrangements for a multiplicity of self-determining peoples. Moreover, as I have argued, such a theory should answer fundamental questions of institutional design, most notably the question of how to distribute jurisdictional powers among the constituent territories and federal government. In the absence of this latter account, we will have no reason to think a federal distribution of powers is not arbitrary, or the result of domination between peoples rather than a distribution consistent with their collective self-determination and territorial rights.

The final theory, while an improvement on the earlier ones, also fails according to these two desiderata of an adequate theory of the value of federalism in multinational contexts. On the fairness in recognition to national identities view, federal structures are justified by the fact that

they can recognize the national identities of two or more groups rather than one. Certainly, this is true: federalism, as compared with a central state design, creates the institutional space for a people to exercise independent territorial self-rule with respect to some jurisdictional domains, rather than yoking them together with potentially much larger groups that will dominate politics with their own shared beliefs, values, and voting patterns. However, this view was found to be inconsistent when we unbundled the set of jurisdictional powers normally associated with territorial sovereignty and observed that federalism, in many cases, would deny equal recognition to minority nations. As we saw, the national majority within a federation, especially in Indigenous – settler cases, will often have effectively more jurisdictional power by virtue of their ability to control the federal government. If equal recognition requires national different groups to have the same effective jurisdictional powers, the view fails to explain the value of federalism over minority secessions. More broadly, the view has not explained how to distribute jurisdictional powers between the federal government and other units of the federal state; considering the above demographic considerations, the problem of domination recurs with additional force in this context. In summary, we will have to look elsewhere for a theory that satisfies the two desiderata.

Chapter 4: Anishinaabe and Diversity-Aware Conceptions of Political Belonging

As discussed in the previous chapter, federalism is often proposed as a mechanism for the achievement of Indigenous self-determination, posing important questions as to the value of this form of political association for self-determining peoples in light of their rights to territorial jurisdiction. The last chapter canvassed five potential explanations of the value of federalism for multinational states (administrative efficiency, citizen preference maximization, non-domination by a central government, territorial integrity of the state, and fairness to national identities), concluding that each failed to explain the value of federalism in a way consistent with the inherent self-determination rights and territorial rights of peoples. While the final view made some progress in explaining the value of federalism vis-à-vis centralized alternatives by centering the nationhood of the constituent groups in multinational states (rather than attempting to bypass or instrumentalize these identities) it did not explain why or how this form of political association could achieve adequate recognition of the constituent nations' rights to self-determination or territorial jurisdiction. I suggested that we could see this problem by considering why settler and Indigenous peoples would have reason to associate in a federal structure if secession were possible; and there was also the further problem, unsolved by the view, of allocating the jurisdictional powers among the constituent peoples without domination.

In this section I develop an alternative way of looking at the value of federal association, grounded in James Tully's theory of intercultural dialogue in diverse political associations, in dialogue with Indigenous theories of constitutionalism, treaty, and legal pluralism. This hybrid

approach better explains the logic and the practice of belonging within federal polities than the alternative views—that is, it better explains a plausible value-based motivation for continued federal partnership among diverse nations, and will provide the grounds for identifying the conditions (in the next two chapters) under which partnership can be said to not dominate the members but to ensure a fair distribution of political powers (that is, genuinely equal recognition of political identities). This view provides us with substantive direction for the institutional design of multinational federations or the interpretation of constitutional principles.

At the heart of Tully’s theory of dialogical constitutionalism is a critique of dominant theories of constitutionalism which draw exclusively from Western political philosophy traditions, thereby eliminating the political understandings of Indigenous participants from public discourse in multinational societies (2007). Whereas historically liberal societies have pursued *monological* practices of constitutionalism drawing exclusively from Western traditions of constitutional interpretation, multinational societies must pursue the construction of federal institutions and civic identities through an intercultural dialogue. Building on Tully’s framework, I turn to the question of the value and practice of federalism in settler – Indigenous societies. I argue that Anishinaabe conceptions of personhood, freedom, and belonging disclose a unique perspective on the value and practice of federalism. Federalism on this view enables interdependent, mutually referring, and co-constituted identities to give institutional expression to their always already being in relationship, and in turn enables their *co-creativity* (reciprocal freedom and co-authorship) of a shared space through reciprocal exchange of gifts on the basis of their unique needs and capacities (Mills, 2019). Federalism – or institutionalized cooperation and sharing of gifts among diverse groups – gives expression to this underlying interdependency and shared

identity, and constitutes the institutional form that enables freedom, in light of these mutual obligations of care already comprising our identities. I argue that this Anishinaabe conception of the value of federalism is intrinsically attractive and deepens our understanding of the nature and development of federal relationships and civic identities in multinational cases. This view illuminates an Anishinaabe conception of *radically interdependent self-determination*, and in turn provides us with resources for thinking about how the self-determination projects of multiple peoples are not only reconcilable but enhanced through federal partnerships. With this hybrid theory on the table, we will be in a position to begin thinking about the process and principles for assigning powers and responsibilities among nations and governments within a federal order.

The outline for this section is as follows. In this first part of this section, I bring together the discussion of minority political identities and federalism into discussion with James Tully's theory of agonistic democratic federal politics premised upon intercultural dialogue. My hope in doing this is not so much to articulate a substantive vision for the institutional design of federal institutions in Canada, as to demonstrate the necessity of a continuous intercultural dialogue for the possibility of non-dominated collective self-determination in federations including settler and Indigenous peoples. Then, in the next section, I go on to exemplify this dialogue, and shed light on the value of federal association, through an engagement with an Anishinaabe vision of constitutionalism and Indigenous conceptions of treaty and treaty federalism. Anishinaabe conceptions are informative as the value of federal design options in cases of multinationalism, and provide guidance in cases where self-determination is a central concern for institutional design. With this distinctive approach on the table, we will have provided an account that fits the

first desiderata of a theory of federalism for settler – Indigenous cases, and be positioned to answer the second.

4.1 Dialogue and diverse constitutionalism

James Tully's work in *Strange Multiplicity* (1995) and *Public Philosophy in a New Key* (2008) directly interrogates the conditions for a just and legitimate constitutional arrangement for the nationally diverse members of contemporary political associations and is thus pertinent to understanding the values at the heart of settler – Indigenous political associations. Tully's central objective in *Strange Multiplicity* is to unsettle the imperial stance towards contemporary constitutions and state forms that has prevailed for approximately three centuries. For Tully, the prevailing modes of constitutional interpretation and political belonging have been defined by Western theories of constitutionalism to the exclusion of distinct and equally legitimate modes of thinking, speaking, and acting. A central purpose of *Strange Multiplicity* is to upset "a habitual imperial stance, where one's own customary forms of reflection set the terms of the discussion," and to construct in its place "a genuinely intercultural popular sovereignty, where each listens to the voices of the others in their own terms" (1995, p. 24).

Tully addresses Indigenous claims for self-rule within the broader array of cultural difference and struggles for recognition in contemporary societies. This is pertinent, considering the diversity of inter- an intra- group differences within settler – Indigenous political associations. A central challenge for the just reconciliation of cultural differences in modern political associations concerns a lingering conception of cultures as internally uniform, bounded, and

unchanging. Instead, in the modern age, according to Tully, “cultures are densely inter-dependent in their formation and identity,” and “citizens are members of more than one dynamic culture” (1995, p. 11). Interactions among cultures give rise to changes in cultural identities through internal and external negotiation (p. 11). Similarly, “cultural difference” is not merely experienced in the face of the cultural other but is internal to one’s own identity as one traverses a complex, negotiated, intercultural space and views it from different perspectives (pp. 13-14). Indigenous claims for self-government must be understood with this anti-essentialist concept of culture and identity, and in the context of wider claims of identity difference.

For Tully, the post-imperial stance towards cultural diversity and political belonging is exemplified by Haida artist Bill Reid’s iconic sculpture, *the Spirit of Haida Gwaii*, which depicts a multiplicity of humans, animals, and traditional Haida myth creatures “vying for recognition and position each in their culturally distinct way” within a single canoe (1995, p. 24). In this piece “the questioning, contestation and renegotiation of their cultural identities seem plain for all to see,” yet this seems to proceed in a fashion without domination but rather achieves a temporary balance. This piece is illustrative of the *aspectival* character of intercultural politics and intercultural institutions (p. 25). As Tully writes: “As you walk around the canoe you soon realise that it is impossible to take it in from one comprehensive viewpoint. It defies this form of representation. Rather, you are drawn to see it from the perspective of one passenger after another, and their complicated interrelations guide you to see the whole now under one aspect, now under another” (p. 26). For Tully, *The Spirit of Haida Gwaii* illuminates the character of constitutional orders comprising many peoples and cultures, and in turn the appropriate conception of popular sovereignty and constitutional legitimacy. On this view, legitimacy

requires “that the people reach agreement on a constitution by means of an intercultural dialogue in which their culturally distinct ways of speaking and acting are mutually recognised” (p. 29).

4.1a Modern constitutionalism

Modern philosophical theories of constitutionalism and corresponding practices of constitutional law do not adopt this aspectual orientation towards intercultural societies, an orientation which necessitates a “multilogue” (cf. dialogue) among diverse cultures to generate the conditions for legitimacy through a consensual negotiation of mutual accommodations (1995, p. 30). Rather modern forms of constitutionalism often maintain conceptions of normative terms such as “constitution” and “other terms associated with it, such as popular sovereignty, people, self government, citizen, agreement, rule of law, rights, equality, recognition, and nation,” which justify the exclusion and assimilation of difference rather than the necessity of recognition and accommodation (p. 36). This is due to the dominant language games of modern constitutionalism employed in assessing claims to recognition, language games sustained by the “authoritative traditions” of interpretation of constitutionalism: liberalism, nationalism, and communitarianism (p. 36).

Modern constitutionalism’s power to exclude consists in the customary agreement through implicit usage as to the meaning and conditions of application of these terms among the dominant members of societies sharing a background language and way of life (1995, pp. 38-39). Claims for recognition are thereby translated “as a claim in the prevailing language of constitutionalism” (p. 39). For example, Indigenous peoples must articulate their claims in the

dominant normative vocabulary of nationhood and self-determination, claims which are then adjudicated according to the conventional criteria of the three authoritative schools – which are themselves challenged in the struggle “to include them, rather than exclude them” (p. 40).

For Tully, modern constitutionalism is comprised of the following picture:

The picture is of a culturally homogenous and sovereign people establishing a constitution by a form of critical negotiation. The sovereign people are culturally homogenous in one of three ways: as a society of undifferentiated individuals, a community held together by the common good or a culturally defined nation. The constitution founds an independent and self-governing nation state with a set of uniform legal and representative political institutions in which all citizens are treated equally, whether their association is considered to be a society of individuals, a nation, or a community.

Tully, 1995, p. 41.

This form of constitutionalism and associated political philosophies (from Hobbes, Locke, Rousseau, Paine, to Rawls) misrepresent the conditions of political association of Indigenous and non-Indigenous peoples (Tully, 1995, pp. 63-82). Each posits an original position for theorizing the conditions of a just society wherein the parties to the contract are not yet politically constituted – yet the conditions of multinational societies across the world including Canada, Belgium, Spain, and the U.K., show this assumption to be false (p. 55). Indigenous peoples, contrary to the blank slate presumed by social contract theories, claim “recognition of the equality of their constitutions and traditions, many of which precede modern constitutionalism by thousands of years” (pp. 53-4). Moreover, in terms of the forms of governance advocated for by these theories, “a firm convention of modern constitutionalism is that the aim of constitutional dialogue is a uniform and comprehensive legal and political association” (p. 55). This view of

belonging is incapable of producing a diverse federation incorporating the appropriate self-rule of members who already find themselves plurally culturally and politically constituted (p. 55).⁵²

4.1b Treaty constitutionalism

This vision of modern constitutionalism comes as a self-conscious break from an older form of constitutionalism, common to pre-modern Europe and defended by thinkers such as Montesquieu and Thomas Jefferson (Tully, 1995, chap. 3). Ancient constitutionalism is based upon respect for the long-standing authoritative customs internal to, and gradually shifting consensual agreements between, diverse entities such as cities, nations, and peoples each presumed to have their own jurisdiction and authority without the necessity of symmetry or hierarchy in their relationships with other political units (p. 67). It is the rediscovery of this form of a politics, or the “hidden constitutions of contemporary societies,” that is the key to appropriately understanding Indigenous claims for self-government today (pg. 99).

Tully illuminates the spirit of this form of constitutionalism with the metaphor of an ancient city, originally deployed by Wittgenstein to characterize the nature of a language. Wittgenstein writes: “Our language can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight and regular streets and uniform houses” (1995, p. 103).

⁵² For broader problems with difference-blind liberalism, see C. Mills, 1997. For discussions of the assimilatory results of difference-blind liberalism for Indigenous identities see Cardinal, 1969.

Constitutions are said to be comprised of an assortment of language games or concrete usages of constitutional concepts, concepts which are deployed in varied practical contexts and defy a comprehensive representation of their meaning. Following Wittgenstein, the meanings of constitutional concepts are not fixed by any complete set of necessary and sufficient rules for their application to instances but rather are related only through family resemblances which are discerned through dialogue in a process of redescription and comparison of different aspects of concrete cases such that interlocutors come to see connections. Likewise, much as one can fail to find one's way about as one approaches a neighbourhood of the city from one direction rather than another, one can fail to see the connection between uses of constitutional concepts in different contexts (Tully, 1995, p. 104-110). In the absence of a dialogue with those with whom we share a complex constitution and who view it from a different perspective, our understanding of constitutional concepts is bound to constitute a limited, *monological* view, that is, to be "partial to some degree – noticing some aspects of usage at the expense of overlooking others" (p. 110). For Tully, "the great tragedy of modern constitutionalism is that most European philosophers followed Hobbes and turned their backs on dialogue just when non-European peoples were encountered and dialogue and mediation were needed to avert the misunderstandings and inhumanity that followed" (p. 116).

4.1c Tully's theory of federal identity

In contrast to the assumptions of modern constitutionalism, the negotiation of relationships between equal, co-existing, and self-governing peoples consists in a continuous democratic conversation about how to live together and share the land (Tully, 2008, p. 239). For the dialogue

to be just, it is necessary that the customary forms of expression and reasoning familiar to one culture do not dominate the others – the members of the majority must not insist upon a dialogue solely conducted in terms of their own cultural expressions and understandings. The first step in a democratic dialogue is that of “listening to the voices of others in their own terms and traditions” (p. 240) – to develop the capacity to move about and see things from the vantage of those in the diverse association. Tully argues that this practice of interaction and negotiation permits the development of an “intercultural middle ground” where “the cultural understanding of the partners... are not completely foreign” (p. 240). A legitimate treaty process, as a practice “woven together out of the customs from many cultures,” exemplifies the possibility of such a middle ground (p. 240).

This conception of an on-going, historical, intercultural dialogue between the members of diverse peoples gives rise to a unique conception of the value underlying the motivation to maintain political relationships. Participation in this continuous intercultural dialogue, about the history, structure, and future of a shared political association gives rise to a unique form of shared identity that is constructed over time and becomes central to citizens’ self-understanding. I will quote here at length, because I believe Tully captures a central feature of multinational associations neglected by earlier views of the value of multinational federalism:

Furthermore, there is a special bond that holds the partners, and indeed the country, together in an intercultural dialogue. For many Aboriginal and non-Aboriginal Canadians, the history of their association with members of the other community has become part of their identity as Canadians. The bond is not one of unity of purpose, but of a partnership in a shared history, with people who they recognise as different. The understandings of the shared history are of course very different. Nevertheless, for many people this is one vital aspect of their identities as Canadians, not just that there are members of the other group present in Canada, but there

is partnership, a shared life... One purpose these Canadians share is sustaining the partnership, the historical conversation between them, as part of their sense of identity as Canadians. It cannot be the aim of a partnership of this kind to reduce one partner to the image of the other, for the partnership exists in virtue of the recognition and maintenance of their differences. This is a unique form of association that has developed in spite of the long struggle to reduce the relationship to a unity. In some respects it resembles the partnership between many English-speaking Canadians and Quebecois and Quebecoises. Its disappearance would be experienced as an irreparable loss, like the lose of a close friend. This fragile bond, this tangled sense of being woven together like different yet inseparable rows of wampum beads in an ancient belt that have rubbed themselves smooth over long use, is often overlooked. Yet, after all is said and done, it is the sort of bond that holds a confederation together. This shared sense of a destiny together, for better or worse, provides the element in which intercultural dialogue has its life and hope.

Tully, 2008, pp. 241-42.

In this passage we see that instrumental benefits – whether measured in terms of the enhanced wellbeing of citizens, or better conditions for the self-determination of groups – are not all that holds a federation together. Participation by citizens in a practical intercultural dialogue about shared institutions shapes a shared (federal) identity for citizens that itself motivates the participants to maintain the intercultural dialogue together. This is a shared identity whose content is self-conscious belonging with diverse others in a political association, such that one understands oneself to be engaged in partnerships with other distinct groups and their members who maintain distinct ways of life – distinct ways of thinking, acting, and speaking. As with friendship, these relationships are valued for their own sake by participants, who come to see the association from their interlocutors' unique perspectives and come to appreciate those unique perspectives and ways of life. Over time, the interlocutors come to understand and value the difference of the others, which both throws into relief the particularity of their own identities, and contributes to their understanding of having an unique identity both *in relation to* the other participants and one in common with them:

[T]hrough these exchanges citizens are able to move around and see to some extent their shared political association from the identity of other cultures, nations, sexual orientations, and so on. In the course of this movement, they become aware on reflection of their own identities as partial and limited like the others. Moreover, the interplay of internal reasons unsettles the prejudices and stereotypes internal to their own practical identities. That is, these practical conversations foster a new, shared citizen-identity among the interlocutors: an identity that consists in the awareness of and respect for the diversity of respect-worthy identities of their fellow citizens and of the place of one's own identity among the diversity of overlapping identities. This shared identity of diversity awareness is precisely the citizen-identity appropriate to, and capable of holding together, multicultural and multinational political associations.

Tully, 2008, p. 179.

On this view, the relationships among groups in a federation are central to the federal identities of citizens. They are constructed through attention to and participation within struggles for recognition and other public discursive exchanges by means of which peoples negotiate shared practices that respect their difference and reciprocal changes in identity over time. It is important to note that this is not just a generic identity possessed by the members of every multinational federation. Although the form and process of development of federal identities is shared amongst federations, the content of any particular federal identity is determined by the groups living together, their histories, and their contemporary struggles for recognition. The shared identity of diversity awareness is an awareness of a particular diversity and history – it consists in an awareness of the existence of particular national partners; one's own place within the place-based web of nations and their customs of thought, speech and action; and the reasons for our mutual accommodations in the present – their meanings to others (in light of their worldviews), and our shared reasons for supporting them.

In the next section, we turn to an Anishinaabe view of these matters.

4.2 Indigenous conceptions of identity, relationship, and belonging

As Tully's work demonstrates, Indigenous peoples make claims to rule themselves – in political association with settler peoples – in ways of speaking, acting, and thinking that are their own. Indigenous peoples have culturally grounded perspectives from which they view the shared structures we occupy and in terms of which they articulate their visions for decolonization and partnership. Indigenous conceptions of identity, relationality, interdependency, and obligation are an important starting point for understanding the ties of political association between Indigenous peoples and settler peoples because they explain, from the perspective of one federal partner, why equal nations are formally united in relationships of political cooperation; and, as we will see, this perspective also explains why cooperation is not *necessarily* an imposition but a condition and expression of the participants' reciprocal freedom.

In engaging Indigenous conceptions of political relationships, it is important to recall that, as argued in chapter 3, it is far from certain why settler and Indigenous peoples would choose to cooperate to maintain a multinational political order – even if that order were structured by federal principles. If Indigenous peoples would choose to do this, under what description and conditions would cooperation take place, and how can cooperation in a political association avoid dominating the smaller Indigenous nations? As Anishinaabe political philosopher Dale Turner makes clear, in interrogating the legitimacy of the multinational state, progressive liberal thinkers have been inclined to set aside Indigenous understandings of Indigenous people's historical incorporation into the state, and to focus on arguments concerning the equality of cultures within a combined political order (2006, pp. 57-70). However, in doing this, liberal

thinkers presuppose something that is fundamentally in question – namely the legitimacy of the multinational state with respect to culturally distinct *nations* which were historically forced to cooperate, provided the state adequately realizes some interpretation of cultural equality among the members of the distinct nations who are assumed to properly be citizens of the state (pp. 68-9).

In Turner's work, the theory of equality at which he takes aim is a particular interpretation of Kymlicka's cultural equality argument (Kymlicka, 1995). Turner broadly accepts Kymlicka's thesis that access to culture is a precondition for human agency and thus that there are matters of fairness in the treatment of cultures at issue within the multinational state. However, according to Turner, there is an interpretation of Kymlicka's argument on which the state is legitimate just if it fairly distributes access to cultural membership to the members of culturally distinctive groups (Turner, 2006, pp. 60-66). And the issue with this argument is not confined to (a particular interpretation of) Kymlicka's theory – but with any theory of federalism that purports to offer an explanation of the legitimacy conditions of the multinational state in terms of a good to which the state can fairly distribute access, without a ground-level inclusion of Indigenous political perspectives on their incorporation within the multinational state. The issue with theories of this kind is that they completely neglect Indigenous understandings of their incorporation with the state, and related Indigenous conceptions of concepts such as sovereignty, rights, and nationhood. However, if, by the admission of theorists like Kymlicka, Indigenous peoples were wrongfully incorporated within the state – that is, originally wrongfully subjected to state authority because they were nations with territorial rights at the time of incorporation, the question of Aboriginal sovereignty remains on the table in the present (Turner, pp. 68-9). As

Turner argues, Indigenous incorporation within the state may be consistent with enduring Indigenous sovereignty – it is not clear that incorporation without consent can extinguish sovereignty – and thus it is not clear that the state can be legitimate just if it realizes some ideal of distribution of rights to access cultural goods.

While it is not Turner’s aim (nor my aim) to argue for a determinate conception of sovereignty, the concept normally suggests the meta-jurisdictional power of a political agent with respect to a population and territory. That is, sovereignty suggests, *inter alia*, the right of a nation to decide upon the distribution of jurisdictional powers with respect to its members and territory. Thus, it is an act of sovereignty when Indigenous nations “conditionally delegate” jurisdictional powers to the federal state – a phrase which Chickasaw legal theorist James Sakej Henderson uses to describe the transfer of authority that may occur through treaties, understood as foundational constitutional documents of Indigenous – settler treaty associations (2002). Correspondingly, Indigenous nations might retain their sovereignty, by this conception, and by their own diverse conceptions, throughout their interactions with settler peoples insofar as they have agreed to cooperate under certain conditions (Turner, 2006). It is worth observing at this point as well, that on the theory of territorial legitimacy constructed thus far by the dissertation, that Indigenous peoples possess inherent territorial rights to make and enforce law for their populations and territories, flowing from the relationships between their members, the land, and institutions of political self-determination. The rights of Indigenous peoples on the theory constructed thus far are the rights of nations *simpliciter*, not special minority rights of ethnic or cultural groups granted by the procedures of the central state; although, as I have discussed, fairness in distributions of land rights after wrongdoing between these self-determining peoples, for

example, must make reference to their cultural difference and the equality of their members (chapter 2).

On Turner's account, the upshot of the enduring political rights and sovereignty of Indigenous nations that have been historically wrongfully subject to settler state power is that the shared political structures cannot be presumed to be legitimate just if they go on to realize some particular theoretical vision of fairness analytically drawn from a consideration of cultural difference and equality, or from any other analytic drawn from liberal political philosophy. Instead, we must attend to Indigenous political perspectives on the nature and structure of international cooperation, and this will require the participation of Indigenous lawyers, politicians, community members, and intellectuals in the political and intellectual processes for articulating the norms and theoretical underpinnings of shared political structures (Turner, 2006). On the theory of territorial rights constructed in chapter 1, we might think that this is necessary, because the authority of shared political structures must be consistent with the rights of peoples to govern themselves according to institutions that reflect their fundamental shared evaluative commitments and assumptions about the world. Only under these conditions would peoples choose to conditionally delegate jurisdictional rights to shared institutions – or to enter into treaties to create federal political structures.

In the section that follows, I will consider an Anishinaabe theory of political belonging and constitutionalism and draw this view into the multilogue concerning federal political structures. Consideration of the Anishinaabe view of political belonging on its own merits as an account of the general value of multinational political associations is extremely valuable – as we will see, it

brings some relief to the tensions for the fairness in recognition of nation identities view, and helps to explain a plausible motivation for self-determining peoples to enter into enduring relationships of political cooperation through federal structures. However, it is also especially important for a case-based approach that must articulate the value of federalism in multinational contexts in terms that are appropriate for specific *peoples* with their own unique identities. If shared political associations are to achieve the goods of mutual recognition, non-domination, and mutual collective self-determination, the norms and structures of those political communities must be constructed through a dialogue between equal peoples. With this vision, we can better understand the reasons settler and Indigenous peoples would choose to cooperate in the production of a federal governance structure, and the principles that ought to animate the partnership from the perspectives of Indigenous peoples.

4.2a Anishinaabe constitutionalism

Aaron Mills' work continually demonstrates that we cannot understand Anishinaabe law or modes of political belonging without understanding the deeper epistemological, cosmological, and ontological foundations of the Anishinaabe way of life and worldview (2016, 2017, 2019). Mills illuminates Anishinaabe conceptions of personal identity through the structure of gift-gratitude- reciprocity- relationship to the natural world maintained by many Indigenous peoples.⁵³ This model illuminates the nature of human personhood, and human freedom, for what

⁵³ Here I primarily discuss Mills' view for ease of exposition; however, that view is itself developed in relation to a whole host of Anishinaabe thinkers, elders, and community members. It should also be noted that, as within any tradition of political thinking (and the social group that maintains it) there is not complete theoretical consensus on such philosophical and spiritual matters among the Anishinaabe or any Indigenous nation—the contrary view would be a kind of essentialism. Yet, I think Mills' view highlights several prominent shared threads of Anishinaabe thought, which are interpreted and given voice to in diverse ways, and which are also shared more broadly by

Mills calls rooted peoples—those that recognize their radical interdependency with the Earth and in turn take direction from it. Rooted peoples adopt an ethos of humility in their interactions with natural beings such that they understand themselves as being under an imperative to reciprocate the gifts of the Earth and find a balance in their reciprocal interactions with it. This is related to what John Borrows calls the inherent limits of law, flowing from an appreciation of the integrity of the Earth and the bounds within which we can responsibly act (Borrows, 2018). Close attention to Mills’ Anishinaabe account demonstrates a unique vision of the value underlying political associations of settler and Indigenous peoples.

For Mills, the world is composed of elements presenting gifts to the all the others: waters, plants, forests, animals, the sun, moon, and stars— each contributes something to our wellbeing and the wellbeing of others. As humans, we are dependant on these gifts, and we are also capable of making contributions to the health and wellbeing of fellow humans, animals, and other elements of the natural world order (2019, pp. 68-71).⁵⁴ Within this context of profound giftedness, the appropriate feeling is gratitude: recognition of the receipt of plural gifts, freely conferred to us, by our natural relatives (p. 100-102). Correspondingly, we ought not to regard the world as a vast storehouse placed before us inevitably by God in recognition of human supremacy, but recognize

several Indigenous nations.

⁵⁴ This point is illuminated nicely by Kimmerer (2013), whose work challenges the assumption that humans cannot make the natural world meaningfully better off. We are capable of doing just that. In addition to judiciously stewarding the gifts freely presented by the natural world – that is, by responsibly interacting with the more-than-human beings upon whom we depend in order to not erode their own being and capacity for contribution (non-harm), we can also promote the wellbeing of the natural world relative to a baseline of no-humans: we can, for example, nurture plants, promoting their flourishing under conditions where they might not. The Haudenosaunee practice of planting the three sisters (corns, beans, and squash) together demonstrates this. The careful planting practice contributes to the flourishing of each species, which would not grow this way without us. In so doing, we promote the survival and reproduction of the plants within the ecological community, and benefit from the gifts of sustenance they offer to us.

that our condition is one of profound giftedness by the Earth.⁵⁵ There is something wonderful in our manifold giftedness: the free presentation of gifts by our natural and human relatives sustains us and is the condition for our flourishing. In turn, the fact that others' needs place demands on us are wholly appropriate; the fulfillment of these needs, in light of our condition of exceptional giftedness and interdependence, is freedom (pp. 108, 126). No one of us possesses all the gifts we require to be self-sustaining: we are all dependant on all the others, and are obligated to reciprocate the gifts of others, which sustain us, with our own gifts.

For Mills, Anishinaabe conceptions of personhood are, in distinction to liberal models of interdependence, conceptions of “radically interdependence” (2019, pp. 78-82). Rather than the liberal emphasis on the recognition and stewardship of our relationships of interdependency as a background condition for the construction and maintenance individual agency (e.g., the idea that individual autonomy is developed through social cooperation that creates the individual cognitive mechanisms necessary for reasoning and choice, and depends upon sociocultural conditions for its meaningful exercise, given the plans we adopt and their sociocultural distinctiveness),⁵⁶ for the Anishinaabe, *we are made up of these relationships* of interdependency

⁵⁵ This is not to say that the natural law is inconsistent with sacred law, an important source of Indigenous law (Borrows, 2002, 2010) – indeed, Mills posits that the reciprocal gift logic of the Earthway, and Creation's way (the Original Instructions), are analytically related.

⁵⁶ See for example, Nine, 2022 and Kymlicka, 1995 for views like this. I take it they are correct about the dependence of our agency on background social and cultural relationships (in both agency's development, and on-going exercise), but I contrast an Anishinaabe conception which recognizes this, but also meaningfully differs, in identifying our personhood as partially ontologically composed and self-consciously understood to be partly comprised of these “background” relationships. I do not mean to take a view on the superiority of one view or the other – indeed, I think they should participate in a reciprocal dialogue– but demonstrating the view of Indigenous peoples towards federal partnership if we are to relate on equal terms as equal nations with equal epistemic agency. In order to set up this understanding of federal relations and identity, we need to attend to Anishinaabe conceptions of relationships and identity more broadly. See above (Aspectival Federalism).

between elements of creation engaged in activity. To venture a metaphysical thought, selves are made up of these links of interdependence and processual mutual obligation that might otherwise be thought to be the background conditions for the Western concept of “individual autonomy.”

For Mills, the Anishinaabe are neither individualists, nor collectivists: neither the individual, nor the collective, has ethical priority in theorizing about justice, nor ought to be understood as having priority in the construction of the self. Anishinaabe conceptions of harmony and of the self emphasize that “We are link people,” – that is, it is in our relationships that our personhood and individual identities consist (2009, pp. 79, 81). As Mills writes: “This is the critical point: to understand rooted legalities, one must think of persons as the sum of their (changing) relationships, not as independent actors in the world” (p. 80). Our identities and obligations are located within a nexus of relationships with others that expands outwards to encapsulate all of creation, with relatively denser webs of mutual obligation and kinship at the centre, and relatively weaker obligations at the periphery (p. 122). As Mills writes, “since we’re link people, and since many of our linkages are to animal, plant, mountain and manidoo persons, they form part of who we are” (p. 81).

Central to this vision is the idea that our identities – as individuals, members of families, and our national identities – are not static and inert properties that attach to us prior to our relationships with one another. Rather, our identities are constituted and maintained through our relationships – with friends, among families, in community life, and in relationships with the natural world itself; Anishinaabe conceptions of group identity are relational practices of mutual aid through which we discharge our responsibilities. In other words, we are members of a kinship structure,

and have respective kinship identities, through recognition of our relationships and the attendant obligations that we possess within those relationships. As Mills writes, “the structure of mutual aid, kinship sets out the relationships through which community members present and receive their gifts and needs” (2019, p. 115). While the kinship structure and customary law might pre-exist the individual, giving social form and content to broader genetic and social relationships, membership in the kinship structure for the Anishinaabe is constituted actively through participating in the obligations that attend one’s role within the kinship structure. For example, being born into an Anishinaabe clan, one will have a special relationship as an auntie to one’s sister’s children – responsibilities that constitute one’s identity as an auntie and the fulfilment of which generate one’s meaningful belonging as a member of the clan (pp. 115, 155). For the Anishinaabe, full membership is active and based upon the fulfilment of role obligations of mutual aid, it is not constituted merely through descent.⁵⁷ As Mills writes, “Ultimately, for rooted communities the ongoing practice of mutual aid kinship is all that keeps rooted persons together, and others, apart” (p. 125).

For Mills, this conception of the person provides grounds for understanding an Anishinaabe conception of respect, and of freedom. As Mills writes, within context of existing within the interdependent Giftway of all creation, “respect for persons turns on the capacity of persons for creative contribution” rather than on some other articulation the ground of human value such as

⁵⁷ Indeed, membership within Indigenous nations is often maintained through what anthropologists call “fictive kinship” – or the creation of the full mutual responsibilities of kinship through formal adoption. Accommodation of these practices by early fur traders, through full participation in them– by for example, the Hudson’s Bay company and its agents – was central to the negotiation of the first treaties in Canada, commercial compacts, between the British and French with Algonquin, Huron, and Iroquois nations. See for example, J.R. Miller, chapter 1.

“dignity” (2019, p. 84).⁵⁸ Humans – as with the rest of the natural world – are co-creators of the world; they participate in the co-creation of the world by offering their own unique gifts to others in the cycle of gift reciprocity with those whom they are embedded in relationships of interdependency. This in turn leads us to a conception of freedom quite distinct from liberal conceptions:

All of this points towards a rooted conception of freedom. If freedom is the state of being that obtains when one’s personhood is respected, then for radically interdependent persons it will have to mean something like *co-creativity*. Co-creativity consists in one’s capacity to gift and to be gifted, and thus might be shorthanded as ‘free gift’, and not ‘free choice.’

Mills, 2019, p. 84.

According to Aaron Mills, then, the existence of responsibilities to others, does not constitute a problematic limit on our freedom, but rather constitutes an opportunity for freedom for radically interdependent persons. Fulfilling responsibilities to others – meeting their needs, for example – is the nature of freedom because freedom consists in co-creation: the reciprocal gifting necessary for sustaining ourselves. In order to gift, one requires another. The needs of others can serve to set the agent free, by providing an occasion to freely gift. As Mills says: “freedom is experienced—and can only be experienced—through and for others, which is to say in relationship” (2019, p. 85). Similarly, Mills writes of the sense of belonging for radically interdependent persons that: “freedom takes the form of ‘co-creativity’, and persons belong to one another through ‘mutual aid’” (p. 68).

⁵⁸ It is important to note that this is not an exclusionary theory of contribution: for Mills, each being – including water, stones, and plant life are already contributing to creation. A fitting reciprocal contribution depends upon one’s own unique gifts and the needs of others.

A practice of mutual aid with diverse others, informs our very sense of identity insofar as we understand ourselves *to be* relationship partners (people engaged in interpersonal and inter-group relationship of mutual aid). This practice is at the heart of Indigenous conceptions of harmonious treaty relationships. Our mutual obligation of mutual aid constitutes each of our identities and gives rise to our reciprocal freedom: we are not entirely separate but overlap in our identities insofar as our identities make mutual reference to the relationship that we are in with the other as we support one another; and the realization of our identities (our freedom) consists in the reciprocal gifting of one another that sustains us.

Mills illuminates this position in another paper:

What are we – the Indigenous and settler peoples of northern Turtle Island, Mikinaakominis, which many today call Canada – to make of a perspective so contrary to our inherited narratives of who the other is, and perhaps more importantly, of who we are to them? I want to suggest that the language of “friends and neighbours,” “side-by-side,” “interdependent,” “married to one another” and most emphatically, the statement that “we share generations of grandchildren,” suggests that the relationship – and a very tightly connected one at that – is actually the point. So tightly are we bound that although we are distinct, unique peoples, we are not and have never been autonomous peoples: as interdependent persons and communities within creation, we’re always already in relationship.

Mills, 2017, p. 210.

Several important observations regarding political association follow from this all too brief discussion of Anishinaabe constitutionalism. First, political association must be viewed in its broader context: as a structure for relationships of mutual aid within the whole web of interdependency that comprises the Earth way, but especially in the context of the ecological relationships directly enmeshed with and relatively near to the treaty relationships. Second, the identities of the participants in political association are in part composed by their relationships

with the others – they have their identities as participants in the relationship, amongst others.

Third, the freedom of the participants is made possible through their freely gifting the others on the basis of their abilities within the structure of a kinship relation—the self-realization of the relationship partners takes the form of co-creation, reciprocal gifting that sustains the conditions of flourishing life for all.

Correspondingly, criteria for the success of settler – Indigenous relations might be derived from this analysis. Any political structures maintained by settler and Indigenous peoples will have to fit this normative conception in order for them to be non-alienating, freely maintained structures, for Anishinaabe people who adhere to traditional Anishinaabe law. They must be structures of relationships understood to exist within their broader ecological and social context, where those relationships and the mutual obligations that comprise them are understood to form part of the identities of the members, and where the terms of association (the relationship) itself consists in sharing the gifts each has with the other in order to facilitate their own contributions to co-creativity. We see here the shape shared identity amongst those sharing a federal structure might have: it is maintained through free and uncoerced co-creative interactions that sustain the structure of relationship by empowering those within.

4.2b (An) Anishinaabe (inspired) conception of federalism

We are investigating what relationships between settler and Indigenous peoples would ideally look like from the perspective of Anishinaabe political philosophy. Within this context, we might see the shape of an ideal that, while deeply attractive, is one of which existing settler peoples fall painfully short in their relationships with Indigenous peoples. Nonetheless, I believe that it is

useful to carry on, to demonstrate the implications of this view of relationships, for settler – Indigenous political relationships. Mills illuminates an Anishinaabe conception of the value and practice of federalism that we should take seriously on its own terms, and as a condition for the non-alienated participation of Anishinaabe peoples in Canadian federalism.

As with Mills’ discussion of grandchildren, the use of the metaphors of kinship by Indigenous peoples to describe settler – Indigenous relationships more broadly (as with “brothers” and “great mother the Queen”) is well documented and illuminates Indigenous perspectives on treaty relationships as extended kinship relationships.⁵⁹ Recall that Mills writes: “ultimately, for rooted communities the ongoing practice of mutual aid kinship is all that keeps rooted persons together, and others, apart” (2019, p. 125). The relevance of this discussion of kinship for my purposes is to show that a similar kind of Anishinaabe reasoning, as found in the discussion of internal clan-based obligations and membership, with the corresponding account of freedom, applies to the structure of relationships and obligations between the members of a political association – namely settler and Indigenous nations sharing and co-authoring a federal political structure. This is the structure of treaty relationships, which should form the bedrock of legitimate settler – Indigenous *treaty federations*.

Recall that for Mills, the clan structure specifies the gifts one is obligated to present to specific persons. By virtue of one’s role identity, which places one in relationship to specific others who also bear a position designated by the clan structure, one is responsible for addressing, in certain

⁵⁹ See Craft (2013) for a discussion of the Queen as Great Mother (a metaphor whose meaning depends upon an understanding of the roles of parents within Anishinaabe culture). See also Williams (1997), and Allard-Tremblay (2022) for discussions of the value of interdependence as represented by the Covenant Chain wampum belts.

ways, the needs of that other (and although this is a relationship of reciprocal obligation, the contents of gift in one direction might be different than the contents in the other, as in the relationships between aunts and nieces, or children and parents; moreover, reciprocity need not always be direct). It is by addressing the needs of others for whom one is responsible that one exercises one's freedom; for interdependent beings composed of mutually sustaining relationships, playing one's part within the cycles of co-creativity that sustains the life of all, *is* freedom.

While this picture envisions a form of radical belonging through participation in relationships of grounded interdependency, it does not eliminate differences between peoples. Mills teaches that difference is a condition of mutual aid. As Mills writes: "I'm hopeful I can show you that a shared political community need not have as its foundation the reduction of difference to sameness; that *we can start instead with our need for one another's unique gifts* and constitute ourselves in networks of mutual aid" (2017, p. 215, emphasis added). Similarly, Mills writes:

Far from erasing the moral significance of individuals, the constitutional view from interdependence privileges it: without identifiable, secure, unique selves, the creative order collapses. We need the other's gifts, and this simple fact presupposes our recognition of and interest in protecting their unique, respective identities. Without those identities, their gifts disappear. Thus within this constitutional framework it turns out that most of the time my interests aren't actually served if yours are the cost of my benefit.

Mills, 2017, p. 232.

The point of this is to suggest a model of collective self-determination wherein the constituent units of a federation are not merely mutually dependent on the others for their own individual exercises of collective freedom (liberal interdependence applied at the collective level, which I

believe to be true), but one, where, additionally, the realization of the freedom of one unit consists in it playing its part within the co-creative process of federal politics that sustains the other to which it is related, and where its relationship with the other partly comprises its own identity. Correspondingly, we have two distinct accounts of the value of federalism here, one liberal, one Anishinaabe. One which centres the self-interest of groups, in the conditions for their self-realization, which might be federal union; and another, which broadens the conception of the self, not to include the other, but to foreground the dynamic relationality within which all are encapsulated.⁶⁰

At this point, we have a distinctive conception of the value of political association between settler and Indigenous peoples. On this Anishinaabe account of the motivation for political relationship – namely, that we are always already in relationships, which constitute our identities, and within which we experience freedom through co-creativity (reciprocal gift exchange enabling continued life and growth). It bears observation that this kind of *linkage* begins to provide us reason to understand why groups might affiliate with one another, notwithstanding the fact of their identity difference and the potential threats they pose to each other’s self-determination. Recall from the discussion of the “fairness in recognition” argument that a key issue with the view was that it potentially failed to account for equality of recognition of the constituent identities in its proposed institutional designs – as in cases where it seemed inevitable that some independently conceived national identity grouping received more recognition than the minority identity – through federalism. That problem does not arise here – at least not directly – because the focus of the explanation of federalisms’ value is not so much the idea that

⁶⁰ Here I am indebted to Arne Naess’ concept of *self-realization* (1989).

independent identities might receive equal recognition through federalism, but that interdependent mutually referring and co-constituted identities might give institutional expression to their always already being in relationship and in turn enable their co-creativity (reciprocal freedom) or co-authorship of a shared space through reciprocal exchange of gifts on the basis of their unique needs and capacities. Federalism – or institutionalized cooperation and sharing of gifts among diverse groups – gives expression to this underlying interdependency and shared identity, and constitutes the institutional form that enables freedom, in light of these mutual obligations of care already comprising our identities.

We still, however, have our second question: How do we practice this understanding of relationship between groups in such a way as we can secure inter-group belonging without domination? How can we respect and enjoy the unique contributions of each other without intruding upon the other or eradicating their difference? In a way, this is a return to the problem that bedeviled the fairness in recognition of independent national identities argument, however we hardly have the same understanding of the backdrop to political cooperation now as we did when we considered *that* view, with its conception of bounded identities. With the resources of Mills' Anishinaabe account on the table, and returning to the dialogical approach recommended by James Tully, we can begin to think of the appropriate mechanisms for securing the relevant sort of non-domination and harmony within settler – Indigenous treaty federations.

Chapter 5: Treaty and Domination

In the last chapter, we uncovered a unique description of the latent value of political partnership among nations, an ideal that explains the potential value of political partnership among Indigenous and settler peoples in federal arrangements. This satisfied the first desideratum for an adequate theory of federalism in settler – Indigenous contexts: a description of the potential value of political partnership inhering in federal relationships between settler and Indigenous peoples that is consistent with the inherent rights to self-determination and territory of peoples. We turn now to questions concerning the institutional design of multinational states in light of this value: the constitutional norms, institutional practices, and sociopolitical conditions necessary for appropriately securing interdependent self-determination. In order to do this, I will consider one of the primary threats to the ideal of interdependent self-determination: inter-group domination. Identifying the nature of this threat and the conditions that give rise to it is part of developing an account of federalism that fits the second theoretical desideratum of an adequate theory of federalism for multinational contexts.

Recall that in addition to identifying the value of federalism, a theory of federalism, for settler and Indigenous relations should be able to give an account of *how jurisdictions should be allocated* between nations. Federalism consists in the distribution of jurisdictional powers among groups in such a way as groups maintain some exclusive areas of independent jurisdiction and share other areas of jurisdiction. It is not plausible that just any distribution of jurisdictional rights and responsibilities is justifiable, considering the risk of settler control of Indigenous jurisdiction through demographic supremacy under poorly designed shared institutions and

constitutional norms. After all, Indigenous peoples have rights to self-determination and territory, flowing from the legitimate occupancy rights and interests in political autonomy of their members. If federalism is to be consistent with the value of interdependent self-determination, an adequate process for allocating powers between units and federal government must be identified. Attention to the nature and source of domination in the relationships between settler and Indigenous peoples – when and why certain distributions of jurisdictional and meta-jurisdictional authority are unjustifiable – will reveal an ideal for the design of political processes for distributing jurisdictional rights and responsibilities in a federation that realizes the overarching value of interdependent self-determination.

In the first section, drawing on neo-republican theory, I will construct a general account of the concept of domination. Domination consists in the arbitrary capacity to interfere with the agential capacities of another, and this relation is often inscribed through a set of political and legal structures that fail to adequately constrain the power of the state to track the interests of citizens. It is a feature of domination that it subjects individuals to *substitution* of their own judgments without good reason, threatening alienation under law. Next, I develop this concept to account for the nature of *inter-group domination* under shared political institutions. The domination of groups can occur through the maintenance of structures that (1) exclude the individual members of the subordinated nation from full participation with the *federal* demos, (2) subject the jurisdictional authority and meta-jurisdictional authority of the subordinated *nation* to arbitrary interference by the stronger group, and (3) privilege the epistemological, ontological, and normative conceptions of the larger group in the institutional processes and discourses of the federal state. I demonstrate that this concept of domination plausibly tracks the position of

Indigenous nations under the political and legal structures of the Canadian state. In order to concretize this discussion, I devote the second section to the Canadian context – articulating with more precision the precise manner in which the Courts and comprehensive land claims procedure (modern treaty process) enable settler groups to dominate Indigenous nations under the current constitutional framework.

In the third and fourth sections, I turn to Indigenous conceptions of treaty and theories of treaty federalism. First, I articulate Mills’ objection to the current structures of political association, grounded in an Anishinaabe conception of treaty relationships (2017). As we will see, this objection fits closely with the domination-based critique of the Canadian state and treaty process developed above insofar as domination forecloses the ability of Indigenous people to live in sociopolitical worlds that reflect their fundamental values and ways of knowing and being. As Mills argues, a fundamental error of the Canadian state has been conceiving of treaties as legal remedies to historical injustices rather than as a whole relational framework for conducting relationships between peoples. Treaties do not aim to permanently settle the problem of intergroup belonging by specifying a final inter-delegation of responsibilities and powers, but are a framework for coordinating the growth of distinct national legal orders in a mutually empowering relationship. I will then turn to the work of James Tully (1995, 2008), in dialogue with Indigenous theorists of treaty. Tully’s work once again instructs us to consider a democratic intercultural dialogue as the basis of both mutual recognition and the foundation for the negotiation of shared political institutions. Central to the logic of treaty federalism are principles of mutual recognition, continuity, and consent which necessarily guide the construction of any legitimate shared political order. This view both articulates an approach to the negotiation of self-

rule and shared rule in multinational federations and provides insight into the grounds for a stable and legitimate distribution of powers among the members.

5.1 The concept of domination

In this section, I develop a conception of the phenomenon of domination, with a focus on the relationship between citizens and structures of political power. This conception is informed by neo-republican theories of domination, conceived of as the capacity of dominators to arbitrarily interfere with the agency of the dominated, and by the theory of political autonomy as correspondence developed by Anna Stilz (2019). The resulting discussion highlights the function of democratic procedures in blocking arbitrary political interference and creating the conditions for a reasonable level of correspondence; it also considers the relationship between domination, and the grounds for citizen complaints against structures of political authority. With this general conception of domination on the table, I will construct a theory of the structures of inter-group domination, which are the primary structures of domination in colonial contexts, in the next section.

Paradigmatically, domination occurs through the coercive interference of one agent into the conduct of another. However, a dominator need not actually coercively interfere in the actions of another in order to dominate the subordinated party: the background ability to intervene at the dominator's arbitrary discretion can also control or erode the agency of the dominated. For example, just as the actual exercise of physical force to hinder or compel the actions of a person

directly intervenes in their exercise of agency, the credible conditional threat of intervention (“If you don’t x, I will y”) can also coerce, eroding the independent exercise of the person’s agency. Finally, even when there is no direct interference or stated threat of interference – an agent may nonetheless stand in a relationship of power to another such that should she form the intention to control the conduct of another, she would be capable of doing so. This too can constitute a relationship of domination by rendering the agency of the weaker party precarious or unjustifiably vulnerable to the interference of another.⁶¹

For our purposes, identifying the conditions for domination goes beyond discussing the bare idea of the capacity to interfere. My formulation has contended the capacity to interfere must be unjustifiable, while neo-republican accounts contend that is the *arbitrary* capacity to interfere that renders a relationship dominating (Pettit, 2005; Pettit, 2012; Lovett and Pettit 2009).⁶² The

⁶¹ In paradigmatic relations of domination, such as slavery and patriarchy, formal institutionalized and/or informal social rules function as a background structure enabling arbitrary interference. In other words, relationships of domination are paradigmatically sustained through social rules and practices that permit or otherwise enable the arbitrary exercise of power over subordinated others. This observation has formed the basis of a discourse considering whether domination is necessarily a structural relationship, or whether episodic interactions (for example, whether a mugger’s threat of interference) count as domination. For an excellent discussion, see Gadeke, 2020.

