The metapolitics of settler colonialism

Individual rights, collective boundaries, and Indigenous (de)colonization

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Thesis for the degree of Philosophiae Doctor (PhD)
University of Bergen, Norway
2020

UNIVERSITY OF BERGEN

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Date of defense: 19.06.2020

Year: 2020

Title: The metapolitics of settler colonialism

Name: Aaron John Spitzer

Print: Skipnes Kommunikasjon / University of Bergen

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ABSTRACT

Metapolitics are like the forces inside the atom, so constitutive of the world around us that they hide in plain sight. If domestic politics happens within polities, and geopolitics happens between them, metapolitics decides which is which. I contend this is one way to look at settler colonialism. Over the past few centuries, settler colonialism has transformed the globe, re-crafting Indigenous continents into a New World modelled on the European motherland. This re-crafting has been accomplished in part through metapolitics. "We" have not merely taken what is theirs, we have done so by redefining it, morally, legally, and constitutionally, as ours. Thus veiled by metapolitics, contemporary settler colonies hide in plain sight.

In this dissertation my aim was to theorize settler-colonial metapolitics, making it visible. I pursued this project in three steps. First I identified an array of contemporary settler (and related) metapolitical conflicts and classified them in an original taxonomic table of cases. Second, drawing from this table, I conducted four comparative case studies – the articles of my dissertation. Each article explores theoretical, judicial and political dimensions of settler metapolitics in the three most iconic settler states, the United States, Canada and Australia. Finally, I devised a theoretical model to better identify, understand, and address settler metapolitical conflicts. At its core, the theory is this: Contemporary settler colonialism harnesses individual liberal rights, which are the core rights *within* polities, to problematize boundaries *between* polities, challenging the legitimacy of Indigenous demotic and territorial difference and thereby dissolving "them" into "us."

This dissertation is, I believe, an original contribution to three sub-fields of political science. First, it contributes to settler-colonial studies, highlighting a largely

unexplored means by which contemporary settlers advance colonization and/or resist decolonization. Second, it contributes to political theory, applying a framework to a nameless theoretical space that has become busy with such unreconciled concepts as "mega-politics" (Hirschl 2008), "sovereignty studies" (Aleinikoff 2000), the "law of democracy" (Issacharoff, Karlan and Pildes 2002), "trans-polity rights" (Kant 1795 [2015]), "cosmopolitan rights" (Benhabib 2004), "democratic inclusion" (Bauböck 2017), the "boundary problem" (Whelan 1983), and of course "metapolitics" (Fraser 2009). Third, it contributes to constitutional law, by identifying metapolitics as a (critically overlooked) legal matter, by cataloging dozens of metapolitical cases from around the globe, and by showing decision-makers how they might grapple with such cases.

INTRODUCTION

It is said when a disciple asked Indian sage Ramana Maharshi, "How should we treat others?" he replied, "There are no others" (Godman 1985). Was Maharshi correct? Should all be treated as "us"? Or are there "others," who should be treated differently? Who decides, and how?

At the level of the individual these are ontological questions, but at the collective level they are questions of metapolitics. Though esoteric, they are elemental. Metapolitics are like the forces inside the atom, so constitutive of the world around us that they hide in plain sight. If domestic politics happens within polities, and geopolitics happens between them, metapolitics decides which is which. Metapolitics thus undergirds politics, constituting its foundations. It hides because, usually, those foundations appear inherent. We typically think of polities and their boundaries as natural and permanent. In fact, they are artificial and tenuous. They rest not on objective, enduring truths but rather on contestable claims about who "we, the people" are and what place is rightfully ours. If these foundations erode – or if they are subverted – "we" may be no more.

I contend this is one way to look at settler colonialism. Over the past few centuries, settler colonialism has transformed the globe, appropriating much of the Western Hemisphere and Australo-Pacific to build new versions of the European motherland. This New World was crafted through obviously physical means, as when settlers dispossessed, expelled or exterminated Indigenous peoples. But perhaps just as necessarily, the New World was – indeed, is – engineered by metapolitics. "We" have not merely taken what is theirs, we have done so by redefining it, morally, legally, and constitutionally, as ours. That is why, today, settler states are seldom thought of as colonies. Veiled by metapolitics, they hide in plain sight.

In this dissertation my aim is to theorize settler-colonial metapolitics, making it visible. I develop a theoretical model to better identify, understand, and address contemporary cases where settler colonialism clashes with Indigenous

understandings of "who are the people" and "where is rightfully theirs," problematizing the collective boundaries of Indigenous demoi and territories and thus potentially swallowing Indigenous peoples into the settler body politic. This dissertation is motivated by a desire to provide decision-makers with moral, logical and legal guidance in resolving these vexing, increasingly common, widespread dilemmas.

