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Colonizing the demos? Settler rights, Indigenous sovereignty, and the contested 'structure of governance' in Canada's North

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ABSTRACT

Settler-colonialism can consist of a struggle over the pre-political 'structure of governance' – over who composes the demos and how decisions should be made. This article examines two lawsuits where settlers contested the Indigenous structure of governance in Canada's Northwest Territories. I show that in both cases settlers brandished a novel 'tool of elimination,' individual rights to voting, mobility and expression. I trace how settlers used this tool in a strategic two-pronged way, challenging as 'illiberal' restrictive laws flowing from Indigenous sovereignty and then championing race-neutral laws the promulgation of which would open the demos to settler domination. I show that courts adjudicating these challenges were compelled to grapple with the appropriate 'framing of justice' – with whether the relevant rights-bearer was the universal individual or the 'constitutionally prior' Indigenous demos. I conclude that, where the court decided on individual-rights grounds, settlers were able to extend control over the structure of governance.

KEYWORDS

Settler colonialism; Indigenous sovereignty; constitutional law; voting; Northwest Territories

Introduction

The March 1958 edition of *MAD* magazine featured a comic depicting the Lone Ranger and Tonto surrounded by apparently hostile Native Americans.[1] The Lone Ranger exclaimed, 'Indians! Indians, all around us! Well, Tonto … it looks like we're finished!' To which Tonto replied 'What do you mean … we?'

The joke became well known. Some see it as racist, framing Indigenous people such as Tonto ('fool,' in Spanish) as traitors or cowards. Others see it as subversive, celebrating a subaltern who turns the tables on his clueless white boss. I suggest it be considered in a third way, as an interrogation into the unstable 'structure of governance' on settler-colonial frontiers. What do settlers mean by 'we'? Who, if anyone, is 'them'? Can 'we' absorb 'them,' as the Lone Ranger seeks to do? Can 'they' resist, as Tonto does?

'Structure of governance' questions may seem esoteric. Yet the answers they generate are the foundation that political regimes are built on. Beneath all our systems of authority – our customs services, deeds-and-titles offices, election commissions, war councils – are fragile claims about who 'we' are and how and where we should rule. Which is why, when those claims become contested, regimes may come tumbling down.

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That is one way, albeit unusual, to think about settler colonialism – the conversion of native domains into New Frances, New Englands, New Zealands and so forth. Though the tools employed by settlers are diverse, encompassing treaties, Bibles, boarding schools and Gatling guns, their goal is simple: to make 'theirs' ours. One way of doing that is by revising the pre-colonial 'structure of governance,' to make 'them' us.

Like other settler states, Canada has experienced such a revision. By the First World War, Indigenous peoples had largely been swallowed into the Canadian body politic. The Métis were pacified, First Nations were subjects of the Indian Act, and treaties had converted traditional Indigenous territories into domestic jurisdictions.[2] Yet a sort of frontier remained, roughly coinciding with the vast, unincorporated Northwest Territories (NWT). There, for much of the past half century, Indigenous peoples and a booming settler population jockeyed for control, striving to shape government in their own image. They battled, in part, over the NWT's structure of governance – over who composes the demos and how decisions should be made. Settlers, with numbers on their side, sought to frame the structure of governance as universally inclusive. Indigenous peoples resisted: 'What do you mean … we?'

I suggest that, by examining this conflict, certain modern settler-colonial dynamics may be revealed. I break these dynamics into four strands.

First, I suggest that settlers, to reshape the NWT's 'structure of governance,' have brandished a novel 'tool of elimination': individual rights to voting, mobility and expression. This tool has received little attention, save from scholars like Rohrer.[3] Building on her work, I secondly suggest that settlers employed such rights in a specific, strategic, two-pronged way, condemning as 'illiberal' those voting, mobility and expression laws that flow from Indigenous sovereignty and then swapping in ostensibly race-neutral laws that in effect would enthrone settlers. Third, building on the 'structure of governance' scholarship of the likes of Issacharoff[4] and Pildes,[5] and on Fraser's[6] theory of 'abnormal justice,' I suggest that how these rights-cases were resolved hinged on how they were framed – on whether courts saw the appropriate subject of justice as the universal individual or the 'constitutionally prior' demos. Finally, I show that, where the court ruled on individual-rights grounds, settlers extended control over the 'structure of governance,' thereby 'colonizing the demos.'

To explore these dynamics, I proceed thusly. In section two I lay out a theory of settler-colonial challenges to pre-colonial 'structures of democracy.' In section three I introduce the fraught political history of the NWT. In section four, I examine two controversial lawsuits, *Allman et al. v Commissioner of the Northwest Territories (1983)* and *Friends of Democracy v. Northwest Territories (Commissioner) (1999)*, in which settlers in the NWT charged that their rights to voting, mobility and expression were violated by Indigenous-dominated decisions concerning the structure of governance. In section five, I analyze those cases against the backdrop of the aforementioned theory, and then conclude.

Theory

The structure of governance

Democracy is conventionally understood as 'rule by the people.' But who are the people, and how should they rule? Paradoxically, these puzzles cannot be solved democratically.