⁶² I think some degree of buck-passing about the wrong of domination is ineliminable here. We will need to make contextual judgments about whether an institution is *adequately* checked in its power to interfere against the interests of those subject to it. But adequacy is bound to be relative to the context in question, given facts about populations, history, economic conditions, and so forth, alongside the stakes of having limited or no political rule. There will always be *some* room for institutions to act against the interests of their subjects, but provided there is *adequate* institutionalized constraint given the circumstances in question, this does not count as an arbitrary subjection to the will of others. However, the extent and nature of constraints on political power that are necessary for the exercise of political power to not be unjustifiable to those subject to it will vary given the resources possible for checking it – including material resources for promoting participation in democratic institutions, and social/cultural capital for creating counterbalances through additional tribunals, citizens panels, referendums, and so forth. Notably, Pettit does not want a “normative” conception of arbitrariness, hoping the republican research program can specify this, it seems, in terms of the absence of a *determinate* and exhaustive specification of institutions. I think this is implausible. While I cannot fully discuss this here, I return to the idea of justifiability in the context of multination states below.

importance of some qualifying condition can be seen through attention to cases of interference that we think justifiable. Sometimes we *do* think that it is possible for one agent to have the power to control the exercise of another's capacities, without this constituting a wrong or domination. For example, under the correct conditions, we do not think that it is wrong that parents have the power to enforce a bedtime upon their children, which limits the decision-making power of the child. In fact, we think the asymmetrical power of parents over young children to control the time when the household turns off the lights is a justifiable inequality. Of greater significance, many think that a legitimate state has *the right to interfere* in the conduct of citizens when it does so for a justifiable purpose – the stopping of an assault, say, or the enforcement of tax or environmental law – especially when the relevant institutions that threaten interference are regulated democratically and in accordance with the provisions of a constitution recognizing equal human rights. Part of the definition of domination, then, relies upon the *unjustifiability* of the asymmetrical power, which can flow from the purposes for which power is used or the process by which it is exercised. According to Philip Pettit, this can be expressed in terms of the idea that a credible threat or background capacity for coercive interference is sufficient to constitute domination when this capacity for control does not reliably track the will or interests of the dominated – which he associates with the *arbitrariness* of a power to interfere (Pettit, 2005; Pettit, 2012; Lovett and Pettit 2009). For Republicans, the absence of sufficient constraints on power to ensure that its exercise track the interests of the acted-upon party (the arbitrariness of the relationship of power) is essential to *domination*.

Another, non-equivalent, but useful way of capturing what is at stake in the phenomenon of domination is described by Anna Stilz in terms of the manner in which the state is capable of

“substituting its own judgments” for those of its citizens (2019). Central to any conception of autonomous agency is the human capacity for reasonable and effective judgment about *what to do* in the circumstances of our lives. It is this general feature of political power that can cause the *alienation* of individuals under coercive state institutions by circumventing their judgments about how to live with others: the state can require us to perform actions, or support policies, which we do not, upon reflection, believe we have good reason to support.⁶³ Alienating substitution is thus often a feature of *domination*, insofar as the dominator *can* substitute their judgments for those of the dominated and thwart the correspondence between judgment and action at their discretion, that is, without good reason, and without any mechanisms for ensuring the substitution will track the agent’s interests. While not *all* incongruence between my judgments about how social life ought to be arranged and state requirements on me necessarily flows from domination, often political alienation flows precisely from relationships of political domination and is objectionable for that reason.⁶⁴

Paradigmatically, we think that the state dominates me by requiring me to do or refrain from performing actions (or, more commonly, forcing me to support policies, programs, and institutions) if the process for legislating has unjustifiably excluded me from having a say, or

⁶³ That is, where we do not see reason to support the requirement, beyond, when applicable, reason flowing from an independent obligation to support the state’s institutions, an obligation which must somehow be grounded precisely in light of the probability of alienation – see below for an account of this.

⁶⁴ This is not to say that all substitution is unjustifiable. Substitution itself is often *necessary* according to liberal theory in order to eliminate conflicting interpretations of individual rights and enable the reciprocal coordination of private action under law in such a way as enables secure planning agency and mutual respect for rights. However, the alienating features of substitution must be explicitly taken into account in judgments as to the legitimacy of a political order. The rule of law and the authoritative specification of rights are central to the justification of political order, but not sufficient – political orders must respect the basic human rights of citizens, including subsistence rights, and grapple with the political autonomy interests of nationally-differentiated citizens.

being a full and equal participant in the political process for decision-making.⁶⁵ Pettit argues in this regard that the equal political status of citizens and democratic decision-making within the context of a mixed constitution is necessary for ensuring political power track the interests of those subject to the threat of interference (2012). One of the greatest safeguards to the arbitrary exercise of power is by enshrining the power of citizens to shape and contest the exercise of public power. That is, by giving citizens a vote, and the opportunities to develop the capacities for meaningful deliberation, citizens may check government officials from exercising arbitrary rule through elections. And by dividing the formal offices of the states between independent branches which exercise authority, they may function as independent checks on each other's exercises of institutionalized power. In tandem with the citizens' right to contest and appeal decision-making (e.g. through court cases, petitions, and so forth), citizens are further insulated from irresponsible government. The absence of such constraints on the political architecture of the state leaves citizens vulnerable to abuses of power by officials, or otherwise renders the law-making process insufficiently attuned to the interests of those subject to political decisions. Decision-making structures lacking these institutional designs enshrine the arbitrary capacity of officials and governments to interfere in the lives of the citizenry and are thereby dominating.⁶⁶

⁶⁵ The fact of subjective *disagreement* with a particular law is irrelevant to whether there is domination when one is coerced to comply with law. To see this, consider that one may be dominated while in full agreement that it would be intrinsically best to do that which is required, while one may be non-dominated while in disagreement with the contents of some policy. What is key to whether or not there is domination is whether the political process is justified in substituting its judgment for that of the particular citizen. If the decision-maker is not in any way constrained through institutional design to track the interests of citizens, they are dominating citizens even by issuing requirements that the citizen has good reason independently to conform with. They are not dominated provided the institutional architecture is designed to promote the protect the rights and interests of the citizenry, and to reflect the agency of each citizen to the greatest extent possible consistent with the rights of others to the same.

⁶⁶ Levy's view, discussed in chapter 4, may be viewed as treating federalism as fundamentally about securing non-domination in this sense, vis-à-vis an otherwise central government unchecked in its power to track the interests of the citizenry.

Consider this analysis in light of the observation that political power may be alienating because it substitutes the judgments of individual citizens with the general policies of the state. We can find similar reasons, centring the *political agency interests of citizens*, for supporting democratic institutions within a mixed constitutional order. That is, considering the risks of alienation under law, there is reason to include all those subject to it within the deliberating demos as equal citizens with equal rights, to confer upon citizens equal formal power to select representatives, and for representatives to be constrained to engage the arguments and considerations adduced by the members of demos while drafting legislation. In so doing, the state incorporates the inputs and agency of its citizens in its drafting of law, reducing the distance between citizens, law-making, and the laws; and the official class (formally responsible for the drafting and passage of law in consultation with the people) is itself ultimately controlled by the people (see Stilz, 2019; Pettit, 2012). Under these circumstances, when the state enacts law or policy with which I disagree, my grounds for complaint are circumscribed in comparison to those I would have were I excluded: my agency has been accorded as much consideration as I could reasonably expect within a *representative* democratic political process. The substitution of my judgment, under these conditions, is made for good reason – the necessary public coordination of individual action, the pursuit of public goods, the upholding of a rights regime, the self-determination of a people – under conditions where I have been given my due, consistent with the equal rights of my fellow citizens. However, as we will see in the next section, the equal inclusion of individual Indigenous citizens into a national demos, even if the citizenry has robust rights of democratic participation and contestation, is insufficient to prevent their domination.⁶⁷

⁶⁷ As discussed within chapter 1, within settler political orders electoral democracy is plausibly a requirement of legitimacy (inter alia) because it is a fundamental reflective commitment of settler populations. As I discuss further

Nonetheless, in the mono-national context, it could be argued that citizen *alienation* may not be *reasonable* provided these conditions are in place – barring fundamental injustice, or a special complaint concerning fair or equal treatment that has not been remedied by the political and legal process. After all, I am not dominated under these conditions, and thus, the substitution should be recognized as necessary considering the inevitability of disagreements given the burdens of judgment, provided it is appropriately implemented through fair representative democratic procedures. In other words, I *should* judge the decision to be the correct political response to disagreement, and the control of the state in implementing it as perfectly justifiable. If I am reasonable, there may *not* even be *substitution* on the matter of which law we should implement here and now given the political circumstances. Even if there is disagreement about which law we would do best to implement *all things considered had we unlimited time and resources to continue the political debate* on this topic, I may acknowledge the independent obligation to comply with the legislative results of non-dominating political procedures, or at least an obligation not to interfere with the legislative process.⁶⁸

in chapter 6, Indigenous political orders, such as that of the Wet’suwet’en hereditary leadership, are plausible candidates for political authority because those systems internalize many of the fundamental democratic practices of citizen deliberation, claims-making, and contestation necessary to prevent domination and ensure that political decision-making tracks the interests of the people.

⁶⁸ Certainly, it is not the case that we do not have a complaint if the majority enacts a fundamentally unjust law. In these circumstances, the state may lack the right to enforce the law, even if the political procedures are non-dominating. Exploring the exact conditions when this obtains is beyond the scope of the chapter.

5.1a Intergroup domination

Does this conception of political domination account for the case of Indigenous people under settler colonialism? For our purposes, we can identify three (often overlapping) levels upon which political domination might occur in the relationships between settler and Indigenous peoples: exclusion of Indigenous citizens from the federal demos, group subordination through constitutional design, and cultural domination through inequalities in the discursive status of epistemologies and ontologies.

The first is precisely that stated above: the exclusion of Indigenous persons from the demos, the unequal protection of their rights under law, or unequal status as deliberators and citizens. This is a paradigmatic wrong of systems of apartheid, racism, misogyny, and other forms of group-based oppression which deny individuals the rights necessary to participate on equal terms in society and to receive equal consideration in deliberative forums and institutions. While this is a significant wrong that has been perpetrated against Indigenous people, it does not capture the fundamental nature of political domination under settler colonialism. The reasons for this are familiar: the incorporation of the members of annexed peoples as equal democratic citizens of an annexing state can still prevent their *collective self-rule or self-determination as peoples* by subjecting them to the institutions, laws, and values of a foreign majority (Stilz, 2015). In other words, while exclusion of individuals from the *federal demos of a multinational state* is a significant form of domination of Indigenous citizens of multinational states, the concept of *exclusion from the demos* as such is insufficient to account for the primary form of domination in colonial contexts. Rather, the problem of *exclusion from the federal demos* is downstream of the existence of a federal state, whose authority cannot simply be presumed over distinct peoples.

The primary mode of domination in settler colonialism is the enforced cooperation of Indigenous peoples with settlers under a foreign political and legal order – an order that does not recognize their national difference or respect their rights as nations.⁶⁹

This too is a form of domination. That is, while the individual members may have their rights of democratic participation respected under annexation and enforced cooperation with other groups, these rights are insufficient to prevent their domination, because the national group to which they belong and with which they identify is prevented from exercising a feasible array of jurisdictional powers for no good reason. Under enforced cooperation with the colonizers, subordinated nations are deprived the ability to realize political options (institutional forms, basic political values, public goods) they would have been able to achieve had they not been interfered with in the first place. Provided the dominated nation is willing and capable of maintaining its own political institutions on land they legitimate reside, and will do so in accordance with the requirements of basic justice, it is unjustifiable to deprive *the group* the right to rule itself through its own territorial political institutions (Stilz 2011, Moore 2014, Stilz 2015; Moore 2015, Stilz 2019). Enforced cooperation with the members of other nations through the institutional forms of the foreign nation is an arbitrary limit on the freedom of the members of the (Indigenous) nation to work together to build their own political institutions – it is an unjustifiable form of substitution, because it is an unnecessary substitution for securing the functionalist goods of political order and it limits the correspondence at the heart of non-

⁶⁹ The exclusion of Indigenous *individuals* from the politics of the *multinational federal state* can only be understood once we have legitimated the *federal state's* claim to jurisdiction over *lands* and *peoples*. Then, we will require an account of adequate participation of federal citizens in the federal demos (e.g. in shared inter-national federal institutions with a delimited jurisdiction over the federation as a whole) in order to give a complete account of non-domination in the federal state.

alienated agency under law.

This discussion highlights another aspect, then, to domination *within* states. While individual people can be dominated in the familiar ways, the groups to which they belong can also be dominated – and the analysis of what this involves is not directly reducible to a discussion of individual judgments and the treatment of individuals, although it is individual interests that are fundamentally affected and relevant to diagnosing wrong. As we have seen in the discussion of the simple case above, democratic decision-making requires the synthesis of the judgments of many people with disparate opinions, and this involves an authoritative decision (legislation), often leading to results which individual citizens do not, all things considered, judge to be the intrinsically best policy option (List and Pettit, 2011). However, provided citizens are included in the demos in the correct way, they do not necessarily have a complaint against the policy – they are treated fairly in the political process, their agency is reflected in decision-making to the greatest possible extent consistent with the rights of everyone to the same, and some minimally adequate decision or legal regulation is often better than none at all – indeed, there is a natural duty of justice to maintain political and legal institutions for the management of conflict under conditions of disagreement.⁷⁰ However, what the annexation case reveals is that individuals' political agency can be unjustifiably circumscribed by including them within a demos which they do not affirm, when there are feasible alternative political institutional arrangements that could achieve the necessary political functions and receive endorsement. Although the individual

⁷⁰ See for example Kant (1996) and Rawls (1971). There is a significant question as to whether the political and legal order need centre coercion as a tool of stabilization – Anishinaabe legal systems do not centre coercion as the mechanism of guiding action (Mills, 2019). Nonetheless, these systems do guide and regulate action through praise, criticism, and at the limits, ostracism (Mills, 2019).

members of annexed peoples may likewise disagree with the political decision-making of their own national institutions, *if they uniquely reflectively endorse participation within those institutions*, they are treated fairly in having *their own national political* system exercise authority over them. In other words, while they could reasonably reject substitution in the case of the annexing state's imposition of its collective reasoning process on them, they might not be able to reasonably reject substitution in the case of their own people's political process provided they are fairly treated within it.⁷¹

Thus, in one sense, the claim of the members of national minorities in regard to the particular laws by which they will be ruled is often indeterminate and not immediately predictable or reducible to the judgments of the individual members taken in aggregate in any obvious way: their claim is to self-rule as a group, to cooperation and conflict-resolution through the collective decision-making procedures of the group as a whole.⁷² Likewise, the wrongdoer does not consist of a particular person, or even a set of persons in aggregate who share a national identity. Rather, it is the annexing group considered as a political unit acting through political procedures of its own (as a people). In this sense, groups dominate other groups, resulting in harms and liabilities to the individual members of the victim and perpetrator groups respectively; however, the act of domination, and the mechanism through which it causes harm, occurs at a group-to-group level.

How does this analysis of inter-group domination fit within multinational states? In multinational

⁷¹ The issue of what is in fact endorsed, thereby achieving correspondence, under conditions of disagreement between minority nationals and their own institutions' policies, is addressed further in chapter 1.

⁷² This point is complemented by the observation that there is no simple way of aggregating preferences in a collective decision-making function (List and Pettit, 2011).

states, multiple peoples cooperate to maintain institutions of shared and self-rule. Whereas in the paradigmatic annexation case, groups do not share a political and legal order and the wrongdoing occurs through the enforcement of any shared order, in any legitimate multinational state there is necessarily a shared political and legal order, and whether or not there is domination depends upon the precise form the political and legal structures for managing the relationships between national groups take. In these states, domination does not always take the form of coercion or coercive threats between groups (although it often does). The way in which domination often primarily occurs in these cases involves the structure of the shared political and legal order, which may enable downstream intentional arbitrary interference between groups as in the annexation case, but need not in order for the structure to be dominating. Instead, fundamentally, in dominating multinational states the legal and political order systematically privileges one nation in its exercise of power over the shared terms of association at the expense of the others.

In some cases, domination occurs through the refusal of the dominant group to recognize the *nationhood* of a subordinate group. For example, the dominant group may insist that there is only one nation and one state – that any group difference is properly characterized as purely ethnic or cultural difference and properly addressed through measures aiming at inclusion of all territorial residents within a single nationally undifferentiated set of political institutions. In other cases, while there is formal recognition of plural nationhoods, the existing structures for political decision-making, including the distribution of jurisdictional powers among groups, and, perhaps more importantly, the distribution of *meta-jurisdictional powers* among groups, enables dominant groups to control the agency of subordinate groups by controlling which policies are implemented, or, perhaps more importantly, which jurisdictions the minority nation is effectively

permitted to exercise. The latter situation (nominal national recognition under conditions of meta-jurisdictional domination) is in fact the situation of Indigenous nations in Canada.

The Canadian constitutional context includes a number of structures – the common law and court system, the constitutional amendment process, and the comprehensive land claims procedure – which privilege settler political communities and settler political actors in the negotiation, specification, and distribution of rights to exercise jurisdictional power. This is a form of meta-jurisdictional domination, insofar as the domination consists in the stronger group having the arbitrary power to determine which jurisdictional rights are distributed to exclusive or shared institutions of jurisdiction (e.g. which jurisdictions are held by the federal government, provincial government, and Indigenous government in any given case). For example, it is primarily non-Indigenous judges that interpret the codified and common laws in Indigenous rights and title cases according to European and Canadian canons of legal reasoning and the constitution (Kymlicka, 1995; Turner, 2006). Within this context of constitutional adjudication, the constitutional documents themselves were ratified and imposed upon Indigenous peoples and territories without their consent (Turner, 2006; Mills, 2017). And it is the provincial governments and federal government – primarily representing the interests of the demographically larger settler community – that would have the final word on constitutional amendments (*Constitution Act*, 1982). Finally, the contemporary comprehensive land claim procedures, as a bilateral mechanism for specifying the scope and content of Aboriginal and title rights, as discussed in more detail below, favours settler governments insofar as they may have few incentives to negotiate any deal – let alone to recognize the full scope of self-determining authority of Indigenous nations – while Indigenous nations depend upon this recognition for the effective

implementation of their right to territorial jurisdiction, and their physical and cultural survival, creating pressures to accede to unfair agreements (Alcantara, 2013; Alfred, 2001; Nadasdy, 2003).

Within this context, the domination does not consist necessarily in a particular political or legal institution, nor does it depend upon the intention or even the awareness of capacity of any actor (individual or governmental) to arbitrarily interfere in the self-determination of an Indigenous group. The domination consists in a set of interlocking structures –a complex set of relations between governments, and the legal and political practices of the state which condition the exercise of power by those governments, which favour settler interests, and place governments and judges under unacceptably weak pressure to recognize or uphold the rights of Indigenous peoples while otherwise pursuing the objectives of the dominant social and political groups (settler groups).

For the purposes of the chapter, the domination consists in the settler governments being in a position to control which jurisdictional powers the Indigenous group exercises, and over which portions of their traditional territory. This is in addition to the legal permission to intervene on Indigenous territories where Aboriginal title is recognized if it is sufficiently in settler interest. The distribution of power to determine jurisdictional distributions favours settler interests and does not constrain decision-making to track the interests of Indigenous groups. In other words, the structures for enabling the exercise of jurisdictional authority, and for allocating jurisdiction, are constrained by an arbitrary imposed constitutional order, and enable settlers to exert unjustifiable power over Indigenous nations' jurisdictional rights. The settler governments are at

liberty to recognize or not recognize an Indigenous demand for recognition of a jurisdictional right, and the overarching process for negotiating recognition is itself controlled by the settler governments. For example, recognition is granted or withheld, its contents determined, just in case that the Indigenous group meets the evidentiary standards required by the settler governments to initiate negotiations in the first place, in accordance with the wider evidentiary burdens articulated by the Supreme Court of Canada for an Indigenous title claim.⁷³ While some degree of mutual influence through rational persuasion is ineliminable in negotiations, and there are a set of jurisdictional powers that the settler governments would in fact accept, settler governments are still able to arbitrarily deny options within the range of legitimacy and moral proportionality, because they are in a position to withhold agreement to a treaty proposal until it fits with their own interests.⁷⁴

⁷³ For example, within the comprehensive land claims procedures: there is a list of jurisdictional competences that the settler government refuses to cede; the settler government has a pre-determined land quota model which limits the scope of potential restitution; the settler governments have moved towards affirming Indigenous *private property* rather than territorial rights proper, and so on. In short, the settler government is relatively inflexible in the structures it is willing to countenance, and there is little to prevent it simply from refusing to agree to a land claim until the Indigenous group constrains its demands to fit with the government's will.

⁷⁴ See the next section for a longer discussion of the contemporary comprehensive claims procedure. This is not to say that settler governments are not under significant legal obligations during the period of negotiation of a treaty agreement, for example, the fiduciary obligations articulated under the doctrine of the Honour of the Crown, and related obligations to consult and accommodate when a governmental action can be expected to impact an Aboriginal right. For the duty to consult and accommodate prior to the recognition of Aboriginal title see, for example: *Haida Nation v British Columbia (Minister of Forests)*, 2004. In cases where Aboriginal title is unproven but nonetheless probably exists, the Supreme Court has articulated an escalating set of obligations of consultation and accommodation held by settler governments when they contemplate a course of action likely to affect the Aboriginal right. The demandingness of the duties to consult and accommodate vary with the importance of the practices likely to be affected by the intervention. These obligations exist even when that right has not been established by a prior court decision or a land claim agreement. This would seem to offer Indigenous peoples protection of their rights even in the absence of land claim agreement or recognition of title through the courts. However, there are two issues here for Indigenous peoples relying upon the protection provided by the legal obligations of settler governments. First, the rights and interests that they are recognized to possess are delimited in scope by the constitutional order itself, and are often thought to be legally indeterminate prior to a negotiated settlement between the Indigenous group and the state. The settler government is thus at liberty once more to articulate the right in question in terms that fit with their agenda and interests within the broad scope of interpretive possibility provided by the doctrine of underlying Crown title and justifiable infringement of Aboriginal rights. Second, Indigenous groups engaged in the treaty process to specify land and self-government rights may be hesitant to legally resist the settler government's interpretations of their obligation to consult and accommodate in the interim

Intercultural Domination

As we have seen, inter-national domination within a shared political order of this kind is related to another concept of domination, *inter-cultural domination*, by which we should understand the priority given to settler epistemological, ontological, and normative frameworks for conceiving and practicing knowledge, personhood, freedom, and community within the shared political order (Mills, 2016, 2017, 2019). This form of domination limits Indigenous agency within multinational communities insofar as Indigenous people are constrained to make arguments, reason, and act in the political realm in ways that are intelligible within the authoritative Western traditions of constitutional interpretation (Tully, 1995, 2008; Kymlicka, 1995; Turner, 2006). Not only does this preclude Indigenous people expressing themselves in their own voices grounded in their own philosophical traditions, but it limits the conceptual resources for articulating and guiding political and legal decision-making, in turn impoverishing the possibility of genuine mutual recognition and mutual learning, and foreclosing the construction of a shared political order that can be reflectively endorsed by Indigenous peoples as an expression of their identities, values, and commitments. This form of domination is akin to inter-group domination insofar as it does not necessarily function on an interpersonal level or require any intention in order to it to interfere or manipulate (cf. the way in which dominating coercive interference is possible interference made actual when interference is intended by the dominant agent), but is rather

(e.g. to challenge whether the settler government has correctly performed this obligation) when they are engaged in land claims negotiation. Initiating a court battle while simultaneously involved in treaty negotiations is a risky endeavour from the perspective of maintaining sufficient trust and goodwill between negotiators to “make progress” on the negotiations, and land claims negotiation is itself the mechanism courts continually turn Indigenous groups towards to specify the scope and content of their Aboriginal rights after they have instigated litigation against the state for breaching their Aboriginal rights. This places Indigenous groups in a position where their rights may be indeterminate for a long period, and at the mercy of settler state recognition through the land claims procedure.

constantly instantiated through the network of institutional spaces, norms, and procedures that constitute the state, regulating the political and social life of groups. The thought here is that the procedures, norms, and canons of reasoning that structure the political life of the state are formally articulated (for example in written constitutions, statutory law, and legal judgments), practiced (in the *form* of institutions), and interpreted (by the majority of citizens and relevant officials) according to the philosophical conceptions of the settler group, all the time.

With the cultural domination of structures, as with domination generally, there need not be an intention by one (group) agent to interfere with another's agency at any given time for the power structure to prove unjustifiable or arbitrary and the relationship to count as a relationship of domination. However, the phenomenon of cultural domination somewhat resists the republican analysis insofar as even if the settler group *could not* form the intention to unjustifiably interfere but was somehow constrained to engage politically in good faith with equal regard for the rights and interests of other groups, *the political environment as a whole* would still privilege the agency of the dominant group. That is, the political discursive environment would reflect the identities, memories, concepts, and theories of the dominant group in the authoritative discourses of the courts, legislatures, bureaucracies, and constitution. Democratic majorities likewise converge through concepts, memories, and arguments sourced from their own cultural sources. In turn, Indigenous concepts and arguments are barred, through the lack of exposure, ignorance, and habit of settlers and institution, from recognition, consideration, and uptake in processes of deliberation, negotiation, and legislation. In other words: from the perspective of most participants within the Canadian political environment the only intelligible concepts are settler

concepts; the only intelligible arguments are settler arguments; the only reasonable political forms are Western political forms.

5.2 The Comprehensive Land Claims Process

In this section the analysis turns to considering, in finer detail, the contemporary comprehensive land claims procedure (modern treaty process) within the broader political and legal context of the Canadian state. The purpose in doing this is to illuminate the structures enabling inter-group and cultural domination in the Canadian state context. With these structures plainly in view, we will have the vision to articulate alternative norms and practices that protect the value of interdependent self-determination from settler domination. That work will begin in the next section. Readers familiar with the details of the Canadian comprehensive land claims procedure might skip this section, as it largely elaborates upon the foregoing discussion in the Canadian context.

The primary issue confronting the legitimacy of the Canadian state vis-à-vis Indigenous peoples is that it does not recognize Indigenous peoples as equal, co-existing and self-governing nations, but rather “assumes that self-government is a right within Canadian law, and then proceeds to negotiate land claims and self-government rights as a package of minority rights under Canadian law” (Tully, 2008, p. 237).⁷⁵ This does not, as Mills suggests, coordinate the constitutional orders

⁷⁵ See also Coulthard (2014) and Turner (2006) for discussion of the limits of the “minority rights” approach to self-government rights.

of free and equal peoples but ignores the constitutional orders of one partner and subjects that partner to the constitutional order of another (Mills, 2017). As Tully and others argue, this is a unique strategy for the extinguishment of Indigenous rights and the incorporation of Indigenous people into non-Indigenous society. The present process is the contemporary iteration of a long-standing structure of domination aiming at the elimination of Indigenous nationhood, legal orders, and territorial rights (Coulthard, 2014; Mills, 2017; Wolfe, 2006).

The dominant strategy of incorporation in contemporary Canada is conducted through the strategy of *accommodating* Indigenous peoples' claims through the non-Indigenous controlled treaty process (the modern comprehensive claims process) and the courts.⁷⁶ This has been conducted with the aim of resolving uncertainty with respect to non-Indigenous sovereignty over Indigenous territories, following earlier unsuccessful attempts at cultural assimilation and the growing recognition of the existence of Indigenous title by the Supreme Court of Canada in decisions such as *R. v. Calder* and *Delgamuukw v. B.C.* (Alcantara, 2013; Tully, 2008, pp. 267-69). For Tully, the arguments in these decisions, which do recognize rights of Indigenous peoples to maintain cultural practices and gain legal rights to land in the form of *Aboriginal title*, serve to legitimate the “continuing colonisation of Indigenous peoples and territories” (2008, p. 269). This argument echoes Borrows argument that the *Royal Proclamation* (1763), while barring unauthorized settlement and recognizing Indigenous nationhood, also paved the way for land acquisition by the Crown and introduced ambiguity concerning the Crown's recognition of Indigenous sovereignty through its insistence of “dominion” and “sovereignty” over the territory

⁷⁶ See Coulthard (2014) for an extensive discussion of settler state recognition and accommodation practices as a contemporary mechanism of domination and assimilation.

of North America (1997). As Borrows writes: “[t]he Proclamation uncomfortably straddled the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights.” In the contemporary jurisprudence, further colonization is enabled through embedded assumptions within the decisions about the underlying sovereignty of the Canadian Crown to all territory within Canada, and the sui generis nature of Indigenous peoples as *Aboriginal* rights rather than free and equal nations under international law (Tully, 2009, pp. 269-271).

For example, Aboriginal rights to land within Canada are legally a “burden on the Crown’s underlying title,” that is, rights against the Crown that came into existence through the historical assertion of Crown sovereignty over Indigenous territories and thus rights which do not pre-exist or have content without this assertion (*Delgamuukw v. B.C.* [1998] 1 C.N.L.R. 14, at para. 145). Thus, “the Court incorporates Indigenous peoples into Canada and subjects them to the Canadian Constitution in the very act of recognising their rights as rights within the Canadian constitution” (Tully, 2008, p. 269). Similarly, Aboriginal rights “derive exclusively from the distinctiveness of Aboriginal peoples as *Aboriginals*. They do not derive from any universal principles, such as the freedom and equality of peoples, the sovereignty of long-standing, self-governing nations, or the jurisdiction of a people over the territory they have occupied and used to the exclusion and recognition of other peoples since time immemorial” (Tully, p. 271, emphasis in the original). This “denies Indigenous peoples the right to appeal to universal principles of freedom and equality in struggling against injustice” (Tully, 272). Within this legal context, in order to justify a claim to Aboriginal title, the burden of proof is on Indigenous peoples to prove that they have longstanding use and occupancy of a territory to the exclusion of other peoples (Tully, p. 272;

Alfred, 2001). And finally, Aboriginal title, even when proven, is not immune to infringement by settler governments for a wide variety of economic and resource extraction objectives (*Delgamuukw*, 1997), further justifying dispossession through the assumption that Indigenous peoples are “incorporated within and subject to the sovereignty of the larger Canadian society” (Tully, p. 273).

While the common law displays a trajectory since *Calder v British Columbia* (1973) of increasing recognition of Aboriginal title rights with respect to traditional Indigenous territories, it has struggled to articulate the precise content and scope of these rights in a way that satisfies Indigenous claims for self-determination, and few Indigenous nations have been legally recognized by the Canadian state to possess them concretely. Aside from a few Supreme Court decisions, such as *Tsilhqot'in Nation v British Columbia* (2014), recognition of concrete Indigenous rights to land and their practical implementation beyond reserves must proceed either through the contemporary comprehensive claims procedure or through piecemeal negotiation of recognition. In the view of the Supreme Court of Canada, the best way to respect Indigenous title rights is through such negotiated settlements (*Delgamuukw v. B.C.*, 1997). The modern comprehensive land claims process is “the primary means through which Aboriginal peoples and the Crown establish mutually agreed-upon frameworks for reconciliation” (Aboriginal Affairs and Northern Development Canada, 2014). 26 Indigenous groups have signed a comprehensive land claim agreement (modern treaty) since 1975, and 70 more are in the negotiation stage. Settlements transform legally indeterminate yet unextinguished constitutional Aboriginal title rights for determinate, federally and provincially recognized treaty rights to land and jurisdictional authority. While Indigenous self-government agreements are often negotiated

separately, these agreements together often involve the concrete specifications of treaty settlement lands' size and geographical locations; Indigenous governments' specific, federally and provincially recognized jurisdictional powers with respect to those lands; settler governments' responsibilities, e.g. for the provision of services; regimes for co-management of shared territories and resources; and financing arrangements.

According to the federal government's *Comprehensive Land Claims Policy*, negotiated agreements are meant to fairly balance the rights and interests of Indigenous peoples with broader Canadian society (Aboriginal Affairs and Northern Development Canada, 2014). However, due to the asymmetry of legal, political, and economic power held by the Federal Government and Indigenous nations in negotiating processes, the substantive outcomes of these agreements have been criticized by scholars for shackling Indigenous groups across the country to unfair specifications of their rights to territory (Alfred, 1999, 2001, 2005; Coulthard, 2014; Hendrix, 2008, 2019). The federal government possesses a veto on all treaty negotiations (insofar as treaties only "become" law through an Act of Parliament) and possesses immensely more power and resources, while often having far fewer incentives to finalize an agreement as compared with Indigenous nations whose fate – recognition of rights and wellbeing – hang on these decades-long negotiations (Alfred, 2001, Alcantara, 2013). Modern treaties largely adhere to the same form and content despite the plurality of languages, lands, customs, and worldviews maintained by Indigenous peoples. Not only does the process of decades-long negotiation substantively risk altering the social, cultural, and political identities of participant First Nations (Corntassel, 2005, 2008; Nadasdy, 2003, 2017; Turner, 2006), but the negotiated agreement risks ignoring the unique circumstances, needs, and aspirations of Indigenous communities as they

recover from colonial damages and articulate renewed visions for their own resurgent futures.

Within the context of intergroup structural domination, settler dominated institutions of law play a central role in both controlling communities and in steering negotiations for decolonization. For example, the concrete rights and responsibilities of Indigenous communities are crystalized at any given time within the settler legal order through a patchwork of Federal legislation (such as the *Indian Act*), court rulings, and land claim agreements. Thus, the concrete rights of Indigenous communities in positive law terms are determined by the system as a whole, the component procedural parts of which are controlled by settlers.⁷⁷ Negotiations for reform are likewise controlled by settlers directly, insofar as the process for negotiation is settler controlled, and indirectly, insofar as the body of existing legal and political practice forms the background for negotiations. The negotiation of comprehensive land claims agreements, which are said by the government to be central to “reconciliation,” takes the existing state of entitlements and powers (for example, the Indian Act band council governments, cultural rights as defined by the Courts, land management and citizenship policies approved by the Ministry of Crown-Indigenous Relations and Northern Affairs Canada, and so on) as the “baseline” or “starting point” for intergovernmental negotiations. For example, Mohawk scholar Taiaiake Alfred writes that by locating the baseline for negotiations in the legal status quo: “The BCTC [British Columbia Treaty Commission] process builds on the history of past centuries’ injustices without

⁷⁷ Here I mean, the current practices of recognition and implementation of law pertaining to Indigenous peoples among settlers – paradigmatically the rights that are recognized and implemented by settler officials, such as judges, politicians, bureaucrats, and police. I do not here dispute the existence of natural law, or the fact that a correct interpretation of the relevant Canadian legal sources and materials to constitutional legal adjudication requires a reform to settler legal practices. Settler judges, properly considering the principles and foundational assumptions of Canadian constitutionalism and federalism (Dworkin 1977, 1986), for example, those who aim to follow an interpretive method, should be able to see the unprincipled and *illegal* political and practices of the state.

questioning the fairness or rationale of past policies, laws, or politics. It uses the present manifestation of colonialism (the state of relations with indigenous peoples and preset status of indigenous communities) as a starting point for future discussions” (Alfred, 2001, 3).

In other words, the present distribution of Indigenous jurisdictional rights, lands, and cultural protections – a distribution defined by the colonial apparatus of the settler state on the basis of past settler Acts, policies, and verdicts – is the baseline from which negotiations begin. For example, by virtue of the Indian Act and associated Federal legislation, Indian Band Councils possess certain limited powers over reserves, including the right to develop a Land Management policy for reserve lands and to otherwise execute basic municipal functions. From this baseline, nearly any increase in jurisdictional rights might appear as an improvement if the community is thereby able to better realize a correspondence between the form and content of its government and its shared reflective judgments for cooperation. However, this is an illusion. The surrender requirement, in later agreements framed in terms of the “modification and release” of inherent rights in exchange for definitive legal rights, insists the Indigenous group agree that the text of *The Agreement* constitutes the final legally authoritative stipulation of the rights of the Indigenous community vis-à-vis the state. Individual modern treaties are not conceived by the settler state as moments in an iterative dialogue premised upon mutual respect and mutual aid among interdependent groups (including, notably, Indigenous nations healing from colonial violence), but as the final resolution of historical territorial and jurisdictional dilemmas that absolves the settler state of future claims against its territorial legitimacy. As Alfred writes:

In essence, stripped of its rhetorical ‘treaty’ façade, the BCTC uses a base form of manipulation of indigenous peoples’ post-epidemic poverty and weakness in the attempt to validate and legitimize the conditions and structures that are an inherent part of the economic

dependency foisted on them, and to achieve a final and crucial degree of control over the futures of indigenous peoples by binding and subsuming their identity and political existence to that of the Canadian state.

Alfred, 2001, p. 4.

Although the Liberal Federal Government has stated its intention to advance a *Recognition and Implementation of Rights Framework* (2018) to conduct relations with First Nations based on the presumption of each nation's right to self-determination, in practice the policies of negotiation and implementation of effective legal rights have largely adhered to the same boilerplate templates centring the exchange of "undefined" Aboriginal title rights for property ownership in a fraction of the Indigenous group's traditional territory, a pre-determined bundle of limited jurisdictional rights, and monetary compensation. This is evidenced for example in the *Algonquin Agreement in Principle* which has been put forward for community ratification and largely resembles the *Labrador Innu Agreement in Principle*. Similarly, Government attempts at consultation of Indigenous peoples on the proposed *Framework* have been criticized for the lack of resources, time, and coordination afforded to Indigenous peoples to articulate a workable institutional vision, generating the criticism of continued unilateralism in shaping the Crown – Indigenous relationship (Assembly of First Nations, 2018; King and Pasternak, 2018).

A complete discussion of the current framework for negotiations, and sites of injustice, would have to address the following policies of relevance to negotiations and concrete treaty agreements that Canada engages in today:

Policies pertaining to negotiations:	Policies pertaining to the agreements:
<p>The tripartite structure of negotiations (between the Indigenous group, Federal government, and one provincial government) and impact on the unity, wellbeing, and self-determination of inter-provincial Indigenous groups such as the Algonquin and Innu (Lawrence, 2012; Samson, 2016) and overlapping Indigenous groups such as Anishinaabe and Metis.</p>	<p>Alternative formulations of the certainty provision within finalized agreements, the dis/incentive of finalization, and the barriers these provisions place on maintaining a federal system that responds to the cultural and political evolution, resurgence, and decolonization of Indigenous nations (Alcantara, 2009; Bowering, 2002)</p>
<p>Confidentiality clauses (prohibiting negotiators from discussing the details of negotiations before the announcement of an AIP) and the impact on Indigenous strategy within and between communities.</p>	<p>The creation of Aboriginal property rights in fee simple and the impact of this on the ability of Indigenous governments to govern land and people in culturally appropriate ways (Cameron et al., 2020)</p>
<p>Funding and debt models for Indigenous lands claims negotiation, along with the sociopolitical costs of negotiation, and their effects on community willingness to initiate or continue negotiations (Alcantara, 2013; Samson, 2016).</p>	<p>The lands selection model (Indigenous groups relinquish rights to the majority of their traditional territory in exchange for a bundle of property rights in some land and use rights in others), and the impact on Indigenous nations' abilities to plan for growth and maintain traditional ways of life.</p>

<p>The effects of the permanent staffing structure of CIRNAC, the appointment of negotiators, and cabinet direction, on the efficacy of negotiations and agreement (Peach and Rasmussen, 2010)</p>	<p>The limitation of negotiation of self-government rights to a set of specific jurisdictions predetermined by the federal government, and the impact on communities' wellbeing and self-determination.</p>
<p>The separation of CLC from SGA negotiations and the impact on government willingness to negotiate once the issue of access to lands has been settled (Alcantara and Davidson, 2013).</p>	<p>The prohibition on restitution of settler property holdings and the effect of discontinuity of Indigenous land holdings on Indigenous governance and traditional practices.</p>
<p>Alternatives to CLC negotiation (sectoral intergovernmental agreements and corporate resource revenue sharing agreements).</p>	<p>The calculation of compensation for historical wrongdoing, and resource revenue royalties, and the impact on the financing of Indigenous institutions.</p>

Theorists of treaty federalism, including James Tully, Aaron Mills, James Sakej Henderson, Thomas Hueghlin, Gina Starblanket, Kiera Ladner, and others, have illuminatingly written about the alternative to this colonial mode of governance. The ideal of treaty federalism is that of equal nations consensually deciding upon the terms of their association in a federal structure. The presumption of this form of relationship is the continuity of a people's institutions and ways throughout the relationship, with revisions to powers and responsibilities only occurring through mutually consensual relationships. Dispensing with settler supremacy requires us, minimally, to think of the reconciliation of national difference in both directions. As Mills writes:

Living in right relation would mean that Indigenous peoples are free to live on Mikinaakominis within treaty confederacies composed of their own unique constitutional orders. It would mean that any settler constitutional order will have to reconcile itself to the confederal treaty superstructure that holds distinct Indigenous constitutionalisms together: interdependent but unique; aiding one another through their differences. Importantly, because Indigenous constitutional orders are designed to orient Indigenous societies in right relationship with the rest of the creative order (i.e., the Earthway), the confederal constitutional structures share their creative-ecological orientation and requires that as existing treaty partners grow and change and as new constitutionalisms join the treaty relationship, each unique constitutional order within it sustains that foundational understanding for itself. As a participant in the treaty order, this means that settler peoples have to reconcile their liberal foundation with the Earth-first relationalism of the treaty superstructure. That won't be an easy task. For one thing, an Earth-first orientation is incommensurable with Earth-alienation, a foundational postulate of liberalism (i.e., how was Earth represented in the contract?)

Mills, 2017, p. 242.

5.3 Anishinaabe conceptions of treaty

For the Anishinaabe and many other Indigenous peoples, the solution to specifying the distribution of powers and maintaining non-dominated relationships of co-creative freedom between self-determining peoples is by adopting a relationship based on *treaty*. However, As Mills cautions us, the Western conception of treaty as *a contract* between groups does not properly reflect the appropriate idea of treaty (2017, p. 225). The Crown's conception of treaties is as a form of legal remedy, which specifies determinate legal rights within the context of the broader settler constitutional order. This assumes the legitimacy of the settler political order (the federation delineated by the 1867 *Constitution Act*) with respect to Indigenous peoples (Mills, 2017, p. 220). The issues with this approach (as with the policies and procedures of negotiation of the contemporary claims process in Canada) are manifold. The settler constitutional order works as an imposed backdrop to settler – Indigenous relations, that is, it is forcibly imposed on Indigenous peoples, and yet constitutes the framework for their claims-making and the

adjudication of their rights as unique peoples. As argued above, this constitutes a structure of intergroup domination. As Mills writes of the Canadian state from his personal perspective:

Through claimed sovereign authority, Canada purports to establish the framework of freedom and constraint which articulates how I may act and how others may act towards me. It bounds that framework with a monopoly on the legitimate exercise of violence to enforce my compliance. It doesn't care whether its imposed constitutional framework reflects my ways of being, knowing, or conception of value. Nor does it care that in the absence of an identity between us it coerces and constructs me without my consent: a fact that should be noted with vicious irony, given that Canada's constitutional order is contractarian.

Mills, 2017, p. 221.

In this section, Mills draws together the personal and the inter-group levels in a description of the impact on persons of inter-group domination. As argued earlier, a fundamental challenge for legitimate political associations between peoples is the institutional recognition of political identities, where this requires institutional coordination that reciprocally promotes the collective self-determination of peoples. As we have seen from the above, the self-determination of peoples is interdependent in more than one way in a political association, including in the very articulation of the distinct identities themselves and the nature of freedom for interdependent identities, however this does not obliterate the need for respect for national difference.

Dominating multinational structures constrain subordinated nations' jurisdiction to the will of the dominant nations, with repercussions for the political agency and alienation of their members. In this passage, Mills directs our attentions to the background political procedures and laws by which the contemporary political association is governed, and points directly to the limits placed on his self-determination (his "ways of being, knowing, or conception of value") as an Anishinaabe person. In the language of Anna Stilz, within political structures that fail to

recognize their political identity and the appropriate constitutional standing of their group, Anishinaabe people are alienated from the social and political world (2019). That is, the Canadian constitutional order is reasonably experienced as an alien force that directs their will, rather than a reflectively endorsed extension of their agency that promotes their self-realization. In the language of Margaret Moore, under an imposed constitutional background, Anishinaabe people are prevented from governing their place-based relationships and the conditions of their lives according to collective (Anishinaabe) conceptions of justice; in turn, Anishinaabe people are precluded from a certain kind of relational autonomy (2015).

Within the context of inter-group and cultural domination, the courts are not reliable instruments of justice and harmony— precisely because they are constrained to the settler constitution in their interpretation of law and reify an alienating political structure. Under the present system, courts are incapable of “taking up the very issue at stake in treaty: the coordination of distinct constitutional orders” (Mills, 2017, pp. 223-4). Moreover, as indicated, the whole concept of treaties as contracts, understood to give effect to distributive justice for unique Indigenous peoples within the Canadian state is flawed (2017, pp. 224-225). As Mills illuminatingly writes:

From an Anishinaabe constitutional standpoint, this is outrageous. Not only is treaty not a form of contract, treaty isn't even the sort of thing capable of giving rise to a legal remedy. Treaties aren't legal instruments; they're frameworks for right relationships: the total relational means by which we orient and reorient ourselves to each other through time, to live well together and with all our relations within creation. They have a legal quality in the sense that they constrain behaviour and are at once political, social, economic, spiritual, and ecological. They're how we constitute ourselves as communities of communities, across our difference.

Mills, 2017, pp. 225.

In contrast to the imposed treaty regime of settler colonial states then, *living treaties* allow “Indigenous legal traditions to stand within their own constitutional worlds,” recognizing their unique identities and gifts, along with those of the settlers; moreover, they coordinate the work of mutual aid between societies, which is oriented towards harmony, and constituted within the context of the broader Earth community (Mills, 2017). Indeed, the total relational framework that Mills points us to here is precisely the framework for understanding identity, freedom, and belonging within the context of the Earthway that we addressed in the last chapter. It is with this understanding, and with a conception of relational selves and freedom as co-creativity, that we must understand Anishinaabe conceptions of treaty. If we abandon conceptions of settler supremacy – the taken for granted legitimacy of the settler constitutional order vis-à-vis Indigenous peoples who are interpreted as citizens subject to the democratic political will of “the whole,” we will find that treaties are not primarily remedies for historic injustice or instruments for contractual land transfers, but are about citizenship more broadly, that is, the negotiation of belonging and relationships among diverse peoples (Henderson, 2002; Mills, 2017). And, abandoning the thesis of settler supremacy, we must understand this question of citizenship not merely in terms of Indigenous difference under the constitution of Canada and thus *differentiated rights* for Indigenous peoples, but about how settler peoples fit into the pre-existing Indigenous treaty order on northern Turtle Island (Mills, 2017, pp. 241-2). In other words, we must conceive of the question of citizenship as the problem of articulating the manner in which we can all belong together harmoniously while respecting our (inter alia) national differences. As Tully has suggested, this work must proceed through an intercultural dialogue about the terms of our association that does not privilege the worldview of one group over another or accord structural

supremacy to one group over another.

5.4 Constitutional principles and public political ethos for non-domination

Tully's work discloses a conception of treaty relationships that is consistent with the Anishinaabe view, and which posits a model for resisting the domination at the heart of the contemporary treaty process. This section will reconstruct Tully's argument for treaty federalism as a mechanism for coordinating settler and Indigenous legal and political orders. Central to this vision are the principles of mutual recognition, continuity, and consent. I argue that these principles are plausible requirements for achieving the value of interdependent self-determination among groups without inter-group and cultural domination. While Tully's argument is at risk of adopting a first occupancy principle for assigning entitlements to territory, which may be implausible by some accounts of territorial rights which centre the needs and interests of territorial residents, Tully need not be interpreted this way. Instead, we can see the fundamental importance of practices of consent for legitimating any *shared* political order in North America without making first occupancy the central principle of territorial rights theory. In the next chapter, I will build on these components to articulate a vision for *negotiating* concrete political arrangements that fit the ideals of treaty federalism.

The first principle that Tully posits to govern just and practical relationships between Indigenous and non-Indigenous peoples is the principle of mutual recognition. We have seen from the earlier discussion of intercultural dialogue that mutual recognition requires the participants in a relationship to attend closely to the views presented by their fellow partners, including the

articulation of their own identities and visions for a shared identity. For Tully, close attention to the principle of mutual recognition reveals the duty of non-Indigenous nations to receive the consent of Indigenous peoples in order to legitimately acquire territory (2008, p. 279).⁷⁸ I reconstruct this argument below, before discussing the implications for the theory under construction within this chapter.

In just relationships between non-Indigenous and Indigenous peoples the participants relate to each other as “equal, coexisting and self-governing people and cultures” (2008, p. 229). I discuss each of these concepts in turn. Recognizing the *equality* of Indigenous and non-Indigenous peoples requires transformation from the “deep-seated prejudices and habits of thought and behaviour inherited from the past,” including the stages view of historical development which ranked Indigenous cultures as inferior in the attempt to legitimate colonial subjection of Indigenous peoples, lands, and governments as part of a “civilizing mission” (p. 230-31). Jettisoning underlying assumptions of cultural superiority or universal stages of civilizational development modelled on European nations paves the way for egalitarian relationships of interdependency between free and equal nations. In this context, the *co-existence* of equal peoples “means that governments and cultures of Aboriginal and non-Aboriginal peoples coexist or continue through all their relations and interdependencies over time” (p. 231). Finally, mutual recognition as *self-governing* requires the participants to “recognise each other as equal peoples who govern themselves by their own laws and cultures” (p. 232).

⁷⁸ What is a nation? Different conceptions of nationhood or peoplehood partly overlap and might fit equally well here. See Alfred and Corntassel, 2005; Corntassel, 2003; Kymlicka, 1995; Miller, 1995, 2007; Moore, 2015; Simpson, 2017; Stilz, 2019.