This dissertation is, I believe, an original contribution to three sub-fields of political science. First, it contributes to settler-colonial studies, highlighting a largely unexplored means by which contemporary settlers advance colonization and/or resist decolonization. Second, it contributes to political theory, applying a framework to a nameless theoretical space that has become busy with such unreconciled concepts as "mega-politics" (Hirschl 2008), "sovereignty studies" (Aleinikoff 2000), the "law of democracy" (Issacharoff, Karlan and Pildes 2002), "trans-polity rights" (Kant 1795 [2015]), "cosmopolitan rights" (Benhabib 2004), "democratic inclusion" (Bauböck 2017), the "boundary problem" (Whelan 1983), and of course "metapolitics" (Fraser 2009). Third, it contributes to constitutional law, by identifying metapolitics as a (critically overlooked) legal matter, by cataloging dozens of metapolitical cases from around the globe, and by showing decision-makers how they might grapple with such cases.

I pursued my research in three steps. First I identified an array of contemporary settler (and related) metapolitical conflicts and classified them in an original taxonomy. As I will show, these cases, though superficially disparate, share core similarities and belong to related taxonomic "species." Moreover, they have become increasingly common. Hence, understanding and resolving them is especially politically salient.

Second, drawing from this taxonomic table of cases, I conducted four comparative case studies. These studies are the articles of my dissertation. All are solo-authored and published in peer-reviewed journals. They are "Reconciling Shared Rule,"

Canadian Journal of Political Science 51.2 (2018); "Colonizing the Demos?" *Settler Colonial Studies* 9.4 (2019); "'A Wolf in Sheep's Clothing,'" *Postcolonial Studies* 22.2 (2019); and "Constituting Settler Colonialism," *Postcolonial Studies*, 22.4 (2019). Each explores specific theoretical, judicial and political dimensions of settler metapolitical conflicts. These conflicts involve the three most iconic settler states, the United States, Canada and Australia.

Finally, the aforementioned steps guided me in formulating my theory of settler metapolitics. At its core, the theory is this: Contemporary settler colonialism has harnessed individual liberal rights, which are the core rights *within* polities, to problematize boundaries *between* polities, challenging the legitimacy of Indigenous demotic and territorial difference. Where this technique succeeds, "they" and "theirs" dissolve into "us" and "ours." At that point, "there are no others."

I proceed as follows. Section 2 presents my theory of settler metapolitics. In this section I also review the important literature on this subject, identify key "scholarly gaps," and discuss my motivations for filling these gaps. Section 3 presents my methods: my scoping inquiry, the taxonomic system I developed to classify settler-metapolitical cases, the cases I found and taxonomized, and the logic behind my selection of cases for the comparative case studies that comprise my four articles. Section 4 introduces those case studies, displays their similarities, differences, and contributions to my theory of settler metapolitics, and then presents each article in turn.

2.0 A THEORY OF SETTLER-COLONIAL METAPOLITICS

All journeys of discovery are said to begin with three words: "Huh, that's weird." My effort to formulate a theory of settler-colonial metapolitics was inspired by a vexing political dilemma I encountered in the place I call home, Canada's Northwest Territories. There, for the past several decades, the Northwest Territories' equipopulous Indigenous and settler communities have feuded over how to apportion representation in the Northwest Territories legislature. Settlers, insisting all residents be treated equally, demand approximate "representation by population." Indigenous groups, determined to protect their homeland from settler control, press for substantial overrepresentation. Politics for the most part has favored the entrenched Indigenous decision-makers. The courts sided first with Indigenous peoples, then with settlers. The media offered no guidance. A few scholars and legal thinkers anticipated the conflict, but then turned elsewhere. To me the case seemed meaningful, urgent, and weird.

I thus set off in two directions. On one hand, I headed outward, seeking empirical examples of similar clashes that pit the self-determination demands of Indigenous (and other settler-colonized) peoples against the individual-rights proclamations of settlers. At first, cases seemed rare. Many prospects, after much twisting and fiddling, turned out not to fit the puzzle. In time, however, my focus sharpened. Rough patterns appeared. Cases more rapidly clicked into place. Some were new to academia. Others had been studied by scholars from divergent disciplines – law, liberal theory, human-rights activism. As in the parable of the blind men and the elephant, many of the scholars seemed unaware they were examining the same phenomenon. I gathered and synthesized their insights. As noted, four sets of these cases became the basis for the case studies that constitute the articles of this dissertation. From these studies I harvested findings and further insights.