The first is political theory's infamous 'boundary problem,' well stated by Jennings: 'The people cannot decide until someone decides who are the people.'[7] The second puzzle is no easier – the people cannot decide until someone decides by what rules decisions should be made.

Issacharoff characterizes these as first-order decisions, foundational and thus 'constitutionally prior' to democracy.[8] Ideally, such decisions are fixed before a government is up and running. In the classic American case, the federal demoi were identified, and their shares of power allotted, during the framing of the Constitution. The Great Compromise was just that – a 'structure of governance' deal, hammered out between the big and small states, so everyone could get on with other business.

What other business? For one, formalizing what I will call second-order political arrangements, which address how power is to be exercised once governance is underway. Second-order matters include rules and rights that fall under what is sometimes termed 'the law of democracy'[9] – the guidelines of the democratic process. These guidelines govern everything from campaign funding to durational-residency requirements to electoral districting. Unlike first-order arrangements, second-order laws of democracy attach to individuals, not demoi. Rather than enshrining collective self-determination, they guard difference-blind and egalitarian liberal principles.

Yet as American federalism makes clear, first-order decisions complexly entwine with second-order ones. Take the aforementioned Great Compromise. Because of it, California, the most populous state, and Wyoming, the least, enjoy equal representation in the U.S. Senate. Though this is a first-order arrangement, it has staggering consequences 'downstream,' for the second-order law of democracy. There, the federal voting power of individual Californians is a fraction that of Wyomingites. Normally this would be untenable, transgressing 'one person, one vote.' However, since the Great Compromise is constitutionally entrenched, Californians have no legal recourse. The flow of consequences cannot be reversed to wash upstream.

But elsewhere this may not be the case. Demotic boundaries are not always drawn, much less enshrined, pre-politically. First-order conflicts may burst into the arena of everyday politics when there develops a fervent demand to re-level the foundations of governance.[10] Around the world, constitutionally prior questions are emerging with increasing frequency, taking diverse forms. What is to be done when a faction locks up power via gerrymandering? How should shares of power be distributed among consociating polities? Should annexed peoples retain a measure of sovereignty, or be merged into the broader state demos? May a restive group break away?

With democracy incapable of answering these dilemmas, courts are increasingly stepping in.[11] Pildes calls this the 'constitutionalization of democratic politics.'[12] Hirschl counts it part of the 'judicialization of mega-politics.'[13] Fraser would place it in the burgeoning field of 'abnormal justice.'[14] Famous first-order cases include the European Court of Human Rights' decisions on the legality of power sharing in Belgium[15] and Bosnia,[16] the German Federal Constitutional Court's ruling on joining the Maastricht Treaty,[17] the Supreme Court of Canada's *Quebec Secession Reference,*[18] and the U.S. Supreme Court's revolutionary redistricting decisions, such as *Reynolds v. Sims*.[19]

All first-order cases are difficult. They revisit potentially fraught bargains that were struck, or awkward realities that were sidestepped, at the time of state-making. (Rhetorically, Tierney suggests, 'why not let sleeping dogs lie rather than invite a confrontation

over inclusion and exclusion.'[20]) Too, where first-order questions are emergent, they cannot be tackled in the vacuum of a constitutional convention. They must be grappled with *in medias res*, with demoi already dug in, powers divvied up, and turf jealously guarded.[21]

Even more vexingly, first-order cases can be hard to distinguish, or disentangle, from second-order cases. Individual plaintiffs may protest ethnic discrimination that ensues from an upstream consociational compromise, as in the aforementioned Bosnian *Sejdić and Finci* case. Or, they may allege that their voting power is unfairly diluted as a consequence of a first-order power-sharing agreement, as in the German Maastricht case. In such cases, courts may find themselves unmoored. As Fraser notes, 'normal justice' is simply about balancing the scale: a bit left, a tad right, and equilibrium is achieved. But in 'abnormal' conditions, where pre-political assumptions are in dispute, Fraser suggests judges must take a step back and begin with first-order questions. What is the appropriate scale to use? Who is the rightful *subject* of justice? How should justice be framed?

Though seemingly abstract, these questions are elemental. This is because, in abnormal justice, the frame often foreordains the result. Take the aforementioned *Reynolds* case. There, the plaintiff charged that apportioning Alabama state senate seats equally by county diluted his voting power, violating the Equal Protection Clause of the Constitution's Fourteenth Amendment. Alabama countered with the 'federal analogy': The U.S. Senate apportions equally by state, so why can't we apportion equally by county? Chief Justice Warren deemed this analogy 'inapposite,' writing, 'Political subdivisions of states – counties, cities, or whatever – never were and never have been considered as sovereign entities.'[22] In effect, he denied that Alabama's political subdivisions bear first-order demotic rights. The sole legitimate subject of justice was deemed to be the plaintiff, owed 'one person, one vote.' As history shows, this finding flowed upstream. The first-order structure of governance of almost every state was radically amended.