For Tully, the justification of this form of mutual recognition rests upon “the arguments that justify the recognition of any self-governing nation” (2008, p. 232), and that in turn consists in “the practice of governing themselves by their own laws and ways” (p. 232). Indeed, the inherent Indigenous right of self-government rests on “exactly the same criteria in international law, then and now, as the status of European nations: the proven ability to govern themselves on a territory and to enter into international relations with other nations” (p. 233). This status as self-governing nations has in fact been historically recognized through legal documents such as the Royal Proclamation, and the Treaty of Niagara (Borrows, 1997; Tully, 2008, p. 233; Miller, 2009).

Tully’s argument for the obligation of settlers to receive consent from Indigenous peoples in order to justify their settlements and exercises of political authority over their communities in North America builds upon fundamental assumptions of international law. By virtue of their status as free and equal nations, with long use and occupation of their homelands, *as is the case with any other nation*, “the only valid way, therefore, that Canada and the United States could acquire sovereignty in North America was by gaining the consent of the sovereign nations that were already here” (Tully, 2008, p. 234). For Tully, this follows simply from a consistent and unprejudiced application of the same principles that govern European nations in their relationships and interactions. The consistent application of the liberal principles of “equality, continuity, and consent” of people’s ways and institutions, require that we recognize Indigenous peoples as *nations* over whom settler institutions have no natural authority. It follows that:

Therefore, the basic justness of Canada, as a self-governing federation actually rests on its recognition by the Aboriginal peoples, not the other way round. Their consent to recognise Canada is, in turn, conditional on Canada’s acknowledgement of the Aboriginal peoples’ equal yet prior status as nations, and, secondly, on Canada’s conducting relations with the First Nations by consent gained through the treaty system.

Tully, 2008, p. 234.

Acknowledgement of this fact leads to the conclusion that we should view Canada as comprised of two confederations. As Tully writes: “the ‘first’ confederation (or federation) is the treaty confederation of the First Nations with the Crown and later with the federal and, to some extent, provincial governments. The second confederation (or federation) is the constitutional confederation of the provinces and federal government” (2008, pp. 236-7). Thus, recognition of the equality of Indigenous nations requires us to judge that the political authority of any settler political structures, and any shared political structure, depends upon the free consent of Indigenous nations to those arrangements.

With this argument in place, we can see that “the presumption that jurisdiction must be exclusive is replaced with two (Indigenous) principles: free and equal peoples on the same continent can mutually recognise the autonomy or sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination” (Tully, 2008, p. 280). In other words, Canadian federalism involves the sharing of political and legal jurisdictions among groups. Indigenous communities “vary greatly in their ability and desire to govern themselves by their own laws” (p. 247) with respect to numerous jurisdictions. Therefore, there must be an inter-delegation of powers among governments through the treaty system “in a way that is responsive to local differences and open to experimentation and revision” (p. 248).

Matters are somewhat complicated here by the supersession hypothesis (Waldron, 1992) or the downsizing hypothesis (Simmons, 2016) taken up in some form by various forward-looking theories of territory which centre the occupancy interests of human beings in the justification of

territorial rights (Moore, 2015; Stilz, 2019). As argued in previous chapters, these theories acknowledge that settlers were originally under an obligation to receive consent in order to have any legitimate residency rights or rights of political self-determination, and in turn, first-generation wrongful settlers had no such rights residency rights nor downstream territorial rights. However, so the argument goes, later generations of settlers (the children of original settlers, and perhaps those with no original *obligation* to receive consent, such as refugees) innocently occupy territory and maintain place-based relationships, and in turn have a right to residency rights and self-determination where they live that are *not* contingent on Indigenous consent. As I argued in chapter 2 – the danger with such reasoning is that is overly broad in its justification of settler political authority, and insufficiently attentive to the case-based particularities of on-going culpability. A central thesis of the dissertation is the legitimacy of settler – Indigenous treaty federations depends upon a justifiable distribution of territory between self-determining peoples, and that existing theories have not thought carefully enough about what this means. However, what requires observation here is that even if the supersession or downsizing hypothesis is partly true – that some settler residency rights are justifiable simply by virtue of settler occupancy interests – Tully’s conclusion is still *largely* correct. Any form of shared political association among Indigenous and settler peoples *requires* consent. This is because even if settlers have acquired some legitimate occupancy region within North America as an inherent right, they could not have acquired *all* of the territory (without discounting the moral equality of Indigenous human beings), and thus Indigenous peoples have continuing rights to jurisdictional authority over *their own* occupancy regions. Therefore, if there is to be a legitimate federal structure, Indigenous peoples must consensually participate. And as we have seen, there are conditions to this participation. Tully carefully articulates this in terms of the mutual recognition by peoples of

their equal nationhood and rights to territory and jurisdiction, and a commitment to a pluralistic intercultural dialogue about the consensually crafted constitutional order by which all are transformed. And as Mills has disclosed, the values at the heart of the partnership motivating treaties should be understood in terms of mutual aid among those in ever deepening relations of kinship, at risk of the structure alienating the fundamental normative, epistemological, ontological, and cosmological commitments of Indigenous peoples. And by virtue of the equality of peoples crafting terms of association, these ideals must be given equal weight in the interpretation of historical and contemporary treaty agreements, as they are plausibly necessary for ascertaining the *meaning* of any such agreements (Craft, 2013).

In short, the state cannot justifiably claim legitimate authority over Indigenous territories simply because settlers have legitimate residency interests in (adjacent) lands in North America. This ignores the equality of Indigenous peoples with their own residency rights and rights to political self-determination. In other words, the authority of the state or any other political architecture, without the endorsement of Indigenous peoples, could only be “justified” by a return to ethnocentric conceptions of politics, culture, and development which demean the significance of Indigenous nationalities, cultures, and philosophies. Instead, if we abandon ethnocentric and settler supremacy, we are left with a situation where equal nations have inherent claims to territorial jurisdiction, and the authority of shared legal structures positing mutual rights and obligations beyond those found within international law depends upon free consent. And as we have seen, the current institutional framework for seeking “consent” (the comprehensive land claims process) is in no sense free – it presents the “baseline” of rights and entitlements of Indigenous peoples as those *internal to the colonial legal order* and empowers settler

governments to veto more equitable arrangements that do not fit with its own interest. Finally, it purports to constrain Indigenous nations in perpetuity to the agreements it completes through the treaty process, ignoring the inevitable change and growth of nations over time, and the background legacies of genocide that condition current efforts at negotiating specific political arrangements or “inter-delegations” of rights and responsibilities among peoples (Henderson, 2002).

It is worth remarking in this context that in light of the disabling effects of colonialism, we ought not to view present “ability” to govern specific jurisdictional domains as fixing the jurisdictional capacities of Indigenous nations for all time. Colonially induced social dysfunction and political incapacity resulting in limited self-governance capacities are not necessarily permanent. Instead, it is plausible that in areas where an Indigenous nation would seek to govern itself with respect to some political function that it is not well-equipped *by its own lights to govern*, settler peoples’ duties of reparation and/or humanitarian assistance place them under an obligation to assist the Indigenous community in developing the capacity to exercise those political functions. The alternative, that settler peoples automatically have a responsibility to fulfil the political function on their own terms, through their own institutions, is implausible if the Indigenous nation could be assisted at a reasonable cost, and in light of any duties of reparation. This consideration is discussed more fully in chapter 6 (section 3).⁷⁹

⁷⁹ Here in the background, I have in mind the proposed requirement on *state legitimacy* that the political order governing a territory meet a threshold of adequacy in the exercising of certain political functions, such as protection of human rights and provision for subsistence rights of the community. This is widely accepted in liberal theory. While this condition is often formulated in terms of *state* legitimacy, the point is broader: a non-state political order is not immune from interference or intervention if it culpably fails to protect the basic rights of the inhabitants of the territory that it governs, for example.

Tully's view is shared by many Indigenous scholars of treaty federalism. While many Indigenous peoples do not endorse *international independence* of their nations under international law (e.g. statehood, or, otherwise, exclusive territorial jurisdiction through fully independent institutions), they could not endorse assimilation into settler states as *undifferentiated* formally equal citizens either. Chickasaw lawyer-philosopher James Sakej Henderson has argued that Canada should be conceived of as a *treaty federation* between settler and Indigenous peoples wherein the respective members of each possess differentiated Canadian citizenships (treaty citizenships) and should be governed by a common law comprised of treaties binding populations together. According to Henderson, individual Indigenous persons belong to Canada through the treaties that govern their nation's relationship to the Canadian settler nations (2002). Indigenous peoples in the Georgian and Victorian treaty-making eras did not totally cede their jurisdictional powers to settler governments, but instead made provisions for limited settler settlements and relations of protection between Indigenous nations and the Crown (1994). Indeed, on Henderson's reading of foundational constitutional texts of Canada, such as the *Royal Proclamation*, the sovereignty of Indigenous nations over their territories is recognized to endure through contact and cooperation with the Crown and settler governments (2002, 2004). We thus should construct Canada on more consensual terms as a federation of peoples, wherein the federal and provincial government possess authority in respect of Indigenous nations and their territories only by virtue of express delegations of demarcated jurisdictional authority by Indigenous peoples.

It is with this view of a shared constitutional order constructed by treaties between settler and Indigenous peoples (Henderson, 2002, 2004; Mills, 2017, 2019; Tully, 1995, 2008) that we have the beginnings of a clear solution to the problem of specification of jurisdictional powers and

competences within a federation, at least for the specific class of cases with which we are concerned, namely those of multinational difference. While the Supreme Court upholds a doctrine of settler state sovereignty (created through the magical assertion of underlying title by the Crown) and in turn adjudicates Indigenous rights and claims through a legal structure privileging written constitutional documents and associated canons of precedent and legal reasoning about Indigenous peoples conceived of as cultural minorities with special rights under this settler dominated constitutional order, we should instead see the necessity of conceiving of an authoritative shared constitutional order as being formed through the relationships between free and equal peoples through the practices of mutual recognition, continuity, and consent and oriented towards the interdependent self-determination of related nations through the sharing of gifts and deepening relationships. We cannot assume the authority of a constitutional order to guide settler and Indigenous peoples prior to the free participation of Indigenous peoples in shaping that shared constitutional order.

Thus, we can see the necessity, perhaps of conceiving of both (1) a shared constitutional order harmonizing the co-existence of settler and Indigenous legal orders, including inter-delegations of political responsibilities and jurisdictions, and regulations for shared political structures, (2) settler and Indigenous legal orders, internal to each nation, regulating the nation in respect of its own internal affairs, territories, and obligations under (2). It is this sense in which there may be “two confederations” or “two levels of federal politics” – the first between the already constituted settler state comprised of settler groups regulating their affairs as two nations across ten provinces and three territories under the *Constitution Act* (1867), the second a unique constitutional relationship between the settler state and Indigenous nations with a higher-order set

of norms specified through consensual international relationships.⁸⁰ In other words, while the settler jurisdictional units (provinces) might see reason to empower a federal government to fulfill certain governmental responsibilities vis-à-vis themselves, the jurisdiction and responsibilities of a federal government vis-à-vis Indigenous nations may be different.

With these arguments in place, we can see a renewed role for a properly interpreted doctrine of federalism within the Canadian constitution. The central aim of constitutionalism consists in the attempt to better protect the functioning of certain political and legal structures from majoritarian interventions than would otherwise be possible under a different political design. Within this context, constitutionalism does not aim to entrench all political and legal structures from majoritarian decision-making, but rather to insulate a class of structures that are especially significant to the fundamental legitimacy of the state, or whose reliable functioning is otherwise of overriding importance in comparison to the imposed burdens that would be placed upon majorities to legally alter them for even some perfectly justifiable purpose under their constitutional entrenchment. The correct way to differentiate the proper scope of constitutional law, or those domains which should be rendered immune from ordinary legislative decision-making, from ordinary law, is a matter of considerable debate, and a general theory of this problem is beyond the scope of this chapter. However, this chapter argues that reflection upon the legitimacy conditions of the territorial state in context of national difference can reveal the

⁸⁰ The complexities of this governance order should not be theorized away, but are rather areas which require more analysis in light of the foregoing theory. There are immediately several issues that arise: (1) the composition of the “federal” government – are there then two federal governments or just one? Do the settlers require a federal government to fulfill jurisdictional and executive roles vis-à-vis and on behalf of the provinces, alongside as higher-order federal government fulfilling jurisdictional and executive roles vis-à-vis and on behalf of Indigenous nations and the lower-order settler federal government? (2) the composition of the federal assembly – must there be two (or more) federal assemblies? These are beyond the scope of the chapter.

necessity of constitutional protection of certain structures and principles relating the composition of the *multinational* state. What we have argued for here is effectively a meta-constitutional principle, a principle to govern the harmonization of settler and Indigenous constitutional orders in a shared political space. That principle requires that the distribution of jurisdictional rights and executive responsibilities among institutions for peoples sharing a political association rest upon the consent of the peoples engaged in the association (Tully, 1995, 2007).

Thus, the question of the value of federalism as a constitutional doctrine for political associations of settler and Indigenous peoples returns with a new meaning. The authority of shared constitutional orders flows from the treaty relationships premised upon the mutual recognition, continuity, and consent of self-determining nations. This is necessary for relationships of interdependency to be non-dominating mechanisms for promoting the mutual aid and growth of nations navigating their deep interdependence and shared future. The constitutional status of these norms – meant to govern the political orders of settler and Indigenous peoples respectively as they interweave their futures through deepening relationships of cooperation – secures the premise that these relationships aim to secure interdependent *self-determination* of peoples. Only within the context of relationships premised upon mutual recognition of rights and the imperative of consent can nations freely offer their gifts and assistance to one another and thereby achieve co-creativity and the freedom that comes from mutual empowerment. In other words, the value of political partnerships depends upon the federal form being a co-authored construction, which necessitates the absence of relationships of domination. In order to achieve that, certain meta-jurisdictional norms must prevail: mutual recognition, continuity, and consent must structure the distribution of political powers and responsibilities between groups and institutions in the federal

political order.

Whereas the presumption of the present legal order is that Indigenous nations' jurisdictional powers are limited to those recognized by the federal government, implementation of the principles of mutual recognition, continuity, and consent requires that Federal and Provincial governments recognize that Indigenous nations' jurisdictional rights with respect to their territories extend to all domains that are not expressed delegated to another government or shared institution.⁸¹ Thus, in the absence of a treaty, the federal and provincial governments should not be presumed to have jurisdictional powers with respect to Indigenous lands if the Indigenous government insists upon its right to manage the domain. Rather, treaty relationships are the site for the negotiation of *federal and provincial jurisdictional and executive powers* in respect of Indigenous nations. In the absence of consent, the federal and provincial governments should not be presumed to have jurisdiction over domains that the Indigenous nation also claims; however, there *are* some political functions which plausibly must rest with shared institutions rather than exclusively Indigenous institutions.⁸² Protection of the scope of Indigenous jurisdictional

⁸¹ In order for this formulation to be informative, we require a grasp on the territorial entitlements of groups – the areas they are entitled to exclusive jurisdiction. This is an especially pressing question for multinational federations because there are multiple national groups claiming their own territories. The meta-jurisdictional right of the people to determine which political institution has jurisdictional authority with respect to a domain on the territory requires an independent theory of territorial rights if it is to be action guiding. As I argued in chapters 1 and 2, the fundamental elements of territorial rights theory can help to specify the territorial boundaries of groups.

⁸² This formulation recognizes the jurisdiction of the federal and provincial governments vis-à-vis Indigenous lands and peoples with respect to governmental functions that the Indigenous nation does not claim. For example, jurisdiction and responsibility for the regulation of a common currency, the defense of federal territory, the provision of hospital networks and advanced medicine, universities, unemployment insurance, public old age pensions, and so forth are likely to remain with the federal and provincial governments on this model, at least in cases of small nations for whom the self-provision of these services is impossible or *unreasonably demanding* on others' assistance when the good could just as well be provided by another level of government. This being said, in domains that the Indigenous nation claims and could effectively exercise with proportionate assistance from the federal partners, the justification for federal or provincial control lapses. And it is plausible that there are some governmental services that are provided for within a federation that are not necessary conditions of political legitimacy, and thus which an Indigenous nation could deny a responsibility to provide for its citizens, or in respect of which it could deny another

authority through recognition of Indigenous meta-jurisdictional rights will create space for Indigenous legal orders to regulate the lives of Indigenous people on Indigenous territories, allowing Indigenous people to live according to institutions, values, and laws that they can endorse. As we have seen, this is central to avoiding alienation under law for arbitrary reasons, domination.

Conclusion

Recall once more that the value of multinational federalism according to Anishinaabe conceptions consists in enabling the mutual self-determination of peoples through the reciprocal provision of gifts, which supports the co-creative potential of each people to contribute to a shared world, which is to return the gift. This form of political association is chosen because it gives expression to the identities of the participants, understood to be fundamentally co-constituted and mutually referential. Accordingly, freedom for those in relationship just is response to the needs of others and reciprocal gifting, which solidifies the relationship and fulfills the obligations of kin. While this analytic is drawn from ideals for politics among

governments' obligation to provide the service (and in turn its right to manage the jurisdictional domain). Finally, the fact that jurisdiction properly rests with another government does not abnegate the responsibility of the federation to properly include Indigenous representatives, claims, and ways of thinking into the deliberations and decision-making procedure. However, with these conditions in place, it is worth observing that there are some functions which plausibly must remain with the federal government, considering the nature of the function and its significance for human welfare. So, for example, the creation of a stable *common* currency and the *unified* defense of the federal territory – plausibly goods of great value for the members of each unit of the federal state, are necessarily the responsibility of a government that represents the citizens of the federation as a whole and provides the good in common to all citizens. Contrast this with the provision of education, land management, policing, or administration of social welfare benefits – there is nothing about these goods that requires their common provision by a federal government. The fact these responsibilities already rest with Indigenous and provincial governments and are effectively managed at that level already proves that. Much more about this will be said in chapter 6 (section 3), which, inter alia, investigates the concepts of *fairness* and *civic kinship* in relation to the costs of reciprocal duties of assistance among the members of the federal state.

individual members of Anishinaabe nations, I have argued, drawing on Mills' theory of treaties, that it can also serve as an ideal for interdependent self-determination among nations in federal structures, and that it is a better description of the value of federalism for settler and Indigenous nations than alternative philosophical theories.

From Tully's perspective, we have seen as well that there is another level to shared identity – not only are the identities of the members of the federation fundamentally linked through mutual gifting and reciprocal obligation, creating a shared kinship identity, but they are in their individuality complemented by a fundamental awareness of their particularity in relation to their relatives. It is by being in relationship that one's own particularity, including one's national identity, is thrown into relief – one comes to understand oneself in relationship with the other. Moreover, the reciprocal awareness of multinational difference, and the cultural differences of the other nations (one's relatives), such that one can see the association from the perspectives of others with whom one has been linked historically and remains linked in the present, is itself a form of valued shared identity, grounded in the practice of dialogue. It is this shared awareness of diversity, an awareness of oneself as in relationships and in part defined by those relationships, which is promoted by a growing understanding of one's relatives. This awareness of shared identity motivates the participants to engage in struggles for recognition and negotiation of the terms of association with a desire to comprehend that contributes to a deepening understanding of the perspectives of the other parties. Through engagement in these practices of recognition and negotiation the shared identity shifts and changes – as do the more particular national identities of the participants themselves. And throughout this process of mutual recognition, we come to identify the gifts we have to offer, and those we might ask for,

from our kin.

Thus, we can see the shape of the treaty federal solution to the specification and domination problems. Specification of constitutional designs among free and equal nations must proceed according to meta-jurisdictional norms of free and uncoerced association among peoples. This follows simply from a consideration of the rights of nations as self-determining groups with place-based and relationship-based autonomy and wellbeing interests in access and control over their own territories. As Mills and other Indigenous thinkers have drawn our attention to, Indigenous peoples have never been considered in the design of the constitutional architecture of Canada. Instead, they have been forcibly incorporated under an alien constitutional structure. Accordingly, the development of a legitimate political association requires settlers to fairly re-negotiate the terms of association on the basis of consent with each Indigenous nation with which they would partner. This is not the status quo. The comprehensive claims procedure, embedded as it is within wider settler dominated processes for specifying the positive law of the Canadian federation, constitutes a dominating structure for inter-group negotiations. There must be a revision to the current mode of negotiating treaties if the Canadian state is to be a legitimate partnership of nations rather than a brutally forced marriage.

Chapter 6: Negotiating Treaty Federalism

Even with the sophisticated vision of the value of treaty federalism for settler and Indigenous populations developed thus far, and the uncovering of related constitutional norms to protect nations' self-determination from domination, we have several remaining questions about the negotiation and implementation of this vision for a shared future.⁸³ What does the process of negotiation, ratification, and implementation of modern treaties look like in practice with this vision? What kind of formal process for negotiating and assigning rights fits with a conception of treaties as a total relational frame for conducting relationships among nations?

While we now have a better idea of what treaty relationships should aim after (mutual empowerment of relationally defined interdependent peoples) and necessary norms of constitutional interpretation to prevent domination (mutual recognition, continuity, and consent) among peoples within these relationships, without a positive account of the concrete *practice* of treaty relationships among the various political actors involved, we have little insight into *how* nations can develop and maintain relationships of interdependent self-determination in a federal political association. For example, we do not have a plausible account of what it means for a people or a nation to consent, or what kind of process for negotiating consent would track the interests of those subject to the agreements. Peoples and nations are comprised of a multiplicity of persons, posing the question: what does it mean for a people to consent to a treaty agreement considering this internal multiplicity? The importance of these problems is heightened by

⁸³ It should be observed that non-domination is a precondition for genuine relationships of interdependent self-determination and mutual empowerment. It is not possible for peoples to freely gift one another or remain self-determining under conditions of domination. Thus, non-domination constrains what counts as interdependent self-determination, but is not itself identical with mutual empowerment which goes beyond the non-domination ideal.

recognition that decolonizing states will have to deal with a multiplicity of differences: there are a multiplicity of Indigenous nations, each with a unique way of life, differentiated capacities and aims, and distinctive ways of thinking, acting, and speaking— and this particularity, on the model of intercultural dialogue and interdependence, must be centred in our thinking about the meaning of gift-giving and reciprocal freedom in the conduct of our relationships. Similarly, there are a multiplicity of local settler communities, each affected differently by distinct treaties with unique Indigenous nations – and we must centre this bi-directionality of the treaty relationship in our understanding of a renewed process for negotiating, ratifying, and implementing modern treaties. How can treaty negotiations be attuned to this particularity of groups and circumstances such that final agreements empower Indigenous communities and local settler communities and draw them closer in their relationships to each other and the lands they must share?

In engaging these questions it is necessary to consider the political and legal mechanisms for negotiating and ratifying *agreements*. While treaty is a broader relational framework for managing international relations than might be suggested by the language of *agreements* (Mills, 2017), from the prior chapter we can also see the importance of receiving *mutual consent* to inter-delegations of power and responsibility between groups if a political association is to respect the equal status of distinct nations. Mutual consent to some kind of inter-delegation of power and responsibility is necessary if the relationships between groups are not to be dominating but instead to facilitate the harmonization of legal orders and mutual aid. Correspondingly, much of what must occupy us here is an examination of the process for seeking and obtaining consent in a way that fits the overarching aims of partnership and which avoids

interpersonal, intergroup, and cultural domination.

Contemporary processes of treaty negotiation in Canada are premised upon a multi-stage procedure including intergovernmental negotiations, Indigenous community ratification of the agreement through a referendum, and an act of Parliament. These procedures pose questions about the relationship between democracy, political representation, and collective self-determination in international relationships. As articulated in chapter 4, multinational federations should be constructed to enable the value of interdependent self-determination between groups. And as argued in chapter 5, these federal structures must be constructed through the consent of peoples. However, the meaning of a group's *consent* – which facts constitute *the consent* of a *group* of persons – is not obvious. For example, the current process requires Indigenous groups negotiating a treaty to hold a referendum on draft agreement that has been negotiated by their officials, while the affected settlers do not hold a referendum but are bound to the agreement negotiated by their government upon the successful passage of an Act of Parliament. At what point do *peoples* consent to treaty agreements? And then, we might wonder, when and in virtue of what facts does “consent” of the yet to be specified kind give us reason to think that an agreement will promote the values underlying interdependent self-determination? Why think that the process for seeking and obtaining consent will track the interests of those subject to the agreements and promote the correspondence interest at the heart of political autonomy? Why think that the agreement will constitute the deepening of a relationship of interdependent self-determination and mutual empowerment?

The connection of these problems to the value of democracy is most apparent perhaps when

considering the legitimacy of unilateral (Indigenous) referendums on matters relating to federation's constitutional norms. The current process gives Indigenous *communities* a direct veto on the treaty agreement, and not *local* settler communities – giving rise to an objection concerning this apparent democratic asymmetry. In addition to this worry, constitutional referendums have been subjected frequently to other objections, such as their vulnerability to elite manipulation and their inefficacy in tracking the preference of populations under conditions of strategic choice. These concerns are especially pertinent in the context of treaty negotiation, considering that referendums concern community ratification of an agreement that has been formally negotiated in advance by the elite representatives of the community and settler governments. The theory I offer conditionally endorses referendums within Indigenous communities on proposed treaty agreements. Provided referendums are embedded within a broader set of well-designed procedures that track the goals of collective self-determination, non-domination, and democracy, the referendum process will avoid these objections.

The plan for this chapter is as follows. First, I interrogate the concept of consent within the context of international treaty-making. Treaty ratification is often discussed in terms of the consent of peoples. I will argue that while this usage of “consent” is acceptable – it often tracks deeper facts that are relevant to the moral force of treaty agreements upon states and their populations. Nonetheless, without disambiguation, the language of consent risks concealing important complexities concerning the relationship between the members of a society, their political representatives, and international agreements. Attention to practices of international treaty-making cast significant doubt upon simple conceptions of “consent” in the international sphere. In most cases, the “consent” of peoples to a treaty agreement should be understood be

shorthand for a complex political process conducted within peoples, involving practices of democracy, contestation, and representation according to constitutional procedures, rather than a unified act of the people in relation to a proposed treaty agreement. While democratic representative processes under the correct conditions may legitimately bind those subject to them, it may be misleading, in the absence of a popular referendum, to speak of the people's consent.

Next, I argue for the importance of disaggregating our understanding of the multilogues at the heart of settler – Indigenous treaty federations. I argue that it is best to recognize that the multilogues of the federation are plural, layered, and overlapping. There is not a single multilogue among the citizens of the federation, but many, and the practical significance of a multilogue for each federal citizen varies to some extent with the citizen's particular locale of residency. Correspondingly, we must conceive of federations as comprised of plural and overlapping relational federal identities – the identity of diversity awareness is itself plural and constituted by internal difference as the citizens engage in distinct territorially-located multilogues. In this context, settler identities and Indigenous relational federal identities will be co-constituted through a place-based dialogue about the Earth and their interdependent relationships with it, one which will draw settler persons into dialogue with Indigenous philosophical and political conceptions drawn from the shared territory. Second, I consider the institutional upshot of the unbundling of political and intercultural discourses for the realization of interdependent self-determination. I argue that legitimate treaty negotiation is an institutionally complex phenomenon, necessarily incorporating public dialogue and consultation, formal intergovernmental negotiations, Indigenous referenda, and settler parliamentary

legislative enactment. The aim of this complex process is to generate agreements that can receive endorsement by their affected populations while also realizing the requirements of fairness in the distribution of responsibilities and powers among groups in a political association oriented towards interdependent self-determination. By necessity, this will require some consideration of the relationship between democratic practices of contestation and consent, and the legitimacy of political institutions. And as indicated, the role of constitutional referendums must be interrogated along these lines.

After this discussion of procedural issues, I move to considering matters of substantive fairness in the agreements, in light of the conception of the value of federalism constructed in chapters 3 and 4. This section is structured around a possible objection – namely, the idea that citizens would have a complaint of *unfairness* against being required to assist Indigenous governments to exercise political jurisdictions that they are not capable of independently exercising. By parrying this objection, I illuminate multiple reasons why fairness might *require* inter-group assistance, and some requirements for substantively fair agreements. Finally, the chapter concludes with a brief argument concerning the necessity of remaining open to the re-negotiation of treaty agreements as identities and circumstances change – an overarching requirement on a process of inter-governmental negotiation in a decolonizing federation.

6.1 Consenting peoples

In this section I consider the meaning of “consent” as a practice within international relations. Although my primary example is the Canadian state’s relationship with other states, I hope that

this section will demonstrate that the language of “consent” in treaty relationships is shorthand for a complex political process internal to and between groups. Consent in international relations is a variegated process which often involves both the executive and legislative branches of the state, in a process undergirded by democratic practices of authorization and contestation. The conditions under which these exercises of authority can plausibly be said to “reflect the will of the people” depend upon background facts about the relationship between the people and the authority that purports to represent them. With this account in place, we will be able to better see the relationship between representative authority, popular deliberation, and referendums in the negotiation of treaty relationships between settler and Indigenous peoples.

Consent and Self-Determination

It is natural to regard peoples as akin to natural persons, and correspondingly to view the autonomy of peoples (conceived of as collective self-determination) as akin to the autonomy of natural persons.⁸⁴ Thus, the concept of *consent* is central to theories that attempt to explain how the rights and obligations of both natural persons and peoples can be modified while preserving their autonomy or self-determination.⁸⁵ In each case, it is common to think that *free consent*

⁸⁴ Applbbaum (2019) makes a similar observation about the limits of this metaphor and the difficulties in formulating a conception of the relationship between individual and collective self-determination.

⁸⁵ Here I wish to explicitly distinguish my use of the term “modification” from the constructions scaffolding this term in relation to inherent Indigenous rights to territory and self-government within Canadian common law. The modification of an inherent right of self-government does not in any way eliminate the inherent right to self-government or foreclose alternative formulations of the right down the line. Rather, it should be conceived of as the chosen manner of expression or exercise of the inherent right of self-government, which persists and grounds the current expression in conjunction with an agreement that is presumed to eventually be open to re-negotiation in full light of the underlying inherent right. This does not mean the Indigenous nation or settler nation in any way waives its ability to exercise their right in a different, more or less robust, form in the future. Nonetheless, for the purposes of coordination of interests and political and legal orders, nations might agree to exercise their inherent right to self-government in specific ways. The inherent right may be claimed in a more or less robust form in the future, and the format of coordination is always open to re-negotiation as circumstances change. I largely avoid further discussion

(manifest in contextually-relevant speech acts such as “yes,” or “I agree”) under conditions of non-domination, respects the *will* or *choice* of the agent. And autonomy and self-determination are associated with precisely that, the free choice of the competent person or people. This is the view that we see among theorists of treaty federalism, and Indigenous theorists of treaty relationships, insofar as peoples are presumed to be able to consent to treaties.

However, the will of a people does not exist in the same manner as the will of a natural person. Whereas it is obvious to most responsible agents how to discern whether or not a natural person consents to an exchange or other modification of their rights and obligations (one asks the person a clear question under non-dominating conditions and attends carefully to their reply), it is not immediately obvious how to ask a people whether they consent to an exchange or other modification of their rights and obligations. After all, peoples are composed of a multiplicity of persons, and seldom would those persons all reply in the same way to a given question. In fact, there are always dissenters in politics – groups are never unanimous. Nonetheless, this formulation does suggest a solution to the puzzle as to how peoples can modify their pre-existing rights and obligations. The apparent solution: modifications to the rights and obligations of peoples can be made through the free choice of the people, taken as an agent in its own right capable of consenting to law. Yet, there are several puzzles with this formulation. How does one discern the will of a people? How does the will of a people vary from the will of the individual members and from the will of component agencies of the state?

in terms of “modification” to avoid the assumptions surrounding this term within Canadian jurisprudence, which are informed by earlier “cede and release” and “surrender” formulations of the certainty provision within treaty negotiation.

In what follows I discuss the existing practices of treaty negotiation, ratification, and implementation of the Canadian state in foreign affairs. I illuminate the complex institutional framework by which treaties are ratified and implemented in Canada, and puzzles that arise for the concept of self-determination of the people through treaty-making accordingly. My aim here is not to totally resolve the philosophical puzzles that arise about the popular will, democracy, and representation but to indicate the complex and contextual relationship between democratic representation, self-determination and treaty-making in Canada. Discussion of this concrete case will help to ground the general insight of this section: that the legitimacy of treaty agreements (and their binding force for peoples) depend upon a complex set of normative relationships between the people, state, officials, and agreement. This should be obvious from a discussion of the Canadian case, but it is also illuminated through consideration of dictators. Finally, I fold this discussion into the earlier argument (from chapter 5) about the nature of domination of individuals by the state, and peoples by other peoples in multinational states. This discussion illuminates the conditions under which treaty negotiations can be thought to be vehicles of collective self-determination, insofar as it specifies the conditions under which a people are self-determining through political institutions that legitimately represent them, rather than dominated by an alien power. What should result from this analysis is a renewed appreciation for the complexities of “consent” within the context of international relations. With this section in place, we will be positioned to interrogate more pointedly the role of popular deliberation and claims-making in the process of treaty-negotiation.

Responsibility for Treaty-Making in Canadian Law

As a matter of common law, and as a holdover from the Crown prerogative to conduct international affairs, the power to negotiate international treaties within parliamentary systems of government rests with the federal government. Said governments, through their ministers, foreign secretaries, or delegates thereof, negotiate the terms of international agreements with the governments or representatives of foreign states. For example, in Canada, the Minister of Foreign Affairs is formally responsible for the negotiation of international treaties (although in practice much of this work is conducted by officials working under the direction of the Minister). In said systems, the power to formally *sign* an agreement in principle, announcing Canada's intention to be bound by a treaty agreement, and later to formally *ratify* a treaty, formally binding Canada to a set of treaty obligations, rests with the Government through cabinet (Barnett, 2021).

However, the process of ratification is often complex. Sometimes, a treaty may be ratified and given effect through the policy-making powers of the Federal Government, requiring no changes to the existing regime of statutory laws in order for the obligations of the treaty to be performed under the current statutory regime. In these cases, it is the current policy of the Federal Government to table the treaty in Parliament for a non-binding review prior to ratification. Nonetheless, Parliament has no formal role to play in the treaty-making process – it possesses no veto over such treaties. However, when the performance of treaty obligations will require a change to domestic law because the terms of the treaty obligations conflict with existing federal law, implementation legislation must necessarily be passed by Parliament. Thus, to be able to give effect to an agreement in principle, and to ratify a treaty in good faith, the Government's treaty must enjoy the support of a majority of members of the House of Commons and the

Senate. A bill must be tabled by the Government in the House of Commons and proceed through the ordinary process of federal law-making in order for the agreement between the party states to regulate Canadian institutions and practices domestically. As a matter of positive law, once the implementation legislation is passed, it is recognized as domestic law by politicians, courts, and bureaucrats, and thereby directs their judgment and conduct to conform with the agreement upon its ratification.⁸⁶ For treaties requiring implementation legislation, the Canadian government withholds ratification of the treaty, after an agreement in principle is signed, until the necessary implementation legislation is passed.

From the perspective of the question that animated this section, namely, how do we discern the consent of *peoples* to treaty agreements, we might say that in the absence of the Government's ratification of a treaty agreement with a foreign state, the Canadian people does not consent to the treaty agreement. We might think that under international law, government ratification of a treaty document *counts* as the consent of the people, and in fact there is no other body within the Canadian parliamentary system empowered to represent the people in treaty negotiation with foreign states or ratification of treaty agreements. However, this formulation of the conditions of the Canadian people's consent to treaty agreements introduces puzzles, due to the role of Parliament in the treaty-making process in cases where implementation legislation would be necessary to give effect to an agreement in principle. In the absence of the necessary support of the legislative assembly for implementation legislation, the state will not perform its treaty

⁸⁶ While this discussion is framed in terms of Canada's Ministry of Foreign Affairs and treaty-making with foreign states, for the purposes of the argument of this chapter, the puzzles that arise here are also relevant to the context of Indigenous treaty-making.

obligations, and thus, ratification is withheld by the Government in the Canadian system on treaties requiring implementation legislation until such legislation is passed by the House of Commons.⁸⁷

This presents a conundrum concerning the way in which *the Canadian people* do in fact *consent* to an agreement. When – and on account of what facts – can the Canadian people be said to *consent* to an agreement? It might seem we are left with three possibilities. The first is to think that the Canadian people consent to treaties simply through the performance of ratification procedures conducted by cabinet, while the second is to think that the Canadian people consent to treaties when implementation legislation is passed by the House of Commons and the ratification procedure for the treaty is completed by the Government. A third possibility might be disjunctive and specify consent in terms of whether or not implementation legislation is required. However, I think this formulation of the problem and possible responses can be misleading. In a certain sense which I disambiguate below, in paradigmatic cases of global affairs concerning Canada, *the Canadian people* do not consent to treaty agreements. However, the Canadian *government* consents, thereby effecting changes to the responsibilities of the Canadian state under the norms of public international law. Throughout this process the Canadian people may be legitimately bound to compliance with the requirements of the state's obligation through the legitimate actions of their government. And, as I will argue below, this may, under certain conditions, be interpreted as an expression of the people's will.

⁸⁷ The *Vienna Convention on the Law of Treaties* makes a distinction between the signature of the agreement in principle and formal ratification for precisely this reason.

While I am less concerned here with metaphysical questions than the practices of existing states and the complexities by means of which treaties are negotiated, ratified, and implemented, the metaphysical question (when – and on account of what facts – do the people consent to an international agreement?) seems pressing if we wish to view the state as the vehicle for the self-determination of the people. The people, on such views, are thought to have a will of some kind. And the state, as their vehicle, must represent and give effect to the people’s unified will in order for the people to be self-determining. Thus, we go looking for the appropriate representative of that will – the person or set of persons that can authoritatively speak and act for the people – and find ourselves mired in contradictions by finding multiple authoritative bodies that often compete and disagree rather than speak with one voice. And in exceptional cases, such as the case where an agreement in principle is reached by the Government but Parliament refuses to pass implementation legislation thereby preventing ratification of the agreement in principle, we find authoritative bodies that do not simply disagree, but that act in a contradictory manner.⁸⁸

The image of a people with a unified will is both productive, and misleading. It is productive insofar as it seems to capture something about the case where treaties are negotiated, ratified, and implemented according to the relevant constitutional procedures of the state. In Canada, when the Executive branch successfully negotiates and signs an agreement in principle, and Parliament passes implementation legislation, and the Executive then completes ratification, it is plausible to

⁸⁸ On my view, whether the failure to implement a treaty agreement after an agreement in principle is signed is in fact a wrong, or simply a forgivable failure that can sometimes be anticipated by another state, depends on concrete facts concerning the case. For example, in the case of international treaties between states, the failure to provide implementation legislation might result from an election, corruption, an unforeseeable event, and so forth. In other words, it may not be on account of any moral failing of a particular official or the government that the treaty failed to be implemented. It is plausible that these kinds of events sometimes provide excuses, that, minimally, insulate the government (and the state) from moral blame (but perhaps not duties to renegotiate the treaty) for failing to ratify an agreement in principle due to the failure to pass necessary domestic implementation legislation.

say that the treaty agreement expresses the will of the people. The coordination and overlapping consensus amongst bodies required to successfully ratify a treaty requiring implementation legislation is a plausible political (if not metaphysical) vision of unity. It is not a total unity of judgment of the members of the nation, but the complementary practical judgment of relevant democratically authorized officials acting in accord with the constitutional procedures of the state in order to give rise to new law and otherwise perform complex state functions. The concept of unity can be misleading, however, insofar as it seems to suggest that there is a single body that represents the people, or through which the people decisively act, rather than a complex structure or arrangement through which the people are self-determining, one which by necessity includes role differentiations and contestation and which can sometimes issue in outright contradiction or turmoil when the component parts are improperly exercising their responsibilities. As the example illuminates, the self-determination of peoples occurs not through a single institution, body, or voice, but through the coordination of institutions, governmental bodies, and political voices in a complex arrangement that gives due consideration to each with the ultimate end of passing law in a manner that fits the requirements of constitutional legitimacy.

The puzzle we are attending to arises because we observed the complexities inherent in modern states' ratification and implementation of treaty agreements. Multiple bodies are responsible for coordinating amongst themselves and performing constitutionally required acts in order for treaties to be ratified and implemented. The Executive must negotiate a treaty, and ultimately ratify it, while the legislative branch must be prepared to give effect to treaty negotiations by passing implementation legislation. Moreover, a good government, within the Westminster system, is keenly aware of the fact that a successful treaty negotiation involves both ratification

(the promise) and implementation (the performance). Thus, multi-level deliberation must occur amongst the Government and the Members of Parliament to ascertain whether implementation legislation – and under what conditions – will pass. And this will normally occasion wider public discussion, lobbying, and contestation by citizens concerned to make their voices heard by their representatives in Parliament. Sometimes this process results in revisions to the draft of the treaty agreement, or reservations in the treaty text, to reflect the conditions for successful ratification and implementation. In so doing, these practices of legislative and executive interaction secure the support of the people’s representatives for the people’s Government’s proposed treaty. And this concord between Government and the legislative assembly, although unstable, and housed with the context of parliamentary structures oriented to reliably *produce* contestation, is in fact an ideal of democratic self-government in parliamentary systems.⁸⁹ The Government is in this manner – through question period, the media frenzies, the floor of the House of Commons, and ultimately through voting on the implementation bill – constrained to exercise authority in a way that is publicly justifiable, and which can secure the consent of the independent representatives of the people. In the past, the failure of Parliament to pass implementation legislation in cases

⁸⁹ From a republican perspective, the organization of the House of Commons into the Government and official opposition, which coordinates opposition parties to contest government policy and ask questions of the Government, helps to reliably produce scrutiny of bills and the Government’s policies. This opposition is in turn reflected in wider discourses, media, and so forth, subjecting the government to public examination. This functions as a check on the Government’s power, requiring it to justify its policies in public, and respond to pressing critiques, if it is not to visibly fall short of the ideal of public justification to citizens. Moreover, the background set-up of regular elections in party systems places governments under pressure to justify their actions to citizens and gives opposition parties an incentive to investigate and publicize the actions of the government. Still, it is within this context of competition and contestation that the Government must find concord within Parliament if it is to successfully ratify and implement a treaty agreement. And that, as I have suggested, is part of the ideal of democratic self-determination through the actions of the Executive, which is accountable to the people directly through elections, and indirectly through the legislative assembly, in Parliamentary systems. When the Government acts under these conditions, it is constrained from acting arbitrarily, plausibly representing the interests of citizens. This is not an exhaustive list of mechanisms for ensuring government accountability and non-domination more broadly, which include the federal division of powers, bills of rights, the judiciary, and so on.

where it is required to ratify a treaty has constituted a vote of non-confidence in the Government and has triggered a national election. In these cases, the Government is thought to no longer represent the will of the people by its policies.

While we may not be able to literally say that when a government fails to secure implementation legislation for a treaty that it has negotiated that it is has lost the support the people—it is clear that it has lost the support of their parliamentary representatives who are empowered to fulfil a vital role in the process of treaty ratification and implementation within a system which, when things are going well, the people endorse.⁹⁰ Within the context of a failed implementation bill it is plausible that there has been a failure of collective self-determination through the Parliamentary system. The institutions of self-government have not functioned harmoniously, but instead have seriously erred somewhere along the way. The Government has acted as if the people they represent would commit to the performance of certain tasks, if the other nation, under conditions of common knowledge, would commit to do so as well. But the people’s representatives refuse to give effect to the performance of the proposed obligations, the representatives of the people are not in fact committed to the treaty.⁹¹ However, within the

⁹⁰ States, being corporate entities, are competent enough to know about each other’s internal procedures, and have prudential reasons to investigate the political conditions of potential treaty partners for whether they will be able to implement the treaty. In this way, states might calculate the extent of their short-term reliance on the treaty agreement based on empirical judgments about the likelihood of implementation in order to hedge potential costs. In either case, trust in international relations will plausibly track facts of these sorts, including knowledge of each other’s political orders. The failure to ratify a treaty due to an error that will inevitably result in the replacement of the government that negotiated the agreement (elections) is less likely to immediately result in enduring international distrust than the outright violation of an implemented agreement with a fixed duration. A country can remain a trustworthy treaty partner precisely because it has internal mechanisms that initiate an election upon the failure to implement an international treaty. This holds governments accountable in the international realm, insofar as they are liable to replacement if they ratify agreements the state will not implement.

⁹¹ The idea that the people’s “will” (conceived of as pre-political or embodied by the people as a whole prior to formal legislation) is given expression in determinate acts of law-making or policy can be severely misleading. It is more plausible that the people’s will just is the upshot of a legitimate decision-making process, and that legitimate

Parliamentary system the people's representatives must be committed to any necessary implementation legislation, if the agreement in principle is to attain the status of law and empower the treaty relationship in the agreed upon form. In short, the Government "fails to represent the people" when it cannot secure Parliamentary implementation legislation for a treaty it has negotiated because it does not have the necessary support of their representatives. Thus, the significance of elections under these conditions, which permit the possibility of reconfiguring the Government in such a way as can propose treaties that can receive the endorsement of the legislative assembly and facilitate international relationships on consensual terms.

In a word, the dilemma concerning the "consent of the Canadian people to treaty agreements," may be merely *apparent*, for it equivocates between the Government, the state, and the people, and ignores the underlying norms of democratic authorization undergirding executive authority in parliamentary systems that are given expression by the contestation between the legislative assembly (parliament) and the government (executive). In international practices of treaty making, the government negotiates a contract that will bind the state, whose people they represent. On a common view, the state persists governments. The state itself is an apparatus – an assemblage of constitutional norms, statutory laws, and related institutions, and practices, by means of which a people, or peoples, maintain a social and political order on a territory.

Governments are collections of persons empowered to exercise the political responsibilities of

decision-making processes are legitimate because the people endorse that process and are appropriately engaged in adjacent deliberation and contestation to which representatives are attuned. The government may purport to represent the willingness of the people to be bound by an agreement, but this must be understood as shorthand for the willingness of legislative representatives to pass legitimate law in the name of the people, binding them to the terms of the treaty agreement, and the willingness of people to be represented by this structure of political authority in general.

state officials by virtue of their appointment according to the constitutional procedures of the state. Accordingly, governments exercise certain powers and responsibilities on behalf of the people whom they represent, according to the norms, customs, and laws regulating the exercise of state power within a particular legal order. Within Parliamentary systems, the Government is thought to rule at the leisure of the people. This is reflected through both formal (written) and informal (unwritten) constitutional laws and conventions. For example, the Government in Parliamentary systems is conventionally comprised of the party with a plurality of votes, or a winning coalition. However, the Government, despite being comprised of Members of Parliament is formally and legally distinct from Parliament. The Government must, in addition to securing a plurality of votes for its party in national elections, secure the endorsement of Parliament itself, which is comprised of the people's representatives. Treaties, as we can see now, are negotiated by Governments on behalf of the people they represent, and issue in changes to the laws and/or policies of the state. The people do not directly consent to treaties in the normal case, although they may have authorized their representatives to negotiate treaties through democratic elections according to the constitution of the state. In cases where treaties require implementation legislation, the legislative assembly and the government must be in agreement about the terms of the implementation of proposed agreements for which negotiations have been initiated by the government.

What I hope to suggest through this analysis is that the image of the people "acting through" a government body – as if *a people* were somehow in ghostly form animating its actions – is misleading. The idea that the people have a pre-institutional unified "will," a consensus position or collective intention on specific questions of government policy at a particular time, that

somehow informs those filling institutional roles as they make particular policy decisions is not plausible. The laws, policies, and practices of states are normally the upshot of complex institutional processes of deliberation, debate, and representative judgment that issue in a particular rule or directive, which may itself be subject to review by another official or agency of the state. The self-determination of groups does not often consist in the state giving life to the (pre-institutionally determined) intentions of “the people,” at least, not beyond the intention to maintain the state itself in its basic form as the mechanism for public decision-making.

However, this skeptical line of questioning can reveal how the people can be self-determining through exercises of political authority such as international treaty making conducted in their name. Provided the particular state form is endorsed, and the people have relevant control over their state, it can function as a vehicle for collective self-determination – it can be the means by which people realize their commitments about political rule, insofar as they endorse a particular state form as the mechanism for territorial rule and they are engaged in a deliberative process with representatives concerning the direction of state policy. In that sense, the Government can “exercise the will of the people,” by acting in their name through procedures the people endorse.

However, the puzzle that occupies us here stems from the thought that the people somehow consent *through* their representatives to laws, policies, or treaties that are passed through Parliament or ratified by executives. I argue that is looking for popular endorsement (in particular: consent) at the wrong institutional level (at the level of laws rather than institutions).

Granted, the exception here may be popular referendums, where the people may directly authorize or veto a proposed law or treaty agreement – but that is not the normal case, referendums are sparingly deployed in Parliamentary systems.

In the absence of a popular referendum, while *the people* have not meaningfully *consented* to the *international treaty agreement*, they might nonetheless be *bound* by an act of governmental authority that legitimately represents them.⁹² It legitimately represents them, when and because they endorse the structure of authority that appoints and empowers their legislative representatives and government, and the government conforms to the legitimacy requirements both internal to the structures of authority (the constitutional law expressing the fundamental values of the people) and the requirements of state legitimacy generally (such as respect for basic human rights). This is relevant to both settler democracies, and Indigenous peoples maintaining traditional governance systems. For example, provided the Wet’suwet’en hereditary leadership system is collectively endorsed by the people, exercises political authority with respect for human rights, and promotes citizen deliberation, claims-making, and contestation, it legitimately represents them. Moreover, it is not the case that “the people” consent every time an act of Parliament is passed, or a treaty is ratified. This is not even the appropriate ideal for the normal case of treaty making – where the Executive and Legislative act in consort and in accordance with the constitution. To specify the ideal as consent would be to hollow out the special normative work that *consent* to a specific law can perform, as might happen when there is a referendum. However, Parliamentary bills and treaties may nonetheless be “authoritative expressions of a people’s will” insofar as the people actually endorse the process by means of which bills are passed and treaties are ratified in their name. In short, the treaty agreement, as the

⁹² I do not here address the question as to whether a legitimate government can create content-independent reasons for action, e.g., whether citizens have special obligations to obey the law (see Applbaum, Raz). It is sufficient in my usage for the people to be “bound” that the state has the right to make and enforce law, and that the people and outsiders have an obligation to not interrupt the process of government on the territory through extra-legal means. Whether or not the people in addition have an obligation to obey the law is a question for the theory of legitimacy that I do not address. There is logical space between such an obligation and the right of the state to make and enforce law (Applbaum 2019, Stilz, 2019).

result of the inner workings of the representative political process of the state may be fully consistent with, and the indirect result of, the exercises of political agency of members of the people who work together to maintain the state.