At the same time, I descended inward, into the legal, constitutional and ultimately metapolitical heart of such clashes. My desire was to make better sense of them, by contextualizing them within established understandings of politics, constitutional

law and theory. What models were relevant to these cases? What analogies would render them comprehensible? What vocabulary would make them legible? What images would summon them into view? Understanding this, I hoped, would allow me to provide logical and normative guidance to decision-makers caught in, and confused by, a clearly important but under-theorized class of political and judicial conflicts. So began my theory of settler metapolitics.

Early, partial versions of this theory appear in all four of the articles in this dissertation. Here I attempt to weave these strands into a more comprehensive whole. Still, I do not pretend this theory is complete. I am aware of certain gaps and inconsistencies that I have not yet resolved. Presumably there are many additional defects I have not yet discovered, and that may emerge and perhaps be improved through the scholarly conversation I hope my articles will prompt.

Still, I believe this theory is solid. As wished, it helps identify, understand, and resolve clashes such as that which I encountered in the Northwest Territories. It does this, first, by showing that such clashes place typically complementary and nested moral, legal and political norms in direct conflict. Second, this theory explains how and why these conflicts occur. Finally, this theory suggests how and why certain norms might be prioritized to potentially resolve these conflicts.

2.1 The 'boundary problem': inputs, outputs, people and place

What is metapolitics? There is no standard definition. Badiou (2005) employs the word to describe consciously politicized philosophizing. Rancière calls metapolitics "the attempt to perform the task of politics … by other means" (2009, 122). Dourado terms it "competition for power in the state of nature" (2016). Following Fraser (2009), I use metapolitics narrowly, to mean contestation over what is, and is not, a polity. Understood thusly, metapolitical inquiry asks, "What are the appropriate bounds of demoi and territory? Are there 'others'? If yes, who and where?"

These are not easy questions. To explore them I begin with the basics. The political world is commonly understood to comprise two levels of moral agents. There are individuals like you and me, numbering nearly eight billion, owed political norms including democracy and liberal rights. But also, there are collective peoples, inhabiting places, asserting self-determination. Self-determination means the right of peoples to choose their political status. First articulated by Enlightenment thinkers such as Locke and Rousseau (Trinidad 2018, 6), self-determination has emerged as a cardinal norm of the modern era. In 1918, Woodrow Wilson, seeking resolution of the First World War, famously proclaimed that "self-determination is not a mere phrase; it is an imperative principle of action" (Hill 1995). Following the Second World War, the global community consecrated self-determination in Article 1 of the United Nations Charter. Today self-determination remains not only a key precept of international law but is perhaps the most universally cited collective political right.

Yet if the right of self-determination sits on a pedestal, controversy envelops its base. The phrase "self-determination," Bucheit observed, "gives no clue to the nature of the self that is to be determined; nor does it provide any enlightenment concerning the process of determination or the source and extent of the self's putative right to this process" (1978, 9-10). Indeed, few political problems are more thorny. Majorities and minorities, states and international organizations, scholars, lawyers and leaders – all feud endlessly over how to operationalize the right of self-determination (Margalit and Raz 1990, 439). Such disagreements are likely the foremost source of conflict in the world.

I think operationalizing the right of self-determination is difficult in part because self-determination is predicated on self-constitution – on defining and legitimizing the collective political self (Tierney 2012, 58). And frustratingly, self-constitution clashes with the aforementioned norms of democracy and liberal rights. This, as I see it, is the source of political theory's "boundary problem." Hinted at by Aristotle (1962, iii, 1-2), highlighted by Dahl (1970), and first systematically tackled by

Whelan (1983), the boundary problem has since been intensively studied (for example: Benhabib 2004, Arrhenius 2005, Goodin 2007, Abizadeh 2012, Owen 2012, Song 2012, Whitt 2014, Bauböck 2015, Bauböck 2017). Though the boundary problem has been framed in a multiplicity of ways, I believe it boils down to this: How may *we* self-constitute in a way that fairly distinguishes us from *them?* The problem comprises what I see as at least four sub-questions salient in this dissertation. These questions lie along two axes, the first relating to input and output and the second to people and place.