It can be seen, then, that demotic bounding complexly interlinks with everyday democratic rules. Hence, scholars have urged judges to enter this realm with caution.[23] Issacharoff warns of the danger of overlooking first-order implications: '[C]ourts should be wary of following their impulses to treat such … conflicts about the structure of political systems as familiar claims of individual rights.'[24] Fraser fears the opposite, that the foundational integrity of the state will overshadow second-order pleas for justice. But her solution is the same: Judges must be cognizant of how justice is framed. To do this, they must adjudicate 'reflexively,' grappling with what scale of justice to use before trying to level the balance.[25]

I suggest there is even greater cause for judicial caution. First-order cases may be strategically *camouflaged* as second-order cases. Despite appearances, plaintiffs' primary objective may not be to liberalize the law but, quite conversely, to shake up the foundations of governance so their own group comes to dominate. This might occur where remedying second-order illiberalism would have an upstream effect, undermining pre-political first order arrangements, much as occurred in *Reynolds*. As I will show next, such caution is especially warranted in cases of settler colonialism.

Settler-colonialism and the structure of governance

As Wolfe famously observed, settler colonialism is an insidious and especially resilient variant of conventional colonialism. Impelled by what he terms a 'logic of elimination,' settler-colonists kill, expel, confine or assimilate the locals, seize their homelands, and found 'a new colonial society on the expropriated land base.'[26] He emphasizes that this is a two-phase process – that 'settler colonialism destroys to replace,'[27] with Native dissolution preceding settler installation. In this manner, Wolfe says, settler-colonialism supplants Indigenous civilizations with new versions of the settler motherland.

Much has been written about how settler states advance colonial projects using the language of rights.[28] For example, Kymlicka, discussing the Global South and Eastern Europe, observes that states engaged in 'demographic engineering' – moving settlers into restive minority regions – may condemn as illiberal those arrangements that guard minority autonomy. He thus concludes, 'where ethnocultural justice is absent, the rhetoric and practice of human rights may actually worsen the situation.'[29] Scholars such as Hoxie have showed how rhetoric concerning 'freedom' and 'equality' have been deployed in U.S. Indian policy; perhaps the most notorious reserve-land allotment law, the Dawes Act, was hailed by government officials as the 'Indians' Magna Carta.'[30] Similarly, Eisenberg, writing about Canada, notes that the expansion of settler-state constitutionalism into subaltern jurisdictions may be passed off as liberalization when in fact it is the opposite – a tool 'aimed at advancing the collective cultural dominance of the majority.'[31]

Far less has been said about how settlers, pursuing a 'logic of elimination,' have in recent decades sought to wield rights, moving them from the realm of rhetoric into the arena of the courts. This article explores that tactic, showing how assertions of settler rights regarding voting, mobility and expression were employed in an effort to undermine the first-order foundations of Indigenous governance – to alter the answer to 'who are the people and how should they rule?' Where Indigenous peoples were once sovereign, settlers strived to dissolve that sovereignty, overturning the pre-colonial order, flipping the demos from 'them' to 'us.'

As Wolfe might predict, settlers may employ voting rights through a two-phase approach. Rohrer discerned this approach in her analysis of the 2000 U.S. Supreme Court case *Rice v. Cayetano*. She observes that the settler plaintiffs in *Rice* first 'problematize[d] collective native identity' and then 'naturalize[d] white settler subjectivity via a color-blind ideology.'[32] Specifically, settlers first charged that existing laws of democracy violated second-order individual voting rights, conflating those violations with the epiphenomenal, downstream effects of first-order Indigenous sovereignty. By framing Indigenous peoples as citizens seeking to illiberally subject fellow citizens to racial discrimination, rather than as a pre-political sovereign exercising self-determination, Indigenous polities were toppled from their demotic throne. The second settler move was to appeal for the law to be reformed so as to treat individuals equally. Such liberalization can have transformative upstream impacts, installing the broader, settler-dominated demos in power.

Hence I suggest that, per the aforementioned warnings, courts should be cautious of (mis)framing settler constitutional challenges as second-order appeals to liberal fairness. Rather, such challenges may be more coherently understood as camouflaged attacks on

Indigenous structures of governance, with settlers deploying rights not to liberalize but to dominate – to 'colonize the demos.'

To examine the above strategy, I turn now to Canada's NWT, where settler/Indigenous relations have long been fraught.

The Northwest Territories

One of Canada's 13 federal subunits, the NWT sprawls across 1.35 million square kilomteres of Arctic and Subarctic terrain. For milennia it was an exclusively Indigenous homeland.[33] Even after settlers overwhelmed the rest of North America, the NWT remained a place apart. Before the First World War the settler population of the NWT was negligible.[34] Canada administered the territory remotely from Ottawa, at times treating it as an Indigenous reserve, vast stretches of which were effectively off limits to non-Natives.[35] Significant settlement commenced only after the Second World War, and was mostly limited to the mining town of Yellowknife. In 1967 the federal government began devolving authority to the NWT, with Yellowknife becoming the capital.