To collapse the distinction between authorized decision-making on behalf of another, and *consent* to the decision of the representative, is to hollow out any normative distinction between consent and (political) authority. However, presumably, well-designed referendums can function to solicit the consent of the people, and the consent or unmediated direction of the people can perform special work to justify state policies by directly engaging the will of the people vis-à-vis specific proposals. Thus, referendums might be thought to be especially important when the basic structure of the state is in question, or where a political decision is not decisively favoured one way or another by the existing values and materials of the public culture. While politicians should be constrained to act in the interests of citizens, and part of this involves reflecting the identities, beliefs, and core commitments of the people (which in turn often involves soliciting public opinion and consulting public deliberation), a referendum is distinct from public opinion polling, responsive government, or government that fits the identity of the people. A referendum is sometimes a form of authoritative *popular decision-making*. As I will argue below, referendums must play an important, though circumscribed, role in Indigenous ratification of contemporary treaty agreements – although they are not necessary for settler peoples and should be avoided for settler populations on pain of submitting Indigenous populations to the risk of arbitrary interference in their collective self-determination and decolonization.

What of the image of relationships conducted between peoples according to norms of consent in

the absence of referendums? Does the theory offered here fundamentally sit at odds with the vision of relationships between peoples conducted through norms of consent? What of the idea of the people as a “group agent” capable of speaking with one voice and acting together in a way that seems to be required for *a group* to consent? Nothing that I have said here should discount consent as the primary norm for the relationships between settler and Indigenous peoples, although we should now see that “consent” in this context cannot help but be shorthand for a complex institutional process that issues in documents referring to states and peoples *as if* they were internally unified natural persons. As I have shown, peoples need not function in that way to be self-determining through treaty relationships. The confusion (and the solution) resulted from an equivocation between two senses of the term “the people.” However, we are now capable of seeing the nature of the confusion and why each concept of the people is necessary to make sense of the *practices* of international treaty making as practices of collective self-determination. It is this tension between the two conceptions that generates the ideal of collective self-determination and which provides an ideal for representative decision-making.

On the one hand, we have the aggregative conception of the people. This is a conception of the people as a set of individual persons sorted as a group without foregrounding any specification of the internal decision-making procedures of the group or any normative connection between the members and those decision procedures. This is the sense of “the people” we might use when we talk about politicians appealing *to the people’s* judgment during election times by persuading them of the case behind the party platform. In these activities, politicians appeal to the judgment of each citizen on morally relevant facts and try to persuade them of the justification or desirability of some policy as a solution to a political problem. This is also the sense of “the

people” that we mean when we say, in the absence of a popular referendum, the people do not consent to a treaty agreement negotiated in their name. Here we recognize the people as comprised of *a set of individual autonomous judges who are subject to political institutions and norms* but where the emphasis is upon the members’ individuality, uniqueness, and independence of judgment. It is concern for the people subject to political institutions that might alienate them that motivates a concern for collective self-determination of the people through a state they can endorse.

The second sense of “the people” recognizes that the residents of a territory are unique individuals with their own capacities for judgment and choice but understands them – or a majority of them – as sharing an identity and being individually committed to a particular decision-making procedure for resolving political conflicts. Here, we have the idea of the people “unified” by virtue of shared commitments to political self-rule through specific institutions. It is this sense of the “people” that is invoked when we talk about the consent of peoples to treaty arrangements. Here we can say the people “consent” to the treaty through their representatives. However, as indicated, “the consent of Canada” can just as well be explained in terms of the ratification of an agreement by the Canadian government, an act of legitimate authority of the government which binds the people when and in virtue of the special normative connection between the people and their representatives. In other words, while we can retain the use of the term “consenting peoples” in order to capture legitimate acts of political authority within states, this can be misleading in some cases insofar as it suggests that the people directly consent to treaty agreements, or that there is some agent within the state that is exclusively responsible for speaking on behalf of the people in all matters respecting treaty negotiations. We should not fall

prey to the false image of a thorough-going unity of choice by “the people” here, even if the people are legitimately represented by the officials that act in their name. In short, the generative image of “consenting peoples” directs us to a complex political process within and among peoples to which we must turn our attention if we are concerned to promote the collective self-determination of interdependent peoples.

Self-Determination and International Treaty Making

Return now to the original question with which this section began. How do peoples remain self-determining through modifications to their rights and responsibilities? The discussion above, grounded in the Canadian case, illuminates how Canada negotiates treaties, and might seem plausible as an account of self-determination of the Canadian people in treaty making through their Parliamentary representatives and Government Ministers. This is a complex process that can go askew. But when it does function harmoniously, it gives us a plausible vision of a group’s self-determination throughout the process of international treaty-making. However, we might be left wondering: what can we take from the discussion of the Canadian case as exemplary of authority respecting treaty negotiation more broadly? How does this image, for example, apply to Indigenous nations?

It is worth returning to skepticism about representative authority in treaty negotiations in order to articulate the stakes of this general question. While we can see the rationale behind thinking that individual intentional performances engaging the language game of promise-making made under conditions of non-domination commit an *individual* agent to the performance of that which they

promise (they have made an unforced promise, it is their choice to modify obligations), we do not *necessarily* have the same intuition when it comes to the governments of states when they make agreements on behalf of their respective populations. After all, while “treaty agreements” in the first instance bind states and their officials to enact certain policies, obligations will often pass down to individual citizens whose citizenship rights might be affected; who might be taxed; who might be subject to new regulations; who might no longer have directly elected representatives with the jurisdictional authority to set policy in a particular domain (think of the rise of the EU). The discussion of the Canadian case illuminates the conditions under which we do think that these actions of government are legitimate – because the relationship between the people, their representatives, and law is correctly configured in such a way as to shield the people from domination by their state, and in turn enables them to exercise collective self-government through cooperating to maintain these institutions.⁹³ However, the discussion can also help to identify conditions under which we do not think that a people are bound by an international agreement, and, as will be discussed later, when a referendum might be required to legitimize a treaty agreement.

⁹³ It is worth observing two connections between republican non-domination and collective self-determination. First, non-domination is plausibly a precondition for citizens’ authentic reflective endorsement of their participation in the relationships of political cooperation that construct and sustain the state. Dominating conditions foreclose the conditions for an informed and sincere judgment about political authority – which is at the heart of political autonomy under law. When people are prevented from assembling, deliberating, exchanging information and opinions, making claims against the state, or demanding public justification, they are denied the conditions for an informed judgment about their political life and thereby prevented from realizing the conditions for political autonomy in one sense. Secondly, it is through participation in practices of democratic self-government, including voting, protest, citizen contestation, law suits, lobbying, and public deliberation (practices which hold the state to account, holding in check its exercise of power) in part that the members of the people participate in their collective self-rule; that is, it is through the civic practices at the heart of non-dominating governance that the people cooperate to maintain the political world through their own agency and shape that political world. In both these senses, the robust civic practices associated with “republicanism” are a component of the citizen activity that constitutes collective self-determination.

For example, we intuit that *dictators* are not empowered to bind their populations to international treaty agreements. If a military leader seized power from a democratically elected government, the fact that he now holds an effective monopoly on violence in a territory is not sufficient to empower the representatives of the dictator to make agreements that bind the people. While there may be special conditions under which we think it morally permissible to deal with dictators, our intuitions strongly lead towards viewing agreements negotiated by dictators as being, if not outright invalid, subject to supersession without penalty upon the ascendancy of a democratic regime in the region which seeks to negotiate treaties.⁹⁴ Contrariwise, we think democratic states violating treaty agreements with a very clear fixed duration, provided the agreements are not patently unjust, requires a strong justification. While it is implausible that a people can bind themselves in perpetuity to an agreement, and it is implausible that a people cannot escape an agreement after unpredictable events render it unduly burdensome or especially unfair, we do think that agreements tend to carry moral force – *prima facie*, it would be wrong for Canada to unilaterally violate the terms of the *United States-Mexico-Canada Agreement*, for example. What these intuitions suggest is the importance of analyzing the relationship between the people, and the institutions of representative authority that negotiate and ratify treaty agreements. The dictatorship case indicates that the state should be non-dominating, controlled by the people, and should represent the people by conforming to their basic shared judgments about legitimate political authority for their territory.

Our intuitions about existing practice, the conditions under which a people can possibly bind

⁹⁴ This is somewhat in tension with international legal practice, which creates a perverse incentive for military coups. See Pogge (2008) for discussion of the natural resource privilege and borrowing privilege of governments.

themselves through a treaty agreement, depend upon the relationship between the people, the representatives, and the agreement.⁹⁵ This was the case with Canada where we disambiguated the relationship between the state, people, and government in such a way as to tell a plausible story about how treaty-making “reflects the democratic will” of the people within a complex constitutional order. While it is misleading in one sense of “the people,” to say that the Canadian people *consent* to treaty agreements in the absence of a referendum, they may be nonetheless be legitimately bound by treaty agreements when these are negotiated, ratified, and implemented according to the appropriate procedures, and this can be said to be an expression of their will. Considering this relationship between the people, their representatives, and the agreement in more general terms will further help explain the rationale for our intuitions, and provide guidance for settler – Indigenous treaty negotiation.

⁹⁵ Somewhat mysteriously, as a moral convention which is supposed to entitle the recipient to expect performance of that which is promised (Thompson, 2002), our actual expectations of performance of promises and treaty agreements seem to depend upon public knowledge of the identities of the promisors and the history of their performances. Consider the following possible world. The fact that Canada does not violate ratified and implemented treaty agreements *unless* they turn out to be especially burdensome or unfair on account of changed (largely unforeseeable) circumstances, would make Canada a reliable treaty-partner if it behaved that way. But this is a plausible construction of the very nature of promissory and treaty relationships in the first place. As moral conventions, there are intrinsic limits to the force of promissory obligations when other moral considerations enter the fray. Why does this not collapse the reason-giving force of promises altogether or the grounds for reliance, considering their strength varies with facts that might not even be anticipated: why ever rely upon a promise or treaty? This is because the class of facts that could defeat the promissory obligation are narrow, and there are attendant responsibilities of public justification if one intends to violate the treaty on account of the emergence of new facts. Moreover, the notion of an honourable participant requires signalling of the intention to violate the treaty in advance, if possible, and to not use the violation as an opportunity to gain an unfair advantage. If states, like persons, constrain infringements of promissory obligations to a narrow set of cases, and perform the attendant duties for honourable dealing in those cases, treaties are still action-guiding and parties might still have good reason to recognize each other as honourable in their dealings (to trust one another) even if treaties do not always provide conclusive reasons to do something.

Non-Domination and Self-Determination of Peoples through Treaty Negotiations

In chapter 5, we considered the question of non-domination of citizens under the conditions of disagreement endemic to politics in contemporary democracies. While it is plausible that some form of political organization is necessary to specify and uphold a system of rights, and that there is a natural duty to build or maintain such institutions, we found that decision-making by the state, including through institutions of majoritarian democracy, pose threats to human agency, and threaten alienation under law. The state is capable of binding us to its decisions, forcing us to comply. In so doing, without political and legal practices to place limits on its power and constrain it to track the interests of the people, the control of the state is plausibly thought to be arbitrary, and the state to dominate us. And as we have seen, there are multiple levels relevant here: norms and institutions are required to prevent the arbitrary control of *majority* identity citizens by the state, and these are insufficient on their own to prevent the arbitrary control of *minority nations* within multination states. These latter cases require norms of mutual recognition, continuity, and consent at the level of *peoples* to account for and prevent the possibility of arbitrary interferences.

The problem that we face here, concerning the legitimacy of treaty negotiations, is similar. We are concerned that the representatives of the state, and the political process for ratifying treaties, track the interests of the citizenries, and that the political process itself reflects the collective commitments of the peoples. In a word, we are interested in designing a process to promote collective self-determination and prevent domination in the relationships between interdependent persons and polities. And as we might infer from the previous section, this need not require unanimity of agreement amongst those bound by the agreement, just as the legitimacy of law

does not depend upon the unanimity of agreement among those subject to law. That is an impossible political ideal for territorial government, with a kernel of illuminating insight. It is an impossible ideal, because there will always be individual dissenters of various kinds. The kernel of insight is that in cases where some other feasible political process for making and enforcing law over a territory would better reflect the judgments of citizens about by whom and how they judge they should be ruled, that political process has a pro tanto claim to authority. Thus, we can see the illegitimacy of enforced cooperation of Indigenous peoples under settler political and legal orders when their own governments and legal orders are waiting in the wings and capable of fulfilling necessary political functions. And more broadly, we can see the normative relationship between the government, state, and people that achieves collective self-determination for the people. This analytic helps to articulate the grounds of legitimate treaty-making for both sides of the equation: both settler, and Indigenous peoples.

As we have seen in chapters 4 and 5, a concern for the political agency interests of the members of minority nations explains collective rights to territorial self-determination, and is the basis of claims by those nations against the domination of uniform, mono-national, state institutions that submit them to the will of a pan-national majority. Indigenous nations have claims to political self-rule and shared institutions that respect their own ways of acting, thinking, and speaking. In addition, this vision of the self-determination of a group through the members' reflective endorsement of complex institutional arrangements for the making of law also helps to explain the ideal of self-determination through treaty-making for members of an individual nation, insofar as it directs us to analyze the relationship between citizens and the institutions of political authority that exercise power over them. Recall from the discussion of domination that states

must be configured to prevent the arbitrary decision-making of officials and lawmakers in order to achieve the robust freedom of their citizens. The practices that prevent domination are complex, including constitutionalism and the rule of law, regular elections, and widespread informal practices of citizen deliberation and contestation. Moreover, we found that practices promoting the status of citizens as equal members of a uniform demos entitled to public justification were insufficient to achieve the ideal of non-domination for settler – Indigenous relations. The constitutional norms of mutual recognition, continuity, and consent must structure the relationships between settler and Indigenous peoples to prevent the arbitrary restriction of the political freedom of the members of Indigenous peoples to maintain their own territorial political institutions.

In the same vein, the neo-republican ideal of non-domination will require that the group of persons represented *in treaty negotiations* do in fact form a people together, a group of persons reflectively endorsing the basic institutions of political rule for their community and committed to maintaining it, and that the members of the people are appropriately related to their representatives within that structure, and are empowered to participate in the relevant political discourses with equal standing and opportunity to make claims concerning the agreements. This does not of itself provide a robust account of what a legitimate process of settler – Indigenous treaty-making looks like, given the complexities of the political questions that must be addressed, nor does it provide an account of the necessary content of the agreements themselves. However, it provides the first articulation of a reasonably complete and clear *procedural* standard by which to evaluate agreements from the Canadian side. In the Canadian case, we can see a public system of government, with complex institutional differentiation and divisions of

responsibilities, in the matter of, inter alia, treaty-making. Provided Canadians endorse this structure, voted for their political representatives within it, are empowered by practices of democratic deliberation to the contest agreements made by their elected representatives, and may submit claims for consideration in respect of how they will be affected, the structure articulated above plausibly fulfils the ideal of non-domination and self-determination through international treaty-making for Canadian citizens.

So too with Indigenous nations: provided the members endorse the structure of representative political authority of their nation, and that structure constitutes a non-dominating mechanism through which they can construct a shared social and political world, and they are empowered to contest negotiations and make claims concerning how their interests will be affected, it appears that negotiations will achieve the ideal of self-determination.⁹⁶ Thus, while the Wet'suwet'en people, for example, do not maintain cyclical elections of their representatives, they too might achieve collective self-determination through negotiated agreements. The potlatch system of government, while not a "democracy" in the Western sense, instantiates many fundamental democratic norms – publicity of decision-making, public norms and rules, and well-entrenched practices of empowering citizens to deliberate together, and with their leaders, in ways that

⁹⁶ Matters are somewhat more complicated when considering treaties that initiate changes not simply to federal law, but to *constitutional law*. It is plausible that normal representative processes – accompanied by the further mechanisms discussed here – are insufficient to insulate citizens from political reforms that do not track their interests when major constitutional reforms are at issue. This is especially the case for constitutional reforms that affect the basic structure and institutions of the political community – that which is normally endorsed in the background, enabling self-determination under representative democratic governments. I take up this issue in the section on referendums below. I argue that there are important reasons to not subject decolonization arrangements to *settler* referendums, while Indigenous referendums upon final agreements may be necessary to ensure adequate representation of Indigenous interests throughout their most decisive constitutional moments. Nonetheless, what is said here about the representative process of *negotiation* (cf. ratification) applies to Indigenous nations.

generate responsiveness of institutions to claims of the people (Napoleon, 2020). In so doing, representative practices amongst the Wet'suwet'en are non-dominating, and the hereditary system may exercise legitimate political authority in treaty making.

While this model does not solve all the puzzles concerning breakdowns in effective government, it does track our intuitions about what goes right when there is an effective and legitimate government.⁹⁷ Much of what will occupy us in the coming sections pertains to what the necessary public consultation, contestation, and deliberation accompanying inter-governmental negotiations must look like, especially in light of the complexity of the issues under negotiation: the distribution of exclusive and shared jurisdictional responsibilities between groups, the overlapping territorial boundaries of these responsibilities, the extent of duties of assistance and cost sharing between peoples, and the nature of the shared “federal” identity of the diverse citizenry itself. On the theory of non-domination discussed throughout this dissertation, the government must be subject to scrutiny, and constrained to consider the input and deliberations of citizens on proposed legislation. This is necessary for the justification of political authority vis-à-vis citizens, otherwise acts of political power fail to be checked by the interests of citizens without any good reason for that failure. Furthermore, the people must be directly engaged in

⁹⁷ Again, this all concerns the process by means of which treaties are negotiated. However, as we saw in chapter 2, and will see later in this chapter (section 3), and in future chapters (chapters 7 and 8), there are significant *substantive* criteria of legitimacy and fairness which must be reflected in negotiations as well, if they are to count as legitimate and not arbitrarily constraining of Indigenous self-determination. If a government insists upon unjust arrangements in treaty agreements, and has the power to constrain the Indigenous nation to those arrangements or the colonial status quo, the procedure has failed to adequately protect the self-determination of the Indigenous nation. This is the case even if the relevant procedural standards for mutual self-determination through agreement-making have been complied with. However, as we will see, in concrete form the arrangements that are necessary to meet this procedural standard encourage injustices to come to light – although this may not, of itself, be sufficient to counter domination.

processes of decolonial negotiation if there is to be any hope of building relationships of mutual understanding and mutual aid between peoples, an ideal which is at the heart of the Anishinaabe conception of political relationships and which provides a plausible account of the value of multinational federal belonging. It is to the relationship between the peoples, their representatives, and one another that I now turn.

6.2 Unbundling the negotiation of decolonization and federal relational identities

As discussed in the previous section, the negotiation, ratification, and implementation of treaties involves a plurality of agents internal to a people engaged in complex relational activities that enable the government to legitimately ratify agreements in the name of the people with other complexly constituted peoples. While this is informative as to the way in which practices of consent can be implemented in settler – Indigenous relations, it is incomplete as an account of treaty negotiation. Treaty negotiation and ratification is complicated further by the facts of the case-type that concerns our examination: the construction of consensual and mutually empowering relationships among a multiplicity of nations whose members' identities overlap within a shared federation. Moreover, the idea of citizen deliberation and contestation is still *vague*. What does this look like in practice? What counts as sufficient opportunity to contest for the purposes of ensuring that representative decision-making is non-arbitrary but rather is adequately constrained to track the interests of the citizenry? We should look at these problems in finer detail if we hope to make progress on eroding the domination endemic within contemporary settler – Indigenous relations.

In this section I will consider the upshot of the multiplicity of Indigenous peoples and complexity of the claims under consideration for a theory of non-dominated negotiation of federal arrangements. The plurality of Indigenous nations and territories necessitates a radical unbundling of the standard package of territorial rights normally attributed uniformly to *states*, and correspondingly, a radical disaggregation of the idea of intercultural discourses, gifts, and shared identity. In undertaking this analysis, I hope to demonstrate two conclusions. First, the public deliberations, necessary for promoting mutual understanding between peoples and legitimating representative decision-making on behalf of those groups must be understood to be plural, geographically located, and overlapping. Second, we should integrate the idea of intercultural discourses within a broader theory of treaty negotiation which incorporates representative negotiation and public deliberation. In this vein, the elaboration of the criteria of legitimate treaty negotiations will reveal the potential of properly designed community referenda for structuring temporally extended processes of community deliberation and contestation in such a way as representative negotiations plausibly track the interests and identity of Indigenous people undertaking treaty negotiations with the settler state.

Multistage Public Deliberation

While the model of non-domination articulated chapter 5, and the model of treaty negotiation articulated in the first section of this chapter both suggest that citizen deliberation and contestation are important for ensuring that the representative activities of government officials track the interests of the people in whose name they are negotiating and ratifying agreements, it is important to remember that the context of treaty negotiation in Canada involves multiple

peoples whose members partly overlap in geographical space and identity. It will be helpful to return here to Tully's theory of democratic contestation within the multinational federal context to see the shape of the situation for the negotiation of treaties in Canada. Tully's model interrogates the dynamics of identity construction in multinational contexts, and the ideal of citizen contestation, deliberation, and agreement at the core of non-dominating political associations. This theory at once explains the overlapping nature of inter-communal deliberation and identity-formation, and the role this deliberation plays in building a political community that is endorsed by the members in light of shared values. However, a full appreciation of the diversity of Canada requires us to re-think Tully's conception of intercultural dialogue, *to geographically locate it*, and to return to the idea of inter-governmental negotiation with fresh eyes. While Tully's theory (1995, 2008) is nearly silent about the relationships and interactions between *governments*, a plausible theory of treaty negotiation requires us to consider the relationships between lands, peoples, *and* governmental representatives. These relationships are important to consider internal to each people, and in a process of deliberation between peoples.

Tully contends that struggles for recognition in federal states involve three overlapping and interacting sites of identity formation and discussion that occur simultaneously, primarily through public discussions and negotiations (2009). First, this occurs within the group seeking recognition, as the group addresses the claims for recognition of its own internally diverse minorities, in the formulation of its claim for (national) recognition. This includes the presentation of demands on behalf of the group as a whole, alongside reasons for the inadequacy of the prevailing constitutional rules of recognition, e.g. the constitutional legal structure (p. 202). Second, this occurs within the society as a whole as it re-articulates its identity in light of

the struggle for national recognition of a part, here “the participants argue for and against one or more proposal after another for reconstituting the rules of recognition of their collective identity” (p. 203). This “site” thus includes all of the members of the federation, in all of their identity-related difference, as they grapple with the meaning of an overarching “shared identity” in light of group-specific demands for recognition and institutional reform. Finally, identity discussion and formation occurs “exclusively among the other members of the larger society (the ‘Rest of Canada’ without Quebec and ‘non-Aboriginal Canadians’ in relation to Aboriginal peoples)” (p. 203), as they re-imagines their own identities in light of the implications of the minority claim for recognition as a nation (e.g. what it means to be a non-Quebecois Canadian, or a province, and what powers provinces should have in light of the accommodation of Quebec’s demands for renewal). This final stage is made further complex by the demands for recognition of the internally diverse members of the rest of Canada belonging to the several provinces (internal cultural, religious, and gender minorities for example), who each have concerns about the articulation of the province’s collective identity.

Tully also provides us reason for thinking that revisions to the terms of association of multinational federations *should* be accomplished through these overlapping sites of public contestation, deliberation, negotiation, and agreement. This is a theory of identity formation and negotiation that is motivated by a robust image of democratic self-determination. For Tully, the legitimacy of demands for recognition of nationhood and revision to the norms of cooperation must “be worked out and decided on by the members of the association themselves, through the exercise of practical reason in negotiations and agreements,” that is through democratic procedures of negotiation (2009, p. 210). Tully gives three reasons for this.

The first, drawing upon the ancient principle of *quod omnes tangit* (what touches all must be approved by all) is that this is a requirement of democratic legitimacy. Indeed, the legitimacy of a specific claim must, in some sense, be decided by the members of the society in question because they are all affected by the proposed change (Tully, 2009, pp. 175-176). Secondly, however, Tully argues that without democratic procedures for negotiation, it will be impossible to account for all of the legitimate concerns of those affected by the change, both those within and outside of the group seeking recognition, in the agreement who are often affected in “complex and variegated ways” (p. 210). Finally, democratic discussion and debate is a condition of the resolution of the struggle for recognition in a deeper sense because the demand for recognition must reflect the collective identity of the people struggling for recognition. As Tully says, “It is the people themselves who must experience the present system of recognition as imposed and unjust,” thus, on the side of the claimant group, “[a] clear majority must come to support a demand for recognition as a nation from a first-person perspective” (p. 210). Moreover, the claimant group “must respond the concerns of the other members and articulate a constitutional identity for the society as a whole that all the members can support from their first-person perspectives.” The alternative, a top-down, or elite-driven approach to advancing and recognizing political demands that bypasses democratic will formation “is not likely to be supported on either side” and “will be experienced as imposed, as misrecognition, and the struggle for recognition will be exacerbated rather than resolved” (pp. 211, 176).

This is a useful model for thinking through the dynamics of democratic identity-construction in a state politically negotiating the realities of cultural and national difference. It suggests that our shared federal practices of national accommodation should be the result of popular negotiation,

which involves judging proposed revisions to the political and legal infrastructure from each of our own perspectives, understanding the meaning – the culturally internal reasons for the proposed changes – to those who propose them, and engaging in an intercultural dialogue about the justification of the proposed revisions according to values that we can all share, such as equality, human rights, and freedom. This process produces the shared federal identity of diversity awareness discussed earlier insofar as we can understand the difference of the other from their own perspective, and can share reasons for thinking some adjustment to the terms of political association are necessary for us to live together in a mutually justifiable way. Our shared identity consists both in this mutual recognition of difference, which throws into relief our own identities, and a shared commitment to mutual accommodation through the construction of shared institutions, laws, and practices that reflect shared values. Finally, it is important to recall that this is neither a homogenous nor static image of belonging. Identities are plural and changing. As political dialogue leads to political and legal change, so do both our federal identity and sub-federal identities change.⁹⁸ Our sense of federal identity changes insofar as we agree upon distinct practices to mediate our difference to maintain our relationship. Meanwhile, our sense of our “lower order” group’s identity changes when another demos within which we participate (say, the federal or provincial demos) is legitimately limited in its exercise of power with respect to some jurisdiction that it continues to exercise over “us,” which it no longer

⁹⁸ The notion of “levels” here might be misleading. For example, the members of multinational federations might judge their “sub-federal” identity to be their primary identity. For example, Indigenous peoples might understand themselves to only ever properly “belong” to Canada if their nation has ratified a fair and non-dominated treaty agreement. That is in fact the position I have endorsed in chapters 4 and 5. Others, especially settlers, might judge differently, feeling most attached to a Canadian identity and only secondarily attached to the identity of a province. I retain the discussion of levels only in the sense that the federal state “includes” or “rests upon” the negotiations between formally “less inclusive” or “constituent” jurisdictional identity groups. I do not mean to suggest any specific priority ranking here – and certainly not to suggest the order of subjective attachment or importance of the identities, as this will vary and is itself contested among and within “sub-federal” groups.

exercises in relation to another group's region. In this latter case we must answer questions like: why do "we" continue to subject ourselves to this federal or provincial jurisdiction in healthcare or education while "they" do not?

While Tully's own theory is relatively silent about representative authority and inter-governmental negotiations beyond insistence upon the primacy of consent in the relationships between peoples, we may interpret something like this public deliberation requirement as a legitimacy condition of treaty negotiations. Political authority structures which are not constrained to publicly justify decision-making to citizens fail to instantiate one mechanism for constraining government decision-making to track the interests of citizens. Treaty negotiations conducted among government representatives will significantly impact the interests of Indigenous and settler citizens and thus, in the absence of institutionalized constraints, citizens may be vulnerable to exercises of power that do not track their interests. The failure of the state to reliably institute citizen deliberation concerning impacts to their interests under proposed decolonization arrangements in deliberative processes to which the government is attuned and to which it is forced to publicly respond risks domination of citizens throughout negotiations. This point is important and applies to both settler and Indigenous populations affected by a proposed treaty agreement. Indigenous governments which fail to reliably institute citizen deliberative forums and claims-making processes regarding impacts to their interests under proposed decolonization arrangements also risk dominating their citizens through their acts of representative authority.

The relationship between public deliberation on decolonization agreements and the ideal of

collective self-determination of the people goes deeper than preventing failures of information uptake by officials, but rather touches to the core of Indigenous self-determination through federal arrangements. The thought here is that negotiated agreements for decolonization should reflect the values and deliberative preferences of the communities that will be subject to them and responsible for maintaining them. If the people do not see reason behind the proposed treaty arrangement, if it does not reflect their values and aspirations, the arrangement will stifle rather than promote their collective self-determination and fail to reflect their collective identity.

However, as I will argue, the aspirations a community might have for a decolonial future are not determinate prior to deliberation about their future during decolonial moments. In turn, collective self-determination may more intimately depend upon the deliberation of the people, and the legitimacy of treaty agreements may depend upon their actual consent in a referendum. Before making this argument, however, we must more closely consider how the structure of the intercultural dialogue and public deliberation. Reflection upon the proposal developed thus far will reveal the need to center place in our theory of public deliberation.

6.2a Unbundling the multilogue

While the argument above suggests that the contents of a proposed treaty agreement must be meaningfully connected to the Indigenous community's own deliberation about their future in order for those agreements to promote the Indigenous community's self-determination, and the neo-republican argument suggests that settler citizens are vulnerable to domination if they are not included in spaces of public deliberation to which officials are attuned, there is still ambiguity and practical tension within the idea "public dialogue" on Indigenous claims for recognition and

revision to the terms of association. Tully's model (2008) suggests that there will be a federation-wide debate on the terms of recognition (and corresponding shifts in the federal identity of each citizen) on each Indigenous struggles for recognition. However, we must recall that there are many Indigenous peoples, each with unique gifts, needs, and aspirations, expressed through unique voices and worldviews. I argue that the ideal of complete citizen participation in a federal multilogues is implausible as an account of the necessary public deliberation on two different interpretations of the ideal of "federation-wide deliberation." We must instead "unbundle" the multilogue and consider carefully the sites, compositions, structures, and timing of public deliberation in an overarching theory of Indigenous treaty negotiation. While there must be a federation-wide public discourse on decolonization, we should centre the local in our understanding of the requirements for the legitimacy of treaty negotiations and decolonization.

Tully's model, if interpreted to apply to each citizen in relation to each Indigenous struggle for recognition within a federation, posits an epistemically impossible ideal. There are already 26 modern treaties, and 70 Indigenous communities are currently negotiating a modern treaty. The ideal of citizen participation in each and every intercultural dialogue, if that is taken to require serious engagement with the case-based particularity of each Indigenous people, is too epistemically demanding to be possible for *any* citizen or negotiator. Consider what it would mean to learn how to hear the claims of approximately one hundred Indigenous communities, each in their unique voice. Minimally, this would involve understanding the political history, geography, and cultural and political practices of one hundred Indigenous communities. This is complicated further by the very idea of multilogue, which involves triangulating one's own understanding of a claim to difference not merely vis-à-vis an understanding of the positionality

and worldview of the other whose claim one considers, but also in light of the ways of thinking, acting, and speaking of third parties e.g., other Indigenous and non-Indigenous nations. Certainly there are shared Indigenous experiences, aspirations, and values, which makes understanding the movements of Indigenous peoples for decolonization in general terms possible.⁹⁹ However, if we are to take the full reality of difference – including worldviews, ways of life, and socio-geographical facts pertinent to treaty negotiation seriously – we cannot think that we will engage in a multilogue, with equal devotion, pertaining to each group with whom we are bound in a federal political association.

However, it is equally implausible to think that the citizen deliberation that is necessary to secure the uptake of claims made by affected interests, and necessary to promote inter-communal understanding of the rationale for specific-on-the-ground decolonized and shared political arrangements, can be achieved through a single federation-wide intercultural dialogue that ignores the details of specific cases and focuses on general concepts, claims, and theories. The federal citizens, if conceived to all be participating in a single deliberative arena on “the issue of Indigenous decolonization” (or even, the “the issue of decolonization of X territory”) will not be sufficiently coordinated in order to make precise claims relevant to decolonial negotiations. For example, claims about local land use practices, attachment to place, or the goals of a particular community will not be “channeled” to the correct citizens or the relevant treaty negotiators. What is needed is that deliberations about decolonization track the needs and interests of those who

⁹⁹ And it is an assumption of this thesis, that there are enough resemblances and similarities between cases to enable us to meaningfully expand the scope of current moral and political philosophical theorizing about Indigenous claims (which involves the construction of concepts, principles, or arguments of general application).

will be most pervasively affected. This is not to say that we should ignore the possibility of a federation-wide multilogue on settler – Indigenous relations. Federation-level discourses frame Indigenous issues in general terms, which can resonate with the experiences of a multiplicity of Indigenous peoples. This level of discourse can unite the members of a federation in their understanding of Indigenous struggles for constitutional change and restitution as struggles for national recognition and self-determination. It can also help us see the ideal of interdependent self-determination of a multiplicity of peoples engaged in a complex political process. However, debate at this level fails to generate significant mutual understanding between concrete groups living in proximity and sharing particular lands because it fails to channel the relevant claims, information, and responses to those who are concretely affected. It is plausible that for legitimate negotiation of fine-grained territorial institutional structures in particular cases, we require place-based multilogues incorporating settler and Indigenous groups who are occupants of the regions under negotiation. By necessity, there will be a multiplicity of such multilogues.

It should be clear then that what is required as a matter of democratic legitimacy is to unbundle the “multilogue.” Treaty negotiations entail place-based deliberations on proposed treaty agreements, a series of deliberative arenas that intersect, inevitably, with a broader discourse that crosscuts the federal level. In this way, citizens can input claims concerning how they will be affected in their day-to-day lives into a public discourse concerning the justification of territorial political institutions where they live. For example, with discourse at the local level, it can track the attachments of settler citizens and Indigenous peoples to particular places within a region negotiating decolonization. This is significant for creating inter-communal understandings of the rationale for specific proposals for decolonizing territorial authority. Deliberation about

decolonization, when rooted in a particular place, can sustain communities' attention to the histories and reasons for local group attachments to particular lakes, forests, and fields, which themselves may be ecologically integrated, and hold these facts in the balance while turning attention to proposed models for both restitution of exclusive territorial jurisdiction and new shared structures for land management in the particular place. Conceiving of the "multilogue" as occurring all at once between all the members of the federation on each Indigenous claim risks drowning out the place-based needs and interests of those most directly and intimately affected by decolonization.

Identity

Recognizing the plural, overlapping, and layered nature of the federal intercultural discourse requires citizens to remain apprised of a general level of discourse about Indigenous treaty politics, and more importantly, to pay attention and participate in the treaty politics of their local region. This division of epistemic labour for the citizens of the treaty federation renders meaningful deliberation about the particulars of decolonization and mutually empowering relationships possible, but also should inform our conceptualization of the nature of identities within a multinational federation. With particular non-Indigenous communities engaging particular Indigenous communities, we will have the generation of a multiplicity of unique federal treaty identities as settler and Indigenous communities refract their understandings of the shared association through the perspectives of the particular other. The unbundled place-base multilogues will engage citizen identities at multiple levels (federal, provincial, local), but the local multilogues may become the foci of settler multinational identities insofar as individual settlers will be drawn into a meaningful political dialogue with a particular Indigenous

community close to home. While citizens may find themselves united in a shared federal identity through commitment to certain general principles, which continue to be rarefied through federal public debate of particular cases and concepts, no citizen can hope to entirely grasp the whole. This is impossible for individual citizens to accomplish, even if the federal system as a whole can implement the vision of a system-wide decolonization by means of disaggregating the discourses and negotiations necessary to maintain a legitimate multinational association.¹⁰⁰

In a multinational federation, all nations are treaty partners with the others, but some treaty partners are, from the perspective of each citizen, more geographically, socially, and politically proximate than others. This conception of the relative centrality of certain relationships and dialogues to our own political identities may be brought into dialogue with the Anishinaabe view. Recall again Aaron Mills' articulation of kinship identities as flowing from relationships of mutual aid. For Mills, identity as kin is a relationally practiced phenomenon, rooted in place, that expands outwards through networks of mutual aid:

Rather than a hard boundary circling community, for mutual aid constitutional orders there's just a steady gradient in the thickness of lived relationships. Those relations are of course thickest at the relational centre and weakest at its periphery. We might think of this gradient in at least two senses: physically (as territoriality) and interpersonally (as belonging). However, more strictly speaking the former is an instance of the latter. Again, from a rooted perspective land isn't a thing but rather another kind of person with whom one stands in relation.

Mills, 2019, p. 121

¹⁰⁰ Here some might choose to think in deliberative systems terms – provided the federation as a whole is comprised of correctly configured and inter-linked spaces and stages of local and federal practical deliberation the system as a whole might realize the goals of deliberative democracy.

For Mills, the boundaries of Anishinaabe community are not hard and static, but always in flux, varying with individual choices to engage in practices of mutual aid. Likewise, community *shared identity* is deepest where relationships are thickest. For local settler and Indigenous communities on treaty lands, interpersonal relationships with the “other” are at their thickest close to home. Each is often united in relationship with the same forests, lakes, watersheds, and animal populations, which implicates the other as co-participant in the natural world directly. And each, presuming some mobility over treaty lands, is called upon to practice respect for the legitimate institutions and ways of life of the others as they encounter them living out their lives on their own territories or on shared territories. This will manifest directly in obligations to respect the laws of particular Indigenous communities, which flow for the particular legal systems of those communities. More generally, it will manifest in the duties of local settler communities to co-manage shared territories with geographically adjacent Indigenous communities. Settler and Indigenous communities in a federation do not have hard cultural boundaries (Tully, 1995). At minimum, there will necessarily be sharing of some local resources; movement (and in some cases, co-residency) throughout settler and Indigenous territories; and shared management that brings people together. Because the local Earthway (understood as a watershed, for example) subtends any political boundary and all inhabitants rely upon it, the harmonious negotiation of interdependency requires special care and attention to be paid to the relatively proximate political others’ ways of speaking, thinking, and acting, and this may be transformative for individual settlers who take their obligations seriously.¹⁰¹

¹⁰¹ See Nine (2022) for a discussion of the importance of shared political institutions for the management of integrated resource systems. While my view recognizes the justification of geographical areas of exclusive

6.2b Renewing and recreating identity

The ideal here then is that through genuine inclusion in a dialogue about the future of cooperation between an Indigenous group demanding decolonized political arrangements and settlers, the Indigenous people and meaningfully affected settlers can come to see the reasons behind the shape of a particular negotiated agreement. By attending to case-based facts and exchange of reasons in a dialogue, the participants can come to affirm those agreements as desirable reflections of their evolving identities and reasonable articulations of the requirements of justice for their inter-group cooperation. In turn, they will learn the reciprocal obligations and gifts that are constitutive of their relationship as kin. In order to facilitate this deliberation and discourse, settler and Indigenous governments are plausibly under an obligation to carefully construct a series of discursive spaces and to enable citizen access to these spaces. However, there is still much ambiguity about the site, composition, structure, and temporal order of these “local dialogues” and their relationship to the other devices for negotiation of agreements that we have discussed, especially intergovernmental negotiations and referendums. Below I interrogate the role of referendums within the broader context of deliberation and negotiation. As I will argue, Indigenous referenda on negotiated agreements are, when deployed correctly within a wider deliberative system, essential mechanisms for ensuring Indigenous self-determination throughout the treaty-making process. However, settler self-determination does not require settlers to conduct popular referenda on negotiated agreements, and there are reasons to refrain

Indigenous jurisdiction, along with those of exclusive settler jurisdiction, some jurisdictional powers and responsibilities in some places will have to be shared when residents cannot avoid mutually affecting each other through (inter alia) their land use practices, e.g., in regions where resource domains are biologically and physically interconnected.

from incorporating settler referenda within treaty negotiation processes at the present time.

Tully's theory of democratic deliberation sits in a complex relationship with other democratic devices such as referenda and representative negotiation and illuminates the challenges for a theory in this domain. While Tully advocates for democratic procedures of discussion and debate, he does not think this entails that that the citizens of the wider society as a whole should engage in a referendum to decide on the struggle for national recognition and revision to the constitution. A referendum to demonstrate the support of the people, *among the people seeking recognition*, is appropriate once they have "articulated reasons why the current form of recognition is unacceptable, reasons, for the proposed form of recognition as nation, and reasons for the proposed amendments to the constitutional identity of the society as a whole" (2008, pp. 212-13). After the referendum, the group seeking recognition must meet conditions of reciprocity in addressing the concerns of the other members of the society regarding the proposed changes; that is, it must offer reasons in support of its proposed changes, in light of the legitimate claims of others. The principle of democracy for *settlers* can be met here through processes of consultation and formal and informal public debates and lobbying culminating in a vote among their democratic representatives (pp. 213, 176). However, a society-wide referendum by settlers would put the rights of very small minorities, including Indigenous peoples, "at the mercy of the non-Aboriginal majority" and would place "no weight on the principle of the protection of minorities" (p. 214). Moreover, it would "collapse the distinction between the inherent right of Indigenous peoples to self-government and the negotiated form the recognition of the rights should take" (p. 214).

The reasons for not holding settler referendums on these matters are overdetermined. Enduring settler ignorance and racism should lead us to think that inserting settler referendums within the political process for decolonization, under current conditions, is a political decision-making procedure bound to perpetuate intolerable injustice and failures to recognize basic legitimacy conditions for federal authority. Moreover, as I discuss below, settler self-determination can be accomplished through treaty negotiations through representative processes. If there is a pro tanto legitimacy gap flowing from considerations of settler self-determination in matters of multinational relationship-building, it is tolerable, considering our pro tanto reasons to design processes that enable Indigenous self-determination through decolonization (see footnote 121 for further discussion). What should interest us here, however, is the subtle neglect on Tully's part to consider more fully the relationship between formal intergovernmental negotiation processes, and public deliberation on the part of both peoples (considered separately and together). We must articulate a process that: (1) constrains Indigenous and settler negotiators to consider the interests and desires of their respective populations in the drafting of a proposed treaty agreement, (2) facilitates inter-communal deliberation about the forthcoming renewed political partnership.

Recall that Tully thinks that a referendum to demonstrate the support of the people, *among the people seeking recognition*, is appropriate once they have "articulated reasons why the current form of recognition is unacceptable, reasons, for the proposed form of recognition as nation, and reasons for the proposed amendments to the constitutional identity of the society as a whole" (2008, pp. 212-13). Although Tully does not put it in these terms, we might interpret him as meaning that, after the *Agreement in Principle* is signed by the representatives of the Indigenous nation, the Indigenous community may hold a referendum. After all, *someone* must have drafted

the formal claim for recognition (decolonization proposal) that is the object of the community referendum. On Tully's theory, public discourse and contestation pertaining the injustice of the status quo occurs at many sites and times, and the members of any political community are bound to have conflicting normative convictions, preferences, future community visions, and rights claims. Thus, there must be some formal mechanism from within the Indigenous community for specifying the contents of the proposal for recognition. And within the current practice of land claims negotiation (modern treaties), the contents of the proposals for recognition take the form of lengthy agreements negotiated by the representatives of settler and Indigenous governments.

While the logic of treaty-making and consent between peoples may suggest the construction of political associations *de novo*, we can never lose sight of the fact that settler and Indigenous peoples are already entwined in a political architecture. Indigenous citizens are already receiving services from the state and subject in practice to the laws and regulations of provinces and the federal government. Self-determination in these conditions, which I have argued are pervasively dominating, requires the withdrawal of settler institutions from Indigenous territories. Thus, in practice, treaty negotiations from the Indigenous perspective aim to decolonize territorial political institutions. This requires opening up space for Indigenous peoples to exercise decision-making authority over their own territories through their own institutions and to administer services through their own local service providers. Decolonization occurs by Indigenous governments and institutions replacing municipal, provincial, and federal governments and institutions in their exercises of authority and administration over Indigenous persons and

territories.¹⁰² Attention to how this formal concept must be concretized introduces significant challenges for self-determination.

As I argue below, a genuine decolonial moment introduces a wide space of possibility for how an Indigenous community would like to govern itself and relate to the wider political association. If settler governmental authorities are ever prepared to negotiate in a fair and honourable manner Indigenous peoples will have choices between significantly distinct futures available to them. It may not be obvious that one among the many is required as matter of justice or legitimacy – these may be genuine choices. Just as importantly, the texts of negotiated agreements, even when negotiated without domination or dishonourable intentions, may reflect a complicated moral balancing of claims by those tasked with carefully considering the interests and claims of inhabitants. These agreements, even while fair, may not fully convey the reasons for their adoption; indeed, the current agreements do not give reasons, but simply articulate, in hundreds of pages, the respective rights and responsibilities of the parties. Both considerations suggest that agreements, even when negotiated under the presumption of the equality of peoples by those striving for a fair balance of rights and responsibilities, risk the alienation of Indigenous peoples, that is, their failure to identify with the agreements which will structure their social and political world. In short, decolonization processes, if motivated to achieve the political agency and non-alienation of Indigenous communities, must incorporate mechanisms in treaty negotiation that build upon the political agency of Indigenous community members.

¹⁰² Or by enabling Indigenous government to fill a vacuum they have forcibly been prevented from governing; or by Indigenous governments gaining greater resources to more effectively govern and administer domains in which they are operating but limited in capacity.

The expansion of Indigenous jurisdictional authorities to regulate new legal domains and with a wider geographical scope, replacing state institutions, will modify the structure of political institutions governing Indigenous people, introducing new institutions, civic responsibilities, and possibilities for transformed policy outcomes. However, under the model of interdependent self-determination, the goal of decolonization is not necessarily a total withdrawal of federal or provincial institutions or governmental functions from Indigenous territories. Rather, it may be the case that consensual cooperation with settler people in the provision of certain public services and goods is mutually advantageous, or even intrinsically preferable. Which shared services and institutions Indigenous communities choose to retain may not be foreseeable in advance but may rather depend upon an overall balancing of the resources available to the community for pursuing projects and policy priorities for the future. Similarly, it may be the case that a great deal of land should be recognized by the state to be under the exclusive jurisdiction of an Indigenous government, but there may be choices about *which* lands should have this status from among a larger set of candidate lands comprising the nation's traditional territory. Finally, the structure of governmental institutions for exercising jurisdiction is underdetermined by political theory: there may be multiple options for how Indigenous institutions could be composed and exercise control over these territorial jurisdictions.¹⁰³ This is where the fundamental importance of public deliberation about the negotiated agreement enters in, insofar as final agreements will have to take a position on each of these questions.

¹⁰³ Decolonization and the recovery of the capacity to govern and administer territories will often necessitate the construction of new Indigenous governmental and administrative institutions. Thus, constitution drafting often accompanies land claims negotiations.

If the goal of decolonizing political institutions is to foster the ability of the community to maintain institutions that reflect their identity and values, and there are choices to be made about which jurisdictional powers and executive responsibilities to claim, where to exercise them, and what form of political institutions to adopt to exercise these place-based powers and responsibilities, then these choices should be made in such a way as to ensure the agreement reflects the identity and values of the community members. However, it is hard to imagine what process this could be other than to directly include the community members in a process of imagining and deliberating together about the shape of the decolonized political world they would like to maintain together through reconfigured institutions. This requires including community members in deliberations about which powers and institutional forms they would like to exclusively maintain through their cooperation as a people, and how they might prefer to cooperate with settler peoples and governments in the construction of shared institutions for fulfilling other collective responsibilities.

One reason for thinking an enlightened representative could not do all this work on her own – by independently discerning the values and identity of the community – is that the character of a community’s political identity is not fixed.¹⁰⁴ The political identity of a community does not somehow exist, fully determinate, prior to treaty negotiations that will pervasively transform the community’s institutional conditions. Prior to deliberation, the community identity does not exist in an unalterable and pre-existing form that must ultimately be expressed in the final agreement

¹⁰⁴ This argument bears significant resemblance to Saward’s claim (2006), taken up in Tanasescu (2008) that the identity of groups does not fully pre-exist in an unambiguous form the claim of representatives to represent the group. The representative helps to call into being the unity and identity of a group as a determinate political subject by naming and representing the group to itself, and to others. However, in this form of unstable representation, representative authority is a claim to represent which must be validated by the emerging identity that the representative claims to represent.

if the community is to be recognized and achieve robust collective self-determination, but rather the people must re-constitute an identity in light of the choices that they face that will systematically reconfigure their position vis-à-vis other nations and lands.¹⁰⁵

Peoples can endure throughout changes to determinate laws, policies, and practices made in their name, and can persist changes in constitution and value systems as well. Treaty ratification will transform the institutional conditions of the community and enable a certain interpretation and expression of its identity. Yet there are options as to these institutional transformations. The way in which a people will choose to revitalize or re-express its identity, once it is genuinely recognized by settler peoples to have the power to renegotiate and transform its relationship with the federation, is not fixed in advance.¹⁰⁶ Representatives of the community might re-imagine the communal identity in light of new possibilities afforded by negotiation, but what ensures that the people will identify with the conception of community life the representatives choose from within the space of possibility? Another way of putting this problem: prior to decolonization, but on its precipice, the people occupy a space of multiple possibilities for a renewed collective identity and future.¹⁰⁷ Why think that agreements negotiated on their behalf represent their identity as a community? Meaningful public deliberation about the treaty agreement is necessary

¹⁰⁵ Certainly, communities will have languages, vocations, special cultural sites, practices, institutions, and values, and so forth that they have persistently hoped to protect from colonial violence, and which form the focus of intra-community agreements about what a treaty or decolonization should aim to protect. However, the point is to not suppose that this translates to a single shared community vision for the precise shape of decolonized arrangements and relationships with local, provincial, and federal governments. These interests of Indigenous communities must find their expression in a concrete proposal, which is the aim of treaty negotiations.