Conceived of as an input challenge, the boundary problem arises from the chicken-and-egg dilemma in which democracy is rooted. Jennings articulated this dilemma, if not first, then pithiest: "the people cannot decide until someone decides who are the people" (1956, 56). He meant that procedurally, democracy is useless for identifying political communities and imbuing them with popular legitimacy. It cannot do so without encountering a vicious circle, a paradox of infinite regress, from which no escape is possible. Because "the people" produce democracy, they cannot also be produced by it. Bounding the "who" of democracy is inherently undemocratic.

Conceived of as an output challenge, the boundary problem is just as troubling. Boundaries have illiberal effects, distinguishing, and almost invariably discriminating, between "we, the people" and others. Theorists like Kukathas see liberalism as comprising a bundle of principles, key among them universalism and egalitarianism (1992, 108). Universalism is the principle "affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms" (Gray 1995, xii). Egalitarianism holds that all individuals are moral equals and deserve legal parity (Kymlicka 1989, 140). Boundary-making offends both. It divides the world into bounded, non-universal collectives. This bounding then has knock-on effects on egalitarianism, treating individuals bound out differently than those bound in. If liberals are to accept self-determination, they must tolerate such discrimination (MacMillan 1998, 127). Habermas calls this compromise the "Janus face of the modern nation" (1998, 115).

As noted above, I feel the boundary problem can also be seen as comprising an axis of sub-questions relating to "people" and "place." The "people" question is straightforward: who are the people who may self-determine? I have already shown that this question cannot be decided via democratic inputs, nor in a way that avoids illiberal outputs.

But the question of "place" is similarly difficult – and, as Stilz observes, less well-theorized (2019, 2). *Where* may "we, the people" self-determine? Empirically, self-determination is typically associated with authority over territory (Agnew 1994; Benhabib 2004, 20; Trinidad 2018, 12). Normatively, "people" clearly need some place. But what place in particular? That is the "particularity problem" (Stilz 2009, Ypi 2014, Moore 2019). As with self-constituting a demos, staking a particular territory cannot happen democratically (Moore 2015, 27). How can voters vote on their voting district? Similarly, providing "us" with authority over a specific place means denying (exclusive) authority to "them." Despite attempts by liberal thinkers from Locke ([1690] 2003) to Kolers (2009), Moore (2015), and Stilz (2019) to articulate theories of rightful particular territory, few justice problems remain so intractable as how to divide up the world.

2.2 Bounding: external, internal, first-order and second-order

I have established, then, that self-determination and liberal-democratic rights are in tension, generating political theory's boundary problem, with difficulties relating to inputs, outputs, people, and place. Yet despite this tangle of difficulties, non-universalism is etched on every world map. Humanity is – illiberally, undemocratically, but nonetheless inescapably – divided into nearly 200 states, each at least in theory a discrete, externally bounded sovereign, exercising both demotic self-determination and territorial authority.

Given the boundary problem, it is no wonder these states' creation stories are often unsavory (Stilz 2019, 19). Their bounds typically emerged from what Whelan calls "historically given solutions" (1983), necessarily external to democracy and

individual liberal rights. Often they were forged through amoral "power politics" (Morgenthau 1946), or simply filtered down from the pre-liberal past, or were instantiated in the extra-legal vacuum of a "constitutional moment." This is true even with the most iconic liberal democracies. England dominated Scotland, Wales and Northern Ireland to form the United Kingdom. Parisians stamped out competing languages and cultures to make France. Canada swallowed up the Quebecois when Anglos won the French and Indian War. And in the United States and the rest of the settler world, Europeans overwhelmed Indigenous peoples, dispossessing them of their lands, resources, culture and even their children (Blackhawk 2019, 1793). These events were neither democratic nor liberal. But they were nonetheless foundational, supplying answers to those elemental pre-political questions, "who are the people and where is theirs?"

Yet of course, boundaries exist not just between states, but within them. As with external bounding, internal bounding may be necessary to protect the self-determination of constituent sub-state peoples. In a state comprising such peoples, Van Dyke observes, "it is as inappropriate to think of majority rule as it would be in the world as a whole" (1985, 172). Hence most liberal democrats tolerate not just external self-determination but also internal non-universalism (Kymlicka 2012). Federal, consociational and other internally "compound" arrangements are common and getting commoner (McCrudden and O'Leary 2013). These arrangements, too, must be instantiated outside liberal democracy. For example, in the classic American case, the federal units were identified, and their respective powers allotted, by the pre-political Great Compromise – a pragmatic bargain, hammered out in a "constitutional moment," so the quarrelsome colonies could become united states.