Today Indigenous people predominate in rural areas of the NWT while settlers fill Yellowknife. The two groups are almost precisely equipopulous.[36] Not all ethnoculturally plural jurisdictions are 'divided,' yet as Choudhry notes, where lines between groups are stark, pluralism can have immoderating effects on political behavior.[37] Such is true in the NWT. In the 1970s, as Indigenous peoples began to mobilize politically,[38] and as Yellowknife swelled with settlers, the NWT became one of the last frontiers of full-blown settler/Indigenous conflict in North America.[39]

Initially, settlers enjoyed the upper hand. With influence in Ottawa, and control of the territorial government,[40] they strived to shape the NWT into a standard Anglo-Canadian province. Jull, writing in 1978, observed that

> [t]he white people are very conscious of the fact that they're building a new society, but it isn't new in any qualitative way. … For them there is no interest in new forms of organization but rather getting the proven Canadian ones, pronto, and dominating them.[41]

Indigenous leaders condemned the settler government as 'transitional and illegitimate.'[42] Key Indigenous groups boycotted it.[43] Indigenous leaders instead pressed for self-determination,[44] insisting territorial governance be overhauled. Inuit lobbied for a territory of their own, to be called Nunavut. The remaining Indigenous population floated proposals such as forming a 'province-like' jurisdiction called 'Denendeh,'[45] which would feature a fully Indigenous senate armed with veto power, and where voters would have to meet a 10-year residency requirement,[46] disenfranchizing most settlers. The NWT government decried such proposals as 'abhorrent.'[47] The federal government agreed, stating, 'there is no place in Canada for governments based on race or ethnicity.'[48]

In 1981, however, NWT voters elected an Indigenous-dominated government.[49] It embraced Indigenous land claims, including the aforementioned Nunavut proposal, which came into being in 1999. As well, it made a habit of apportioning assembly seats such that rural Indigenous districts enjoyed substantial overrepresentation vis-à-vis settler-dominated Yellowknife.[50] Hence, despite growing settler numbers, assembly members were disproportionately Indigenous throughout the 1980s and '90s.

Scholars followed these developments with intrigue. They termed the NWT 'the most distinctive society within Canada'[51] and 'a laboratory for students of political representation.'[52] Jull called the conflict in the NWT '[n]ot healthy dissent to be resolved by the ballot box, but [a] fundamental dispute about whose country it is and what the ground rules are.'[53] Dacks observed that

> of all jurisdictions in Canada, only in the NWT does the question still remain open as to which political philosophy – liberalism based on the individual, nationalism based on ethnic identity, or consociationalism which attempts to integrate the two – will ultimately guide the political process.[54]

At first, the NWT's settler/Indigenous conflict was fought mostly through appeals to public opinion, petitioning federal officials, and territorial electoral politics. In 1982, new weapons became available. Canada, which to that point had lacked a substantive bill of rights or active judicial review, adopted the *Constitution Act, 1982* and the associated Charter of Rights and Freedoms.

Those documents, for the first time, entrenched Indigenous rights. Section 35 of the constitution affirmed certain Indigenous 'existing rights,' which (as will be discussed below) were in time deemed to include the 'inherent right of self-government.' Meanwhile, section 25 of the Charter, often called the 'non-derogation clause,' anticipated clashes between individual and Indigenous rights, buffering – perhaps even blocking – diminution of the latter.[55]

Yet the Charter also spelled out rights owed to all Canadians, including settlers. Section 2 protects 'fundamental freedoms,' including freedom of expression. Section 3 guarantees that 'Every citizen has a right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.' Section 6 enshrines the right 'to move to and take up residence in any province.'

As I will now show, almost immediately, settlers took up these rights to challenge the Indigenous-controlled NWT government.

The cases

Allman et al. v the commissioner of the Northwest Territories

Allman was heard by the NWT Supreme Court in January 1983. Margaret Louise Allman and 10 other applicants charged that the territory's new Plebiscite Ordinance violated their Charter-protected rights. The ordinance had been enacted in preparation for an April 1982 plebiscite on whether to divide the territory to form the new Inuit-majority territory of Nunavut. Though the plebiscite was legally non-binding, the territorial government had vowed to respect its outcome. Unlike in territorial elections, where citizens qualified to vote after just one year of residency, the new ordinance limited voting in plebiscites to residents of three years or more. The applicants, all of whom had lived in the NWT between one and three years, met the regular-election criterion but were ineligible to vote in the plebiscite.

Legislative-assembly records and media and scholarly discussions make clear that the plebiscite was polarized along settler/Indigenous lines. In crafting the plebiscite bill, some Indigenous assembly members championed a residency requirement of at least 10 years, 'to have these long-term decisions made by the native people.'[56] In turn, they decried their

most vocal opponent, a settler member representing Yellowknife, as 'the number one enemy of the people of the North.'[57] Of course, the vast majority of residents disqualified by the three-year requirement were settlers. Abele and Dickerson note the plebiscite was 'part of an overall Native strategy to shape novel … governing institutions for the Northwest Territories.'[58] Settlers largely opposed that strategy. Unsurprisingly, the plebiscite's results were split by race, with nine of the NWT's 10 majority-settler communities opposing division and 17 of the 24 majority-Indigenous communities supporting it.[59] Overall, the pro-division vote was 56 percent. It can be assumed that, had the plebiscite ordinance not barred newly arrived settlers, the result would have been closer.