¹⁰⁶ A community can persist in having a unique identity while that identity changes. This distinction might be put in terms of cultural structure and the character of a culture (Kymlicka, 1995).

¹⁰⁷ It goes without saying I have in mind the idea of free and fair decolonization—possibilities are considerably more limited under dominating conditions.

because the people must participate in making the demand in order to be recognized by the agreement. In other words, we should think that through public deliberation the community is re-stating and potentially, in part, re-making its identity throughout the treaty negotiation process. In the absence of robust community participation in the formulation of the treaty agreement, the people will not experience the new system of rights and obligations as recognition of their shared identity but as an imposed image of who they should be or what their politicians wanted or chose.

There is thus a significant degree of danger of negotiations by representatives misfiring.¹⁰⁸ Inter-governmental negotiations may fail to track the interests of citizens by simply failing to attend to relevant facts about the community. More deeply, the world that representatives negotiate may in fact fail to resonate with the community's preferred way of articulating their values and history as they confront a wide space of decolonial possibility. Finally, the balances struck within agreements many remain opaque to Indigenous community members; the agreement may, for example, delegate control over certain lands or jurisdictions to the provincial or federal government, and the reasons behind this may not be articulated but seem like neglect or selling out. It may be impossible for representatives to discern any of this without the wider community constructing a vision of itself through deliberations together and remaining apprised of negotiations on specific items within the agreement.

¹⁰⁸ This is especially pertinent in light of the possibility of representatives being co-opted by settler governments, which has often been a goal of settler colonial states. Referenda provide at least one mechanism for local communities to resist agreements made in their name by corrupt officials, although they are insufficient on their own to prevent harms caused by a colonial war of attrition.

Within this context, on Tully's argument, referenda seem to provide an antidote. On the current model in practice, the Indigenous community must affirm the *Agreement in Principle* for a treaty to ultimately be ratified. In principle, this can serve as a check on representative negotiations that have failed to articulate and secure an informed vision of the Indigenous community's future that the community members can affirm. The referendum functions as a mechanism for the community to precisely *deny* that they accept the Agreement in Principle. However, what the argument above suggests is rather that we view the referenda as the culmination of a process of intra-community consultation and debate. As I will argue below, if deliberative processes are properly constructed around the referendum, we need not view the referendum itself as a blunt instrument for ascertaining whether or not the people agree to an agreement that has been negotiated by elites in their name. Rather, under the correct conditions, a successful referendum vote can be conceived as the community members' direct affirmation of a treaty agreement that it has substantially co-authored with its representatives.

6.2c Negotiation and referenda

Modern treaty agreements, in principle, systematically recognize rights and responsibilities of Indigenous nations that have been ignored or eroded by colonialism, and the texts of said agreements constitute the blueprints for the new political structures by means of which Indigenous communities will exercise those rights and responsibilities, in partnership with settler governments and peoples, over a set of territories. As we have discussed, there are important, life-changing decisions to be made by Indigenous communities confronting a genuine

opportunity for decolonization.¹⁰⁹ The future identity and political structures of an Indigenous community are not completely settled in advance of negotiations – even if considerations of justice and fairness must have a significant role to play in ascertaining justifiable distributions of land and authority, and in designing political structures that can legitimately exercise these rights and responsibilities. By some mechanism, the community must re-state its identity in light of a decolonial moment.¹¹⁰ Below, I argue for the positive role that referendums, when deployed carefully within a broader democratic deliberative process, can serve in ensuring correspondence between the identities of Indigenous peoples and decolonized institutions.

Within this context it is important to observe that modern treaty agreements are astonishingly complex legal texts. Modern treaty agreements are often 300- or 400 pages, often negotiated over the course of a decade or longer, and draw upon the geographical, legal, and economic expertise, testimony, and written reports of dozens of experts and representatives of affected parties. These documents describe the legislative and executive powers and responsibilities of Indigenous and settler nations with respect to several classes of exclusively held and shared territories and specify the legal mechanisms for conflict resolution in the event of conflicting laws. Moreover, they specify the divisions of rights, powers, and procedures of shared and self-rule with respect to carefully specified parcels of land and territorial boundaries, carefully documented down to

¹⁰⁹ Unfortunately, this description of a rich decolonial moment is precisely what is denied Indigenous peoples under the conditions of domination historically characteristic of the modern treaty process.

¹¹⁰ It should be observed what this does not mean. It does not mean that a community must abandon its language, values, land-based practices, traditions, inherent laws, clan structure, or anything else. Rather, what seems to be necessary is for the community to re-articulate the way in which these will feature in practice within a set of institutions for effectively governing lands which they may have been forcibly prevented from governing by colonial authorities for decades, if not centuries. Thus, the community must rally behind a workable and determinate vision for structures that appropriately, by their lights, integrate traditional and collectively endorsed communal values, practices, and laws (see Alfred, 2001, 2005; Alfred and Corntassel, 2005).

the GPS-marked acre and meter, for geographical areas that span tens of thousands of kilometres.

While the day-to-day life and political status of settlers will change under a treaty agreement, insofar as they may be called upon to recognize Indigenous laws in shared territories and insofar as their governments' authority will be limited in territorial scope,¹¹¹ their daily routines are unlikely to change to the same extent as the lives of members of Indigenous nations will change. Indigenous peoples, by contrast, may gain a renewed ability to collectively manage lands, govern new jurisdictional spheres they have been deprived since the Indian Act, and implement new self-managed social services on their own territories. In order for these political structures to function, the members of Indigenous communities will be called upon to exercise new or renewed responsibilities, and they will in daily life be subject to the effective decision-making of *Indigenous* institutions.

The fact of differential affectedness of settlers and Indigenous peoples in decolonizing settler colonial societies should not be surprising. Territorial decolonization is motivated by the interests and self-determination of Indigenous peoples, which in settler colonial societies are often pitted against the interests and power of capital (which are not co-extensive with the interests of workers and citizens) and the misguided “benevolent” civilizing mentality or racializing assumptions and stereotypes of settlers. Although there will be cases where non-Indigenous people are subject to an Indigenous government (or settler and Indigenous people are subject to shared governments), under a plausible theory of restitution the vast majority of settlers will go

¹¹¹ And also to petition *Indigenous governments* for recognition of their needs and interests when affected by an increased scope for Indigenous law-making.

on living within the social and political world of settler societies. Even when a settler is subject to Indigenous jurisdiction, there will be a proximate political space (settler society) to which the settler can return and within which the settler can access services and opportunities reflecting the scope of options within settler society. Primarily, throughout territorial decolonization, settler societies will see a reduced geographical scope, reflecting the inherent territorial rights of Indigenous peoples. In other words, the settler political and legal order and social world will endure decolonization, but with a reduced geographical scope. At risk of oversimplification, Indigenous people engaged in the treaty process may be fighting for the existence of their nations, cultures, and ways of life, which are often tethered to a single, geographically limited space, while settler interests engaged in the treaty process may be holding out to retain control over resource-rich “Crown land,” or, if they have better motives, in order to achieve an ideal of justice. And while settler governmental structures may be limited in their geographical scope of authority and may have reason to undertake new duties of assistance and cooperation of Indigenous governments, Indigenous governments and communities may find themselves with a systematically new structures of jurisdiction and responsibility that comprehensively affect the lives of community members.

Deliberation over the fine-grained details of the text of a land claim agreement is difficult and time consuming and favours some division of labour within a community. Reflecting all the interests of meaningfully affected persons, who themselves differ in the extent and intensity of their affectedness, involves the identification and balancing of the claims of thousands of Indigenous and settler citizens to a range of social, spiritual, vocational, political, and economic practices within regions that are thousands of square kilometers. This is made more complicated

by manifold facts about governmental capacities, historical wrongdoing, and moral proportionality analysis, which modify the justifications of proposals. There are likely to be several proposals for how to divide and share jurisdiction and delimit the territorial boundaries of shared and exclusive jurisdictions, and ascertaining the feasibility and proportionality of proposals involves fine-grained deliberation. This work is difficult, but not impossible. Plausibly, we should recognize it to be a specialized kind of labour that requires a lengthy commitment to a steep learning curve, and then the hard work of considering thousands of pages worth of relevant facts in the negotiation and articulation of agreements that strike fair and harmonious balances of claims between populations.

However, as elaborated above, it is not plausible that the work of negotiating a treaty agreement can be conducted in isolation from the community affected by the agreement. And here, for the reasons discussed in terms of identity above it seems that Indigenous communities are especially vulnerable to alienation under treaty agreements, in comparison with settler subjects. This is due to both the nature and extent of their affectedness by the agreements. Treaty agreements will pervasively affect the political structure of Indigenous societies, and, in principle, may open up a vast array of new options and opportunities in daily life while foreclosing others. It is for these reasons that the inclusion of a referendum in the Indigenous community process of deliberation is advisable. On the other hand, the relatively limited impacts of decolonization under the structure of the settler political world (rather than its geographical scope) diminish our reasons for thinking a settler referendum is necessary to reduce the risk of alienating decision-making by

settler representatives.¹¹² A referendum will enable the people to ultimately affirm or deny the proposed agreement for the implementation of their rights of self-determination. This in itself realizes an attractive ideal of democracy. However, more important than the simple idea of democracy through the people's direct choice: a referendum, when properly deployed, will provide incentives for Indigenous negotiators to meaningfully engage the democratic deliberations of their citizens over their shared future, which in turn will ensure that collective values and aspirations of the Indigenous community are articulated during the decolonial moment and ultimately get reflected in the final agreement. This is a more robust democratic vision of the role of referenda in treaty negotiation processes.

The value of referenda in the context under discussions is clarified by considering a battery of related objections to their deployment. Referenda have been subject to several important

¹¹² That is, provided that settlers are included in an iterated deliberative process wherein they can submit claims for consideration by those negotiating the agreement. This process would be similar to the Indigenous process, insofar as it would require representatives to present drafts of the negotiations regarding specific items, and to respond to the claims and arguments of citizens affected by the negotiations. These deliberations might take the form of some combination of focus groups, mini publics, townhalls, written submissions and replies, television and radio dialogues, church and civil society organization meetings, and so forth. It is worth observing, however, that settler representatives in decolonization negotiations may find themselves at odds with those they represent. The people may not feel represented by *any* possible negotiator in decolonization discussions, because they reject *any* proposal for decolonization at all. One reason decolonization negotiations must happen is precisely in order to *decolonize* a society structured by settler supremacy in order that political relationships between peoples fit the criteria for territorial legitimacy. Inevitably, there will be settlers that share the attitudes and discourses that sustain settler supremacy as a political and legal order, and these persons, in the grips of racist stereotypes and ideology, will resist any good faith attempt to reason about decolonization. The extent to which local populations affected by treaty agreements share in these attitudes is likely to vary, and these facts are not irrelevant to the design of consultation processes. Likewise, we should not underestimate settler apathy or corporate attempts to capture public government consultation processes. What this reveals, however, are the limits of any "delegation" model of representative authority in the case of treaty negotiations on behalf of settlers. Representatives are responsible for negotiating a fair agreement, in light of the relevant facts, which can guide relations towards legitimacy. One reason these negotiations are necessary is precisely because the populations they represent have beliefs and attitudes that have produced and maintained illegitimate structures. The duty of representatives in these cases is *not* to simply reproduce the beliefs, values, claims or demands of their constituents in negotiations – these may be patently unjustified claims, demands, or values. However, within the limits of what public reason must filter out, representatives should strive to represent the interests and values of their constituents in negotiations.

criticisms that question their democratic credentials, including the accusation that referendums are subject to elite control, thereby diminishing their purported value as an expression of the people's will, and that limited citizen motivation and deliberative capability creates the risk of poor decision-making through popular decision-making (Tierney, 2013, 2015). For example, there are concerns that referenda may only be initiated by political elites under advantageous circumstances in such a way as to favour the preferred outcome of political elites (Tierney, 2013). Likewise, citizens may lack the time, information, motivation, or resources to properly reason about a political issue that will be decided by a referendum, a consideration which favours representative democracy rather than direct popular decision-making through referenda (Tierney, 2013). Additionally, there is the important objection that referenda, due to their often binary nature (voting "yes" or "no" on a narrowly defined question), are incapable of capturing the complex preferences of populations, especially under strategic circumstances (Moore, 2019b; Tierney, 2013). For example, populations facing referenda are often faced with the question whether to affirm or deny devolution (as in Northern Ireland, Scotland, and Wales), or whether to affirm or deny secession (as in Quebec, Scotland, and the UK), and so forth. However, these simple binaries fail to capture the array of possibilities in between, such as limiting central or federal government power (or constitutionally consolidating devolved powers granted by statutory law) in the case of referenda on secession (Moore, 2019b, p. 628). Likewise, it may be the case (as with Brexit) that the *meaning* of what is being assented to or denied in the referendum (yes or no on the question of "leaving") is ambiguous. Citizens confronting Brexit, prior to the intergovernmental negotiations between the UK and EU triggered by the referendum, had little knowledge of how their day-to-day lives would actually change after choosing to "leave" the European Union. All of the details of the future EU – UK relationship, post

secession, were up in the air until an agreement was finally successfully negotiated between governments. Yet that agreement (and the meaning of “Leave”) was *not* subject to a referendum (Moore, 2019b, p. 929).

I cannot here fully respond to these objections in the abstract, nor in the specific context of settler – Indigenous relations. We can, however, discern a deliberative turn in the democratic theory of referenda which conceptualizes the referendum as a part of a wider deliberative system that achieves democratic values (meaningful participation, claim-responsive and reason-responsive decision-making) through the system as a whole rather than the simple site of the referendum vote (Tierney, 2013, 2015; Parkinson, 2020). This conception of referenda shows potential for guiding the construction of referenda in settler and Indigenous treaty contexts in such a way as can avoid the above objections and which can demonstrate the special value of referenda as additions to a process including inter-governmental treaty negotiation.

According to deliberative conceptions, while referenda on their own are insufficient to promote the democratic dialogue necessary for good governance, the expectation that they should largely misses the insight of deliberative systems theory (Parkinson, 2020). A central insight of deliberative system theory is that we should view public reasoning and decision-making as functions realized across a multiplicity of spatially and temporally connected sites (Parkinson, 2020; Mansbridge and Parkinson, 2012). Accordingly, we should regard referenda as a piece of the puzzle, as necessarily deployed within a wider deliberative system that includes constitutional and statutory law, representative government, citizens’ initiatives, lobby groups, media, and wider public debate (Tierney, 2013; Parkinson, 2020). It is by attending to how and

when referenda are deployed in relation to all of the other parts of the deliberative system that we can promote well-informed and non-manipulated choices by populations (and, it should be said, the role of referenda is to be understood in enabling the system as a whole to deliver good judgments on public policy rather, it is not that the system should serve the single goal of direct decision-making by citizens through referenda). Accordingly, the concern with the elite manipulation of referenda can partially be conceived of as important practical challenges that can be resolved in certain cases through the careful design of legal and political institutions that regulate the initiation and timing of referenda (for example, by automatic triggering of referenda under law under certain conditions), and which create impartial campaign rules, information campaigns, and impartial public oversight bodies (Tierney, 2013).¹¹³ Furthermore, citizens initiatives, such as constitutional forums and mini publics, may be deployed within a referendum process in order to set the question for the referendum rather than leaving this directly in the hands of the executive (Tierney, 2013, 2015). Additionally, citizens' initiatives such as mini publics, provided they are well-publicized, can provide model arguments for public deliberation on the question, initiating a more informed and normatively robust popular debate on the issue (Parkinson, 2020).

This conception of referenda as embedded within a wider set of deliberative and decision-making contexts is informative for how we might conceive of referenda within the context of Indigenous treaty negotiation. Recall that one worry about referenda is that they present populations with a binary choice, which may fail to reflect the distribution of citizen preferences. Even worse, the meaning of what is assented to or denied may not even be determinate prior to

¹¹³ While it beyond the scope of this chapter, these questions have a particular salience in the context of land claim negotiations.

the downstream actions of the executive or legislature (Moore, 2019, p. 629). It is hard to reconcile referenda of these forms with the ideal of the political agency of citizens in crafting their shared identity and future in any fine-grained way. However, by attending to the theory of inter-governmental negotiations articulated thus far, we can see that rather than promoting elite manipulation or offering citizens binary choices detached from their own priorities, referenda may anchor the negotiating process (and the referendum question itself) in the claims and deliberations of the Indigenous community members.

Consider the nature of the question put before Indigenous community members on the theory articulated above concerning community deliberation in the context of representative negotiation of the text of a treaty agreement. The referendum question is framed in terms of a binary question (citizens may vote “yes” or “no” on whether their representatives should ratify the proposed treaty agreement). However, if the negotiation process has been structured by a robust process of citizen – negotiator dialogue of the kind recommended, the binary nature of the choice should not concern us as it might in other contexts. The referendum question asks the citizens of the Indigenous nation whether or not the treaty agreement – which they have had a systematic, iterated, and extended opportunity to consider, contest, and shape in public with their fellow citizens– is acceptable to them.¹¹⁴ In other words, the referenda is on a whole package of policies

¹¹⁴ Each of these terms: *systematic*, *iterated*, and *extended* is relevant to ensuring that community members are given a sufficient opportunity through community deliberation to meaningfully impact the text of the treaty agreement. By *systematic*, I mean that each item of the treaty agreement has been discussed in public in a methodical way. The draft text concerning specific provisions of the agreement has been circulated to the citizens, and the reasons for negotiators tentatively agreeing to each provision rather than alternative possibilities are stated. These reasons may involve, inter alia, reasons of principle, considerations of feasibility or efficiency, or the fact the item reflects a negotiated compromise of values and interests on that item or other items. Just as significantly, citizens are given an opportunity for an initial engagement with the item, and a follow-up engagement upon reflection. By *iterated*, I mean that, there are multiple times at which official public deliberation occurs. This is necessary to secure a systematic engagement with the treaty agreement. Moreover, it is necessary to secure the time for individual

which have been disaggregated and discussed in public, allowing room for compromise and fine-grained deliberation, which has then been brought to the intergovernmental negotiation table, and then once again returned to the community and potentially revised again in light of the claims and counterdemands of the settler government. Citizens are not just offered an elite vision or denied alternative options without reason; nor is it the case that they are voting on an agreement where the post-vote intentions of the relevant other party are opaque. The content of that which is to be affirmed or denied has been shaped through citizens' own participation in a dialogue oriented to considering the future of the community. This significantly distinguishes Indigenous – settler treaty agreements from Brexit, or other citizen referenda where the choice was presented in binary terms by elites prior to a meaningful community dialogue, or where the meaning of the choice was not actually determinate. In a good deliberative referendum process accompanying treaty negotiations, citizens have had the opportunity to try and influence co-citizens and negotiators through contributing stories, ideas, and cultural sources; they have had the opportunity to offer their own visions of a decolonized future and to try and rally support in deliberative spaces for those visions; they have had the opportunity to submit claims for

reflection upon the disclosures and arguments of others, which may necessitate revisions to beliefs and positions on the agreement. By *extended*, I mean that this process is not conducted in haste: there ought to be enough time that community members, if they choose, can learn about the details of the agreement, form opinions on those details, discuss their opinions, and revise where need be. Likewise, negotiators ought to be given the time and opportunity to seriously consider facts, arguments, and claims offered by citizens, to pose questions or counterarguments of their own, and to note any convergences or consensus arising in the community during the systematic and iterated deliberations of the community on any particular item. It bears observation that for this process to be meaningful, there may be further conditions. Community deliberations should also be *accessible and inclusive*. By *accessible*, I mean that they should occur at times and venues that citizens are able to attend. They should not be during the workday, for example, nor should they be physically remote from where the majority of citizens live. Accessibility may also require that honoraria should be paid to citizens to enable attendance, to facilitate any travel costs or other expenses incurred by taking the time to attend (such as meals for the family). By *inclusive*, I mean that they should be structured to be physical safe and respectful environments for women, LGBTQ+ people, and internal minorities; in addition, the unique ways of thinking, speaking and acting of women, LGBTQ+ people, and internal minorities must be given equal consideration.

recognition of their own attachments and interests; they have had the opportunity to make arguments of principle concerning the justifiability of the choices representatives have made at the bargaining table; and all throughout they have been subject to alternative visions, other cultural texts, counter-proposals, counter-claims, and arguments offered from both the negotiators, and co-citizens.¹¹⁵ If all has gone well, they have considered these proposals and counter proposals in good faith, and all have modified their positions, at least partially, to account for facts and arguments they did not consider – or at least have come to see reason for the positions of others on particular items contained within the agreements. And this has had an impact on negotiators’ bargaining positions at the intergovernmental negotiation table.

Part of the reason for adopting a referendum in the context of treaty negotiations is to affect the incentive structures of citizens and negotiators. In properly designed negotiation processes incorporating public deliberative components, a public referendum on the final agreement can motivate both citizens and officials to productively engage one another and can ultimately contribute to the formulation of a treaty (and constitutional identity) that is meaningfully endorsed by the Indigenous people. Citizens will be incentivized to learn about the details of the agreement and to participate in citizens’ forums because, in addition to the gravity of the decision, they will ultimately have the right to decide. Moreover, the fact that citizens will have a

¹¹⁵ It should be observed that the appropriate institutional form and venue, along with the appropriate form of contributions to the public discourse, cannot be stated independently of consideration of the community. Community members should be free to adopt their own cultural forms and modes of expression. Traditional governance institutions (such as the potlatch, clan-based meetings, and so forth) may also be the correct venue for community deliberation. This is up for each community to determine, and it is plausible that there should be an initial battery of community meetings to determine the best design for structuring community deliberation with negotiators. To ensure legitimacy, the design should realize the principles of systematicity, iteration, extendedness, inclusivity, and accessibility mentioned in the footnote above.

final say over the agreement through the referendum vote, provided their ability to participate in the process outlined above is secure, will motivate representatives to engage with citizens and reflect their concerns during intergovernmental negotiations.

If representatives are motivated to achieve an agreement, they will have an incentive to respond to citizen claims, and where desirable in light of a systematic, iterated, and extended community discussion, revise the community bargaining position vis-à-vis the state. This is necessary in order to demonstrate that they are seeking an agreement for the good of the community that reflects the community's input, values, and desires; the failure to demonstrate responsiveness and consideration of citizens' inputs may very well result in the community rejecting the results of inter-governmental negotiation.¹¹⁶ Even if the representative cannot achieve agreement from the state over a particular item valued by the community, they will be able to return to the citizens again, with an account of what the state has offered in light of the demand.¹¹⁷ A representative's failure to properly engage citizen deliberation and claims, through responsiveness in public forums and a preparedness to incorporate citizen inputs in inter-governmental negotiations, under conditions where this is all out in the open for citizens to view, may result in the community's

¹¹⁶ This argument assumes that representatives are motivated to achieve an inter-governmental agreement that will ultimately be ratified. If representatives do not have this motivation, then they will not be incentivized to respond to citizen claims or incorporate citizen inputs in negotiation processes. They will not care whether the citizens can accept the results of negotiation. The case of what can be done to respond to corrupt negotiators is beyond the scope of this dissertation.

¹¹⁷ Likewise, a particular citizen's preferences on a certain item of negotiation may go unsatisfied by the turns of deliberations and negotiations. However, provided that they can see good reason for this – for example, that acquiring land A was incompatible with acquiring land B, and the majority of the community members want land B, or there are more reasons for re-asserting control over land B – they may still regard the agreements as fair and securing the good of the community for the future. What is central is that the rationale for particular choices within the treaty agreement are aired out in the open for the community to discuss. It is only then that the citizens can have direct input into whether the new agreement reflects their preferred future.

loss of confidence in the negotiations. In turn, representatives keen to maintain confidence in their negotiations in order to achieve an agreement for the good of the community will have a strong incentive to engage the community in the way outlined above. In this way, citizens are not simply offered a binary choice presented to them by elites. They are instead asked to accept the results of a systematic, iterated, and extended process of community deliberation and contestation concerning the community's future. Citizens are offered the opportunity to meaningfully shape the contents of the agreement ultimately put forward for a vote, and then may vote on whether the process of negotiation has *reasonably* reflected their inputs, values, and desires, consistent with the inputs of each citizen receiving equal consideration, the possibility of individual deliberative error, and the necessity of political compromises within and among groups. While citizens may not realize their top preferences for each item on a treaty agreement, they will have had the opportunity to participate in a robust community debate over the reasons for the community adopting the formulation that it did.¹¹⁸

6.2d Settler ratification

Before concluding this section, it is important to return to the settler side of negotiations. The above section has argued for the importance of the referendum with Indigenous deliberative systems undertaking treaty negotiations and ratification. However, the strategy for designing

¹¹⁸ In Tully's account, we receive an argument against "top-down" or "elite-driven" procedures for constructing the terms of inter-group recognition. Such procedures are said to violate the all-affected interests principle, overlook the legitimate concerns of sub-groups within affected populations that ought to be reflected in the agreement, and to impose an elite-constructed conception of identity on populations without their participation (leading to instability of the agreement which fails to reflect the self-understanding and identities of populations). The account I have offered here, while incorporating a central role for representative negotiation of treaty agreements, avoids these objections.

settler public engagement should be distinct. Here I briefly re-canvass the reasons for not including a settler referendum within the negotiating process, before returning to the role of the settler legislative process in ratification. I conclude with a brief proposal for insulating Indigenous nations from domination by the legislative branch of the state in treaty ratification, although, for reasons I describe, this can only be a partial solution – a full solution to the problem of domination requires the adoption of a public ethos of national diversity, interdependent identity, and mutual gifting.

As I see it, there are several reasons for thinking a popular referendum among settlers on proposed treaty agreements is misguided under present conditions. Some of these reasons are intrinsic to the concept of Indigenous territorial rights and self-determination, while others are contingent upon sociological facts but still hold significant force considering the stakes of negotiation.

The most important reason, often discussed, is intrinsic to the concept of territorial rights. Making recognition of Indigenous territorial rights dependent on a popular referendum would potentially hold Indigenous territorial rights captive to the will of majority identity citizens and would thereby fail to recognize the inherent nature of Indigenous territorial rights, suggesting instead that they were fundamentally rights had by delegation of power from a body with the primary inherent right. For example, the idea of subjecting a negotiated agreement to a settler referendum suggests that Indigenous territorial rights depend upon the democratic will of the whole composite community of settlers and Indigenous peoples, which has a prior authority to decide. However, this is incorrect: Indigenous territorial rights are inherent and flow from the

sustained political relationships between the Indigenous community members with one another and their territory. Treaty agreements, in the context of historical and enduring assimilation and domination, are thought to be important instruments for relieving background territorial injustice. To make the ratification of treaty agreements – which are instruments of territorial decolonization – contingent on the say of the settler community reproduces the illegitimate settler control of Indigenous territories that is the very target of territorial decolonization. At the very least, it subjects the rights of Indigenous communities to an additional mechanism of settler control.

Related to this worry is another, concerning the limits of referenda generally to promote quality political decision-making. Recall that referenda are often subject to the criticism that citizens may lack the motivation and resources to undertake the necessary deliberation to properly understand an issue under consideration. While this is not an intrinsic defect of citizens, it threatens to hold the ratification of complex agreements captive to the judgment of those who do not understand the agreements nor have the motivation to understand them. One reason for this limitation in motivation is precisely the extent to which the average settler citizen's justifiable political interests will be affected by the negotiation of a treaty agreement, which I have suggested in its own right is a reason to forgo settler referenda in favour of representative decision-making. While settlers may be affected in some respects, and if open to a transformative process their identities will change, the internal structure of their political institutions *will* largely remain the same: they will, by and large, continue to live within societies where settlers are a large majority, and will otherwise retain access to established and enduring settler spaces and

political institutions controlled by settlers.¹¹⁹ Individual settler citizens stand to lose or gain less than Indigenous people, whose reliable access to a national territory, institutions of self-determination, and way of life still remain to be secured by territorial decolonization through a treaty agreement which may transform their existing political institutions. Whereas Indigenous peoples are fundamentally re-shaping their identity through renewed collective territorial control and responsibility, much of territorial decolonization consists in settler governments dropping their unjustifiable claims to power and authority with respect to Indigenous lands. With fewer interests at stake, there are fewer prudential reasons motivating settlers to scrutinize long and complex documents, which, in order to understand and reasonably contest, I have suggested requires participation in a systematic, iterated, and extended deliberative process. We should want settlers to participate in such a process, both among themselves, and in combined settler – Indigenous spaces, but many may not. Provided settler negotiators are informed and responsive to citizen claims by those who are engaged, negotiations should be able to track important settler interests without the pressures on negotiators provided by robust citizen participation in a deliberative process structured by a referendum. Because settler political identity will not change to the same extent as Indigenous political identities, provided negotiators are appointed through a public political process fitting the requirements of the settler constitutional order, and settlers endorse that structural order and have opportunities to contest that structure, the self-determination interests of settler interests are not threatened.

¹¹⁹ There may be a more thorough-going revision to settler political identities, values, and institutions in the future. The vision presented throughout this dissertation is precisely of reciprocally-informing identities growing in their recognition of the value of the other and the depth of their interdependence. But this is unlikely to happen immediately at a societal level across the board. We require a theory that can guide negotiations and constitutional law *now*.

This worry about settler motivation to scrutinize complex political agreements under conditions where their way of life and institutions are protected from unwanted changes by other means already (namely continued access to settler territory and the settler political process itself governing that territory) is complemented by a third consideration against settler referendums, which concerns popular attitudes and popular ignorance concerning Indigenous peoples. It may often be the case that, in various contexts, a majority of settler citizens hold racist or prejudicial attitudes towards Indigenous persons or communities or are otherwise ignorant as to the basic facts about Indigenous peoples and their histories. This in fact may motivate many of the settlers who would feel strongly about the details of treaty negotiation in a particular region.¹²⁰ While the forms of domination that have occupied us throughout this work have primarily been structural, we cannot lose sight of other forms of oppression and their roles in larger systems. It is not my contention that all settlers hold such attitudes, nor that there are not respectful settler communities. However, historically, racist beliefs and attitudes of populations have sustained racist political structures. The ideologies underlying settler colonialism shift throughout time, morphing in light of changing desires, information, and circumstances to justify domination. Under present conditions, where dominating institutions are the status quo, we have reason to design the process for decolonization in such a way as to insulate it, as much as is possible, from decision-making driven by racist beliefs and attitudes. While negotiators, cabinet, judges, and legislative representatives are not invulnerable to racist beliefs and attitudes, they *are* under an obligation to give reasons for their exercises of political power. In societies where racist reasoning is not *publicly acceptable*, but often lingers below the surface, the requirement, placed

¹²⁰ This fact is not irrelevant to whether, in a particular case, there should be combined settler – Indigenous public treaty negotiation forums, or to the design of such forums. Further research should be conducted in this area.

on officials, but not on voting citizens, to publicly justify their decisions, goes some way to imperfectly insulate decolonization agreements from racism.¹²¹

¹²¹ In the future, after initially adequate decolonizations, settler referenda may be necessary to fully respect settler political identities under conditions where there are further international inter-delegations of power and responsibility among governments and populations. We can hope for a more politically engaged world free from racist beliefs and attitudes. In such a world, these reasons for withholding settler referendums would not obtain. Then, there might be more sophisticated processes for negotiating and ratifying treaty agreements, including both settler and Indigenous referenda, on components of agreements that go beyond recognition of inherent rights but pertain to implementation of specific negotiable intergovernmental regimes through international cooperation. Such referenda would likely pertain to different components of the agreements (to reflect the fact that not all items of an agreement are contingent on settler consent – that much of the role of agreements consists in Indigenous nations asserting control over jurisdictions which they possess an inherent right to govern). However, it remains to be stated that just as Indigenous institutions might take multiple decolonized forms, so too might settler and Indigenous forms of cooperation – there are components to political association that should be conceived as voluntaristic alliances between peoples rather than mandatory recognition of inherent rights. This is because, as I will discuss more fully in the part below, treaty agreements do not merely result in the settler state withdrawing from Indigenous territories, but bind settler governments to the performance of certain obligations vis-à-vis an Indigenous community. And the character of these obligations will be, to a certain extent, up for the communities to determine themselves. In the future, the character of Indigenous – settler relations may better realize the ideal of interdependent self-determination among tightly related nations. Under those conditions, after a legitimate distribution of powers and lands have been restored to Indigenous nations, the maintenance and deepening of inter-national relations in a treaty federation may focus more fully on the mutual consent of populations deepening their relationships. While Indigenous *territorial rights* per se will never be properly subject to a settler referendum, it is not certain that the various possible *inter-delegations of power and responsibility among settler and Indigenous governments* in a shared political structure should never be subject to a settler referendum (in conjunction with an Indigenous referendum)

While settler political identities will change less than Indigenous political identities under contemporary treaty negotiations, they will still change. There will be new institutional forms, especially for shared territories. The discussion of consociationalism earlier additionally poses the prospect of more throughgoing changes to legislative assemblies central to settler self-determination. If these sorts of changes begin to modify the very structure of the political world for settlers (rather than its geographical scope) it is possible that for the people to remain self-determining (for the new institutions to reflect an identity the people impose upon themselves, rather than an elite-driven identity) we will require a referendum. It may be that already this is called into question, and there are correspondingly reasons for a referendum. If this is so, I would still argue against a referendum. If there is a pro tanto legitimacy gap, flowing from the failure to fully promote settler self-determination through the decolonization process, it is tolerable, considering our pro tanto reasons to design processes that enable Indigenous self-determination through decolonization. This is because there is still the significant *asymmetry* in importance to the populations, including the recovery of adequate Indigenous self-determination simpliciter, and because under present conditions, morally reprehensible facts (such as racism) are likely to drive settler referenda. In the future, the balance of reasons may favour settler referenda in addition to Indigenous referenda.

6.2e Settler statutory enactment

We can now see the shape of the justification for the requirement that there be a statutory enactment to ratify the treaty agreement on the settler side. The first pertains to the collective self-determination of the settler peoples throughout the decolonization process. The second pertains to the necessary process for settlers to discharge their obligations to Indigenous peoples.

First, in order that the agreements and associated obligations of settler governments express the will of settler people, it is necessary that they pass through the procedures for legislation that settler people endorse. The basic institutional forms maintained by settler peoples are structures of representative democracy. Settlers endorse representative democracy with a robust deliberative background as the mechanism for generating new laws, and in turn can view those laws as extensions of their political agency because they pass through the endorsed procedures that settler people collectively maintain for exercising the responsibilities of government. Treaty agreements significantly modify settler governmental practices, and place settler governments under new duties of assistance towards Indigenous governments. Some of these duties are grounded strictly in non-interference, while others flow from the nature of interdependent relationships between kin (see section 6.3 below). For both these kinds of duties to be plausibly freely collectively undertaken by the settler people, rather than some elite-driven or foreign coercive imposition, their freely chosen representatives must pass the treaty agreements as bills in the legislative assembly after robust public discussions.¹²²

¹²² While settler representatives have a responsibility to deliberate over Acts of Parliament prior to voting, it is not the case that settler representatives have a strong form of discretion to affirm or withhold assent to a bill implementing a decolonization agreement. Provided the treaty agreement is fair and has passed through public debate, under present conditions it is the moral obligation of settler representatives to affirm the agreement.

Second, considering the structure of the Canadian state, with the primacy placed upon the rule of law in the departmental cultures and administrative affairs of the federal and provincial governments, treaties and their associated settler state responsibilities must attain to the level of law if they are to effectively direct civil servants to perform their associated treaty responsibilities. The affairs of Canadian ministries and departments are directed by constitutional law, statutory law, administrative law, and ministerial policies and directives. However, treaty agreements do not only modify the *policies and practices* of relevant ministries and departments (forestry, fisheries, environment, education, healthcare, and so forth) exercising their jurisdictional scope according to the relevant constitutional, statutory, and administrative requirements; treaty agreements fundamentally modify *the executive powers, responsibilities, and geographical scope of departments' authority*, and impose new, sui generis and place-based responsibilities on those departments, requiring cooperation with and the provision of assistance to Indigenous governments recognized to possess an expanded scope of legislative powers and executive responsibilities.

Given the primacy of constitutional law and statutory law over political agreements,

Contemporary treaty agreements are a vital mechanism for achieving forms of decolonization upon which the legitimacy of the Canadian state depends. To withhold consent from a treaty agreement that realizes a fair distribution of lands and powers is simply to continue a dominating regime with respect to the Indigenous community. It is worth remarking that even if, by the Member of Parliament's lights, the agreement is mildly or moderately unfair vis-à-vis the settler community (for example, by way of financial burden or loss of control over economic resources), the reasons to pass the bill are still overdetermined. The self-determination of the Indigenous community (and perhaps the survival of its way of life) is at stake on account of continued settler control – a weighty good in comparison to forms of mild or moderate financial unfairness. Moreover, for the epistemic reasons discussed above, it may be that the average Member of Parliament has reason to defer the negotiation process for the specification of the terms of a fair agreement, including as it does the systematic, iterated, and extended process of community deliberation. These matters turn on a close examination of facts which are beyond the ability of Members of Parliament – saddled as they are with other responsibilities – to ever complete. We should instead view Parliamentary ratification as a necessary, final step – not necessarily as the proper site of the full and robust consideration, debate, and specification of terms – on a democratic theory of treaty ratification.

governmental policies, and most common law precedents in the Canadian constitutional system, Ministerial *directives* and governmental policies to limit the scope of departmental power or impose new obligations of assistance are incapable of overcoming the hurdles posed by provincial statutory law regulating, for example, the responsibilities of the Ministry of Natural Resources. If the relevant statutory law demands that the Ministry exercise a specific function, it must be limited by statutory law or constitutional law on pain of judicial or administrative review – cabinet directives cannot overturn statutory law or constitutional law. Thus, the effective governance of treaty relationships in most cases requires, minimally, statutory enactment of treaty agreements to limit, regulate, and impose the powers and responsibilities required of associated state governmental departments and ministries if those departments are to actually fulfil their responsibilities under the treaty.

In Canada, after successful negotiation, a treaty is passed as an Act of Parliament. Due to the *Constitution Act* (1982) governing Aboriginal title rights, the agreement ascends to constitutional law, becoming immune to revision through the normal political procedures governing the body of statutory law. The above arguments simply state that the treaties must attain at least the level of ordinary statutory law – if they are to be effective in directing settler government agencies to perform their responsibilities under the treaty agreement. However, this is not an argument against the constitutionalizing of Indigenous treaty agreements, merely an argument as to the conditions of possibility of settlers, with their specific rule of law system, discharging their obligations. The reasons for understanding these agreements to be *constitutional texts* are overdetermined.

Recall from chapter 5 that nations retain their rights to self-government and territory throughout their interactions. The only way for a nation to legitimately acquire *authority* with respect to the citizens of another on its own territory is through consensual agreements to share jurisdiction. Prior to such agreement, nations possess no warrant for exercising power over each other's populations or lands. Treaty documents must be constitutional documents in order to reflect the special status of the agreements they enshrine – namely agreements between nations with rights to self-determination. It is simply not within the moral purview of governments on either side of the relationship to unilaterally modify the powers of the other. Settler – Indigenous treaties mutually modify the form of self-determination of each nation, deepening of interdependency, by constructing a complex landscape of institutions among overlapping territories and groups. However, on pain of rendering the exercise of governmental power an illegitimate *foreign intervention*, treaty agreements must be upheld. To secure this basic condition for the legitimacy of the settler state, treaties with Indigenous peoples should be accorded interpretive priority over statutory law and rendered immune from ordinary statutory revision.

At this point a skeptic might wonder: if a democratic referendum of all affected settlers is not required, because this would hold recognition and implementation of inherent Indigenous territorial rights captive to the will of the majority, and would suggest their nature was delegated rather than inherent (in short, because it would dominate Indigenous peoples in the enjoyment of their inherent rights), why is the procedure requiring a broader deliberative exchange and, ultimately, the affirmative will of a settler-controlled Parliament, not itself a form of domination in the recognition and implementation of Indigenous territorial rights? After all, the federal-level deliberative exchange could occur in bad faith; moreover, Parliament is primarily comprised of

non-Indigenous representatives elected by their non-Indigenous constituents, and it was the power of the latter, through a potential referendum, that was said to be problematic if implemented. The discussion above suggests that the reasons are practical (concerning the ability of settler government officials to comply with their obligations) and also pertain to the self-determination of settler communities through their relationships with Indigenous peoples. However, the spectre of domination looms despite the possibilities, discussed in chapter 3, for consociational revisions to the structure of the federal legislature (which would go some way, but not the whole way, to preventing unaccountable decision-making).

The problem of settler domination is not easily resolved. It is just as difficult to constitutionally change a legal system to a form that prevents domination of one group by another, as it is to get settler governments to negotiate and ratify fair agreements in the first place. In fact, these are one in the same, and demonstrate the extent to which we cannot forgo a concern for the moral integrity of persons and communities in our concern for justice or territorial legitimacy. This dissertation attempts on the one hand to identify basic requirements of constitutional legitimacy through a renewed vision of multinational federalism through treaty-making, and on the other to identify some of the substantive requirements of fair treaty agreements that such a process should aim to bring forth. One difficulty we confront in these matters is that it is not certain that any formal constitutional design in Canada will ever be capable of preventing domination through iron-clad procedural rules that prevent it, as were, mechanically. The matter of treaty negotiation brings this to the fore. Treaties are thought to result in complex federal arrangements; however, they are vulnerable in their terms to domination by settler power even if they are negotiated to formally fit the requirement of consent. What kind of rule would prevent domination internal to

the treaty bargaining table, such that only treaties with advantageous terms to the Canadian state make it to Parliament for ratification? As I discuss below, rules are not sufficient on their own, but they can assist.

The decolonized relationships between settler and Indigenous peoples are most likely to require complicated case-based political relationships and are for that reason it is unlikely that the judicial system can fully prevent domination on its own. For example, it is not plausible that decolonization in Canada will or should result in Indigenous secessions – these might resemble “abandonment” more than “relief.” By this I mean, secessions might result in massive disruptions to Indigenous people’s enjoyment of services and opportunities, and a disruption to political identities, rather than an enhanced capacity for self-determination. While Indigenous territorial rights are inherent, the reasons for cooperation in the exercise of these rights through a consensual and non-dominated federal structure are overdetermined. In the context of historical injustice, diminished political capacity, and poverty, any simple constitutional rule mandating settler governments refrain from exercising any authority vis-à-vis Indigenous peoples or lands in the absence of a new negotiated agreement in the hope of forcing them to negotiate a fair treaty agreement is not necessarily a productive “mechanism” for preventing domination, insofar as it may lead to “abandonment” rather than relief. What we can hope for is that a close attention to moral facts, by settler populations, politicians, and jurists, will motivate them to recognize and implement the complex demands of legitimacy. We can hope this will occur on multiple levels: among the people directly as they negotiate their political identities, among politicians as they negotiate shared structures, and among jurists as they articulate basic principles for holding peoples and politicians to account to the requirements of political legitimacy. For example, it has

been a central argument of chapter 4 of this dissertation that the value of federalism is intrinsic: it is a way of practicing relationship among people who recognize and affirm the value of their differences, and who see their own futures as intertwined through practices of mutual aid and mutual empowerment. The cultivation of this basic ethos of respect and the celebration of national difference can go some way to motivating settler populations and politicians to accept political arrangements that respect and enable the self-determination of multiple peoples.

However, jurists sensitive to the nuance of the balances to be struck through decolonization agreements can also articulate principles that promote the negotiation of fair agreements, without themselves usurping the work of political representatives and governments or threatening abandonment of Indigenous populations. That is, in fact, a primary challenge for courts which would wish to promote decolonization without specifying the future peoples should undertake together (recall: there are many possibilities, including territorial distributions, for a decolonial future). Courts, attentive to the requirements of multinational political legitimacy, should not shirk the difficult task of identifying the limits of settler governmental power, even if a treaty agreement is ultimately necessary to create a legitimate federal structure.

A pressing challenge in Canadian constitutional law is to create incentives for settler governments to negotiate, in a non-dominating way, fair treaty agreements.¹²³ The primary way that seems likely is through negative incentives. For example, if the legislative and executive powers of various Canadian institutions with respect to certain jurisdictional spheres was made contingent upon a good faith effort to negotiate fair decolonization agreements, both settler

¹²³ The current system creates incentives to negotiate agreements, but not agreements that are necessarily fair.

populations and governments would have a significant incentive to negotiate fair treaty agreements. In the absence of doing so, they might be incapable of regulating various domains or executing various political functions in which they have an interest. I cannot here fully specify the conditions under which legal challenges to the Canadian state should result in the suspension of the validity of Canadian laws with respect to certain jurisdictions on account of specific facts about negotiations. However, this is not impossible, and much of this dissertation is concerned with identifying the procedural and substantive requirements on the legitimacy of the negotiation of such federal arrangements – although not necessarily the specific legal strategies that could be justified, in light of these facts, to create incentives on governments to negotiate fair agreements. Below, I briefly consider some possibilities in this regard.

It bears observation that while decolonization leaves open a range of possibilities for territorial and jurisdictional distributions and thus requires choices, and there are complex territorial facts to consider in the distribution of territorial rights and jurisdictional powers, nonetheless not *all* such distributions or facts are beyond the capacity of the courts to directly ascertain under certain conditions.¹²⁴ Sometimes, it may be the case that the courts can ascertain that a particular region is the heartland of an Indigenous group, and that settler occupancy interests in that region are minimal. In these cases, it is not difficult to conclude that if a settler government claims the right

¹²⁴ If the courts could ascertain all the requirements of decolonization in particular cases, we might leave all territorial decision-making to the courts and eschew processes of political negotiation. However, this dissertation provides several reasons for thinking it is beyond the epistemic and normative powers of the courts to do this. Nonetheless, there may be cases where the courts have good reason to believe that they can ascertain what facts would allow in regard to a particular subset of a territorial dispute. The existence of some rights, under specific conditions, with the correct evidence, are beyond question. Note the second order framing: we would require a theory of the limits of juridical knowledge regarding the relevant empirical and moral facts to fully make out this point. However, if this is plausible, the courts can indeed intervene to motivate the correct negotiations for a comprehensive settlement.

to govern that area in respect of a particular jurisdictional competency, but the Indigenous group contests, that the settler claim must give way. Even if the Indigenous group would ultimately prefer a fair treaty agreement and to share jurisdiction over that domain, in the absence of such an agreement, the Indigenous group has the right to exclusively govern that domain if it chooses to contest the status quo. This follows from the fact that Indigenous territorial rights are inherent and not delegated. Provided that the Indigenous group does seek to govern that jurisdictional domain *with* settler governments in a negotiated compromise *and* it is the sort of jurisdictional domain in which the wider settler population may have an interest in sharing rule, this creates an incentive to negotiate a fair treaty agreement.

This argument also applies to jurisdictional domain in areas where there is settler occupancy, but where the jurisdictional domain claimed does not affect the basic interests of the settler community. For example, in the absence of a fair treaty agreement, the settler government may be prevented from pursuing new natural resource development projects over a wide portion of the traditional territory of an Indigenous group. The correct distribution of authority vis-à-vis natural resources – while up in the air and contingent upon a negotiated settlements – has not yet been settled through the necessary political process. This form of incentive is likely to be present in many cases, insofar as territorial boundaries are overlapping and there will inevitably be “shared” territories where natural resources must be co-managed by settler and Indigenous governments. Stifling settler resource interests of this kind, in the absence of a negotiated agreement, creates an incentive to negotiate an agreement that the Indigenous community can accept.

Throughout these legal battles the provision of services to Indigenous communities by agencies controlled by the provincial or federal government should not be threatened if the Indigenous community cannot afford to fund these services itself. It is plausibly the duty of settler governments to provide these services, as Indigenous communities have been forced to rely upon them by colonialism itself. Moreover, the very ideal of federalism (interdependent self-determination of equal peoples) has as its precondition healthy and safe human beings with sufficient opportunities for growth and development to flourish as individuals. Thus, the provision of water, electricity, healthcare, and resources to maintain schools and other services should never be threatened by the shortfall of state legitimacy vis-à-vis Indigenous peoples. This risks seriously causing more harm and perpetrating more wrongdoing. While the settler government may lack a wide sphere of jurisdictional rights with respect to Indigenous communities, it is not plausible that it lacks a wide set of responsibilities to provide basic services to Indigenous people.

Finally, it should be repeated that these proposed mechanisms for incentivizing settler governments to negotiate fair treaty agreements are seriously limited on their own and show the fundamental limits of an adversarial approach. This can be seen by considering the possible case where the settler government does not have a self-interested reason for sharing in jurisdiction with an Indigenous community with respect to its territory, as it most clearly does with natural resource development—due to the limited natural resources on a particular territory. In these cases, the threat of “losing out on” a share in jurisdiction over an area that the Indigenous community would be happy to share, or to delegate to the provincial or federal government, definitionally provides no incentive to the government to negotiate a fair treaty agreement. In

these cases, we require incentives with a different structure if we are to try to get “iron-clad” safeguards to prevent domination.¹²⁵ More plausibly, this reveals the limits of the purely self-interested approach to thinking about settler – Indigenous relations. As I have argued, our reasons are more robust: settlers have relationships with Indigenous nations worth pursuing in their own right. Settlers are engaged in an intrinsically valuable relationship that they have badly damaged. Settlers must take responsibility for this relationship, and to do that they must begin with recognition of their wounded relatives and initiate the effort to build consensual and mutually empowering terms of association. Grounding non-domination in the possibility of adversarial conflicts in the courts centring on natural resource jurisdiction is not the best way to go in giving shape to this ideal, grounded as it is in self-interested motives, although it may be a necessary component of the process in the interim (and, as discussed, it may be required as a matter of law).