Bounding, then, can be both external and internal. It demarcates self-determining peoples and their places. Yet it contravenes liberal rights and democracy. Hence, Issacharoff calls bounding a "first-order challenge." Bounding establishes the "structure of democracy," so must be considered in a manner "constitutionally prior" to liberal democracy itself (2008, 231). This seems to me to mean bounding

comes first – it must be *temporally* prior. Bounding is politics' original event, instantiating the "who" and "where" of governance. But it also means for self-determination to endure, the boundaries of a people and their place must remain under the people's control. In this way, I suggest, bounding is *existentially* prior. It must be provided for not just at the outset but perpetually. Benhabib seems to discern this when she observes, "Defining the identity of the democratic people is an ongoing process of constitutional self-creation" (2004, 21). If at any point exogenous actors subvert the people's boundaries – if the people are unbound – then the self is unmade. If that happens, self-determination ends and control by others begins.

After demotic and territorial boundaries of a self-determining people are established, and while maintaining those boundaries in perpetuity, I suggest the interests of the aforementioned other category of moral agents, individuals, must also be addressed. As noted, individuals are widely considered to deserve, and increasingly demand, liberal rights and democracy. Operationalizing liberal democracy occurs through what I deem "second order" arrangements. Second-order arrangements recognize and protect "natural," or "negative," individual rights such as speech, worship, and mobility. They also enact "positive," or "political," rights, such as those that fall under the "law of democracy" (Issacharoff, Karlan and Pildes 2002) – the guidelines of the democratic process. These guidelines govern practices and procedures related to, for example, electoral districting, candidacy, campaign funding, and of course voting.

I suggest that in the structuring of the political world, second-order arrangements typically are nested within, and complement, first-order arrangements. Again, unlike first-order arrangements, I see second-order arrangements as applying to individuals, not polities. Rather than enshrining collective self-determination, second-order arrangements guard individual liberal rights. I call these arrangements "second order" because they are not "constitutionally prior" but "constitutionally post." This means that they are not just temporally post but, also and more importantly, existentially post. They rest on the foundation of, and thus

are contingent upon, pre-political decisions relating to the bounding of "who are the people and where is rightfully theirs."[1]

2.3 Kant's rights conflicts: intra-, inter-, and trans-polity

I have proposed, then, that in the political world there are two categories of moral agents, collectives and individuals, and that honoring the rights of these agents requires two orders of arrangements, first- and second-order arrangements. Typically, I suggest, these two orders are complementary and nested. First-order arrangements relate to the establishment and preservation of demotic and territorial boundaries, thereby enshrining self-determination for collective peoples. These first-order arrangements are "constitutionally prior," i.e., pre-political, and, as noted, tend to hide in plain sight. Second-order arrangements, meanwhile, operationalize liberal rights and democracy for individuals within a constituted polity. Second-order arrangements are thus "constitutionally post," i.e., political, and are relatively conspicuous in everyday civic life.

Yet despite the typically complementary and nested relationship between first- and second-order arrangements, the two may come into conflict. I suggest these conflicts are thorny due to the boundary problem. Among the first scholars to explore such conflicts was Kant. In *On Perpetual Peace* (1795 [2015]), Kant seems to recognize that because the political world has two categories of moral agents, individuals and polities, it thus has *three* potential axes of rights-conflicts. Each of these rights-conflicts involves what Kant saw as a distinct kind of rights. There are domestic conflicts, involving the rights of individuals within their own polity. There are inter-polity conflicts, pitting the rights-claims of one polity against those of another. And

[1] In calling collective rights "first order" and individual rights "second order," I do not mean to argue, as communitarians sometimes do, that collective rights are morally antecedent to individual rights (Wellman 1999). I mean simply that *arrangements* guarding collective rights antecede arrangements guarding individual rights *in practice* – in the practice of constituting and governing polities. This practice, despite its many critics, has been "paradigmatic" at least since Hobbes (Shaw 2008, 10). Because of this practice, Arendt deemed citizenship in a state "the right to have rights" (1973).

finally there are trans-polity conflicts, involving the rights-claims of individuals vis-a-vis other, external polities.

The first two kinds of conflicts are familiar. In domestic-justice conflicts, individuals assert what Kant called *staatsbürgerrecht*, or citizenship rights. These are, in my view, second-order rights – for example, the right to have one's vote counted equally. Domestic-justice conflicts are the sort usually considered by liberal thinkers. Famously, Rawls, in his *Theory of Justice*, considered how to ideally arrange justice among individuals within a fixed, unitary polity (1971). Domestic-justice conflicts are also the most common subject of constitutional law. In the United States, for example, a substantial portion of the Supreme Court's cases deal with discerning and balancing the rights of American citizens (Hirschl 2004a, 19-20).