Significantly, Allman and the other applicants did not challenge the validity of the plebiscite itself, which had been held three days before the Charter came into effect. Rather, they challenged the enabling ordinance, claiming it abridged their section 2 right to freedom of expression or, alternately, their section 6 right to freedom of mobility. They further argued that these abridgements were not 'saved' by the Charter's section 1 'limitations clause,' as the three-year requirement was abnormally long – six times the Canadian average – and so fell outside 'reasonable limits … demonstrably justified in a free and democratic society.' They maintained that, even if the plebiscite's results could not be retroactively invalidated, the law should be amended as 'there is a reasonable expectation that the ordinance will be used again.'[60]

The respondent, the government of the NWT, disagreed. It argued that the three-year requirement was justified given the exceptional circumstances of the NWT. It wrote:

> the Canadian North faces problems which are unique in Canada. … People come from the south part of Canada and work or live in the Territories for a year or two or three and then return south again. It is not surprising nor is it unreasonable that the Legislative Assembly of the Northwest Territories should wish a means to find out the views of the long-term residents of the Northwest Territories. They are the people who will be most affected by decisions of a long-term nature.[61]

In January 1983, NWT Supreme Court Justice Mark de Weerdt issued his ruling, finding in favor of the Indigenous-controlled government.[62] He ruled largely on technical grounds. Per the text of the Charter, he wrote, section 3 voting rights cover elections, not plebiscites. This, he surmised, was why the applicants had hung their case on section 2, freedom of expression. But he found freedom of expression relates to speech and the press, not voting. Likewise, de Weerdt ruled that section 6, concerning freedom of mobility, was irrelevant – despite the plebiscite ordinance, the applicants had successfully taken up residence in the NWT. Finding no Charter violations, de Weerdt made no comment on whether limiting voting to 'long-term residents,' rather than people 'from the south part of Canada,' was a constitutional government objective. The plebiscite ordinance was allowed to stand.

Friends of democracy v. Northwest Territories (commissioner)

Friends was heard in the NWT Supreme Court in January 1999. A group of residents of settler-dominated Yellowknife, including the city's mayor, charged that the territory's latest electoral-districting map violated their Charter voting rights. As with the 1982 plebiscite, the run-up to the 1998 redistricting had been racially charged. A series of legal and demographic developments had converged to make the redistricting exercise a crucial battle in the NWT's long-running Indigenous/settler power struggle.

The first development favored Indigenous interests. In 1995, the federal Liberal government had issued the 'Inherent Right Policy,' proposing ways to implement section 35 Indigenous self-government rights. One avenue, which it deemed especially applicable to the NWT, was through 'specific guarantees within public government institutions.'[63] In the NWT there followed a flurry of high-level efforts to forge a new constitution establishing Indigenous/settler power-sharing. While many settlers were deeply opposed to this idea, compromise seemed inevitable. 'A balance will be struck between these contending forces,' Dacks predicted. 'The question is where exactly the balance will lie on the axis between self-government and public government.'[64]

The second development favored settlers. Following adoption of the Charter, the specter of a voting-rights challenge loomed over the NWT's malapportioned electoral map. In 1983, during the first post-Charter redistricting, the NWT's electoral-boundaries commission split over whether to bolster representation in Yellowknife, with the two Indigenous commissioners opposed and the sole settler commissioner insisting that the principle of representation by population 'cannot be ignored.'[65] In the next redistricting, in 1989, the entire electoral-boundaries commission recommended a new seat for Yellowknife. Some Yellowknife assembly members insisted the Charter required at least two new seats.[66] Under constitutional pressure, the assembly approved the commission's proposed new map. In White's analysis of the 1989 apportionment, he noted that, unprecedentedly,

> the Charter forced the commission to concentrate on the equality of individual voters. … [T]o the extent that northern political distinctiveness is more than an exotic curiosity, but represents a political response to the unique political problems of the North, this is not a positive development.[67]

With the two above developments placing Indigenous self-determination and individual voting rights in tension, the third development ratcheted the tension higher. The eastern half of the NWT was set to become Nunavut in 1999. The demographics of the remaining, western NWT would thus transform, from a decisive Indigenous majority to an even split between Indigenous residents and settlers. For settlers, this would represent a dramatic gain; it would, noted Dacks, give them little incentive 'to support a constitutional innovation that would undermine the majoritarian principle.'[68] The opposite would be true for Indigenous people. Without entrenching Indigenous self-government, the post-division demographic situation would open them to domination by settlers.

In June 1998, a boundaries commission was empaneled to redraw the NWT electoral map in preparation for Nunavut's departure. Both settler and Indigenous actors knew their political future hinged on how many seats would be assigned to their respective factions. That decision, in turn, hinged on the rules of electoral-boundary making. The commission conducted hearings, in which Indigenous communities expressed 'substantial concern … about being "overwhelmed" by Yellowknife.'[69] In settler-dominated Yellowknife, meanwhile, 'the majority … wanted to see the electoral districts changed to reflect the principle of "representation by population."'[70] The commission called for two more seats in Yellowknife. In November 1998, in an explosive session of the legislative assembly, Yellowknife and Indigenous legislators dueled over the competing values of electoral parity and Indigenous self-determination. The commission's recommendation was voted down and the status quo preserved. Yellowknife, home to 44 percent of the

territory's residents, was left with 29 percent of assembly seats. Two Yellowknife districts dramatically exceeded Canada's generally accepted constitutional limit of 25 percent variance above parity. One district, Yellowknife South, exceeded parity by 152 percent. The next day, the *Friends* lawsuit was announced.