¹²⁵ There are further possibilities here. For example, it is plausible that many provincial and federal laws of general application are invalid in their current form – in the absence of a fair and non-dominated treaty agreement they claim jurisdiction generally over a province (including Indigenous lands) without the correct authorization. Thus, it may be possible for Indigenous nations to challenge the validity of provincial and federal laws of general application, creating an incentive on settler governments to negotiate a fair and non-dominated treaty agreement. Successful court challenges of this kind would create significant uncertainty for settler people, as they would challenge the validity of laws pertaining to *settlers as well*, and result in a temporary legal vacuum. This need not hinder the basic functioning of the settler state or the basic human rights of settler citizens insofar as the declarations of invalidity may be *targeted and specific*, that is, relating to non-essential functions of the state, and temporarily *suspended* in effect, providing time for an agreement in principle or draft agreement that fits appropriate criteria of fairness. The statutory laws in question may be specific and not threaten basic rights, targeting instead areas such as inter-provincial trade (for example) wherein the government and citizens clearly have a major interest but not one such that the collapse of regulation will *imminently* threaten their health or safety. There are also other domains, such as sport hunting and sport fishing (cf. subsistence hunting and subsistence fishing), where a temporary prohibition on settler legislation might be accompanied not with a legal vacuum, but with a court order *prohibiting* all activity in the domain until an agreement is reached. This idea would need to be made significantly more precise to function as a workable legal doctrine, but its basic contours, and how it could fit within the existing legal regime, should be visible.

6.3 Fairness in distribution of jurisdictional powers

As discussed in chapter 5 and directly above, a core problem for the negotiation of modern treaty agreements consists in the power of the federal government to shape negotiations and their outcomes to its own benefit. This section picks up on this problem by countering a fairness-based line of argument that might be advanced against some Indigenous jurisdictional rights. The ways in which this objection might fail are illuminating about the requirements of fairness in cost sharing to support Indigenous jurisdictional capacities within multinational states. The thrust of this argument contends that it is unfair to the members of settler groups to force them to contribute to the collective self-determination projects of Indigenous peoples through the positive provision of resources to Indigenous groups for this purpose when this would create the parallel provision of services. I advance two lines of argument against this: the first disputes the argument on its own terms, contending that fairness, when correctly analyzed, may require precisely this, while the second argument displaces the absolute priority of the concept of fairness as an ideal for settler – Indigenous under certain conditions, considering the Anishinaabe ideal of federal relationships constructed in chapter 4.

While this argument does not in itself provide an institutional mechanism for the prevention of domination, it does provide a principled account of why some limitations of Indigenous jurisdictional claims within a federation are arbitrary. Correspondingly, along with other arguments discussed throughout this dissertation, it may enable us to develop constitutional principles to regulate federal structures for settler and Indigenous peoples—that is, principles concerning *fairness* in the proposed agreements. For example, the failure of negotiations to

recognize the relevant facts articulated here may be grounds for Courts to find that negotiations have been unfair, and thus that existing agreements must be (at least in part) renegotiated. More directly, citizens, negotiators, and politicians concerned about justice should carefully consider such arguments when deliberating about treaty negotiation. Thus, this section continues the important work of specifying, in finer-grained detail, substantive (cf. procedural) principles for the fairness of modern treaty agreements. Neglect of these principles will result in substantively unfair agreements, and because such neglect almost certainly results from settler negotiation dominance, treaty agreements neglecting these principles will be arbitrarily shaped by the asymmetrical power of the settler state. Plausibly, such agreements are agreements negotiated under conditions of domination and demonstrate interference.

The principles of fairness that I have in mind can be demonstrated through an important objection to the proposed obligation of settlers to support the costs that might arise to enable Indigenous people's self-determination. To see clearly the shape of the objection it is useful to return to some of the animating considerations of liberalism as they are expressed in territorial rights theory. Recall that Stilz's territorial rights theory, for example, is grounded in a concern for collective self-determination. This value is reflected in Indigenous conceptions insofar as primacy is placed on consent within interpersonal and collective relationships, although Stilz's own account is not consent-based per se, nor does it fully reflect the depth of concern for others present within the Anishinaabe conception reconstructed in chapter 4. Stilz's neo-Kantian account builds on the concept of Kantian freedom as independence (2011, 2019). Kantian freedom as independence suggests that humans have a natural right to be free from subjection to the will of other agents, where the scope of this right to freedom is limited by the mutual

freedom of subjects to independence. While there is, in the Kantian account, a natural duty of justice to maintain a state in order to promote a condition of public right, e.g. a state in which coercive power is exercised publicly rather than privately in the service of the non-domination of subjects, this does not entail the concerns animating freedom as independence do not recur in our questioning the legitimacy of state boundaries.

Consider Stiliz's argument that the imposition of political authority on a group would constitute an arbitrary limit on the political autonomy of agents maintaining a state when they are willing and capable of maintaining that state on their own (2019, p. 116-7). If we accept this, it also seems to be an arbitrary limit on freedom as independence to prevent a group from exercising more limited forms of self-rule (e.g., with respect to a specific sub-set of jurisdictions normally possessed in a bundle by states) if they are willing and capable of doing so in ways compatible with the rights of others. In each case, since the persons are by definition willing and capable of exercising jurisdictional authority, in the absence of good reason, to prevent them from doing so is to limit their autonomous agency and natural independence and is therefore pro tanto wrong. The exercise of coercive exercise of authority to maintain a centralized state is arbitrary with respect to annexed subjects or regions seeking forms of federal self-rule because their proposal is not to eliminate a condition of right, e.g. to shirk the duty to form a just state, but to maintain the condition of right through independent institutions (providing some but not all essential political goods), a condition that they judge to be preferable to all political goods being provided by the central state.

The puzzle that is appears for the theory of federalism articulated thus far (e.g. the fairness-based

objection) is as follows. While freedom as independence in the Kantian tradition secures rights to self-determination as non-interference, it less clearly supports rights to self-determination as a positive right to the assistance of others in order that one have the capacity to exercise collective self-rule with respect to some jurisdiction. This is not necessarily a problem for the rights of regional populations that are capable of exercising jurisdictional power with respect to certain political goods through their own administrative structures and taxation (or a proportionate share of the federal or provincial tax levied upon them). As discussed above, to enforce some other distribution of jurisdictional authority is to arbitrarily coerce subjects who, but for the negative interference, could maintain the jurisdictional responsibility with respect to some political good.

However, while in the global justice literature thinkers like Rawls, Buchanan, and Moore support a duty of international assistance to burdened states, which requires of better off states that they aid states incapable of properly exercising the functions of statehood due to poor circumstances, injustices, or disadvantages they have suffered, it is not clear that this generalizes into a positive duty of states to support the regional autonomy of groups that are not capable of “ever” exercising a sector-specific jurisdictional right independently (Buchanan, 2004; Rawls, 1999; Moore, 2015). Indeed, with a certain reading of the duty of assistance to burdened states, the duty flows from the temporary disability of the state to properly exercise its political functions due to contingent circumstances, but does not extend to groups that are “intrinsically incapable” of exercising jurisdictional powers without permanent “external” support.

In this light, there may be some minority claims to regional self-government with respect to specific jurisdictions of which they are incapable of ever exercising without the assistance of

others. Rather than due to contingent circumstances, they may be limited in ever fully independently exercising certain powers due to their low population size or density or the unavailability of certain resources. In these cases, the claim of the agent is not to non-interference in the unobjectionable exercise of their independent capacities, but to positive assistance in order that they may exercise capacities of which they would be otherwise unable.

The objection is that it is not clear that a polity owes this kind of assistance to a subset of its members, or alternatively, that groups within a multi-group state owe this to other groups. This is not to deny the existence of the positive rights of individuals within states generally – I take positive rights to shelter, healthcare, disability insurance, education, and so on, provided through public provision, to be uncontroversial.¹²⁶ The problem is that it is not obvious that a polity owes assistance to a group – a subset of its members – to independently administer an independent group-based scheme for the provision of positive rights to shelter, healthcare, disability insurance, education, and so on, to its own members, when this takes the form of the provision of additional per capita resources to those citizens to deliver a service that would be more efficiently delivered by the public institutions.¹²⁷

The problem with this is that the other citizens potentially have a complaint, namely a reduction

¹²⁶ See Dworkin, 2000; Rawls, 1971, 1993.

¹²⁷ This is not simply a repetition of the efficiency account of federalism in chapter 3 (section 2), which suffered from the objection that reasons of collective identity and self-determination plausibly trumped efficiency gains. The reason for this is that we have not specified whether or not the right to self-determination is to be understood in primarily negative or positive terms in a federal state. The challenge is to show that the value of collective self-determination not only *prohibits interference* in sector-specific self-rule motivated by reasons of economic efficiency, but that it also *requires the assistance of others*, even counter to economic efficiency considerations. This is the stronger claim of this section, while the weaker claim is simply that the economic efficiency consideration is overblown—often it is not more efficient, or if it is, the reasons that it is more efficient are objectionable and do not defeat the claim to self-rule through assistance.

in overall public resources, or their own group-specific resources, in order that they support the project of a subset of the federal citizenry that they do not share and which it is not obvious that they have an independent obligation to support.¹²⁸ The citizens of the broader federal society can complain that the benefit they are being taxed to provide for is not one that they share. Moreover, this goes beyond evenhandedness in provision by the provincial and federal governments insofar as it will require citizens in the outgroup to pay a larger per capita amount to support the ability of other citizens to independently provide services for themselves than it would cost if the services were provided by some other group. It is important to note that while the collective provision of positive rights (to healthcare, education, etc.) to all federal citizens may be morally required, in this case, the reasons for the additional cost in providing these positive rights are not for the reasons positive rights are usually differentially costly to provide for different citizens (e.g. first-order health or educational needs individually differ), but because the citizens have elected to receive them through an independent institution in their particular project of collective self-determination. As such, there is a complaint of unfairness: the outgroup citizens are being treated unfairly, by being taxed to provide a benefit for others that does not serve their own interests and which it is not obvious they have an independent obligation to support.

Below, I discuss 8 replies to worries of these kinds. They are of two types. The first type of reply (1-7) disagrees with the complaint on the basis of the violation of fairness, contending that additional assistance to enable independent jurisdictional authority can be even-handed if we consider relevant empirical and moral facts. The second type of reply (8) disputes that the ideal

¹²⁸ That is, in the absence of a prior agreement, which would ground an obligation not based in fairness or non-domination directly but through contract, treaty, or promise.

of fairness should always take priority over other normative considerations in the context at hand. Each of these replies provides a unique ground of response to the objection—eroding its power and providing us with an account of the proportionate burdens of cost-sharing between groups in decolonizing settler colonial contexts.

[1] Considerations of federal fiscal parity between provinces, regions, and minority groups undermines the fairness complaint. By giving regions their proportionate share of federal and provincial tax revenues (adjusted, perhaps for equalization), they may be able maintain the jurisdiction. It is unfair for the provincial or federal government to tax the minority region for supporting services from which they would not benefit if they are willing and capable of maintaining parallel services by taxing their own citizens. It may actually be the case that the group, if it opts out of the wider system of provision and is in turn proportionately relieved of tax burdens (or alternatively, if it is given a proportionate share of tax revenues), could maintain the jurisdiction independently.

[2] The possibility of unbundling sector-specific jurisdictional rights favours Indigenous jurisdictional claims in a similar way. Unbundling specific jurisdictional rights to emphasize that jurisdictional rights over areas like education, healthcare, or shelter usually amounts to law-making and administration over a wide variety of policies and sub-programs under each head of jurisdiction sometimes can undermine the fairness complaint. These policy areas can be unbundled, and the costs of supporting control with respect to some of the unbundled package may not be disproportionate. For example, while it may be sometimes disproportionately costly (vis-à-vis the benefit) to require the citizens of a province to enable a small Indigenous group to

maintain their own hospital with a surgery and MRI machine through financial transfers, it may not be disproportionately costly to enable them to maintain a local clinic that refers to the local general hospital for use of these services (e.g., through giving them a proportionate amount of provincial and federal tax dollars to maintain this service independently, or by relieving them of the associated tax burden to maintain a local clinic). Thus, it might be arbitrary to deny the group the ability to make policy and administer a subset of services usually collected under the specific head of jurisdiction of healthcare, even if they cannot, with disproportionate costs, exercise the full jurisdictional sphere.

[3] Adopting a contractualist account of morality with significant weight accorded to the good of collective self-determination undermines the fairness complaint if the costs to any particular federal citizen of requiring their assistance are small and fail to undermine any important project of their own to a significant degree and the specific jurisdiction is of genuine significance to the minority group. The contractualist framework suggests that a general principle imposing a burden on one agent is not reasonably rejectable if any alternatives to the principle would pose significantly greater burdens on another agent's ability to lead a good life (Scanlon, 1998). The burden or potential benefit to the minority group members in cases of this kind is often of non-trivial significance to their capacity to lead good lives, because they have significant political agency interests at stake in exercising a specific jurisdiction. It is plausible, when the jurisdiction sought is of deep significance to the political identity – because the self-understanding of members, or their way of life, is placed in jeopardy by external control¹²⁹ – that if the local

¹²⁹ See Eisenberg (2009) for the language of jeopardy in evaluating minority-based claims grounded in reasons of identity.

provision is only moderately costly relative to centralized provision, then the interests of the minority region ground an obligation of assistance to be discharged by their federal partners. If the additional cost to the broader federal polity is truly a marginal monetary cost, but the significance of great consequence to the minority group because their collective political agency interests are at stake, the greater burden principle *requires* assistance. In this way, the duty of federal assistance to enable the exercise of jurisdictional rights important to minority identity or way of life is akin to a more traditional duty of rescue with marginal costs (R. Miller, 1998; Singer, 1972; Wellman, 2005).

Thus, considerations of fairness might pull in both directions—both in limiting a claim to the resources of others for a project of minority self-determination, and in grounding a claim to resources on the basis of a non-trivial harm that would be allowed to fall on the minority group if moderate costs were not undertaken. It may be unfair not to transfer additional resources, considering what is at stake for the interests of the minority group members compared to those of the wider society, and the conception, argued for in chapter 4, of multinational society as oriented towards the reciprocal empowerment of self-determining nations.¹³⁰

¹³⁰ However, if we do not adopt contractualism as an explanation of our deontic claims or as an explanation of fairness, or my application of the greater burden principle is not plausible for some reason, it still may be the *right* thing to do. While our reasons for assistance may not be deontic, nevertheless because a course of federal assistance can still respect deontic constraints (e.g., basic, civil, and political rights understood in garden-variety terms), considerations of the good may enter in and be the next level of moral analysis relevant to action. Where deontic reasons run out, we may be required to act on the basis of reasons of beneficence (wellbeing). With respect to a limited consequentialism, it may be that assistance is the correct thing to do for reasons of beneficence—this may achieve the most good (or at least more good than alternatives) while respecting the claims of others to lead good lives of their own.

Additionally, even if we think that the political *wellbeing* of others as such does not give us *reasons of justice* for adopting these measures (cf. possible rights-based claims, or contractualist justification), it may still give us *ethical reasons* nonetheless. It may be *good* to do this. While these are not the sort of reasons that can be coerced from us without moral residue, we can impose them on ourselves through legislation that permits an opt-out (and lesser evil

[4] The potential presence of reparative obligations may undermine the fairness complaint. It may be the case that the broader federal state possesses reparative obligations to the minority group for historical wrongdoing. In that case, these obligations (in part) may be best discharged through assistance in maintaining the specific jurisdiction, even if this would otherwise be disproportionately costly. This is certainly the case if the group chooses assistance in maintaining jurisdictional powers at the expense of other forms of reparations (land more than what legitimacy requires, money for other projects, and so forth).

[5] Unfairness in the historical distribution of resources relevant to maintaining the jurisdictional power today may undermine the fairness complaint. Drawing from the above, it may be that the costs of recognizing a specific jurisdictional right are high initially, in order to support capital improvements, initial training, legal/ institutional design, and so forth. The reason this may not have occurred already may in part be due to colonial interventions in Indigenous governments and territories, racist stereotypes concerning needs and abilities, or decades-long neglect which motivated the failure to invest in gradual capital upgrades of various kinds. If that is the case, it is

justification probably enters in here too, plausibly justifying coercive imposition of doing supererogatory good when the costs to citizens are very low and the importance to others very great – including the importance to those citizens that choose to exercise their imperfect obligations).

Consider also virtue-theoretic terms. Suppose that despite it not being morally required to assist (which I deny), it is nevertheless best (beneficent) to assist. Considering the potential gravity of the harm to the group in a case with small costs, it follows that it may in fact be shameful because *greedy*, *callous*, or *uncaring* to fail to assist. In this last argument, considerations of the good and virtue directly enter into the explanation of our reasons—while this is no longer a contractualist or fairness-based argument, it is the kind of argument that might nonetheless appeal to peoples concerned with their collective identity – are they caring and kind? Do they value diversity for its own sake? We cannot claim to not be greedy if we fail to be beneficent with very low costs to our own projects, but instead retain wealth for our own luxury (compare this to retaining wealth to enable familial, vocational, religious, creative, or educational pursuits important to achieving a good life). Perhaps, the extent to which we are *greedy* in denying such a claim to assistance depends on our quantity of luxury and whether we always fail to give, or only sometimes.

plausible that these initial costs should not count against recognition of the group's authority with respect to the jurisdiction. It is unfair to deny them a power that would have been fiscally proportionate for them to exercise had they not been treated unfairly or with neglect in the past in the distribution of resources.

[6] Consideration of the future (future people) may undermine the fairness complaint. It bears observation that while the costs may be disproportionate at t_1 , Indigenous populations are growing and the costs may not be disproportionate at t_2 with a larger population size. If the initial start-up costs (capital, institutional design, and so forth) are what leads to disproportionate costs (consider a hospital), and these are largely fixed and the rate of capital degradation low, then the policy of enacting the transference of power at t_1 is not necessarily disproportionate. Since investment is inevitable and a large chunk of the costs pertain to capital, it may be best to make the investment now, providing benefits to the local community in terms of self-determination prior to the population arriving at precisely the proportionality point that justifies the overall investment. In a way, this is pareto efficient: since the population is growing the investment is inevitable, but if it is made sooner rather than later, we will achieve more good with proportionate costs.

[7] Expanding our conception of reciprocity undermines the fairness complaint. The federal citizenry as a whole may benefit through the inclusion of the minority region in the federal polity through a number of distinct ways. For example, part of the region may serve as a thoroughfare for an important free highway between two federal centres, it may produce magnificent art, it may cooperate in renewable resource production such as agriculture and forestry, it may be a

region of geopolitical strategic interest for the wider state, and so forth. It may be the case that the minority group has no obligation to provide these benefits to the federal polity—that, were they to choose secession, these benefits could be appropriately lost to the wider state. The contribution of these diverse gifts to the federal political system – which goes over and above the idea of monetary resource sharing and equalization – should be recognized through the reciprocation of benefits to them. Benefits need not be returned in kind for the relationship to constitute one of reciprocity.

While the above seven arguments are merely sketches, I believe they are important. They are at once capable of responding to a certain line of skepticism about the justification of Indigenous jurisdictional rights that require federal assistance, and in turn reveal several non-redundant yet mutually compatible ways of thinking about what fairness substantively requires by way of the inter-delegations of power and responsibility accomplished by modern treaties. While chapter 5 and the first part of chapter 6 addressed procedural requirements on the negotiation of contemporary treaty agreements, these arguments contribute to our understanding of the requirements of fairness internal to agreements themselves. Insofar as the justice of treaty agreements depends upon the terms respecting the rights and claims of nations subject to them, these fairness-based claims require significant consideration if treaty negotiations are to result in just agreements.

The final kind of consideration that is relevant flows from the concept of reciprocity, expanded to account for the facts of our deep relatedness centred on Indigenous conceptions of identity. This consideration does not attempt to respond to the fairness-based objection in liberal terms,

although it is consistent with the above arguments. Instead, it poses an additional consideration of relevance when “evaluating” the requests of partner nations for assistance so that they may maintain self-administered services and jurisdictional competences.

[8] The above discussion of reciprocity provides an opportunity to think about the situation from the framing of the value underlying treaty federalism pursued throughout this dissertation: the mutual empowerment of relationally defined and interdependent self-determining nations. For example, on the Anishinaabe conception discussed earlier, we should not conceive of selves (or polities) as fundamentally autonomous and independent. Rather, persons and polities are entities are constitutively interdependent for their survival, identity, and flourishing. On this view, we find ourselves with special abilities and unique needs, and already in relationship with diverse others whose gifts we need in order to survive and flourish. And, amazingly, we find that the Earth gives – and our kin and social systems give – and we are sustained through the free generosity of others moved by our needs who freely gift us. In these virtuous cycles that sustain life the question is not how we can contract to our own material advantage, pleasure, or ego, but rather how we can repay the generosity that we have been given (Tully, 2018). As Mills teaches, the reciprocity at the heart of interdependent relationships is not always direct, or strictly speaking, proportionate, either (2019). In Anishinaabe communities, it is appropriate to give to the extent that one is able – and correspondingly, it is necessary to claim what one needs, which may be unique. A moment’s thought about the relative quantity of “benefits” we receive in friendship and family as compared to our friends and loved ones reveals that the strict equalization of giving is not always appropriate – while a concern for the agency and equal self-realization of each member is appropriate. Likewise, we find ourselves part of living systems of

land, animals, and people. We may find that we have benefited from one and are capacitated to give. According to the Anishinaabe, we may appropriately repay a gift horizontally rather than directly back to the initial giver. Reciprocity can properly pass benefits forward, reciprocity does not necessarily pass benefits back (Mills, 2019).

The upshot for the federal design of institutions of the Anishinaabe approach is two-fold. First, we should emphasize the unique gifts, abilities, needs, and aspirations of the constituent members of a federation. Reciprocity that sustains a system for mutual flourishing may consist in giving distinct kinds of gifts to distinct others in reciprocity for the gifts that one has received. We should be aware of the unique gifts of others and consider reciprocity in light of our abilities. Secondly, it may be inappropriate to insist on a liberal view of *fairness* as an absolute trump in the distribution of jurisdictions when we consider the relationships between settler and Indigenous peoples as relationships between kin (or alternatively, friends) as opposed to relationships between strangers or business associates. While my earlier discussion revealed that considerations of fairness may very well militate in favour of federal assistance in the exercise of jurisdictional capacities, the Anishinaabe view emphasizes a deeper ethical truth pertinent to relations between kin. In these relationships, we may have special responsibilities to care for specific others that require unique things of us if they are to flourish in their unique way – and it may be that there is not strict equality or direct reciprocity through the exchange of in-kind benefits between particular partners. Rather, as with family and other kinds of enduring relationships among intimates, it may be appropriate to consider an analogue to the reasons of love and kinship that we possess in treaty relationships. Part of our individual freedom and self-realization in relationships like these consists precisely in capacitating the other whom we love.

Certainly, it is inappropriate to make onerous demands for little benefit within kinship relationships, especially if this is one-sided and the other is burdened in their own projects; however, generally, we do think that if a family has produced a flourishing member, she does well to do more than what can be exacted of her through a conception of strict reciprocity or fairness.

6.4 Renegotiation

It must be remembered that treaties were never intended to be fixed or locked into a static form but were to represent a framework for relationship that could be revisited and employed by future generations. While it is important to recognize that certain aspects of this relationship, such as the retention of pre-existing ways of life, and respect for legal and political plurality, were intended to be carried on in perpetuity, it is also vital that treaties not be interpreted in overly essentialist or rigid terms, as doing so would betray their purpose.

Starblanket, 2019, p. 17.

Within the context of decolonizing liberal democracies that have maintained systems of settler colonialism, we have several reasons to think that any negotiated agreement will eventually be in need of re-negotiation. This section canvasses such reasons and argues that we especially ought to consider effects of colonization and the long-run nature of decolonization and resurgence. This is important, because Indigenous groups have serious complaints of unfairness and domination against treaty negotiation processes if they purport to specify final agreements without the possibility of alteration. Continuing on with the prior general argument of the dissertation, treaty agreements must include the possibility of meaningful renegotiation if they are to create legitimate structures for regulating the interdependence of equal nations. As highlighted in the

quotation by Starblanket, and earlier by Aaron Mills, this understanding of treaty-making is central to Indigenous conceptions of treaty relationships.

One reason for thinking that the cyclical re-negotiation of treaty agreements should be built into any process for territorial decolonization in settler colonial contexts flows from a consideration of the epistemic limitation imposed by any given treaty negotiation period. As discussed throughout this chapter, the negotiation of a treaty agreement requires the development of a complex set of relationships among and between communities, their representatives, and the representatives with one another at the treaty negotiation table. For Indigenous communities, the process of negotiation will culminate in community referendums on agreements that the members will, if all has gone well, had a substantial opportunity to shape through iterated claims-making and deliberation with their representatives in a process intersecting with intergovernmental negotiations. Nonetheless, there are limits constraining the ability of any process of deliberation to arrive at fully just or optimal results – flowing from the inevitable finitude of time, resources, and capacity, on both sides of the equation (that is, representatives on both sides, as well as community members on both sides). Even if the negotiation processes is structured by respect for the values of mutual recognition, continuity, and consent of nations with rights of self-determination, and even if deliberations internal to the treaty bargaining table are oriented towards achieving fairness in light of the historical background, intercommunal reparative obligations, and reciprocity in the relationships between interdependent nations who will to deepen their relationship of mutual empowerment, there will inevitably be shortfalls in any agreement to correctly identify and balance relevant facts and interests in the negotiations. Put in the language of identity and recognition, agreements on “forms of recognition” will by

necessity need to be renegotiated due to contestation by group members who contend they were not properly taken account of in the decision. There will also be changes in group members' identities over time, including intergenerational change, and changes brought about by the new "rules of recognition" and new evidence about the effects of the agreement on affected parties (see for example: Tully, 2008, pp. 182, 152).

The practice of opening up treaties to total or partial re-negotiation, when there is substantial political will on the side of one treaty partner, would enable the recursive design of decolonized political structures in light of the experience and claims of those subject to them- including new generations, those whose claims may not have been fully heard, and those whose identities have changed over time.¹³¹ It may become apparent after living under decolonized structures of a particular form that they have not struck upon the correct balance of jurisdictional rights and executive responsibilities among Indigenous, shared, and settler political institutions for responding to the needs and aspirations of those subject to them. The process of negotiating

¹³¹ There are of course reasons in favour of regarding treaties as partial, temporary, closures of political questions. These reasons apply to both Indigenous and settler peoples. For example, treaties, by specifying the mutual rights and responsibilities of groups, give groups grounds for forming expectations that enable their medium and long-term planning. By having a clear stipulation of rights and responsibilities, including those in respect of land, governments can undertake new social, cultural, and economic projects, with the understanding that their communities will be able to carry these through to fruition because they will have the legal powers and resources to do so. Such medium and long-term planning entails opportunity costs of various kinds (because capacity and resources will be spent on particular projects rather than others), and thus the insulation of the community's decision from other levels of government (through a closed inter-delegation of rights) will help ensure that these projects can be successful, and that the community remains coherent in its decision-making and action over time. A different kind of reason, indirectly related to the self-determination of communities over time, concerns the costs of negotiation: treaty negotiation is itself expensive – requiring the time of many experts and citizens, and these costs themselves limit the available resources to spend on other projects. Nonetheless, it is not always the case that communities will be set back in their projects by renegotiating treaties, as it is not clear that the renegotiation of all specific jurisdictional powers or responsibilities affect the past planning of the other level of government and community. It is not always the case that a change in jurisdictional powers would entail a loss for a community because it spent resources on developing a capacity which it no longer exercises, or because the community forwent an alternative policy in order to spend resources on another that it can no longer complete. Perhaps most importantly, it is not plausible that, if the treaty has actually created or failed to resolve an injustice, or if there is a resurgent self-determination interest in additional powers, that the planning-interest of the other community always outweighs these reasons to negotiate.

treaties is in effect a process of grounded learning through experimentation under novel structures. The development of recursive practices of treaty negotiation, implementation, and experience/claims-making will enable the development of political arrangements that are just and substantively fair, and which can remain so in light of the myriad changes internal to and confronting communities.

A related reason for thinking that structures for the perennial re-negotiation of federal agreements are requirement of legitimacy in decolonizing settler colonial contexts flows from an appreciation of the impact of the structures of colonialism on Indigenous identities (collective will, capacities, and self-understandings) alongside the necessarily temporally extended character of decolonization, nation re-building, and cultural resurgence.

Colonization occurred through the annexation of Indigenous territories, the subjection of Indigenous populations to foreign institutions, and the construction of ideologies of supremacy that were, to some extent, internalized by Indigenous peoples. This dismantling of Indigenous political structures, severance of Indigenous persons from traditional lands, assimilatory public institutions such as residential schools, and racism has resulted in chronic political alienation, poverty, and socio-psychological dysfunction within many Indigenous communities (Alfred, 1999, 2005; Ladner, 2009). These structures of colonialism remain, shifting form, but also, plausibly, in some cases, receding. The resurgence of Indigenous identities, and the recovery of self-respect and collective capacity qua Indigenous, is occurring under gradually decolonizing social and political structures as people come to re-affirm their identities as Indigenous, and to generate new meanings for that identity in light of traditional cultural resources, kinship

networks, and political institutions under contemporary conditions (Alfred, 1999, 2005; Simpson, 2017). New collective aspirations may develop through this process as the psychological and material structures of colonialism (internalized racism, white masks, direct foreign administration) dissipate and are eroded through self-conscious traditionalism, resurgence, resistance, mobilization, and (attenuated) legal state recognition of Indigenous political authority and rights to self-determination (Alfred, 2001, 1999, 2005; Coulthard, 2014; Simpson, 2017). The generation of new collective aspirations may flow from resurgent identities and the growing collective power of those sharing these identities, which are negotiated personally and politically as Indigenous people recover self-respect qua Indigenous and generate healthy ways of living together.

New demands for the federal structure of association – for governmental powers, lands, and resources – will flow from the temporally extended process of decolonization of the mind and territory and the corresponding creative envisioning of new possibilities for living and self-government. This process is complemented by the mobilization of resources and development of Indigenous social, cultural, technical, and political capacities necessary to envision, plan, and execute distinct governmental jurisdictions after colonial interference and subjection. It is plausible that the new demands – for additional powers, or alternate forms of shared jurisdiction – will iterate throughout this extended, recursive, process of decolonization. Political legitimacy will require a good faith negotiation by the participants, who all have reason to suspect that past agreements have been superseded through the overcoming of colonial legacies and their impacts on the social, psychological, economic, and governmental capabilities of Indigenous nations.

6.5 Conclusion

This chapter has examined the process for the negotiation, ratification, and implementation of modern treaties. These procedures pose questions about the relationship between practices of public deliberation and citizen contestation, political representation, and the collective self-determination of peoples in international relationships. I have argued that the “consent” of peoples to a treaty agreement should be understood as shorthand for a complex political process conducted within and between peoples involving practices of representation, popular contestation, and institutional coordination through political decision-making structures reflectively endorsed by the people. Accordingly, I have argued that political processes of popular deliberation, claims-making, and contestation within extended, iterated, and inclusive forums are central to achieving the non-domination of citizens throughout treaty negotiations and are thus central to the explanation of how acts of representative authority in treaty negotiations can promote the collective self-determination of the people. For these reasons, I have shown that legitimate treaty negotiation is an institutionally complex phenomenon, necessarily incorporating public dialogue and consultation, formal intergovernmental negotiations, Indigenous referenda, and settler parliamentary legislative enactment. Moreover, within this context, I have argued for the importance of disaggregating our understanding of the multilogues at the heart of settler – Indigenous treaty federations. I argue that it is best to recognize that the multilogues of the federation are plural, layered, and overlapping. In this context, settler identities and Indigenous relational federal identities will be co-constituted through a place-based dialogue about the Earth and their interdependent relationships with it, one which will draw settler persons into dialogue with Indigenous philosophical and political conceptions drawn from the shared territory. Within

this chapter I have also addressed substantive issues of fairness concerning the contents of negotiated agreements. I have shown that a variety of contextually specific factors, concerning historical injustice, proportionality, reciprocity, and kinship are relevant to the justification for burden-sharing the costs of Indigenous self-determination within treaty federations among settler and Indigenous peoples. Finally, I have demonstrated the importance of a presumption that contemporary treaty agreements will eventually be renegotiated in light of the changes in identities and conditions that can be expected to occur as decolonization proceeds.

Chapter 7: Land Management in Overlapping Territories

As argued in chapter 1, a key requirement for legitimate political institutions in decolonizing settler colonial contexts is the construction of political domains where Indigenous peoples can maintain their own historically and culturally informed governance systems. In this chapter, I turn to lands of systematic population overlap between settler and Indigenous groups. In these areas, for the reasons canvassed in chapter 2, there may not be much permissible full restitution. That is, after the correct and proportionate full restitutions are made, there will be areas of such extensive intermingling and interdependence between approximately equally sized groups such that exclusive jurisdiction by either group according to its own unique political processes and legal values would harm too many people in the other group given their distinct values and uses for land. In these cases, we have the same problems as those that structure any analysis of legitimate political authority. How can shared institutions and legal norms serve the values underlying legitimate territorial authority – including basic human rights, along with the more robust autonomy ideal of individual self-directed agency under law – in a context where residents share distinct political and cultural identities? In particular, how can settler and Indigenous groups share and co-inhabit lands in ways that enable them to live decent lives by their own standards? How can they share a political structure for the specific shared territory given their non-identical social, vocational, and political practices and their varying ontologies and normative/evaluative commitments concerning how to live together in and with land? In examining these questions, I engage predominantly with Anishinaabe conceptions of our relationships with land, although it is my hope that much that I say here will resonate with the distinctive views of other Indigenous peoples, providing insight into the co-management of

territory in other contexts.

Consider regions where the demographic balance of settler and Indigenous populations seems to suggest the risk of mass alienation if either group's institutions or values predominate political decision-making and the legal structuring of a territory. Unlike in large cities with settler supermajorities, in these regions it seems intuitively true that settler-dominated political institutions – or cyclical representative electoral democracy combined with non-territorial autonomy for Indigenous peoples – would not be fully legitimate as a political structure.¹³² Likewise, governance according to Indigenous constitutional and political orders without significant accommodation to settler groups would seem to alienate large settler groups as well: in each case, the existing standards for human and environmental relations, and corresponding land use practices, might diverge very greatly from the values and preferred land use practices of groups. The risk of alienation of large national populations is especially pertinent in these cases where Indigenous and settler groups are economically reliant upon the use of the land for their subsistence, or otherwise use the land in service of their life projects, when full restitution is impossible due to demographic proportionality but where practices, uses, and values systematically diverge on cultural lines. Land management, or political decision-making about the stewardship and use of territorial resources such as lakes and rivers, forests, wild animal populations, and mineral deposits is an area of special concern for these places. How can systematically overlapping groups manage lands and natural resources together in a way that does not dominate one or the other group when each is a distinct nation with distinct ontologies,

¹³² This is not to say that in shared territories there should not be non-territorial autonomy with respect to specific jurisdictional domains, such as education and child welfare, for example. Jurisdiction in shared territories will have to be unbundled, negotiated, and distributed in such a way as to promote the autonomy of distinct groups.

practices, and values?¹³³

Understanding the stakes of this conflict will require us to go deeper into Indigenous worldviews and to also see the shape of a broadly Western worldview. Indigenous communities often (at least partially) rely upon grounded relationships in and with land for the provision of sustainable sustenance and wellbeing. Resurgent Indigenous communities will often adopt a way of life, grounded in what Aaron Mills describes as an underlying Indigenous *lifeworld* (a background ontological, epistemological, and cosmological system), that engages in subsistence, economic, social, and cultural practices that conflict with settler modes of land use (Mills, 2016). For example, while the norm is certainly a mixed wage and subsistence economy even for modestly “remote” Indigenous communities where development has not completely obliterated forests and traditional plant and animal life, many Indigenous communities maintain ways of life grounded in a seasonal round of hunting, fishing, plant foraging, berry gathering, and planting that make specific uses of the environment that are pitted against the mass agricultural and resource extraction practices common to settler peoples (Daly, 2005). The issue of conflicting conceptions of land and land use goals among groups is at once about achieving subsistence and wellbeing among peoples with diverse economic and cultural practices presumed to be equally valid, and simultaneously about the ability of their members to maintain lives that are chosen freely – lives that express their specific goals and values, including their background conception of what it is to be a person in the world and in community with other beings (a background *lifeworld*). How can Indigenous and settler peoples each provide subsistence for themselves and live good lives

¹³³ The theoretical background to the problem of this chapter is the collective self-determination theory of territorial rights developed in chapter 1.

by their own lights under shared institutions when they diverge and even conflict in ways of life and lifeworlds?

To engage these theoretical issues in a way that might shed light on the limits of existing practice, I begin this chapter with an overview of Canadian land co-management institutions and some of the challenges that have been documented by scholars concerning the incorporation of Indigenous perspectives into these processes. While scholars see something like the political problems discussed above, they have not provided the resources to solve it, nor have they framed it adequately to see the shape of a solution. In the next section, I discuss conceptions of land on liberal theories of territory. I argue that while these theories often claim to be neutral, they privilege Western ways of life and life ways by refusing to recognize the intrinsic value of the natural world. I argue that this is an unreasonable *and* unfair position. Neutrality about fundamental ontology should be downstream of recognition of the intrinsic value of the Earth. In the third section, I discuss a quite distinct philosophy of our relationships to the natural world, namely the Anishinaabe relational conception called the Earthway (alternatively: the Giftway). I argue that while this conception avoids the issues with the instrumental liberal conception, and provides a sensible model of our relationships to the natural world from which we can learn, there are nonetheless some elements that may be too incongruous with settler ontologies and lifeways for full inclusion on a shared framework for land management prior to significant and long-run cultural exchange, dialogue, and co-adaptation between these distinct peoples. I conclude with the proposal that we model the intrinsic value of the Earth for co-management purposes as a moderate conservative bias in favour of healthy ecosystems, a concept which can be given further definition through place-based dialogue and negotiation between groups.

7.1 Canadian co-management boards: caught between scientism and domination

In practice, Canada's land and resource co-management boards are invested with significant institutional and political resources to attempt to find solutions to environmental policy challenges in shared lands. The creation of management boards is often the result of intense political negotiations as they find their legal standing through ratified comprehensive claims agreements ("modern treaties") which often mandate their creation. Land management boards are often tasked with the regulation and approval of resource development and land use for territories that are tens of thousands, and in some cases, hundreds of thousands of square kilometers. They are variably tasked with a variety of management responsibilities pertaining to renewable and non-renewable resource planning and permitting, including the development of standards for and regulation of mining, forestry, water, housing and commercial development, and relations to plants and animals, on non-exclusive jurisdiction settlement lands. While the structure and jurisdiction of these boards varies, they aim at equal representation of Indigenous and settler interests through the appointment of an equal number of Indigenous and settler representatives to the board (White, 2020). In practice, while often technically serving an advisory function to territorial governments, land management boards have significant political power and constitutional standing due to their status as treaty institutions: for example, the procedures of land management planning, including specific reciprocal duties of mutual consultation and justification between boards and territorial governments, are protected by constitutional law (*First Nation of Nacho Nyak Dun v. Yukon*, 2017; Spitzer and Selle, 2019).

The history of settler – Indigenous relations in Canada is one marked by the usurpation of

Indigenous control of their territories, and a systematic lack of consultation and consideration of Indigenous territorial interests. Traditional land management institutions in Canada have proceeded much the same way – a process dominated by settlers. A recurrent theme in the early co-management literature is that co-management of land with Indigenous peoples is valuable because increased local participation in resource management decisions will lead to more efficient and effective management of resources (Natcher et al., 2005). Not only will the incorporation of “TEK” (traditional ecological knowledge possessed by Indigenous peoples) in land and resource planning enable better modeling and understanding of the environmental region for the sake of the crafting of new policy (Natcher et al., 2005), but local stakeholders who remain on the ground will be able to report about the effects of policy experimentation, and local participation will lead to more equitable distribution of the benefits of natural resources by focusing attention on their distinct needs concerning particular resources (Castro and Nielsen, 2001). In short, discussions have for a long time focused on the epistemic resources possessed by Indigenous peoples about the ecosystems in which they live, and on the value of integrating this knowledge with land management processes.

However, as observed by several scholars, existing processes for co-management in one way or another privilege Western ontologies and evaluative frameworks in the design of co-management institutions and goals (Nadasdy, 2003). In other words, the justification for co-management given directly above assumes an evaluative framework by which we can assess “effectiveness” in resource use and planning decisions, whereas, in fact, there is often systematic disagreement between user groups about the values that good environmental policy through co-management ought to reflect. Often, in the literature, this is elaborated in terms of the idea that traditional

ecological knowledge, along with having observational components that are valuable to resource use planning, is also comprised of values and bound up with cultural identities (Houde, 2007). For example, while traditional Indigenous ecological knowledge includes robust contemporary and historical knowledge about wildlife populations' sizes, habitats, and migration for example, which are clearly relevant to specifying determinate seasonal hunting quotas, it also includes an evaluative component concerning the correct way to engage in respectful relationships with those same wildlife populations. Indeed, it has been observed that the concepts of "conservation" and "management" are themselves normatively loaded and prioritize Western ways of life and ontological conceptions of our relationships to land as a repository of resources and as something to be intervened in for human benefit (Howitt and Suchet-Pearson, 2006). Unsurprisingly, the literature on co-management suggests that a major challenge for co-management efforts is incorporating the evaluative component of traditional ecological knowledge into resource planning processes.

There are two additional, interrelated features of contemporary land management boards which constitute problems for achieving non-alienating environmental policy in co-managed areas, further explaining the difficulties of integrating "TEK" with Western "scientific" assumptions. I take these problems to prevent the possibility of the sorts of mutual compromises concerning deeply held principles that are necessary for convergences on environmental policies.

The first of these is the institutional position of land management boards within Canadian federal structures. While there may be well entrenched practices of provincial governments and federal ministries reliably heeding the recommendations of highly respected land/ resource co-

management boards in specific regions, still, the primary formal role of most land management boards is to offer formally non-binding *recommendations* for the management of renewable and non-renewable resources and animal populations within a geographical region (White, 2020).

Thus, the decisions of land management boards, even if they were to strike upon a fair balance of principles/ interests, are vulnerable to interference by predominately settler authorities. Assuming that land management boards must retain independence in order to achieve their compelling normative goals (the balancing of affected groups' occupancy interests and mutual self-determination interests), this legal position renders the populations represented by land management boards dominated (in the sense of vulnerable to arbitrary interferences) by the settler state.

This problem is in practice compounded by the second problem which has already been alluded to above. The esteemed role of land management boards in those case where their recommendations are routinely heeded by the territorial authorities with the legal right of final decision may be in part due to the priority given to the Western scientific concepts, goals, and procedures of environmental management in the deliberation and recommendations given by such boards (Nadasdy, 2003). When land management boards comply with the broader settler state's underlying epistemic, ontological, and normative goals and framings, their recommendations are more often heeded, compounding the problem of domination if we think these boards could reasonably be expected to diverge from the perspectives of one group in their vital work of articulating convergences and compromises between worldviews in their proposed land management policies. The privileging of settler normative and ontological presumptions is further reinforced by various inequalities among representatives at the land management table:

often the settler appointees are wildlife biologists and environmental scientists who draw significant salaries from their work for provincial or territorial governments, and who possess a great deal of prestige given their advanced training. Indigenous representatives may not receive more than honoraria for their travels and find their traditional lifestyles burdened by the imperative of meeting in boardrooms (Nadasdy, 2003). The domination problem creates significant incentives for members of land management boards to limit their reasoning and recommendations to fit with the epistemic and normative expectations of settler wildlife experts, bureaucrats, and politicians, in a context where those maintaining these views have more resources and prestige. In effect, this can be expected to create poor policy from the perspective of occupancy groups' self-determination interests, which require careful place-based learning, negotiation, balancing, and compromise on principles for land management.

These power dynamics structuring interaction with Indigenous knowledge, values, and practices are present in a wide array of Indigenous - settler contexts, including treaty negotiation and the recognition of Indigenous law. A recurrent common theme is that the incorporation of Indigenous perspectives into political and legal spaces only occurs insofar as they serve a pre-conceived institutional goal or do not fundamentally threaten the power, structure, and ideals of the settler state. In this vein, Indigenous political theorists Gina Starblanket and Heidi Stark argue that Indigenous knowledge in the context of our relationships with land are often only seriously considered by settler governments when Western science and practices have shown themselves to be bankrupt or transparently inefficacious – for example in matters relating to climate disaster (2018). Starblanket and Stark suggest this “logic of containment operates as an extension of the epistemological and physical violence endemic to settler colonialism. We see this logic at work,

for example, in land claims and title cases that utilize a temporal framework that contains Indigenous relationships with and responsibilities to Creation as historical claims of prior occupancy” (p. 186).

This dynamic is visible on land management boards as well, insofar as Indigenous relationships with and responsibilities to Creation are not merely claims about the past, or a historical explanation of a present interest or right in territory, but they are claims about how land must be treated in the present – they are claims about the sorts of assumptions, values, practices, and attitudes that ought to structure human relationships in and with land in the context of enduring Indigenous relationships with land. These relationships exist within, inter alia, shared territories.

Starblanket and Stark write that “[t]hese tendencies minimize or contain the transformative potential of Indigenous knowledge, rendering it easier to incorporate and assimilate into the Western categories of knowledge. We argue it is not enough to make space for Indigenous knowledge. We must allow for this space to be reconfigured by Indigenous knowledge” (2018, p. 182). This chapter is in broad agreement with this idea. From the theoretical perspective motivating this chapter, land co-management boards seem to promise institutional avenues for achieving mutual self-determination of groups in shared territories in such a way as those subject to political power are not deeply alienated from it. While this last goal is not often discussed in the challenges relating to the “integration” of Indigenous knowledge into land management frameworks, I argue that the values underlying territorial rights (self-determination of groups) should be among the primary goals of co-management institutions. This argument may help to reframe existing discussions about the challenges confronting co-management boards.

That is, if we step back from a specific conceptualization of “land management” or “conservation” – e.g. the assumptions we have surrounding the methods, purposes, and procedures for governing land and natural resources through environmental management boards – then we can see that in territories defined by intense overlap of distinct peoples, something like joint management of the shared environmental domain will be necessary to do justice to each group. This is especially so if the groups diverge greatly in their values concerning human – land relationships, and in their uses of and relationships in and with land. Residents will not be able to exercise their agency in ways that are valued or intelligible to them in the absence of joint regulation in regions where we have a confluence of two or more peoples whose ways of life threaten one another; and regulation itself threatens to prioritize the assumptions and values of one group or the other if not carefully undertaken in order to mediate their mutual impacts. So, if we approach this issue as a problem of *normative political legitimacy* rather than as a technical problem about the maximization of human benefit or the conservation of species (or any other pre-formed goals or values for “land management” as commonly feature in Western state bureaucratic institutions for regional environmental monitoring and regulation), then the framing of the current discourse surrounding TEK can be seen to be severely limited. The pathways forward will be illuminated by *legitimacy* considerations rather than the traditional considerations endemic to environmental policy (e.g., balancing conservation goals with other human resource uses).

The question then is not merely how TEK and Western science are to relate in service of pre-figured state or institutional goals for land management as conceived formerly by settler institutions; but rather, what sorts of goals are legitimate for land management institutions to

pursue considering their distinct role as shared governance bodies for multiple overlapping peoples with distinct ways of life? And here we can return to ideas animating self-determination theories of territorial rights generally, such as the requirement for correspondence between the considered judgments of political subjects about the correct fundamental political values and procedural forms for political power, and the political institutions themselves insofar as they regulate the subjects' social and political world. It is in this sense that these institutions must be “transformed” by Indigenous perspectives (as suggested by Starblanket and Stark): land management institutions ought to procedurally and substantive reflect fundamental Indigenous values because they are political authorities required for the regulation of shared Indigenous and settler territories. Now we can see the real stakes of the problem: how can we achieve sufficient value correspondence for diverse agents – in these cases, both settlers and Indigenous people with primary affiliations to their own groups– for the members of each group to reflectively endorse their participation and subjection to these shared land management boards? This is how to frame the question about the integration of “TEK” in political legitimacy terms.

7.2 Liberal quietism, liberal capitalism, and spiritual liberalism: rethinking ontological neutrality

In thinking about these problems, it is important to attend to the normative purpose of land management institutions as articulated above, and how the specific land use goals, values, and assumptions of land management boards intersect with groups' ontological conceptions, evaluative commitments, and ways of life. We should do this to ascertain whether boards can promise correspondence between subjects' deepest values and commitments to specific

institutional procedures and policies (a central requirement for territorial political legitimacy). In this section I discuss background liberal assumptions about the natural world and suggest how these conceptions influence the direction of liberal environmental policy. Political liberals contend that theirs is a “neutral” conception of the world and thus the fair backdrop for political decision-making about the environment. This assumption very well might be rallied to the defense of the status quo with respect to the basic assumptions of environmental management boards which centre the maximization of human goods, often conceived in terms of increased tax revenues through corporate profit and “sustainable” development. However, as I demonstrate, this conception is decidedly non-neutral, and both alienates and disables groups with distinct ontological and evaluative conceptions and ways of life, including Indigenous peoples. With the non-neutrality of the liberal worldview (including possible “public reason” constraints on intrinsic value) in view, I suggest that we ought to incorporate the intrinsic value of the Earth into our moral theory, as this resonates with natural facts about human relationships to the Earth and our considered judgements about the good according to a wide range of worldviews. In the next section I discuss an Anishinaabe alternative to the background liberal conception. I argue that this view overcomes shortcomings with the settler view, but cannot, for political legitimacy reasons, be entirely adopted as a framework for land management either. Yet, as I hope to demonstrate here and below – there is much room for convergence among settler and Indigenous worldviews.