Meanwhile, in the second kind of justice conflict, the inter-polity variety, polities claim rights vis-à-vis one another. Kant called these *voelkerrecht*, the rights of peoples. These are what I see as first-order rights, concerning collective self-determination. Political theory long ignored first-order-rights conflicts, considering the international realm to be hopelessly anarchic – a "war of all against all," best left to political realists (Walker 1993). Here, Rawls is among the exceptions; his *Law of Peoples* (1999) sought to articulate principles of international justice. Law, too, has made some inroads here, employing conventions, international courts and the like to try to hold states to agreed-upon global norms.

Kant's third kind of justice conflicts are the trans-polity variety. This is the variety relevant to this dissertation. Again, trans-polity conflicts pit the rights-claims of individuals against those of external polities. Kant called individual trans-polity rights *weltbuergerrecht*, or world citizenship rights. Conflicts involving these trans-polity rights are very poorly theorized (Requejo and Nagel 2017, 9). I believe this is both a cause and a consequence of their complexity. I conceive of them as differing from Kant's first two rights conflicts as they take place not *within* the first or second orders, but *across* them. That is to say, they take place across boundaries, hence

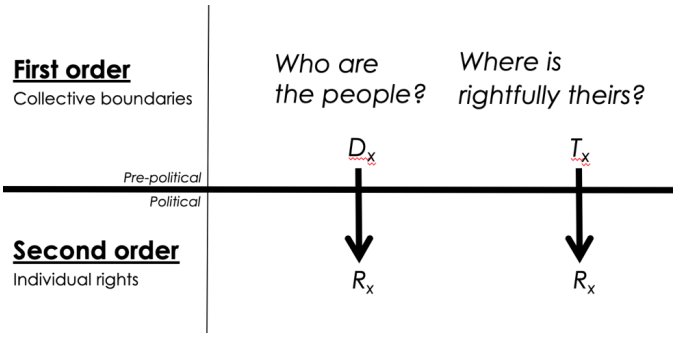
encountering the boundary problem. I suggest resolving trans-polity rights conflicts is particularly challenging for two reasons, both inherent to the boundary problem. The first reason relates to what I call "transpolitical hydraulics." The second relates to what Fraser calls "abnormal justice" (2009). I next discuss each in turn.

2.4 Trans-polity conflicts, transpolitical hydraulics, and abnormal justice

Trans-polity conflicts involve complex interactions between "constitutionally prior" first-order arrangements, protecting collective self-determination, and "constitutionally post" second-order arrangements, guarding individual rights. These interactions exhibit what I call "transpolitical hydraulics," involving "downstream" and/or "upstream flows." First, I will discuss "downstream flows."

As noted earlier, in practice second-order arrangements protecting individual rights typically complement, and are nested within, antecedent, first-order arrangements protecting self-determination. Hence, self-determination typically conditions individual rights. I conceive of pre-political demotic and territorial bounding decisions as "flowing downstream," acting on democracy and liberal rights. This dynamic is depicted in Figure 1.

Figure 1: The 'downstream flow' of 'transpolitical hydraulics'
Pre-political collective-boundary-making facilitates self-constitution and self-determination, addressing the matter of "who are the people" by bounding the demos (D_X) and addressing "where is rightfully theirs" by bounding that demos' territory (T_X). These bounding decisions can be understood to "flow downstream," from the pre-political first order to the political second order, acting on individual rights (R_X).



As noted, in my conception this "downstream flow" takes place across borders – across international borders and, in "compound" states, also across the boundaries of constituent peoples and/or subunits. Internationally, an example involves immigration and voting. My own experience is illustrative. I was born in the United States but as a young adult sought to move to Canada – a trans-polity appeal. Like in most states, Canada's citizens possess second-order rights, enshrined in the Charter of Rights and Freedoms, to move and vote anywhere domestically. Also as with most states, Canada values its self-determination, so employs first-order arrangements protecting its territorial and demotic boundaries. I was allowed to move to Canada (i.e., to be included within Canada's territorial boundaries) only after proving my presence would not disadvantage Canadians. Several years later I was allowed to vote (i.e., to be included within Canada's demotic boundaries) only after meeting the requirements of citizenship. Hence, until I was naturalized as a Canadian citizen, Canada's first-order boundary regime placed "downstream" conditions on my liberal democratic rights. These conditions would have been unconstitutional had I already been Canadian.