The applicants, in presenting their case to the court, claimed the underrepresentation of Yellowknife districts denied them 'effective representation' – the electoral-districting standard established by Justice Beverley McLachlin in the Supreme Court of Canada's controlling *Carter* case. The applicants further argued that such underrepresentation was not redeemed by the territory's distinctive 'historical and social context,' nor by difficulties providing 'ombudsperson' representation to rural and isolated electoral districts. The NWT, they stated, 'is not so different that fundamental democratic principles do not apply.'[71] The applicants finally challenged the objection that adding Yellowknife seats would upset the territory's ethnonational 'balance of power.' This view, they argued, 'represent[s] a fundamental misapprehension of the right to vote under section 3. The section 3 right is an individual right,'[72] not a right owed to ethnonational collectivities.

The respondents, the Indigenous-dominated NWT government, defended the impugned boundary map. They too quoted Justice McLachlin – not from *Carter*, but from *Dixon*, a case she had decided while head of the British Columbia Supreme Court. There, McLachlin had ruled that 'departure from the ideal of absolute equality may not constitute breach of section 3 of the Charter so long as the departure can be objectively justified as contributing to better government of the populace as a whole.'[73] In the NWT, the respondents argued, the goal of 'better government' had always trumped strict voter parity. Since the territory's first apportionment, territorial leaders had 'accepted that Yellowknife would be underrepresented in favor of the smaller communities with Aboriginal majorities.'[74] This arrangement compensated for rural disadvantages related to 'ombudsperson' service, provided effective representation to small but culturally distinct 'communities of interest,' and facilitated tacit power-sharing between the territory's discrete cultures. The respondents closed by stating that the NWT 'is unique and deserving of a northern solution which … could be the envy of any jurisdiction with a significant Aboriginal population.'[75]

A submission to the court was also made by intervening parties representing the NWT's key Indigenous organizations. They grounded their case explicitly in Indigenous rights.[76] Providing Yellowknife with more assembly seats, they maintained, would impede ongoing efforts to negotiate and implement the 'inherent right' of Indigenous self-government, protected under the constitution's section 35. Thus, they said, even if the territory's electoral map contravened section 3 voting rights, this contravention was shielded by the Charter's section 25, the Indigenous 'non-derogation' clause, which buffers Indigenous rights when they conflict with other Charter provisions.

The *Friends* decision, handed down in March 1999, was, like *Allman*, penned by Justice de Weerdt. He stated that the question before the court was 'whether the underrepresentation of voters at Yellowknife … is in violation of section 3 of the Charter.'[77] He ruled it was. Addressing the government's submission, he agreed that, given the NWT's distinctive geographical features, 'ombudsperson' representation was doubtlessly difficult in isolated rural districts. Hence, he said, many of those districts had been apportioned fewer constituents than the territorial average. Having done so, why additionally impair urban electors by making their districts exceptionally large? The more justifiable solution, he argued, would

be to expand the legislature, preserving small districts while giving new seats to Yellowknife.[78]

De Weerdt next addressed 'balance of power.' While careful not to concede that this issue was germane to the case, he suggested that, regardless, it was moot. Providing Yellowknife with two more seats, as the boundaries commission had recommended, would still leave the city's legislative share at just six of 16, a clear minority.[79] He took a similarly dim view of arguments concerning Indigenous rights. The section 35 rights the intervenors claimed were threatened, he declared, were at best 'process rights,' relating to 'negotiations over the future self-government of Aboriginal or other groups which might yet take decades to bring to a conclusion.'[80] Further, given the central role of voting in democracy, he questioned whether Indigenous rights could ever trump voting rights: '[N]either the existence nor the due exercise of that right should depend on the leave … of any government or executive authority, be it in relation to the negotiation or enjoyment of any Aboriginal land claim or other Aboriginal treaty right.'[81] De Weerdt ordered the electoral map be redrawn.

Analysis and conclusion

I contend that these two legal battles in Canada's NWT – *Allman v. Northwest Territories* and *Friends of Democracy v. Northwest Territories* – showcase a web of modern settler-colonial strategies deployed in an effort to colonize Indigenous 'structures of democracy.' From this web, at least four distinct strands may be teased out.

First, *Allman* and *Friends* both highlight the use of a novel and understudied settler 'tool of elimination': individual rights. In *Allman*, the settler plaintiffs charged that the NWT's plebiscite ordinance infringed their individual rights to free expression and mobility guaranteed under sections 2 and 6 of Canada's Charter of Rights and Freedoms. In *Friends*, settlers alleged violation of their section 3 voting rights. Free-expression, mobility and voting are rights of the second-order variety, concerning 'laws of democracy.' They attach to individuals, not to first-order polities, and are at first blush unrelated to the pre-political, 'structure of governance' questions 'who are the people, and how should they rule?' Yet settlers have used these rights to challenge Indigenous self-government such as that guaranteed by the constitution's section 35, as well as to challenge Indigenous decolonial projects such as the formation of Nunavut and the entrenchment of consociational power sharing in the NWT. Clearly, in the NWT, individual rights have been harnessed as a tool of settler-colonialism.