Land in liberal political philosophy and the costs of “neutrality”

In evaluating land management boards’ performance for legitimacy-related functions, it is

illuminating to consider the background liberal assumptions about the natural world. This is simply because, as I argued above, settler conceptions and values dominate land management boards. Thus, we should investigate what sorts of ideas underlie these institutions, whether they are reasonable, and how they impact the assumptions and practices of distinct groups when they are put into policy.

While liberal political philosophy often begins from the presumption of scarcity of natural resources, this is, without significant supplementation, a highly misleading description of the human relationship to the natural world. This model suggests a background to our political structures where humans are fundamentally threatened by the elements, constrained by geological features, and under the physiological imperative of acquiring resources in order to survive. On the other hand, on this view, we find ourselves in a world of *stuff* – quite distinct from us – which can be manipulated to withstand wind and rain, bridge rivers, and produce foodstuffs and other commodities. In addition to these classical considerations, we have a conception of land as the space of inter-personal relationships, and land as territory. These are also in keeping with the instrumental conception of land. Land is the place where people maintain their relationships (family, friendship, associational, vocational) and related institutions (markets, churches, schools, and the state). This is largely where liberal political philosophy ceases discussion of the natural world: we are threatened by it and find a lot of stuff within it (including the “space” itself) to deploy to our own ends. The task of politics is to ensure a fair distribution of this stuff and to manage human relations on a footing of equality.

While earlier chapters have argued that by focusing on the full extent of our place-based

practices and relationships we can make progress in discussions about the allocation of territory among groups, here I would suggest that a model of natural value that is purely instrumental is deeply implausible even by the lights of our own way of life—by very simple truths that ought to resonate despite, perhaps, their hackneyed nature.¹³⁴ It is liberal political philosophy’s obstinacy to what we all know already to which I now draw our attention.

In childhood, and hopefully throughout our lives if we are not so mired in the demands of the capitalist lifeworld that we cannot step back from our ends and reflect, we are in moments struck by the *givenness* of being and its sheer abundance, mystery, and complexity. The first astonishing fact is that there is *something* rather than nothing – why anything at all? Either an infinite backwards causal chain or a divine first mover, but still, an inkling that perhaps it would make more sense for there to be nothing. Moreover, it seems the existence of this *something* is independent from our will but responsive to human intentionality; it is complexly structured with a depth that reveals even more complexity upon closer attention; and it is composed of mutually reinforcing parts and cross-cutting relationships with the rest of the fabric of being. It is within this already existing mysterious abundance of relationally-co-determining being that we find ourselves, often struck alternatively with its beauty or sublimity, and—if we are happy—*gratitude*.¹³⁵ While the liberal view centres one genuine and significant aspect of humans lives that all societies confront, it is impoverished in its overarching ethical orientation to this mysterious abundance from which we all spring and are nourished and can affect. Namely, it is

¹³⁴ While we should keep in view all of these instrumentally conceived interests in land when articulating the stakes of group struggles over territory in order to fairly evaluate conflicting claims to land, this model of the human relationship to the natural world is still unacceptably limited.

¹³⁵ In formulating our existential condition in this way, I am indebted to the work of William Desmond (2012) and many discussions with Jessica McMullin.

impoverished in its lack of any recognition of this abundance whatsoever.

Certainly, the liberal may say that they have good reasons for avoiding discussion of the interdependent abundant mysterious existence of the world, this delightful and astonishing excess of being. After all, these are matters ripe for endless and pervasive disagreement, and the conditions of politics are such that we must live together despite these disagreements in fundamental ontological and evaluative orientations to the question of being. If we can bring on board considerations such as these, we will disagree both about their meaning and their implications for our political values. And then – if one view wins the day – it would seem that, because these matters simply are *essentially ambiguous*, that we will *disrespect* the reasoning and equally reasonable worldviews of our fellow citizens about this mysterious element by subjecting them to the political implications of our own interpretations. This is a problem about *respect for pluralism*, and the corresponding *risk of alienation from a political world inflected by the ontologies of others*. Better, so says the liberal, to focus on what we can all agree about regardless of our deeper worldviews – namely the universal use-values of land for individuals and collectives. Then we will not demean our fellow citizens in their capacity for deep reflections of their own—or worse—force them to cooperate to maintain a world structured by the particular, idiosyncratic values of others.

Yet, this quietism about the intrinsic value of the natural world is not quite adequate. Even the liberal worried about pluralism and non-alienation ought to be dissatisfied. I will briefly mention five problems with this view, before discussing each more fully in turn. First, liberal quietism suggests that these matters are *essentially controversial* – or so contestable that we could not

agree about anything deeper whatsoever than *the use values* of land. Second, it fails to recognize the *alienation endemic in political societies that are estranged from the Earth*. Third, it fails to recognize that this *neutrality about ontology* itself privileges the *spiritual liberal* – namely the person with no curiosity on these matters, who makes of the Earth no end in itself.¹³⁶ Fourth, it fails to recognize that restricting political deliberation purely to universal use values privileges *liberal capitalists*, to the exclusion of other worldviews. Fifth, the dominant liberal approach, arguably, can fail by its own lights: namely, as a strategy for fairly promoting universal human interests in the world as resource. This view is not as neutral as we might think – although, as I shall suggest, there still is need for humility and neutrality, but only in the context of the right overarching conceptualization of the disagreement about the value of the natural world.

First – it seems like there is something we ought to be able to agree about. Namely the givenness of an abundant reality whose existence is – to some extent – independent of our will but in which we are totally enmeshed, and to which we owe our lives, and any happiness that accrues to them. Moreover, within the *natural facts*, we find that humans have manifold special reactive attitudes towards this given abundance: the experience of beauty in birdsong, sublimity by the ocean, curiosity when confronted with biological complexity, and gratitude when we step back and endorse our own lives within the context of societies enmeshed in this world. The liberal should start at least with these *natural facts* about the natural world and these spontaneous *natural human reactive attitudes towards it*, attitudes which track the value of the world rather than merely our own use of it.

¹³⁶ I do not mean the liberal with spiritual or religious beliefs, but rather the quite distinct character who makes of neutrality or, more pointedly, agnosticism about the value of the natural world, a fundamental ethical or cosmological orientation towards the natural world. This is, in other words, part of their own character.

Second— we find ourselves in this world, structured by these phenomena eliciting the experiences of beauty, awe, and gratitude, yet our political world is structured by ‘dead’ conceptions. Quietism about these relationships we have to a pre-existing generative abundance – treatment of it as inert, mundane, and purely instrumental – fails to correspond to our real attitudes towards the natural world. In this mismatch of attitudes and sociopolitical practices, we are alienated. Many of our collective activities and practices – including those within liberal political philosophy which centre only the use values of land – do not fit with our knowledge of the world. The purely instrumental treatment of the natural world and our political discussion of it purely as a resource or means to human wellbeing described independently of it may in part explain the increasing levels of alienation confronting modern societies. We are in this world, and depend upon it, and all that we *do* recognize as having value likewise depends upon it. Our failure to reconcile ourselves in some way to the mysterious abundance leaves a gap in our vision, because we are not reconciled to the abundant world upon which our both we and our cherished loved ones depend.

Third— certainly there are some who have considered ideas such as these and are unpersuaded. They will say, *I refuse to acknowledge this abundant mystery of which you speak*. The world is out there, we evolved within it, and humans are the only source of value of which we can be certain – what more is there to be said? Certainly, the world is complex and independent as you say, but so what? The world is stuff, and we are agents. All atoms. The world is to be used, but prudently, in such a way as we do not harm ourselves or treat some of us humans unfairly.

It is clear that this is in fact the dominant view within liberal societies. However, what is less obvious is the fact that liberal neutrality on these matters prioritizes a certain kind of person. It produces a public political world which fits especially well with people who, rather than adopting quietism out of humility or respect for pluralism, simply have no deeper commitments or relationships to the natural world. In fact, the baseline of quietism about the significance of the natural world privileges what I call ‘spiritual liberals’ – people who do not have any deeper worldview about the mystery of abundant being or who have become so immersed in the techniques of capitalism that they no longer feel beauty, awe, or gratitude. This is not entirely fair. These people get for free what other people would have to struggle to establish and maintain – namely, a public culture that reflects their deepest ontological and ethical commitments about the natural world (that it is inert, not intrinsically valuable) and our place in it (as masters). This does not suggest that the motivations of liberal theorists are so illicit as to secretly derive a world conducive to spiritual liberals; however, this is nonetheless an upshot of the pluralism to “ontological neutrality” argument.

Fourth— another kind of subject thrives under ontological quietism: the liberal capitalist. This person seeks to generate commodities to sell to acquire further commodities with exchange value, and fundamentally leads a plan of life structured around the acquisition and use of *commodities*. This person may value relationships such as friendship and family, but they seek to acquire more commodities to use in the context of their lives and relationships, and like the spiritual liberal, they do not value their relationships with the natural world as such. However, whereas the emphasis in discussing the spiritual liberal is the lack of a certain kind of appreciation or value and the fit between ontological and evaluative conceptions and

sociopolitical institutions, the emphasis in the discussion of the liberal capitalist is how quietism enables the pursuit of particular ends—recognition of the intrinsic value of the natural world would impede optimal capitalist functioning. Thus, liberal quietism prepares the way for liberal capitalism. The only considerations admissible in public discourse surrounding our relationship to the natural world are the use values of objects. Not only is this pursuit unconstrained by legal prohibitions or procedural vetoes – it is not even constrained by admissible counter discourse or negotiation. The whole world is construed by the state and economy as serving for the satisfaction of human needs, interests, and desires. The only considerations limiting acquisition are fairness in the satisfaction of human needs, interests, and desires, described in a way with no concern for the mystery or the abundant being of the natural world.¹³⁷ Thus, liberal quietism prepares the way for the pursuit of liberal capitalist ends in the presentation of the world as a repository of objects for acquisition and use. Again – there are deeper fairness issues at play – not everyone is a liberal capitalist, and the liberal capitalist gets for free what others would have struggle to maintain – namely a construction of the world conducive to their own particular ends.

Fifth, and finally – the liberal worldview has not succeeded in generating solutions to the imminent catastrophes of species extinction and global climate change despite its global hegemony for decades after scientific consensus surrounding the existence of global warming. There is something motivationally inert about the liberal worldview when it comes to our own fate.

¹³⁷ Granted – there is increasing agreement that *future people* should also count in environmental resource planning – but this view still fails to acknowledge any non-instrumental value of the natural world.

7.3 An Anishinaabe alternative, living the Earthway

For the reasons discussed above, liberal neutrality about the value of the Earth ought not be the default baseline for conducting human affairs in land management. In this section I will briefly reconstruct a broadly Anishinaabe perspective on the human relationship to the natural world. I can only most briefly attempt to present the nuance and depth of this tradition. Robin Kimmerer’s work is tightly related to the Anishinaabe ethos that Aaron Mills alternatively calls the Giftway and the Earthway. These are Anishinaabe models of a legitimate relationship to the natural world—ones which grapple with what I have called the mysterious abundance of being. The Anishinaabe view and related practices demonstrate a commitment to the value of the natural world as such. Thus, the view is one contender for a reasonable theory of our relationship to the natural world according to the criteria with which I started this chapter. Liberal political philosophy would do well to engage this worldview with an open mind and without any attempt to domesticate it.¹³⁸ However, as I will go on to argue, the considerations motivating neutrality re-enter the debate and may favour adopting a compromise conception of the intrinsic value of natural world for the purposes of land use planning—more dialogue is necessary before shared territories could adopt this ontological conception without producing high levels of settler alienation.

Aaron Mills describes this fundamental worldview of the Anishinaabe as “the Earthway,” or alternately “the Giftway” (2019). These descriptions of the Anishinaabe orientation towards the

¹³⁸ This section is just barely scratching the surface of Anishinaabe ontology and Anishinaabe law. There is much more to be said. By not attempting to domesticate it, I mean, when we are perplexed, we should let its difference stand out freely and on its own terms rather than forcing it into settled categories.

natural world are analytically interchangeable but have different suggestions for the sources of law in Nature or a Creator respectively. For the Anishinaabe, we find ourselves in a world of gifts: creation is fundamentally composed of manifold gifts deserving of our respect and gratitude. Correspondingly, it is our responsibility to ascertain the gifts we have received and how we may gift others within the order of creation. Both the natural world, including persons and animals, along with human artefacts such as culture, are conceived of as gifts. For the Anishinaabe, the order of creation contains non-human elements that themselves freely share their gifts with us and others and to whom we have a responsibility to respectfully reciprocate.

Mills writes:

‘Miinigowiziwin’ means that each and every one of you have been given and been blessed with a gift that has come from the higher source of power, that our people have always acknowledged, and we say ‘the Great Spirit’ and ‘the Great Mystery’.

Mills, 2019, p. 69.

Walking the path of miinigowiziwin means that from the cosmic order of sacred gifts creation provides, we draw out a general ethos of giftedness for our daily lives. This means that in addition to our sacred gifts and unique gifts, we share our often-ordinary gifts of knowledge, skill, labour, and material goods. It means centring gift as a way of being in the world: of walking a giftway.

Mills, 2019, p. 72.

Mills observes that the Giftway model – centring the Creator’s original instructions to discern and make good use of our gifts– is analytically interchangeable with an Earthway model – centring natural laws that suggest the fundamental interdependence of all living things. Mills writes: “[t]he other way to think of the giftway is in the more proximate sense of the Earth and of natural law. In this way of thinking, in following the giftway we mimic the Earth” (2019, p. 74).

On each model the essential point is to respectfully live within the already existent organization inherent within the natural world. Mills terms this “the humility thesis,” an imperative which his work enjoins settlers to follow in lieu of continuing with their ontologically and evaluatively suspect conceptions of human independence and exceptionality.¹³⁹ For the Anishinaabe, living well requires fitting within already existing interdependent relationships comprising the Earth community, which includes the life-sustaining relationships between plants, animals, water, and other beings. Mills writes: “rooted societies strive simply to fit into the lawful, ordered, Earth community which always already is. For greater certainty, constituting community as a reproduction of the Earthway in which one is immanently rooted means annihilating any pretense of a nature/culture divide.” (2019, p. 76).¹⁴⁰ Thus, for the Anishinaabe, relationships of kinship are said to extend to all of creation – and in turn, our identities are said to be not just partly dependent on, but to be constituted by our relationships with all the elements of the human and non-human world. As our identities are constituted by others, freedom in part depends upon the ability to gift those to whom we stand in relationship in a way appropriate to the relationship, rather than to be able to simply choose and take whatever it is that we want. For the Anishinaabe, “radical interdependence” is the rule, in the sense that our very identities are thought to be composed of our relationships, and thus the demands presented by the needs of our kin, and self-sacrifice, bring real freedom rather than freedom-limiting external constraints.¹⁴¹

This does not mean that the use of the natural world is prohibited on the Anishinaabe

¹³⁹ From a certain perspective, the view that humans are independent and exceptional – ontologically and evaluatively removed from the world – seems much more controversial than the Anishinaabe alternative.

¹⁴⁰ James Tully has adopted this ethos in his recent work, stressing the imperative that the human species fit within the commonwealth of species and symbiotic living Earth systems as “a plain member.” See Tully, 2018.

¹⁴¹ Mills distinguishes liberal theories of interdependence – stressing our mutual dependence one another’s compliance with rules and cooperation to produce resources – from the radical interdependence of the Anishinaabe.

worldview—nor that this does not sometimes take the form of an instrumental use. As Mills writes, expanding the concept of person to include the intelligence, animacy, and agency of the non-human:

For the instrumental use that rooted persons sometimes make of one another is never made as of *right*, but rather as of *relationship*. Even as we use others, we regard them as persons with inherent interests, not as resources that exist strictly for our benefit. Thus, when humans honour animals and plants and meet the conditions of their recreation, these others often offer themselves up as gifts.

Mills, 2019, p. 86.

On this view, we can see that the non-human world is invested with a significance and importance that transcends instrumentalization, but which does not preclude its use. What is key in maintaining respectful relationships is reciprocating the gifts of other beings, and finding proportionality in one's relationships, such that in one's taking and giving of gifts, one does not merely instrumentalize the natural world, but acts in such a way as to enable the other's health and growth within its relationships.

In this vein, perhaps the most striking insight of Kimmerer's book, *Braiding Sweetgrass*, is that humans may benefit ("gift") the natural world—in addition to receiving gifts from it (2015). Not only is it the case that we can desist from harming the natural world through extractive development, but in good relationships with the natural world, we can make it better off than it would be without our intentional gifts. This is reflected in the Anishinaabe creation story. Sky woman drops down to a watery Earth and, with the help of animals who help to create solid ground, plants seeds which bring about an abundant forest; today, our planting of domesticated

vegetables and careful stewardship of wild plant species is a condition for their proliferation. Likewise, in regions where people harvest black ash in order to make traditional baskets, the black ash populations have been shown to fare better than in regions without this interaction (Kimmerer, 2015). In all these interactions we see a focus upon reciprocity: we nourish our bodies with corns, beans, and squash, but can also benefit them by enabling their abundant reproduction through stewarding of seeds and careful planting; likewise, we benefit from woven baskets but by thinning out the forest in a responsible way we can enable the sunlight to reach individual trees leading to healthier, sturdier ash populations. We can enable the nonhuman world to fulfill its responsibilities to us by fulfilling our own.

On the Anishinaabe worldview, we possess obligations to all of creation in much the same way as we possess obligations to fellow humans. This is reflected in respect for the unique contributions that natural elements make to interconnected relationships within which they are enmeshed – including those with us (Craft, 2013; Simpson, 2017). The appropriate form of respect is often gratitude – recognition of our giftedness – and reciprocity (as discussed above). However, there are further norms flowing from respect which embody reciprocity; for example, those embodied in the traditional Anishinaabe view of the honourable harvest – which requires that we take only what we need and use all that we take – and also that we receive consent from those from whom we take. For example, as Kimmerer describes, in harvesting a black ash, one might ask of the ash to take from it. And then one waits for a response – a sudden change in the environment, bark particularly resistant to cutting, or perhaps just a feeling of rejection all of a sudden. Then, although the norms vary, there are protocols for how much one can take of different species and under what conditions. Similar Indigenous practices of recognition and

respect of natural beings involve leaving tobacco or another substance as a gift for the harvested being (Kimmerer, 2015). These norms of attention to the ash embody respect for the particular element of creation, that is, substantial recognition of its intrinsic value as an entity, and moreover, on the Anishinaabe view, recognition of its agency and kinship relationships with us, shown, *inter alia*, through its generosity towards us. Rather than merely viewing the natural world as a site for use – the Anishinaabe worldview embodies recognition of the intrinsic value of natural elements and the necessity of respect in reciprocal relationships of gifting through such practices.

7.4 Non-neutrality about the intrinsic value of the Earth

What are liberals to make of the Anishinaabe worldview – (which scholars such as Mills contend are at the heart of Anishinaabe law) – when considering norms for the co-management of shared territories? One way of framing the predicament as discussed above is that the standards of liberal public reason require that values and principles exercised by political power be of a kind that are in principle shared by all: admissible values and principles for public justification are those that comprise either a consensus, such that we all have the very same reasons to favour a policy, or a convergence, such that we all have different reasons that nonetheless favour a policy (Vallier, 2011). The motivating idea of liberal neutrality is that it would disrespect plural citizens to force them to contribute to goods that they do not value – it would instrumentalize them or otherwise make them worse-off in order to service the particular interests of others. However, liberalism is committed to respect for the free judgement of diverse persons about what is personally valuable in life, and thus forced contribution to private goods violates norms of equal

respect for diverse reasoners who can reasonably disagree (see, for example: Lister, 2007). Thus, so says the classic liberal neutralist: the intrinsic value of the natural world is not such a value – people might disagree about the value of the natural world, and certainly among those who converge, their reasons for valuing beyond a limited set are massively different. Therefore, the intrinsic value of the natural world is inadmissible in public justification. It bears observation that the earlier literature was skeptical not merely about the intrinsic value of the natural world, but the capacity of public reason liberalism to justify any environmental policies whatsoever for these reasons.¹⁴²

The significance of neutrality comes to the fore in those cases where public affirmation or provision of a specific good would come at the expense of demeaning the reasonable judgments of other people by suggesting that they are invalid or not as weighty as those of others. This is a central and valuable liberal commitment. However, there are two intervening considerations here. First, as I sought to demonstrate in section 2, a rethinking of our current liberal “neutral” stance on the environment is required if we are to in fact uphold this liberal value and respect inter-group fairness considering disproportionate burdens on peoples with equal claims to reside within a territory. And second, neutrality among options in terms of state policy is desirable only when it is necessary to respect the conflicting judgments of diverse agents on a particular issue where disagreement is reasonable and some compromise or even-handedness in the provision of “elective” goods is impossible. But we should not immediately presume that when it comes to

¹⁴² Derek Bell (2002), following Rawls, observes that there are clear public reasons to manage and conserve ecosystems for human purposes such as enabling the long-run consumption of natural resources which are necessary for the maintenance of healthy human lives, the production of medical technologies, and the protection of minorities from environmental harms. Where public reason liberals disagree concerns the protection of the environment for, *inter alia*, specific (non-shared) recreational purposes, or for the sake of its own conservation.

every human good there will be interminable disagreement, or that the nature of every disagreement about the good is equally reasonable; it is possible that there is broad convergence between almost all worldviews that the natural world is valuable. As I argued in section 2, it may be unreasonable to deny that the natural world is intrinsically valuable, considering the broad array of spontaneous human natural attitudes towards the natural world that condition and explain our activities. Minimally, it is arguable that, upon reflection, more of us share these attitudes than those of us who do not. We can perhaps, on these two bases, consider going beyond liberal quietism about the value of the natural world.

There are additional reasons to be skeptical of the default political liberal position on the value of the natural world – namely, non-recognition of intrinsic value out of a purported concern for neutrality among controversial worldviews. Here I would like to suggest an analogy with Kymlicka’s argument for special rights for cultural minorities and Indigenous peoples. As Kymlicka argues, it is a conceit to think that the state can be culturally neutral: most states have, for example, a recognized public language, political institutions of particular parochial form, certain holidays and customs, and canons of reasoning and memory that are culturally inflected (Kymlicka, 1989, 1995). Thus, the denial of cultural recognition or accommodation to a minority group on grounds of “state neutrality” about culture is not a coherent view: the state is already culturally structured such that the default background privileges some groups over others insofar as it produces a context conducive to their meaningful choice. Likewise, the denial of recognition of the intrinsic value of the environment and the centring of a minimal set of shared use values privileges a particular group’s worldview and ontology, thereby denying voice to the claims of other groups. Insofar as the denial of the value of the environment (or, more specifically: the

judgment that this value must be indeterminate – *environmental agnosticism*) privileges the way of life and political correspondence interests of particular groups, it is decidedly non-neutral.

Liberal neutrality about the natural world is not, in fact, neutral in its assumptions or effects. As I have argued above, environmental agnosticism favours spiritual liberals and liberal capitalists to the detriment of reconciliation to the natural world and those who are committed to leading lives that respect its non-instrumental value.

Kymlicka's argument above is similar in structure to Aaron Mills' argument that the fundamental assumptions of the liberal constitutional order about the nature of persons, community, and freedom are presented as neutral by liberals while dominating and causing harm to Indigenous peoples. For Mills, these assumptions, including commitments about the nature of land and our fundamental relationships to it, are themselves decidedly non-neutral. Settlers will often describe Indigenous legalities and political systems as non-neutral, while ignoring that all legal orders rest upon deeper onto-evaluative assumptions. Mills writes:

To claim non-neutrality is to acknowledge that every constitutional order represents a positive project: it seeks to bring into being and to sustain a particular vision of freedom for its members. In so doing, it makes choices and eliminates possibilities. With sufficient time, stability, and the passing of generations, some of us forget how things might have been; the constitutional order we ended up with is naturalized, as if it has always been and as if no exercise of power is reflected within it. But trading out the self-acknowledging partiality of an Indigenous life way for the self-denying partiality of a settler one isn't an exit from the reality that every society has a political-philosophical foundation.

Mills, 2018, p. 146.

The non-neutrality Mills documents constitutes a form of violence to Indigenous lifeworlds and is directly relevant to the correspondence ideal at the heart of the collective self-determination

theory of territorial rights. Mills writes of the violence attending the imposition of deep settler ontological and evaluative assumptions on Indigenous governance and constitutional orders that:

[T]he violence it contemplates is to indigenous peoples' capacity to understand the world on our own terms and to organize ourselves accordingly. It's far more abstract than specific practices, which is what makes it difficult to identify. This kind of violence denies indigenous peoples our ability to speak and to live our truths, and over enough time, even to imagine our lives constituted within our own understandings of persons, freedom, and community.

Mills, 2019, p. 5.

According to Mills, the imposition of a settler liberal constitutional logic – in terms of the underlying assumptions about the nature of persons, community, and freedom, threatens Indigenous legalities and does violence to Indigenous people's ability to live according to their deepest conceptions about the world and the appropriate way of showing respect and managing relationships on and with a particular territory (2019, p. 61). From the above discussion of the centrality of certain conceptions of human – world relationships, I hope to have shown that shared governance standards which totally neglects the intrinsic value of the Earth is one example of a liberal norm that is fundamentally inconsistent with Indigenous values. As it is possible within the settler worldview to construct shared institutions and policies that reflect the intrinsic value of the Earth, for our own first-order reasons, and for reasons of fairness in apportioning the benefits and burdens of cooperation on shared territories, settlers ought to prevent this form of violence to Indigenous ontologies and values. This does not mean that settlers will necessarily have to adopt Indigenous ways of knowing, ontological assumptions, or evaluative traditions. Rather, this shared norm about the intrinsic value of the living Earth will allow a convergence onto policies for land use, harvesting, and development that themselves are

more consistent with the Indigenous worldviews centring kinship relationships than would be achievable without recognizing the intrinsic value of the Earth. In what follows below I discuss how we might institutionalize this value.

In this context, as I hope to have illuminated, there are general facts that support the view that the natural world is intrinsically valuable (good). That is, if the natural world warrants our pre-theoretical experience of beauty, awe, curiosity, and gratitude, then it seems to possess intrinsic properties that are good or that otherwise warrant these manifold attitudes. Intellectual traditions might cache out this intrinsic value differently—and perhaps that is where liberal neutralists should draw the line about endorsement of specific conceptions of the good or ontological conceptions of the world. However, that line for neutrality will be downstream of the current political position: *agnosticism about the value of the environment*, which omits or ignores salient aspects of our experience. We should aver to “neutrality” (the desire to avoid non-shared commitments the political adoption of which would disrespect plural ontological knowledges) after an initial “non-neutral” endorsement of the value of the natural world. This will have implications for land management that go beyond recognizing human use interests, which include our interests in scientific research, land-based communities, and enjoyment of nature.

Now certainly, the way this intrinsic natural value gets specified by different traditions and groups will vary. However, of significance in addition to the convergence for first-order reasons is that the relaxation of neutrality on this principle at the abstract level will allow more neutrality at another level. One way of putting it is that by being non-neutral at the higher-order abstract level of principle – e.g. by admitting intrinsic value – we can then be neutral among the distinct

conceptions of this value – or at least strive for fair political compromises for populations that must coordinate according to shared political principles. This situation seems fairer – it brings on board a principle recognizing a substantive good (albeit one with cross-cutting support among distinct groups), but in so doing it opens up room for the voice of systematically marginalized groups, and for decision-making to reflect their values, not merely the values of spiritual liberals or liberal capitalists (the long-run beneficiaries of “faux neutrality”).

For example, from the short description of an Anishinaabe way of being in the world, we can discern a radical alternative to the liberal ontology – including relational theories of territorial rights – which view the natural world as a repository of use-value and otherwise as a space for the agency of individual humans and groups in their relationships and activities. For the Anishinaabe, we come into being among already existing interdependent Earth systems which themselves are comprised of elements with intrinsic value, animacy, and agency. And from the above, we can see that recognition of our interdependent rootedness takes the form of practices embodying respect and reciprocity. For example, the norms of consent discussed above demonstrate a commitment to respecting valuable non-humans: by addressing the non-human as a being fit for consent, the Anishinaabe, *inter alia*, recognize the intrinsic (e.g., non-instrumental) value in the being. Similarly, the practices of the honourable harvest, which prohibit wanton destruction of non-human beings, embodies recognition of the value of non-human beings. Certainly, these norms suggest further beliefs – in the animacy and agency of nonhumans – however minimally, they suggest a way of being in the world which decentres the human as the

locus of all value.¹⁴³

There is thus a strong possibility for a convergence on *the intrinsic value of the natural world*; ontological neutrality becomes necessary for legitimacy only downstream of this convergence. As I have argued, as liberals we have reasons from our reactive attitudes to the natural world, and a concern for non-domination and fairness among diverse groups, to relax the neutrality position on matters pertaining to the value of the natural world. The Anishinaabe likewise have reasons to converge upon the intrinsic value of the natural world: their worldview and practices depend upon and embody, inter alia, this belief. However, beyond this point, in terms of the foundational justification for this norm, we approach deep ontological disagreements and are in danger of disrespecting a majority of subjects by adopting a single decisive political explanation one way or the other. From my experience, settlers, generally, are wary of seeking consent from plants, and are skeptical that mountains have animacy or agency. Similarly, Indigenous people might think that the reactive attitudes I have discussed as grounds for believing in the value of the natural world are yet another instance of use-value and human-centrism. However, there are still good reasons to converge upon *this norm* from the perspectives of both sides, and we may specify, in a way that should be acceptable to both groups, the policy implications of this convergence. More discussion, mutual-learning, and evolution of our theories is likely to attend recognition of this fundamental norm.

¹⁴³ Importantly, much of this radically different worldview rests on facts we can all observe and agree upon—they are simply being interpreted and evaluated in a different way. Where the liberal ‘neutral’ view focuses on the potential for scarcity in the world, the Giftway emphasizes the actuality of abundance that is constitutive of that same world. The liberal capitalist attitude of lack, and desire to maximize utility is directed towards the same reality which, on the Anishinaabe interpretation, is replete with gifts, offering us more than enough. Entitlement, here, is contrasted with stewardship. We ought ask ourselves: which of these sorts of interpretations serves, and whom? Which is truer to our experience?

One way to specify the political import of the proposal to recognize the intrinsic value of the Earth would be to establish a mild conservative bias towards maintaining the integrity and composition of existing ecosystems in the face of the possibility of achieving marginally more instrumental value for humans through development. This mild bias would not preclude development entirely; however, it would raise the bar on the amount of prospective value to be achieved by a development that would be required to justify fundamental alterations to the living Earth systems in a place.¹⁴⁴

There is an analogy here to G.A. Cohen's value conservatism (2012). This is not political conservatism of the normal kind, but rather a bias in favour of existing value. I take it that the conservative bias, which for Cohen is grounded in the special value of things to which we are attached, recognizes that the value of an object can go beyond its value as a functional instrument to our own ends. That we already have a relationship to some repository of value (an object) gives us reason to prefer it over new alternatives that would realize an equal amount of value but would require destruction of the old thing. The analogy is not perfect, as Cohen's view may depend upon something like a cognized relationship with the object in question to establish the special reason for its preservation. Two things are worth attention here. Many settlers may not have relationships of the kind in question with the natural world, so the analogy to Cohen's

¹⁴⁴ The conservative bias is to be distinguished from epistemic humility when anticipating the value of modifications to the Earth. Epistemic humility requires that, when we are somewhat uncertain of the likely consequences of a specific intervention into an ecosystem, we should somewhat discount the prospective value of a proposed intervention in our deliberations about whether to make the intervention. Likewise, it is to be distinguished from particular human attachments to or uses of particular places that are for some reason non-substitutable. In these cases, some object or place has a functional form that is irreplaceable yet depended upon by an agent. Depriving them access to the particular thing would prevent them from exercising a valuable capability or maintaining a special practice because they can only do it with that thing. Epistemic humility and attachments of this kind must also factor into deliberations about land management, however I distinguish them from the intrinsic value of the Earth specified in terms of a mild conservative bias in favour of preserving existing healthy ecosystems.

conservatism is limited in grounding a reason to block intervention in the natural world – although, many do in fact recognize their relationships of this kind. However, second, assuming we can still understand the *intrinsic* value of the Earth as similar in structure to Cohen’s conservative bias in favour of existing value, independently of any cognized relationship among settlers to specific parts of the natural world (to which they may very well be related in actuality), this “bias” or “preference” in favour of existing value is still not absolute – in fact, it could vary in weight.

For example, it may be appropriate to change or destroy existing things of value if we could produce something of much more value. We might cut down a small section of trees in order to build a large apartment building for refugees in a crowded city. However, the conservative bias suggests, on the most minimal interpretation, that we ought not to destroy something of value x in order to produce something of equal value x . Even assuming there is no financial opportunity cost or negative impact to human health, we ought not to cut down a park in order to build a parking lot that will service the equally important recreational ends of the exact same number of people who formerly used the park for recreation. We ought instead to conserve the existing value of the ecosystem: the lives of the plants, trees, flowers, liminal animals, and so forth that peaceably interrelate in the green space. However, a conservative bias might also say that mild improvements on existing value are also not sufficient reason to destroy existing value. It is this position that I hold here – attempting to strike a balance between settler and Indigenous ways of relating to the natural world for the sake of land management institutions. Thus, even if we could anticipate a mild improvement in wellbeing from cutting down a greenspace, to, for example, build another football field in a town with one already, we ought not to do it—even if

the financial opportunity costs and environmental impact measured in terms of physical human wellbeing or resource planning are negligible, and we are certain there would be a mild improvement in recreational wellbeing for some people.

While I do not necessarily endorse the conservative bias wholesale, and have articulated its limits as an explanation, I think Cohen's concept can help us understand the concept of the intrinsic value of the Earth in terms that are shareable – or at least initiate the discourse. We will slightly raise the stakes of development – giving some weight, that must be accounted for, to the intrinsic value of the Earth, in addition to the instrumental functions it serves for food production, medicine, recreation, carbon capture, and so forth (which count with independent weight for preserving the environmental status quo or in favour of some modification). Whether or not some intervention is justifiable will come down to the facts, that is, how important the proposed intervention really is to enable humans to live well, but we should recognize the value of the existing plant and animal life in a region before charging forward with developments.

Conclusion

This chapter is by no means exhaustive in its description of the legitimacy conditions of land management institutions for shared Indigenous and settler territories. There are certainly additional constraints on legitimate decision-making about land management for shared territories, including respect for the subsistence rights and occupancy rights of present inhabitants, the rights of future generations, the climate stabilizing functions of certain regions. A complete theory would also require the development of a theory of fair compromise on land use

practices between distinct nations when cherished practices themselves are inconsistent— this requires additional work that goes beyond the values and constraints here. In this chapter I have focused on just one particularly difficult issue for co-management – one which may often be at the heart of Indigenous alienation from environmental planning institutions.

By recognizing the non-instrumental value inherent in ecosystems, forests, lakes, grasslands, animal populations, and so forth, we establish a mild bias in favour of maintaining the environmental status quo when ecosystems are healthy – eschewing the opportunity to develop land further for only relatively mild gains in human wellbeing in the grand scheme, and otherwise raising the bar developments must meet in order to be justifiable. Settlers can understand the rationale for giving weight to the natural world in its own right according to different explanations, even if they are unable to appreciate the Indigenous kinship-based approach – for example, they can understand the rationale for the mild conservative bias in terms of sustaining the intrinsic good of the natural world, this living thing that warrants praise of beauty, awe, curiosity and gratitude. What is key is that we establish something like recognition of the intrinsic value of the Earth within land management institutions to prevent settler and Indigenous alienation from the Earth, one another, and their shared political institutions in shared territories. The legitimacy of land co-management institutions thus depends upon their recognition of the intrinsic value of the Earth. While I do not think I have determinatively specified the weight of this value or how exactly it factors into deliberation, I think it important to recognize its existence, and how it might plausibly intersect with settler and Indigenous worldviews. Ultimately, recognition of the intrinsic value of the natural world should pave the way for more productive mutual learning and negotiations among settler and Indigenous

representatives on land management boards. The specific form of co-management institutions in particular contexts, and the particular articulation of this value in relation to policy, must vary according to the intercultural dialogues of particular places.

Chapter 8: Indigenous Communities that Straddle Borders

The arguments presented thus far throughout the dissertation have considered the requirements of legitimacy in Indigenous – settler relationships while largely presuming a single state context; however, as I demonstrate in this chapter, there are important requirements of legitimacy in decolonizing settler colonial contexts that flow from the imposition of international borders and border practices on Indigenous peoples by two or more colonial states. The imposition of colonial borders and border regimes has significantly impacted the occupancy rights and self-determination interests of Indigenous communities whose traditional territories were partitioned by colonial states. In turn, legitimate political authority structures in multi-national contexts will have to recognize a set of special rights held by Indigenous peoples to freely occupy and govern geographical regions straddling multiple states if they are to be non-dominating and legitimate. While the arguments within the chapter should be of direct relevance to non-Indigenous non-state nations that straddle borders, and should also illuminate the limits of existing treaty negotiation practices internal to states insofar as they partition communities internally along provincial boundaries, the chapter primarily aims to contribute to the discourse on Indigenous territorial rights and decolonization by focusing on the issues that arise for Indigenous communities bisected by multiple colonial states.

In order to make this argument, the chapter examines two illustrative cases, employing the method of recursive theory construction defining Grounded Normative Theory (GNT): the Mohawks of Akwesasne, whose traditional territory and currently recognized areas span Canada (Ontario and Quebec) and the United States (New York state); and the Tohono O’odham, whose

homelands are in both Sonora, Mexico, and in Arizona, U.S.A. I argue that it is sometimes morally required to accord a wide set of special rights to Indigenous peoples in these circumstances in the context of a multinational federal system.

To make this argument, some context about the two Indigenous peoples that I focus on is necessary. With historic homelands in the Mohawk Valley of New York, the Mohawk today have eight communities throughout Ontario, Quebec, and New York (Hoover, 2017). Situated at the nexus of these borders, Akwesasne is the capital of the Mohawk Nation and home to approximately 13,000 Mohawk people. Subject to the de facto jurisdiction of two countries, three provinces/states, two (historically forcibly imposed) state-recognized Indigenous governments, a traditional government grounded in the pre-contact clan system, and crosscut by variable allegiances with the wider Haudenosaunee confederacy of which the Mohawk are a member, the territorially contiguous yet politically divided Akwesasne has been described ‘as a jurisdictional nightmare’ (Hoover, 2017; Kalman, 2021). As I will explain, the international border has had deleterious effect on the lives of the Mohawk people, even with some currently recognized differential movement rights.

The second group that I will consider is the Tohono O’odham who live in communities in both Southern Arizona and the Sonora desert on the Mexican side of the border. Like the Mohawks, their lives have been greatly impacted by the creation of colonial state borders. In 1853, the Gadsden Purchase drew the international boundary between the United States and Mexico through the traditional Tohono O’odham homeland in Arizona and the Sonoran Desert (Meeks, 2020, p. 642). In 1917, a large reserve for the Tohono O’odham was created in Arizona, with its

territorial limits at the Mexican border (Meeks, 2020, p. 642). While the Arizonan Tohono O’odham have had recognition of a special status under American Indian law for well over a century and have gained progressively stronger powers for self-government on their Arizonan reserve, the policies of the Mexican government towards the Sonoran Tohono O’odham, as with other Indigenous peoples, have had markedly different consequences. The border, I will go on to show, has had a significant negative impact on the social and political life of members north and south of the border, especially on group cohesion.

This chapter is structured as follows. First, it will situate the interests, rights and claims of these two Indigenous peoples (and by extension similar Indigenous groups) in the wider territorial rights literature drawn upon throughout this dissertation. I re-iterate the argument presented in the first chapter that, for structures of political authority to be legitimate, they must be legitimate over a particular geographical domain (a territory). The chapter will then move to discuss particular incidents of territorial rights – focusing on rights of movement and return; management of border crossing sites; rights to determine group membership; and jurisdictional rights – to show that the failure to adequately recognize Indigenous people’s special rights has had harmful consequences for Indigenous groups in this situation. I argue that the requirements for protecting occupancy and self-determination interests in particular cases justify claims to specific incidents of territorial rights, an analysis which relies on how state authority impacts the legitimate interests of Indigenous people. These are group-differentiated, or special rights, because the underlying interests apply to Indigenous peoples in these circumstances and not in general. Finally, I respond to two lines of critical questioning in relation to the theory constructed within this chapter. The first questions how the discontinuity of Indigenous nations’ territories

should be reflected in the construction of complex multinational political arrangements. The second considers why the right to construct unified cross-border institutional structures is framed conditionally, as a right entitling Indigenous nations in this situation to construct such structures *if they choose*.

8.1 Territorial rights theory and border-straddling communities

Recall that after years of focusing on the justification of the state's political authority over its members, theorists have turned to a separate question: what justifies the state in exercising political authority over its territory, its geographical domain? This is an important question, since many disputes concerning political legitimacy (boundary disputes, secession) are not primarily about the relationship between state rules and their justifiability to abstract citizens, but about the geographically demarcated region in which the state rightfully exercises authority (that is: the territory). Territorial authority is usually conceived in terms of a bundle of different incidents of territorial rights: rights of jurisdiction, rights to control borders, rights to use, access and control resources within a territory, and rights to live in a place and to return there (Espejo, 2020; Miller, 2012; Moore, 2015; Nine, 2022; Simmons, 2016; Stilz, 2019).

On contemporary accounts, arguments for state authority are grounded in an argument about the moral relation between people and place, thereby explaining the geographical domain of political authority. There are now a variety of competing accounts of this relation (Espejo, 2020; Miller, 2012; Moore, 2015; Nine, 2022; Simmons, 2016; Stilz, 2019). Recall that this dissertation adopts a position within the liberal branch of theories centring the concepts of occupancy rights and

collective self-determination, drawing most frequently on the work of Margaret Moore and Anna Stilz, in dialogue with Indigenous theorists (chapter 1).

Like the other theorists of territory, Moore and Stilz commonly appeal to the idea that people have place-related moral rights in order to provide an explanation of legitimate political authority over territory. First, there's a right of residency, which is a right that attaches to individuals and involves 'a right to remain, at liberty, in one's own home and community, and not be removed from the place of one's projects, aims and relationships' (Moore, 2015, p. 36), or from their 'located life-plans' (Stilz, 2019, pp. 40-5). This right explains the wrong of removal, a wrong that was frequently perpetrated against Indigenous people in the formation of settler-colonial states like Canada and the United States, because they were unjustly displaced from lands on which they depended to maintain their projects and relationships (Moore, 2019, p. 153). If we accept residency rights then it's clear that when an individual has been unjustly excluded from land on which they have a right to reside, they must have a right to return (Moore, 2019, pp. 141-6; Stilz, 2019, p. 52).

The central justification for residency rights is that individuals have fundamental wellbeing and autonomy interests to live in a particular place without the threat of expulsion, because living in a particular place is a background condition for living one's life, for making plans and projects, and for having relationships with other people. We are all physical beings who take up space, and we develop relationships, projects, and attachments by residing in a particular geographical locale (Moore, 2015, p. 38). We reason on the basis of a background assumption of continued access in order to plan meaningful and flourishing lives. To disrupt this expectation of continued

access would be to disrupt the agent's long-term planning of their life and their pursuit of substantive wellbeing-promoting projects, threatening their autonomy and flourishing over time.

In order to fully understand the interests underlying occupancy rights, we must also look at the specificity and particularity of our relationships and projects – the wide variety of familial, vocational, religious, economic, and political relationships and practices that make up our lives – in light of our social, political, linguistic, and cultural identities, which cluster and overlap in place, and which are the context for meaningful choice (Kymlicka, 1995: pp. 75-106; Nine, 2022: pp. 105-24). Alternative options may be unintelligible or lack meaning for us (Kymlicka, 1995), or otherwise fail to instantiate the value of established relationships for people, who form intimate bonds with particular others (Moore, 2015: pp. 64-5). In Stilz's terminology, we may not be able to "reflectively endorse" another such set of located relationships and plans than those afforded to us by living within our occupancy region (2019). We may be attached to them by virtue of our earlier, perfectly legitimate choices, and our social, cultural, or political identities which are rooted in a particular place.

We also need to access resources, and these too are place-based. Thus, residency rights also include rights to access and use basic resources like food, shelter, and water, and economic opportunities (Moore, 2015; Nine, 2022; Stilz, 2019). The right of residency is distinct from liberal rights to private property; individuals have residency rights even when they don't own property (Moore, 2015, p. 39; Stilz, 2019, p. 35). While this chapter does not consider resource rights in detail, it should be clear from the arguments throughout that reliance on particular resource domains that straddle international borders grounds a right of Indigenous community

members to cross borders and access resources (see also Nine, 2022).

While residency rights are individual rights, in the sense that they attach to individuals, as Moore writes: ‘individuals have collective identities... and these are integral to their sense of who they are, and their collective aspirations as members of these groups are an important part of their lives’ (2015, p. 40). In many cases, individuals are attached to place by virtue of their membership in a group with which they identify (Moore, 2015). We are not connected to place merely by living there and pursuing our own isolated projects, but by virtue of our sharing in the common life of a group, the network of place-based practices, traditions, and institutions that are intelligible to us and upon which we depend to realize our autonomous agency and wellbeing. It is for this reason that individuals ‘see themselves as members of groups which are attached to specific areas, specific bits of land, which form an important source of the group’s identity’ (Moore, 2015, p. 40).

Thus, in addition to individual rights to reside, there is a *collective* right of occupancy held by the *group*. This is not accepted by all territorial rights theorists (see Stilz, 2019, pp. 53-55), but serves an important explanatory function. While occupancy rights give groups similar rights of non-dispossession and rights of return as individual residency rights, they are ‘not merely an aggregative form of individual residency rights’ (Moore, 2015, pp. 36-46). Group occupancy rights serve to specify the *domain* of individual residency rights, to identify the geographical area to which the group members have a right to return if they are displaced (Moore, 2015, pp. 36-46). Group occupancy rights also provide the basis for a collective right of control over the geographical area in which a people live (2015, pp. 36-46). By maintaining a political order

together to manage the shared conditions of their lives which reflects their shared political identity, the residents of a place are able to experience a unique “collective dimension” of autonomy (Moore, 2015: 65). By comparison, for Stilz, the aggregation of individual residency rights grounds the territorial rights of *a people* over the areas the members individually legitimately reside. Provided the inhabitants reasonably reflectively endorse the relationships of political cooperation through which they sustain territorial political institutions of a specific form, and those institutions meet requirements of basic justice, they can experience the coercive nature of law as self-imposed and an extension of their own agency, rather than as a source of alienation (Stilz, 2019: 107).

Residency and occupancy rights are theoretically compelling, because they underlie key elements of contemporary western political theory (e.g., state control over territory). To justify state territory, we must examine the relationship between the people and place. However, the above discussion suggests that the model for territorial rights should not be that of a unified state controlling a homogeneous territory, but a landscape potentially composed of different communities, having different kinds of interests in place, and different kinds of relations with each other, which any structures of political authority should recognize and protect.

Indigenous peoples are often a paradigmatic example of occupancy groups that lack full state territorial rights but that nonetheless have moral rights to territory. Indigenous peoples have strong group-based collective identities, demonstrate the willingness and capacity to maintain collective self-government together (but usually not through a state), and maintain enduring and legitimate relationships in and with their land. This may be evidenced in many ways. For

example, in the cases under consideration, this is evidenced by the continual refusal of many Mohawk people to carry Canadian and American passports to cross the U.S.-Canada borders, thus signalling their commitment to Akwesasne as a sovereign nation with authority to traverse their own territory, unimpeded (Simpson, 2014). The Tohono O’odham, too, have also asserted their right to cross the border at will, for social, cultural, economic and religious purposes, and have mobilized to include in their community people on both sides of the border. More broadly, each community has demonstrated the sustained willingness and capacity to make law and administer various functions of government through their own political institutions.

As we can see on the theory constructed above, the territorial rights of Indigenous groups are justified by the relationships of the members of a people with one another and with place. This is a theory of inherent rights, insofar as it claims to identify the facts that morally justify rights to govern territory, and these facts are first-order facts about communities themselves, rather than facts about the relationship between the community and some entity with the supposed higher-order power to delegate the right of self-government. In other words, the territorial rights of settler and Indigenous communities are both justified at “the same level” – namely on the basis of facts about their occupancy and self-determination interests.

In this regard, it should be observed that the conception of occupancy rights adopted here partially overlaps with Indigenous conceptions of land which conceive of land as a “system of reciprocal relations and obligations” (Coulthard, 2014: 13). As I argued in chapter 1, both conceptions forgo treating land solely as a resource for achieving subsistence or producing commodities, and instead centre the valuable relationships people have with each other and the

natural entities in a place when analyzing our moral duties in respect of place. However, it should be recalled that the theory constructed by liberal theorists of self-determination is not identical to Indigenous ontologies and value traditions, which often conceive of relations with land as taking the form of kinship relationships structured by logics of gift, gratitude, and reciprocity that extend to the more-than-human world (Mills, 2017; Tully, 2018; L. Simpson, 2017). As I have argued in chapters 4, 5, and 6, this logic should be embraced in the ethos of multinational federal states, insofar as we should strive for these unions of peoples to embody the value of interdependent self-determination among relationally-defined nations. However, it may not be possible to fully instantiate Indigenous logics of kinship grounded in robust cosmological conceptions in all their deep particularity in all public policy decisions for shared territories at risk of alienating settler populations (chapter 7). Nonetheless, the connection between rooted Indigenous value systems and the political autonomy of Indigenous people is central to the justification of Indigenous nations' territorial rights in exclusive zones of jurisdiction, and places limits on the exercise of power in shared regions (chapter 7). By having "control" over place, that is, respect for the people's rights to make law for the territory through their own institutions by other peoples, the members of Indigenous communities are able to govern their lives together according to ontological and normative conceptions that reflect the deeply held shared beliefs and commitments developed by living together in and with a place over time.¹⁴⁵ This in turn enables the members of the people to realize a robust form of political agency as they cooperate to maintain political institutions.