As noted, it is not just when traversing international borders that individual rights are conditioned by first-order arrangements. Such conditioning occurs within states that are federal, consociational or otherwise "compound." When I moved to Canada I settled in Nunavut Territory, which, with fewer than 40,000 residents, is the least populous of Canada's federal subunits. Federalism is a first-order arrangement – a "historically given" constitutional structure designed to represent and protect not just the rights and interests of individuals but also the self-determination of constituent polities. This arrangement has staggering consequences "downstream," on second-order rights. Under Canadian federalism, to protect small polities, those polities are, per capita, "overrepresented" vis-à-vis large polities. Hence in Nunavut it takes just one-third as many voters to elect a Member of Parliament as it does on average in Ontario – a transgression of the egalitarian principle of "one person, one vote." Canada's internal, federal structure, just like its external boundaries, can thus be said to place downstream conditions on certain individual rights.

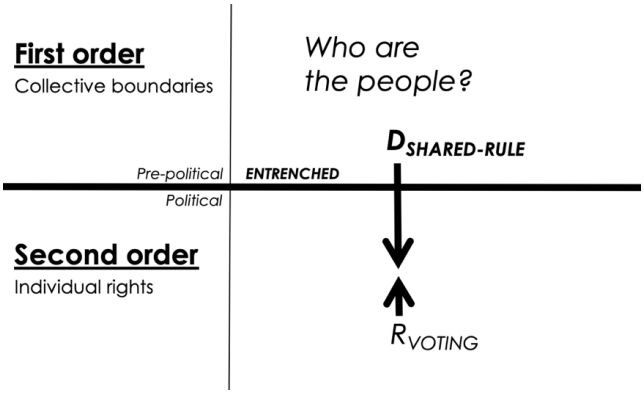
I suggest one of Kant's key innovations in *On Perpetual Peace* was to resist this downstream flow, championing individual rights that push "upstream." Such were his third sort of rights, or *weltbuergerrecht*. Kant conceived of *weltbuergerrecht* narrowly, as rights of hospitality owed to travelers visiting foreign countries. Nonetheless, I believe Kant's claim was a bold one. In effect, he condemned certain illiberal outputs of self-determination, challenging the conditioning of individual rights he felt should be inviolable not just domestically but abroad. Kant maintained that *weltbuergerrecht* should resist the standard transpolitical current, conditioning the self-determination of foreign sovereigns. In this way he seems to have imagined a world in which the second order might condition the first – in which collective boundaries would bend to the exigencies of liberal rights.

Yet Kant did not take this too far. Observes Benhabib, Kant's "right of hospitality … does not entitle one to plunder and exploit, conquer and overwhelm by superior force those among whom one is seeking sojourn" (2004, 40). Otherwise, individual rights would push *all the way* upstream – they would not merely condition but quash collective self-determination, unbounding the foreign sovereign. Hence, Kant seems to call for what I term a *trans-polity balance*: for respecting individual *weltbuergerrecht* while preserving self-determination.

But where is the line between individual rights and self-determination – between conditioning first-order arrangements and quashing them? In the battle of transpolitical hydraulics, how far upstream is too far? How much can boundaries bend before they break? Where is the appropriate trans-polity balance? The answer may be straightforward – if it is articulated in a constitution. Indeed, in federal or other "compound" states, trans-polity balances are often constitutionalized. For example, as noted, the relative "weight" of my federal vote in Nunavut was three times that of voters in Ontario. It was not infinitely weightier, nor equally weighty. Rather, it fell in between. As is depicted in Figure 2, Nunavut's self-determination *conditions* the individual rights of Ontarians but does not quash them, nor is it quashed *by* them. Nunavut's self-determination flows downstream, Ontarians'

individual rights flow upstream, and Canada's constitution prescribes where, approximately, the two currents meet. In this way, I see federalism as establishing a trans-polity balance between individual and subunit representation.

Figure 2: The trans-polity balance of Canadian federalism
In federal systems like Canada's, pre-political bounding decisions provide the demos of each federal subunit, including that of Nunavut, with a measure of shared rule ($D_{SHARED\ RULE}$). As this provision is constitutionally entrenched, Nunavut's pre-political demotic boundaries 'flow downstream,' acting on voting rights of individuals in other subunits, such as Ontario (R_{VOTING}). These downstream flows condition – but do not quash – Ontarians' voting rights. Rather, the constitution prescribes a trans-polity balance.