Second, in both *Allman* and *Friends* the plaintiffs employed a specific strategy involving dual moves of destruction and then construction. I suggest this strategy reflects Wolfe's assessment that settler-colonialism 'destroys to replace.'[82] Even more precisely, I suggest these dual moves were presciently discerned by Rohrer, who, in analyzing the U.S. Supreme Court case *Rice v. Cayetano*, observed that settler-rights claimants sought to 'problematize collective native identity' and then 'naturalize white settler subjectivity via a color-blind ideology.' Let me try to trace this dynamic.

As noted, the plaintiffs in both *Allman* and *Friends* claimed their rights were violated by NWT laws. The impugned laws were distinctly 'laws of democracy.' They were downstream effects of a pre-political 'structure of governance,' designed to treat the NWT's Indigenous peoples as a first-order, rights-bearing demos. The NWT government articulated this view

in its submissions to the courts. In *Allman*, the government maintained that the impugned voting restrictions flowed from its desire to poll 'long term residents' about 'an issue of a long term nature' – that is, to provide Indigenous residents with decision-making power over the creation of Nunavut. In so doing, the NWT government, for the purposes of plebiscitary voting, framed the demos in a manner predominantly comprising Indigenous people, exercising self-determination.

In *Friends*, meanwhile, the government testified that any underrepresentation of Yellowknife voters was merely a downstream consequence of pre-political arrangements to achieve 'better government.' Overweighting the NWT's Indigenous polity, and thus promoting inter-polity power sharing in the NWT assembly, was, the government suggested, 'a northern solution which … could be the envy of any jurisdiction with a significant Aboriginal population.' The Indigenous intervenors were more explicit, deeming overrepresentation to be a section 35 right owed to the Indigenous demos. This right was especially relevant in 1999, when the NWT's proportion of settlers was about to leap, and when efforts to entrench Indigenous/settler power sharing hung in the balance.

In both *Allman* and *Friends*, the plaintiffs' legal challenges seemed intended to undermine these 'structures of democracy.' In this manner, as Rohrer put it, 'collective native identity' would be 'problematized.' This may be seen as Wolfe's initial dimension of settler colonialism, where Indigenous political selfhood is targeted for destruction.

But of course, in both *Allman* and *Friends*, settlers appealed not merely for the impugned 'laws of democracy' to be invalidated, but for them to be liberalized. This move too might seem an innocuous second-order appeal, to make laws regarding expression, mobility and voting fair to all. As Rohrer again discerned, such a move would 'naturalize white settler subjectivity via a color-blind ideology.' In *Allman*, settlers requested that, in case of another plebiscite, durational-residency requirements be shortened to match those elsewhere in Canada. Likewise, the *Friends* plaintiffs asked that the territory's electoral map be redrawn in a more egalitarian fashion. Both of these changes would inevitably flow upstream, altering the 'structure of governance.' In both plebiscitary voting and electoral districting, the NWT demos would be recast to consist of relatively equal, undifferentiated individuals. This would dramatically empower settlers, whose numbers were booming, providing them with greater control over not only everyday politics but also over territorial (de)colonization. This may be seen as exemplifying Wolfe's constructive dimension of settler colonialism, in which the Indigenous political self is replaced by that of settlers.

Third, it is evident that the success of this settler strategy hinges, at least in part, on how justice is framed – on whether courts see the relevant rights-bearers as second-order universal individuals or as the first-order Indigenous demos.

In the *Allman* decision, Justice de Weerdt interpreted settler rights narrowly, deeming no justiciable violation to have occurred. He let the status quo stand, taking no overt position on the question 'who are the people, and how should they rule.' He thus stayed clear of the proverbial 'political thicket,' in effect evading the first-order question at hand.

But in *Friends*, de Weerdt deemed that settlers' section 3 voting rights had been abridged. He thus faced a dilemma: Was this abridgement indefensible, or was it, instead, the epiphenomenal, downstream effect of a protected first-order structure? Put another way, was Indigenous domination in the NWT, like the overweighting of small

states in the U.S. Senate, constitutionally justified? Or were the NWT's Indigenous peoples more like the Alabama counties in *Reynolds* – pretenders to the throne, who 'never were and never have been considered as sovereign entities'? The plaintiffs argued the latter, disputing the notion that voting rights should take into account concerns such as 'better government' or the securing of 'a northern solution.' That notion, the plaintiffs said, is 'a fundamental misapprehension of the right to vote.'

De Weerdt agreed. Apparently seeing *Friends* in what I have called second-order terms, he declined to consider whether the impugned section 3 violation was the downstream effect of a legitimate structure of governance. And, he refused to accept that liberalizing the law would have unconstitutional upstream effects. To the NWT government he noted that, despite added representation in Yellowknife, the balance of power in the assembly might not change. To the Indigenous intervenors he stated that their section 25 and 35 rights could not block such changes. Sharing the settler plaintiffs' views, he in effect ruled that, for the purposes of redistricting, the territory's proper demos was one comprising all residents as relatively undifferentiated individuals.