¹⁴⁵ The opposite of "territorial control" on my use is the subjection of (Indigenous) legal orders to arbitrary interference by other peoples. The concept of "stewardship" may better reflect the values animating Indigenous governance, but "control" captures the dimension of inherent political authority and the possibility of a veto capable of defeating governance claims by other agents.

Why adopt the language of “special” or “group-differentiated” rights if these are inherent rights, grounded in Indigenous occupancy rights and the importance of Indigenous value systems for Indigenous peoples’ political autonomy? My contention is that the language of “group-differentiated rights” or “special rights” captures an important aspect of how inherent Indigenous rights are implemented in practice – namely in relationship to other groups, with their own unique bundles of jurisdictional rights, within a complex federal political order. Indigenous communities may have a unique bundle of rights that may not be held by other territorial residents or groups within the overarching political context of a federation of peoples. Their rights, compared to other citizens and communities within the state are different – differentiated from the total bundles of rights possessed by other citizens and communities.

Recall that most Indigenous peoples do not demand a right to constitute independent states but claim bundles of jurisdictional rights and responsibilities within multinational federal orders premised upon treaty relationships between settler and Indigenous peoples (Henderson, 1994; Ladner, 2005; Mills, 2017). This literature understands Indigenous rights to be inherent, entitling Indigenous and settler nations to spheres of exclusive and shared jurisdiction within a complex federal order. The territorial rights theory under examination can guide our thinking about the inherent territorial rights of Indigenous communities in such multinational associations in particular cases, complementing Indigenous theories of treaty federalism and the arguments within chapters 4, 5, and 6. As I will show in the following sections, the justification for specific inherent rights to spheres of exclusive and shared jurisdiction over cross-border regions can be understood through an analysis of the occupancy and self-determination interests of particular communities. I will focus on three specific bundles of rights, which are of key importance in

transboundary cases: individual rights to cross borders and collective rights to co-manage border crossings; rights to determine group membership; and rights to collective self-government as an integrated jurisdictional unit intersecting with separate states.

8.2 Rights to cross borders and co-manage border crossings: the Mohawks of Akwesasne

Because the Mohawk homeland is divided by the Canada – U.S. international border, it is usual to view it as comprised of at least three relevant ‘segments’ for the purposes of discussion of how the border affects their daily lives: Cornwall Island (ON), Hogansburg (NY), and St. Regis village (QC). On the Canadian side of the borderline, there is a Cornwall Island (exclusively in Canadian territory), home to several thousand residents, many of whom are Mohawk. The Seaway International Bridge spans Cornwall Island on both the north and south sides. On the north end of the north span of the bridge near on the Canadian mainland in the city of Cornwall, is the present location of the Canadian port of entry. The port of entry (POE) was moved from the south end of Cornwall Island in 2009 following a massive Mohawk protest of the arming of Canadian Border Services agents. On the south end of the south span of the bridge on the American mainland is the American POE. The borderline runs right through the territory on the south side of the St. Lawrence River: driving east from American POE, one is nominally in New York state and the main ‘American’ segment of Akwesasne Mohawk territory. Once one reaches the middle of the territory (approximately the village of Hogansburg, NY), if one drives north, one will find oneself in St. Regis Village (Quebec). In this relatively dense Mohawk community, the border runs in such a way that some people have ‘a front door in one country and a mailbox

in another’ creating a variety of challenges for residents and visitors who often cross the border daily at various points (Kalman, 2021, p. 42).

The interests that the Mohawk have in being able to access all parts of their territory was recognized historically. Following the American revolutionary war, through the *Treaty of Amity, Commerce, and Navigation* (otherwise known as the Jay Treaty) of 1794, Britain and the United States agreed to recognize the rights Indigenous people to freely cross the colonial border and to be exempt from paying customs duties on the transport of goods across the borderline. These provisions were upheld in the Treaty of Ghent (1814) following the War of 1812, and the United States continues to recognize the rights of Native Americans in Canada to cross the border, to reside in the United States, to receive services, and to work within the United States without the legal requirement to receive a visa, or ‘green card’ (Osburn, 1999, p. 478). The customs exemption, however, has been found by the U.S Courts in several cases to be superseded by statute laws pertaining to customs (Osburn, 1999, p. 478). While the Jay treaty has never been formally ratified by Canada, Canada similarly recognizes Indian Status Cards as proof of identification at its POEs. Notably, by a remission order in 1991 by the Canada Border Services, Mohawks in Akwesasne are exempt from paying custom duties on goods for personal use – such as groceries, and sports equipment – although they are not exempt from reporting the goods they import, or paying duties imported for trade (Kalman, 2021, p. 95).¹⁴⁶

The theory of occupancy rights offered in Section I explains why recognition of a special

¹⁴⁶ This has not stopped the “illegal” import of goods such as cigarettes—which many in the community contend is not illegal at all.

movement right through international treaties is required. The Mohawk occupancy region, an interconnected web of kinship, cultural, spiritual, vocational, and political relationships and plans, extends over the international borderline. Because Mohawk people have a right to access their occupancy region, and because it is bisected by an international border, they have a special right, flowing from their identity as Mohawk, to cross the international border. However, although the current situation recognizes a differential rights regime grounded in recognition of treaty rights, the current form it takes has a deleterious effect on the cohesion of the Mohawk community and on individual interests in maintaining relationships and life-projects.

Consider the challenges presented by reporting-in requirements and the location of ports of entry. Indigenous persons travelling from the north end of Akwesasne (St. Regis Village, Quebec) to the south side of the territory (around Hogansburg, New York State) need not report their crossing of this interior border to border services agents (Kalman, 2021, p. 132). However, there is nonetheless a practice by U.S. border control of requiring *non*-Indigenous persons, each time they cross the ‘interior border’ from St. Regis village (Quebec) into the American part of the reserve to drive 9 km to the U.S. POE to ‘report-in’ – even if they have done so in the past hours and are merely doing business around Akwesasne (Kalman, 2021, p. 131). Kalman writes that these ‘reporting-in’ requirements for non-Indigenous people discourage trade, non-Indigenous visits, and create barriers in Indigenous – non-Indigenous relationships (Kalman, 2021, p. 132).

Most seriously for Mohawk residents, since 2009, the location of the Canadian POE renders the residents of Cornwall Island in a unique position. The island is the borderline's only ‘mixed traffic corridor,’ containing travellers from the American mainland that have entered a relatively

spacious and inhabited area of Canadian territory before physically encountering Canadian Border Services (Kalman, 2021, p. 119). The POE was moved from the south end of Cornwall Island in 2009 following the Mohawk protest. The permanent relocation of the POE to Cornwall has resulted in more delays for many Mohawk residents than the previous location at the south of the island. This is primarily because one may no longer simply leave Cornwall Island for the Canadian mainland without having to present oneself to the Canadian POE—even if one has not passed through the United States but came to Cornwall Island from Canadian territory. This is a significant inconvenience for Mohawk residents of Cornwall Island, especially those who work, shop, or have social relationships in Cornwall.

As evident in both the Mohawk case, and the Tohono O’odham which I discuss below, the ill-informed selection of ports of entry and the vulnerability of traditional crossings to state decision-making about border policy can have deleterious consequences on the day-to-day life of residents in terms of their ability to carry out place-based projects and central relationships. I argue that these situations suggest a special claim of Indigenous peoples to co-manage border policies in their occupancy regions. The Mohawk uniquely rely upon the crossing in the Cornwall region and, in virtue of their shared community life straddling the border, possess a special vulnerability in choices about the locations of the port of entry. Thus, the Mohawk have a serious interest in determining the location of this life-shaping institution (the POE) when there are feasible alternatives. Whether this interest amounts to a right to decide to locate a POE in a particular place is limited by whether the range of possible decisions would disproportionately impact the lives of others, such as the interests of the wider Canadian state community in territorial security, the prevention of smuggling, and limiting monetary costs. Nonetheless, there

may be a range of permissible decisions within these limits, where the choice is correctly taken by the most directly and systematically affected (Indigenous) community.

For similar reasons, Indigenous communities that straddle borders may have serious interests in the specification of reporting-in requirements on their territories when there is no POE at the borderline, and thus they may have special rights to enhanced consultation or to decide on whether and how to implement reporting-in policies for Indigenous and non-Indigenous persons on their territory. Recall that the village of St. Regis (QC) is virtually a territorial enclave of Canada—it is impossible to access much more Canadian territory than the village itself when one crosses north into St. Regis Village (QC) from the St. Regis Indian Reservation (NY) due to the physical constraints imposed by the St. Lawrence River which runs west and east hundreds of kilometres directly north of the village.¹⁴⁷ In cases such as these, we can see grounds for a decisive interest of the Indigenous nation in determining the ‘reporting-in’ policies on reserve. While there is no POE any longer at St. Regis Village, there formerly was a Canadian operated booth. And while Indigenous persons in Akwesasne are exempt from ‘reporting-in’ back to American authorities several miles away about their crossing of this internal borderline, the current policy requires non-Indigenous persons to ‘report-in.’ The possibility of states creating additional requirements renders Akwesasne Mohawk vulnerable to further state incursions into their day-to-day lives. There may be important reasons for the Mohawk to desire a non-Indigenous reporting-in requirement. However, as with the location of the POE, this decision

¹⁴⁷ In these matters, geographical facts are central to identifying feasible and proportionate options for choice. The fact it is an enclave is significant to demonstrating the lack of a greater national security interest in regulating movement here—if it were not an enclave, then a POE either within the reserve or on its borders might be justifiable.

properly rests with the Mohawk, as it is primarily their community and relationships with outsiders that are most affected, and they have an interest as a community in shaping their internal and external relationships through their own institutions, values, and choices.¹⁴⁸

Therefore, in addition to seeing the specific grounds for special Indigenous rights of movement through their traditional occupancy regions, we can also see grounds for normative rights-differentiation in the unbundling of state territorial rights relating to border policy. The interests underlying a special right to cross borders, e.g., individual residents' constant dependence on crossing to maintain their central plans and relationships, suggests also a special interest of the border-straddling community in choosing the location of ports of entry that they uniquely rely upon and in choosing reporting-in requirements in some cases. These differentiated rights to incidents of the powers of territorial authority flow from their serious and unique vulnerability as a unique border-straddling community to the location of ports of entry and reporting-in requirements. Without special consideration of this kind, the movement right may not be adequately protected—it may, for example, be arbitrarily limited by state decision-making; and, in addition, the members' related self-determination interests in shaping the conditions of their lives together as a distinct group may also be arbitrarily limited by a state claim to unilateral authority in the selection of border policies (see section IV below).

¹⁴⁸ An objector might contend that Canada or the United States has overriding interest in regulating this internal boundary due to the highly lucrative smuggling trade which has extended from cigarettes to illicit narcotics and people. However—there is no way to cross over from St. Regis to mainland Canada (or back) without crossing the St. Lawrence River. The river and the Cornwall POE are likely to be the most pertinent places for smuggling and each could be collaboratively controlled without further regulation of the internal borderline.

8.3 Maintaining communities in a bordered world: the Tohono O’odham

This section discusses the Tohono O’odham experience, whose land is dissected by the U.S. and Mexican border, and their struggles to maintain relationships across that border, with each other and with place. As I argue below, this coercive state authority, in addition to impairing access to relationships and plans, can threaten the very existence of cross-border Indigenous relationships and the integrity of Indigenous border-straddling communities altogether.

In 1853, under the term of the Gadsden Agreement, the United States agreed to pay Mexico \$10 million for a 29,670 square mile portion of Mexico that later became part of Arizona and New Mexico. This Agreement severed the territory (and the relationships) of the Tohono O’odham people. The international boundary line between the United States and Mexico went straight through the traditional Tohono O’odham homeland in Arizona and the Sonoran Desert (Meeks, 2020, p. 642). At present, there are about 34,000 enrolled members in the Arizona-based Tohono O’odham Nation, and almost one-third (approximately 10,000) Tohono O’odam reside on the 11,240 sq km Indian Reservation which extends 62 miles along the border. On the Mexican side, approximately 2,000 Tohono O’odam people now live south of the reservation in small villages and urban areas (Meeks, 2020, p. 644).

As with other early colonial borders, the creation of the Mexican – American border originally had limited impact on Tohono O’odham movement, as they could cross without observation for a variety of social, cultural, economic, and religious purposes. However, the imposition of the stronger border enforcement policies since the 1970s – first to combat drug smuggling, then

illegal migration and the war on terror – risks both further disrupting the lives of Tohono O’odham, and, as we will see, has severely challenged the unity of the group on both sides altogether.

While there are several official border crossings throughout southern Arizona, traditional border crossings, along with “border gates” (informal border crossings actively monitored by U.S. Border Security) have long been relied upon by Tohono O’odham people to live out their lives (Luna-Firebaugh, 2002; Neustadt, 2017). In recent years, these border gates and traditional crossings have been cut back—with one of the last, the San Miguel Gate, closing due to the construction of a barrier by a private property owner south of the border (Wiles, 2019). Even when the border gates are open, crossing has been rendered vulnerable, in part due to changing passports requirements. Meeks reports that a 2008 requirement that all travellers from Mexico possess a valid passport was successfully fought by the Tohono O’odham and Yacqui in 2008 (Meeks, 2020, 652). While members of these groups can cross the border with enhanced tribal ID, many Mexican members do not possess tribal ID cards or passports, and for those who do, the small-scale border gates – monitored by US Border Agents – have been vulnerable to the discretion of Border Security Agents (Woods, 2018; Kowalski, 2017).

In this context, border fences and car barriers, originally constructed in 2007 and expanded by Trump’s Border Wall prevent Tohono O’odham people from passing freely to visit family and friends, shop, trade, receive services, and to attend cultural and religious events, with the nearest border crossing sometimes requiring people to travel 100 miles (Neustadt, 2017, p. 579). For example, by one report, the closing of the San Miguel gate has prevented the members of three

small villages in Mexico from easily accessing food in Tucson or Sells (Arizona), requiring them to drive three hours to buy groceries in the nearest Mexican town (Wiles, 2019). Tohono O’odam activists and politicians have furthermore contended that the construction of border walls has interfered with sacred streams (Democracy Now, 2020); prevented the gathering of ceremonial objects from the desert (Kowalski, 2017, p. 655); and hindered traditional pilgrimages central to the O’odham way of life (Traditional O’odham Leaders in Mexico, 2019).

The second serious problem that the Tohono O’odham confront is connected to differential rights-recognition on the American and Mexican parts of their territory, which has led, over time, to divisions within the community and in-migration to the American side. This in turn threatens relationships with those left on the Mexican side and their ongoing connection to their land in Mexico.

This differential rights-protection in the form of communal rights began in 1917, when a large reserve for the Tohono O’odham was created in Arizona, with its territorial limits at the Mexican border (Meeks, 2020, p. 642). This has meant that, while the Arizonan Tohono O’odham have had recognition of a special status under American Indian law for well over a century and have gained progressively stronger powers for self-government on their Arizonan reserve, the policies of the Mexican government towards the Sonoran Tohono O’odham, as with other Indigenous peoples, have not involved recognition of their Indigenous identity and specific interests as Indigenous peoples. As Meeks reports, while the Mexican government recognized the rights of the O’odham to form communal landholdings (ejidos) under the broader national policy, they had no recognition as a distinct people nor political rights as such (Meeks, 2020, p. 644). This

situation has not been alleviated by ‘moderate reforms’ in Mexico during the last quarter of the 20th century. Recognition of further land rights for the O’odham and representation on urban city councils, have not prevented land encroachment, nor have they gained the Mexican Tohono O’odham ‘sovereignty or economic security’ (Meeks, 2020, pp. 644-5).

In partial response to the situation of relatively stronger rights on the Arizonan side of the border, many members of the Tohono O’odham people who lived in Mexico have migrated to the American side (Madsen, 2014). This has been facilitated by the policies of the Arizona Tohono O’odham, which recognize their Mexican members as tribal citizens, and issues tribal ID cards, granting them the right to receive tribal services including healthcare (Luna-Firebaugh, 2002, pp. 159, 166). While this helps to affirm the status of the Tohono O’odham people as one people, the fact that there are different rights, institutions, and statuses in the two parts of their homeland has led to divisions. It has also meant that more members of the Nation are situated on the American side of the border, which has resulted in a sense of loss of the Mexican part of the homeland (Madsen, 2014, pp. 101-102). There are grounds for concern that out-migration combined with land encroachment will permanently erode the land base of the Mexican O’odham and reduce religious and cultural connections to land, which is lost to people on the other side of the border. As Luna-Firebaugh writes of the separation by the border: ‘The effect was devastating for Mexican O’odham people and their culture. Contacts between families were severed and the political history and government structure diverged sharply’ (2002: pp. 166).

As cultural divergence through distinct socialization and rights protection occurs, the border risks intensifying mutual ‘othering’ by Tohono O’odham of their relatives across the border (Leza, 2018). As Leza writes of a complex intersectional situation: ‘Due to these differences in daily

practice and the way such practices intersect with Indigenous identity discourses, U.S.-Mexico border Indigenous persons may experience difficulty in conceptualizing cultural relatives across the international divide in terms of community self rather than “Other” (2018, pp. 615). Thus, in addition to eroded access to important relationships and resources, there has been serious damage to the social, cultural, and political cohesion of the people in their community, created by the imposition of the colonial border.

As with the Mohawk, the Tohono O’odham are clear candidates for a special moral right to cross borders, and they also have a special right to select sites for POEs. The recognition of a Tohono O’Odham right to select POEs would alleviate pressure on Tohono O’Odham individuals who seek to retain projects and relationships across the borderline, and would allow the nation to partly control the direction of change in their relationships and practices, which is central to collective self-determination. However, as I discuss below, the Tohono O’odham case also suggests the importance of a right to determine their membership in ways that transcend state citizenships. And, perhaps most importantly, it suggests the limited efficacy of special cross-border rights under conditions where recognition of land and jurisdictional rights are themselves insecure in one (or both) state contexts.

The power to determine membership enabled the O’odham to somewhat preserve the integrity and identity of the community when half of their nation was under-recognized by their state, and vulnerable to land encroachment and the extreme pressure of assimilation. Control over membership allowed the U.S. Tohono O’odham to secure the rights of their south-side members to basic services provided in part through the budgets aided by the state, to issue tribal ID, and

may pave the way for the political participation of Mexican Tohono O’odham in the American Tohono O’odham Nation if they chose to relocate (Madsen, 2014).

It is highly unlikely there is a single solution to determinately specifying membership criteria for Indigenous groups. After all – who belongs to a community, or who is a member of the occupancy group in practice – depends upon members’ plans, projects, and relationships with one another, and these are structured by forms of evolving mutual recognition informed by collective grappling with colonial history and changes in who meaningfully participates as a group member in day-to-day life. However, beyond the ameliorative function evidenced in the Tohono O’Odham case, important legal rights enabling access to relationships and other residency interests may flow from recognition of Indigenous group membership. In order to protect their occupancy interests together through the special rights that should be afforded to them as a group, Indigenous peoples have an interest in control over their own membership, since it may be entirely opaque to the broader state who is a community member. Control over membership enables Indigenous nations to determine who is able to cross under special treaties and who is able to participate in unique jurisdictional spaces that govern the heartlands of the Indigenous occupancy group, in turn protecting the relational occupancy interests and self-determination interests of the group members. Thus, Indigenous peoples should be recognized to have the right to determine who qualifies as a member on the basis of their own unique histories and shared deliberation.¹⁴⁹

¹⁴⁹ Recognition of Indigenous authority over group membership criteria does not entail that any possible collective membership decision is just. Moreover, it is plausible that for decision-making regarding membership to be legitimate, it must strive to equitably consider the claims of internal minorities and vulnerable groups, such as women, who have been perennially excluded by colonial logics of assimilation in historical status laws.

Finally, while the overall goal of this chapter is to demonstrate that Indigenous people's interests justify differential rights to cross-border movement, co-management of border policy, and rights to specify group membership criteria, it is also clear from the Tohono O'odham case that rights protection that is radically different in the different jurisdictions can create significant challenges to the unity of border-straddling groups, and suggests an even more basic threat to Indigenous territorial interests. Even if the Tohono O'Odham were recognized to possess special rights concerning movement, membership, and co-management, these would be insufficient to protect their interests in occupancy and self-determination. What Tohono O'Odham people require – in respect of their interests in Mexico – is recognition and protection of their land and jurisdictional rights by the Mexican state. Without these rights, the lands to which Tohono O'Odham people have special rights of access would be outside of effective Tohono O'Odham control, and Tohono O'Odham people would be still prevented from maintaining their place-based relationships and projects.

8.4 Collective self-determination challenges

This section is interested in perhaps the most fundamental territorial right: the right to jurisdictional authority. This is the right of a group to make the rules that regulate their lives together on their own territory. It is this right which gives groups the institutional mechanisms to make decisions over their own affairs and to shape the collective context in which they live, and thus, it is fundamental to collective self-determination. The discussion above hinted at the challenges that Indigenous groups face in the exercise of their right to self-determination, as their

lives are centrally impacted by state territorial jurisdiction. How can a group govern itself when it is itself governed under the auspices of these wider state contexts, which govern formative institutions? Both the Tohono O’odham and the Mohawk people attempt to do this, reaching out across the border to include all members of their community in various ways – but, as I will show, these efforts are likely to be insufficient as long as the over-arching states themselves do not cooperate to recognize the powers and authority of the group as a unified, transboundary whole.

Consider the Arizonan Tohono O’odham, who recognize their Mexican members as tribal citizens. If, at the heart of self-government is the power to make rules over the very land that you live in and depend upon, and to govern the community relationships on the land, then this practice confirms the inclusion of the Mexican Tohono O’odham as members of the people in the part of their homeland that better recognizes their land and self-government rights; but it doesn’t enable them to exercise collective self-government over their Mexican lands, which have been systematically encroached upon by settlers with the complicity of the Mexican government.

While I have suggested above that what is most pressingly at issue in the Tohono O’Odham case is the failure of meaningful recognition of Tohono O’odham rights to territory and self-determination by the Mexican state, here I argue this recognition alone, would be insufficient to *fully* protect O’odham interests in collective self-determination.

In Akwesasne, the attempt to incorporate Indigenous self-government into the colonial system has led to an institutional complexity that is somewhat counter-productive for full-fledged self-determination – even assuming there was recognition of the proper scope of Indigenous

jurisdictional rights by the respective Canadian and American governments. While there are multiple Mohawk governance structures, including the distinct Canadian and American Mohawk governance councils, and the traditional clan system, these are also not unproblematic for Mohawk self-determination. This is because these structures (especially the band councils) cannot be clear instruments of Mohawk nationhood when they are themselves divided between American and Canadian states. In other words, recognition by each state of the differential movement and co-management rights of the Indigenous people on “their side” of the border, and the pursuit of treaty relationships with *that* group may not be sufficient. What may be needed is for both states to recognize a single group maintaining a unified government system, across the whole territory, with authority over that territory and Indigenous members who live there.

Thus, I argue for a special right of Indigenous communities that straddle borders to comprise an integrated cross-border jurisdictional unit. For Indigenous peoples sharing a common life as a community, and a shared-valued political identity oriented towards regulating the conditions of that community, the requirement that they make rules only with those who share the same settler-state citizenship is an arbitrary limit on individual political agency and an erosion of a collectively valued group identity. For example, the current division of jurisdictional authority between two band councils subjects the Mohawk to differential laws on their homeland – subjecting members to distinct legal requirements, and shaping their lives differently, in ways that are undesired by people aiming to craft a shared future. Insofar as the shared intention of Mohawk is to govern themselves together, this cleavage of the demos impairs the political freedom of the individual members. The arbitrary diminishment of the individual ability to co-author a shared world with those with whom one shares a political identity is itself a harm;

however, we should worry also about the more extreme forms of mutual alienation from those sharing an Indigenous identity, as in the O’odham case – a more profound sort of erosion of the shared identity itself caused by subjection to differential state legal regimes.

This suggests a distinct differentiated right of some state citizens to comprise an integrated sub-state political community with non-citizens on non-state territory. This right would enable the Mohawks of Akwesasne to constitute a single political body, one with the authority to make laws within the proper scope of Mohawk jurisdictional authority, over the entirety of their territory. To see why this is a special right, consider that most of the time, in non-Indigenous communities adjacent to a border, the primary political identification of residents is with the state citizenship on each side, making special jurisdictional cross-border differentiations unnecessary to secure the occupancy interests and political freedom of members. However, the Mohawk and other Indigenous peoples often identify as Mohawk or Indigenous above all else and live together despite the borderline. Thus, there are grounds for rights differentiation to protect their members’ political freedom and shared identity. While this right is special, in the sense that non-Indigenous state-identifying citizens are unlikely to have reasons of identity to claim it, we can see that the underlying logic for this right also explains the rights of non-Indigenous citizens to maintain their own independent states (e.g., the theory explains how to draw territorial boundaries between states and explains the wrongness of annexations of non-Indigenous peoples’ territories). In each case, the rights flow from the interests of the members of a people conceived of as an occupancy group sharing a valued political identity.

8.5 Territorial contiguity and choice

Consideration of two lines of critical questioning to the proposed theory should prove illuminating about the nature of the proposal within this chapter.¹⁵⁰ First, it might be wondered how considerations of territorial contiguity should figure into the foregoing analysis. For example, what should we make of the several component communities of the Mohawk nation that are not directly along the borderline? Are they candidates for inclusion in the integrated cross-border jurisdictional unit that I describe? Additionally, why have I said that the Mohawk should be able to form a special entity “if they want.” After all, the Mohawk do sometimes behave as an integrated unit, issuing Mohawk passports, and so on. Why condition discussion of an integrated cross-border jurisdictional unit in hypothetical terms?

First, I agree that geographical facts about groups, such as their contiguity and relative population density vis-à-vis other groups, are relevant to the justification of group territorial rights over particular geographical regions. There are always pockets covered by territorial claims where the people do not live nor make direct use, posing the question as to how to justify territorial authority in places a group does not physically “occupy” (Miller 2012). In the Mohawk case, there are Canadian, Quebecois, and American settler identities in the mix. From the perspective of the theory offered here, it is easier to justify the control of a group that clumps together in two or more places, over “intervening areas,” if there are not other groups, with political identities of their own, in between. In this sense, on the theory proposed, the justification of exclusive Mohawk jurisdiction over the entirety of their traditional homelands is

¹⁵⁰ I thank an anonymous reviewer for the Critical Reviewer of International Social and Political Philosophy for these questions.

limited by population geography and considerations of contiguity – this is because there are other groups with justified occupancy and self-determination claims.

However, the lack of territorial contiguity between Mohawk communities does not mean that they cannot function as an integrated political community to govern affairs on those territories where the claim to control by Mohawk institutions is justified. That is, where the Mohawk are in legitimate residency, form a territorial majority, and reflectively endorse a set of basically just institutions for self-government. To see this, consider that Mohawk claims to jurisdiction might pertain to, *inter alia*, land use and natural resource development within Mohawk territories, a Mohawk education system, Mohawk language and culture, and, for the purposes of this chapter, border management. I do not purport here to exhaustively identify all geographical areas over which the Mohawk can justifiably claim jurisdiction, or all legal domains where exclusive or shared jurisdictional claims are morally justified. That being said, although Mohawk people live in several distinct communities and have been politically fragmented by the settler-imposed band council system, there is nothing in principle preventing the Mohawk from working together to maintain a complex political arrangement wherein territorially discontinuous communities govern themselves together, creating principles and regulations to govern their own territories, through a complex cross-community framework.¹⁵¹ And, as argued in the chapter 2, some degree of contiguity may be re-established through mandatory restitutions.

¹⁵¹ Granted, whether or not a group is a territorial majority depends upon how we draw borders precisely between groups when there is overlap, taking us into questions about restitution, resources, and fairness “at the edges”. However, there are clearly territories where the Mohawk are a majority, where their relationships and projects very densely cluster relative to other groups – these are Mohawk heartlands and should be uncontroversial sites of Mohawk self-determination. I address issues of fair access to lands in chapter 2.

Now to the point about the conditional formulation of the content of right – namely, that if the Mohawk choose to form an integrated cross-border unit, then this should be recognized by the settler states. One reason for putting it conditionally is simply that even if the states on both sides “recognized” this right, they might be incompetent in its implementation. The Mohawk might decide it better to carry on with the status quo than risk incompetence or other harms that we are not in an epistemic position to predict; there are surely many relevant details to consider preceding an attempt at institutional integration under changing political conditions. However, more deeply, the central insight of the self-determination theory of territorial rights is that the specific set of institutions or political forms that would best realize Mohawk self-determination depends upon the members of Mohawk communities – their political commitments about how they should regulate their own communities through political and legal institutions of specific forms (Stilz, 2019). As a non-Mohawk person, it is not my argument that the Mohawk have an all things considered reason to adopt any specific institutional form. It is my argument that, on this theory, we can see reasons for appreciating that the Mohawk have a right to adopt integrated institutional forms if they choose.

Similarly, there are a wide variety of possible ways of implementing this right, or for designing Indigenous political institutions more broadly. It may be that the Mohawk people at Akwesasne do not conceive of themselves as linked to other Mohawk communities in such a way as those other communities should have an authoritative say on the regulation of border crossings (for example, the location of POEs) in Akwesasne, while nonetheless recognizing that the members of other Mohawk communities do possess differential movement rights on the basis of their membership in the nation and extended ties of kinship. For example, the Mohawks of Akwesasne

may have responsibility for POE policy as part of the division of political labour within the Mohawk nation. And this view would be consistent with a strong commitment of all Mohawk communities to integration in the provision of other services or in the regulation of other specific jurisdictional domains through shared Mohawk institutions that cut across all the Mohawk territories. On the other hand, it may be that Mohawk people on both sides of the borderline would prefer to retain institutional differentiation from one another on certain spheres of jurisdiction (but not others), in order to maintain differential relationships with the settler communities on each side of the borderline. For example, as argued with chapter 6, within properly designed federations, there very well may be “nested identities” or relationships of “kinship” with particular proximate settler groups, and these may have implications for institutional design.

However, these multiple specific proposals for the realization of multinational federal arrangements in cross-border cases are merely possibilities that must be investigated, and I do not purport to determinatively state what is best or required for the Mohawk. The possibilities for decolonized political forms, how they should integrate the geographically dispersed communities of an Indigenous nation within a complex set of national decision-making structures, and how those should relate to settler political institutions, are multiple. The particular option that a community (or communities) should take is often underdetermined by political theory. For resolution of these questions the collective self-determination theory points us to the agency of the Indigenous people themselves. The particular form that Mohawk governance should take for Mohawk communities depends upon Mohawk politics – the shared commitments of Mohawk people(s) to specific institutional forms, to be developed through debate within and between

Mohawk communities, as they articulate their histories, values, and visions for a shared future.

It is not a limit of the theory that it does not purport to authoritatively present the view of the Mohawk, which for present political purposes is made against the backdrop of deep injustice and misrecognition of the scope of legitimate Mohawk political options. Nor is it a weakness that I do not decisively state that a shared jurisdictional unit of some specific form is required. The argument of this chapter is that we should attend carefully to the space of proportionate and legitimate possibilities for Mohawk governance – as political philosophers, we should cultivate awareness of the kinds of complex Indigenous political arrangements that fall within the space of legitimate governance. This space has hitherto been arbitrarily constrained by settler domination. There is much more to be said about discontinuous territories, international borders, and complex federal arrangements –I hope to have shown that these are puzzles demand further analysis, and to have provided a framework to start thinking about these integrated issues.

Conclusion

I have argued for a host of special rights for Indigenous communities that straddle borders grounded in the place-based occupancy interests of their members and the unique vulnerability of their interests to non-Indigenous state power. In addition to special rights to traverse the international borders intersecting their territories, the Akwesasne Mohawk and Tohono O’odham cases also suggest the importance of a right to co-manage ports of entry and some reporting-in requirements. These are differential rights in the sense that they are the rights of a particular group – a subset of a state’s claimed citizens in a geographical region – to cross borders and to

make political decisions with respect to particular crossings. As incidents of the territorial right to control border crossing, these rights are to be exercised by collectives with a unique interest in regulating their shared occupancy region together in concert with the broader state community. Moreover, I have argued that full protection of Indigenous occupancy and self-determination may require recognition by multiple states of a group's jurisdictional rights as an integrated political unit with specific powers over their border-straddling territory, alongside the right of the group to determine the criteria for membership.

Conclusion

This dissertation began with the argument that a theory of political legitimacy and territorial decolonization must answer an interconnected set of philosophical questions in order to provide a coherent and action-guiding account for the decolonization of settler colonial contexts.

Exploration of these problems and relevant grounded contexts uncovered further questions which were subsequently taken up in the development of the theory. Ultimately, we have arrived at a vision of treaty federalism centring interdependent nations with inherent rights to self-determination and territorial jurisdiction, a vision that necessitates the non-dominated negotiation of substantively fair treaty agreements between Indigenous and settler peoples. While I have argued that philosophical theory is limited in the precision with which it can specify the structure of decolonized political institutions for particular cases, in virtue of facts about context and choices that must be made by the participants, I have also demonstrated that there are robust procedural and substantive constraints on the legitimacy of negotiated agreements and territorial political structures. Here I briefly recapitulate the central questions, arguments, and conclusions developed through this analysis.

Most fundamentally, a theory of territorial legitimacy must provide an account of which moral considerations ground the right of a group to govern a portion of the Earth and the people who live there. This is important both for specifying the territorial boundaries between groups and identifying the essential wrong of settler colonialism. We called this the problem of *territorial rights* and subsequently determined that the prevailing theory, functionalism, fails to provide a principled explanation of how to draw territorial boundaries. Moreover, functionalism falls prey

to the *annexation objection* and fails to grapple with the central wrong of settler colonialism – the dispossession of Indigenous territory and usurpation of Indigenous political authority.

Following Moore and Stilz, in chapter 1, I argued that consideration of residents’ grounded relationships, located life plans, and political identities can provide a solution to the problem of territorial rights. The occupancy and self-determination interests of the members of a people ground their collective rights to reside together where they live, and also ground their right to maintain independent political institutions to regulate their lives in ways that reflect their shared identities and evaluative commitments. This theory is capable of providing a principled explanation of how to draw territorial boundaries between states, and also recognizes the inherent territorial jurisdiction of Indigenous nations over their own lands. While the theory meaningfully differs from Indigenous conceptions of politics, it grounds the rights of Indigenous communities to maintain political institutions that fit their own ontological, normative, and epistemological conceptions. Thus, the theory provides a compelling account of both the wrong of annexation generally, and the intrinsic wrong of settler colonialism.

A theory of political legitimacy for settler colonial contexts must also provide an account of the considerations that ground the right of a subset of a group’s members or institutions to make binding decisions relating to the group’s territory and occupants. This is especially pressing in contexts where two or more institutions claim the right to represent a people in treaty negotiations or to govern in their name. We called this the problem of *political authority*. Directly related to the question of political authority are questions concerning *democracy*; a theory of political legitimacy must explain the conditions under which people can remain

collectively self-determining under political authority structures, and how democratic norms of popular deliberation, authorization, and contestation intersect with processes of decolonization such as treaty negotiation.

As we discovered through our grounded analysis of Wet'suwet'en political institutions, the justification of institutions of political authority relies upon a contextualist analysis of patterns of popular endorsement and contestation. Political autonomy can usefully be understood as an individual interest in correspondence between the citizen's reflective second-order judgments about political order and the institutions of political authority that they cooperate with others to maintain. The political authority of particular institutions rests upon the reflective endorsement of populations subject to them, and this is related to institutions' realization of shared values. Within this context we discerned that the traditional Wet'suwet'en governance system might better reflect the fundamental shared commitments of Wet'suwet'en people than the band councils – although we also noted that epistemic access from the outside is limited, and that complex constitutional arrangements combining two or more institutions of political decision-making internal to peoples are always possible. Access to this form of knowledge requires careful case-based analysis and may not always be accessible given limitations of the existing data and scholarship or the lack of opportunity to participate in Indigenous communities. While referendums can potentially serve to authoritatively clarify structures of political authority internal to communities, they should not be externally imposed, at risk of warping long-run processes of resurgence and decolonization internal to communities in service of settler ends.

Although this dissertation has not focused on the relationship between democracy and legitimacy to the same extent as it has on legitimacy issues that arise in the relationships between peoples

and territories, the theory is not silent on the democratic values of equality, political participation, and contestation. These issues arose in several of the chapters and were addressed as needed. I collect them here to remind the reader of the vision of the whole.

In chapter 1, we determined that cyclical elections in the Western form are not necessary in *every* context to realize the value of political autonomy as correspondence – while arguing that robust rights of political contestation such as those embodied within Indigenous governance systems *are* necessary to secure the conditions for reflective endorsement. In the absence of rights of free association, debate, and political contestation, citizens cannot adequately form reasonable reflective judgments about the structures of political authority by which they are governed. In chapters 5 and 6, I argued that this is also a matter of the non-domination of citizens under coercive institutions. Institutions of political authority risk dominating their citizens by making political decisions that might fail to track their interests without an adequate excuse – and thus political orders must incorporate robust public practices of citizen consultation, claims-making, contestation, and governmental response as mechanisms to prevent domination. In some contexts, cyclical elections are plausibly a condition of legitimacy because electoral democracy is a deeply held second-order commitment of the members of the people concerning how and by whom they should be ruled, and their absence would result in widespread political alienation. However, consideration of the non-domination argument also suggests that in some systems, cyclical elections may be a condition of legitimacy because they may be necessary to ensure sufficient government consideration and responsiveness to citizen interests given facts about that context (such as for example, population size, levels of civil society organization and solidarity, facts about corruption, and so forth). Finally, in chapter 6, we determined that democratic

referenda within Indigenous communities on the ratification of comprehensive treaty agreements are necessary due to the pervasive reshaping of Indigenous political institutions and consequent changes to Indigenous political identity entailed by these agreements. Referenda by themselves do not ensure that treaty negotiations will track the interests of Indigenous populations or reflect an identity that they are re-articulating for themselves, which are conditions necessary for non-domination and self-determination. However, provided that referenda are deployed alongside other democratic devices such as public consultation, public deliberation, and citizen contestation, and these are deployed in an iterated, extended, and inclusive way alongside inter-governmental negotiations, referenda can serve an important function in meeting these ideals.

The discussion of treaty negotiation poses fundamental questions about the relationships between settler and Indigenous peoples and shared political association. In the introduction, we posed this as a question about the political negotiation of co-existence among distinct peoples sharing a political structure. How can Indigenous and settler peoples negotiate political structures to govern their relationships after histories of wrongdoing in ways that do not reify domination between and/or within peoples—and what form should these shared structures take? We called this the *problem of treaty negotiation*.

As I argued in chapter 3, it is not immediately obvious why Indigenous and settler peoples would choose to cooperate in the maintenance of shared political associations, despite frequent calls by Indigenous and non-Indigenous theorists that they should engage in the construction of a federation through treaty-making. Thus, chapters 3 and 4 canvassed a variety of theories of the value of federal political orders with the aim of identifying the value of this form of political

cooperation for settler and Indigenous peoples. First, I considered the arguments that federalism is a valuable institutional design because it is (1) administratively efficient, (2) promotes citizen choice and preference maximization through footvoting, (3) creates a bulwark against central state domination, and (4) promotes the stability and territorial integrity of the state. While each of these theories identifies a genuine value of relevance, each also fails to account for the rights to territory and self-determination of constituent peoples in multinational states – sometimes pulling away from the distribution of authority that would promote self-determination (administrative efficiency), or failing to recognize the distinction between preference satisfaction and political agency (citizen choice), or instrumentalizing political identities (certain bulwark and stability views). I then considered a view that I called the fairness in recognition of national identities view. While this view better explains the reasons for settler and Indigenous peoples to share a federal political structure insofar as a federal division of jurisdictional powers recognizes the national identities of the component peoples, it fails to explain why the recognition accorded to Indigenous peoples would be sufficient within a federal order where settlers were in the numerical majority. Settlers, I argued, might be effectively capable of controlling the federal government in a place like Canada, suggesting that Indigenous peoples might not achieve equal recognition of their status as self-determining peoples if we understand equal recognition of self-determination rights as sameness in jurisdictional powers between independent nations. Moreover, the view leaves the specific distribution of jurisdictional rights between groups up for grabs, posing the problem of domination in states where settlers form majorities. A theory of federalism for settler and Indigenous peoples must foreground the rights of self-determination of peoples and explain why a particular distribution of jurisdictional powers within a particular context is not an arbitrary reduction of the self-determination of Indigenous peoples. I also used

this chapter to consider issues of institutional design – namely power-sharing in the cabinet and representation within the federal legislation assembly, suggesting that, while necessary to help prevent domination, considerations of democracy and settler self-determination preclude these from being a total solution to the problem of domination.

In chapter 4, I developed a more robust account of the value of federal constitutional orders for settler and Indigenous peoples. This view started with Tully's observation that federal constitutional practices are maintained by peoples sharing distinctive conceptions of politics, and that modern forms of constitutionalism unacceptably exclude the perspectives of minority nations from the constitutional dialogue. Following Tully, I argued that we should conceive of multination states as spaces of multilogue about a shared constitutional order, wherein we come to understand ourselves through coming to understand the other's ways of thinking, speaking, and acting. Within these spaces, we negotiate our shared belonging not merely out of self-interest, but out of concern for our relationships as members of diverse nations who share a valued federal identity. In the second part of the chapter, I unpacked an Anishinaabe view of political belonging (Mills, 2019). The problems that arose for the fairness in recognition of national identities view do not arise here directly because the focus of the explanation of federalism's value is not so much the idea that independent identities might receive equal recognition through federalism, but that federal citizens possess interdependent, mutually referring, and co-constituted identities. The value of shared political institutions consists in giving institutional expression to member nations' relationships, which in turn enable their co-creativity (reciprocal freedom) or co-authorship of a shared space through the exchange of gifts on the basis of their unique needs and capacities. Federalism – or institutionalized cooperation

and sharing of gifts among diverse groups – gives expression to this underlying interdependency and shared identity, and constitutes the institutional form that enables freedom, in light of these mutual obligations of care already comprising our identities.

With this view of the value of a federal treaty order in place, in chapter 5, I turned to the domination problem. As Mills and other Indigenous thinkers have drawn our attention to, Indigenous peoples have never been consulted on the design of the constitutional architecture of Canada. Instead, they have been forcibly incorporated under an alien constitutional structure and denied rights to make law for their own affairs in a wide variety of jurisdictional domains. I identified three levels on which domination functions in the Canadian context: in exclusion of Indigenous citizens from full participation in the federal demos, in the structural relations of inter-group political negotiation of the distribution of jurisdictional powers, and in the cultural assumptions of discursive spaces and institutions. In response to these problems, I argued that the construction of shared political structures among free and equal nations must proceed according to meta-jurisdictional norms of free and uncoerced association. Nations retain their rights to self-government and territory throughout their interactions. The only way for the political institutions of one people to legitimately acquire authority with respect to the citizens of another on their own territory is through consensual agreements between peoples to share jurisdiction. Therefore, the development of a legitimate political association requires settlers to fairly re-negotiate the terms of association on the basis of consent with each Indigenous nation with which they would partner. As argued throughout chapter 5, this is not the status quo. The comprehensive claims procedure, embedded as it is within wider settler dominated processes for specifying the positive law of the Canadian federation, constitutes a dominating structure for inter-group negotiations.

Adherence to the procedural standards of treaty negotiation discussed in chapters 5 and 6, in conjunction with judicial review of the requirements of territorial legitimacy and restitution specified throughout, would go a significant way to achieving political legitimacy and territorial decolonization. While non-domination is not equivalent to the more robust ideal of the mutual empowerment of interdependent and self-determining peoples in a treaty federation, it is an important precondition for ensuring the self-determination of peoples, a constituent element of this ideal.

Additionally, we had questions about reparative justice. The negotiation of decolonization agreements requires specifying territorial and jurisdictional boundaries of various kinds under conditions of historical dispossession. Settler colonial contexts are definitionally marred by a wide set of historical and enduring wrongdoings, and thus a theory of legitimacy for these contexts must explain what to do when groups are suffering historical and enduring injustices such as the dispossession of territory. We called this the *problem of restitution*, focusing on the territorial dimension of reparative justice. As we saw, a central objection to the restitution of Indigenous territory focuses on the contemporary reliance of settler populations on Indigenous lands. This objection, alternatively framed in terms of the supersession of obligations of restitution, or the mandatory downsizing of Indigenous land rights out of consideration for the equal right of humans to fair access of the Earth, is shared both by theories that centre the present-day occupancy and self-determination interests of populations, and more backwards-looking theories that regard territorial rights as a property-like entitlement that can be transferred only through consent.

As I argued in chapter 2, these arguments implausibly justify too much dispossession. Indigenous rights to restitution are robustly heterogeneous and depend on case-based facts concerning land and people. In some cases, Indigenous peoples already form clear territorial majorities maintaining uses of the territory that are central to their ways of life, and the competing settler interests are insufficient to supersede Indigenous interests in occupancy and jurisdiction. In other cases, settlers engage in new settlements and are individually liable to removal for committing a new wrong. In older settlements where settlers possess occupancy rights, proportionality analysis may also permit mandatory removals of settlers as the ‘lesser evil,’ in order to enable greater numbers of Indigenous people to maintain an adequate array of located life plans. Moreover, in larger settlements, longer-run decolonization strategies may achieve corrective justice goals by preventing the formation of place-grounded projects and relationships by new generations of settlers by enabling their relocation and formation of adequate life plans elsewhere. Finally, individual settlers may be forced to reduce the size of their land holdings because they have benefitted systematically from a process which has dispossessed Indigenous groups of their land. When evaluating a claim to restitution, we must keep each of these considerations in view in order to ascertain the correct remedy. These case-based facts are directly relevant to the substantive legitimacy of contemporary treaty agreements.

Consideration of these facts also suggests an important sense in which territorial rights theory is limited in the extent to which it can specify the determinate rights and entitlements of particular groups in decolonizing settler colonial contexts. While restitution may be justified in a variety of cases, and in different places within a particular territory under examination, it does not follow that restitution of *all* the lands that each would be individually justifiable restitution is *itself*

justifiable. Considerations of residents' use interests, facts about liability, and case-based proportionality analysis of interests may justify restitution of one set of lands, or another set of lands, but not both: restitution may require choice among options. The full array of justifiable options must be foregrounded in inter-governmental negotiations and public consultation if negotiations are not to unjustifiably constrain Indigenous nations to unduly limited agreements or stifle community self-determination through the decolonization process. Moreover, treaty negotiation processes should be designed to enable community participation in shaping the contents of the agreement to account for choices such as these.

In cases where restitution of exclusive territorial jurisdiction is not possible, I have argued that shared institutions of governance, organized on an equal nation-to-nation basis, may be necessary for legitimacy. These arguments may work in conjunction with the reparative arguments for exclusive territorial restitution in particular cases, ultimately justifying further restoration of an Indigenous nation's jurisdictional authority and the extension of Indigenous political values into the political sphere, although this takes a different form than in cases where it is appropriate to recognize an Indigenous nation's exclusive territorial jurisdiction.

For example, in chapter 7, I argued that in regions where neither settlers nor Indigenous peoples form decisive majorities, rule exclusively according to the political procedures and values of either group would be unjustifiably alienating. While there are deep questions here that remain, I have addressed one especially deep axis of potential Indigenous alienation in the context of land management of shared territories flowing from settler alienation from the Earth. The procedures and policies of land management for shared territories must recognize the intrinsic value of the

Earth if they are to not unfairly alienate Indigenous peoples in these circumstances. In other words, considerations of fairness, alongside convergence in reasons for valuing the Earth, require a rethinking of the conditions of legitimacy of land management institutions for shared territories. This reconsideration of the Earth's value must be continued through place-based dialogues between Indigenous communities and settler communities in particular circumstances.

In chapters 6 and 8, I also emphasized the unbundling of state territorial rights into component rights in such a way as to justify the further extension of Indigenous political jurisdiction under contemporary circumstances. These arguments either ground exclusive jurisdictional rights over a subset of political responsibilities usually invested in a state as a whole bundle, or they justify further shared jurisdictional rights that are exclusively claimed in the present by another agent. For example, in chapter 6, I argued that case-based considerations of fairness, reciprocity, and kinship can justify settler obligations of assistance to Indigenous peoples to enable their exercise of jurisdictional rights in domains where they depend upon settler assistance for the ability to exercise the right. For example, while it might sometimes be disproportionately costly on settlers to place them under obligations of assistance to financially support the exercise of Indigenous self-determination in some jurisdictional areas, I argued that the further unbundling of responsibilities, appreciation of Indigenous contributions to the federal order, and the logic of federal kinship can justify duties of assistance. In chapter 8, I extended the discussion of overlapping jurisdictional powers to consider the case of border policy (specifically, the location of international ports of entry and reporting-in requirements). While exclusive authority over border policy writ large may not be a justifiable Indigenous (or settler) right in a multinational treaty federation, there are components of the right to control borders that can be justified in

particular cases such as the right to choose the location of ports of entry in areas where an international border bisects an Indigenous community. Through case-specific consideration of how institutions of political authority affect the occupancy rights and self-determination interests of Indigenous peoples, I showed how border policy is another area of decision-making that is a candidate for joint decision-making or co-management – and hopefully to have also demonstrated the power of the method of grounded normative theory to make further progress on these issues.

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