Fourth and finally, *Allman* and *Friends* show that, where settler-colonists strategically assert indivudal rights to voting, mobility and expression, and where justice is framed so as to validate that strategy, a conquest of the Indigenous structure of governance may result. Settlers, able to dissolve the Indigenous 'them' into the settler 'we,' may achieve power over Indigenous peoples and lands.

Following the *Allman* decision, the applicants appealed all the way to the Supreme Court of Canada. In May 1984 the court denied their application without comment. Meanwhile, the territorial government, as promised, appealed to the federal government to let Inuit form their own territory. A second plebiscite was held, in 1992, again with a three-year residency requirement, to establish the precise border between the NWT and Nunavut. In April 1999, to great fanfare, Nunavut came into being – a widely cited exemplar of Indigenous decolonization.

But where *Allman* paved the way for Nunavut, *Friends* plunged the NWT into a 'constitutional crisis.'[83] The territorial government, its hands tied by the ruling, added five new assembly seats, three in Yellowknife and two in mixed settler/Indigenous communities. The territory's premier, a longtime Indigenous leader, called the change 'a bitter pill and … a shift in power.'[84] To forestall that shift, the territory's leading Indigenous-rights organization took the remarkable step of imploring the federal government to dissolve the assembly. (Said the organization's co-chair, 'the imbalance we have always feared is upon us.'[85]) The federal government declined. After a quarter-century of effort, work on settler/Indigenous power sharing in the NWT ceased.[86] Indigenous groups switched focus, abandoning collaboration with the territorial government and instead seeking self-rule through so-called 'treaty federal' arrangements. By 2003 the first such self-rule arrangement was established, providing a standalone ethnic government to the territory's most populous Indigenous group, the Tłı̨chǫ.

Thereafter, setter/Indigenous conflict in the NWT became more muted. Still, electoral redistricting remained contested. In the 2006 redistricting, the electoral boundaries commission recommended two new seats, in Yellowknife and a fast-growing Indigenous community. The assembly rejected this proposal, sticking to the status quo. Yellowknife members raised the specter of another Charter challenge,[87] but none was launched. In the 2013 redistricting, the assembly again refused appeals for new Yellowknife seats.

Instead, the assembly adjusted Yellowknife's seven districts so all were near, but none above, 25-percent deviation from parity. The City of Yellowknife launched a lawsuit, rooted largely in procedural arguments. It was easily defeated, with the court ruling that the redistricting did not impair Yellowknife residents' 'effective representation.'

This article has shown that settlers may employ rights-claims as a tool of elimination, with a transformational goal – to 'colonize the demos.' Settler-colonialism can in part be understood as an effort to flip the existing structure of governance from 'them' to 'us.' Settlers employ rights to alter the normative and legal answers to the foundational first-order questions 'who are the people, and how should they rule?' Pre-colonially, Indigenous peoples formed the demoi of their homelands, governing through Indigenous self-determination. Settler-colonialism strives to redefine the demos as 'all of us.' In this new demos, settlers are of course numerically predominant, and may govern by majority rule. In this way, settlers seek to enact Wolfe's 'logic of elimination,' displacing Indigenous sovereigns and 'erect[ing] a new colonial society on the expropriated land base.'[88]

This article thus shows Issacharoff is correct that '[C]ourts should be wary of following their impulses to treat … conflicts about the structure of political systems as familiar claims of individual rights.'[89] This is because, to upend the demos, settlers may camouflage first-order cases as second-order cases. Per Rohrer, they may do this through dual strategic moves. The first move is to 'problematize collective native identity' and the next is to 'naturalize white settler subjectivity via a color-blind ideology.'[90] Put simply, settlers attack as illiberal those second-order laws that are the epiphenomenal, downstream consequence of first-order Indigenous sovereignty – durational-residency constraints on settler voting, underrepresentation of settlers, and so forth. In doing so, settlers frame the Indigenous governors as a racial group subjecting people of another race to illiberal treatment, rather than as a pre-political sovereign exercising legitimate national self-determination. Settlers then demand that the second-order laws be liberalized. If courts do not find that the first-order structure of Indigenous sovereignty is constitutionally entrenched and/or otherwise legitimate, then the ensuing liberalization may flow upstream. The demos may be transformed.

Finally, this article has shown that settler-rights cases may shape the course of Indigenous (de)colonization. They did so in Canada's NWT. Broadly speaking, the court's refusal in 1983 to condemn the impugned plebiscite ordinance opened the way for the creation of Nunavut, a landmark act of Indigenous decolonization. Conversely, settlers' success in 1999 effectively terminated hopes for territorial Indigenous control or power sharing; thereafter, Indigenous self-determination was pursued more narrowly. The NWT demos was, to a greater degree, colonized by settlers. Ongoing settler legal action has sought, so far unsuccessfully, to extend and entrench this demotic advantage. How further rights-claims will shape the course of settler-colonialism in the NWT remains to be seen.

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