Frustratingly, most trans-polity balances are less easily achieved. Often, constitutions provide no guidance. This is of course a problem internationally, in the legal vacuum of geopolitics. But it may also be a problem domestically. Take, for example, another case from Canada. Founded in 1867, Canada was the first state to employ federalism to provide self-determination to a discrete internal people, Francophones. It did this by crafting a predominantly Francophone province, Quebec. To bolster Francophone self-determination, Quebec in 1977 passed Bill 101, requiring that commercial signage be in French only. In 1988, Anglophones launched the case *Ford v. Quebec*, maintaining Bill 101 violated their individual right to freedom of expression, guaranteed in Canada's Charter of Rights and Freedoms. The Supreme Court of Canada found in their favour. Quebecois were outraged. The

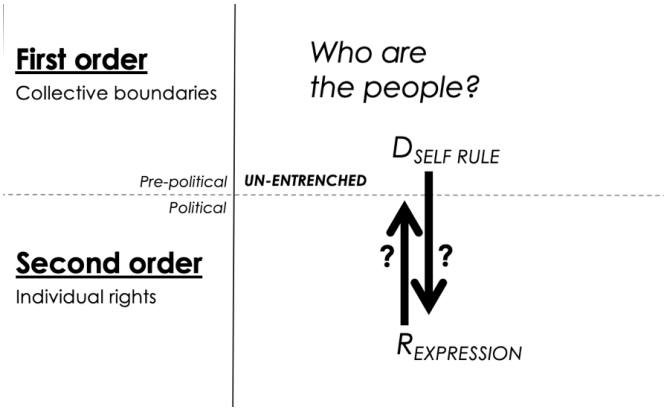
ruling helped spur the mid-1990s *séparatisme* crisis, the closest Canada has come to breaking up (Smithey 1996, 83).

Did the Supreme Court of Canada decide *Ford* correctly? Was freedom of expression rightly defended, or was Quebec's self-determination wrongly undermined? These questions – and I believe all non-constitutionalized trans-polity questions – are difficult. It seems to me this is for at least three reasons. Two of those reasons I will discuss here; the third I will save for the next section. First, trans-polity cases, which, as noted, involve *weltbuergerrecht*, would seem to be hard to distinguish, or disentwine, from ordinary second-order cases involving *staatsbürgerrecht*. After all, the plaintiffs in *Ford* alleged ethnic discrimination, a not-uncommon *staatsbürgerrecht* complaint in liberal democracies. For the court to properly try *Ford* I believe it needed first to recognize the distinct nature of the case, as one potentially involving not a conventional intrapolity clash between co-citizens, but rather, possibly, a trans-polity clash pitting individuals against an ostensibly exogenous polity defending its purported demotic bounds.

The second reason trans-polity cases are difficult, I believe, is because even when they are not mistaken for run-of-the-mill intrapolity cases, they nonetheless depart from what Fraser calls "normal justice" (2009). I suggest normal justice is analogous to a soccer match, with the judge as referee. In a soccer match the referee's task is to call fouls and determine a winner based on a clear, agreed-upon set of rules. In this way, a soccer match is clearly bounded. Typically, the best team wins. Fraser's "abnormal justice" is maddeningly different. In "abnormal" conditions, the rules and objective of the game – its boundaries – are themselves in dispute. Achieving abnormal justice is like refereeing a contest between a team playing soccer and a person playing chess. In such a contest, determining the winner hinges on a prior determination, which in turn will foreordain the outcome. If winning means scoring the most goals, the soccer team will triumph, even if it is not a good team. If instead winning means checkmating, then the soccer team, no matter how skilled at soccer, will lose.

Ford v. Quebec, I suggest, presented an abnormal-justice challenge. For the court to properly try *Ford* it needed first to recognize the distinct nature of the case – to see it as an "abnormal" contest, akin to the soccer-versus-chess match described above. Second, the court needed to determine the rules of the contest, absent constitutional guidance. Did the rules of soccer apply, or did those of chess? If, as the plaintiffs claimed, the contest required guarding liberal equality, then Bill 101 clearly broke those rules. If instead the contest required what Quebec demanded – protection of the self-determination of Canada's Francophone minority – then Bill 101 was arguably proper. In such an "abnormal" trans-polity clash, determining the relative priority of individual vis-a-vis collective rights will all but foreordain the result. The abnormal-justice challenge of *Ford v. Quebec* is depicted in Figure 3.

Figure 3: The abnormal-justice challenge of *Ford v. Quebec*
Federal systems insure each subunit enjoys not just shared rule but also self rule ($D_{SELF\ RULE}$). This pre-political bounding decision 'flows downstream,' impacting individual rights, potentially including rights to freedom of expression ($R_{EXPRESSION}$). Canada's constitution gives little clue as to the appropriate trans-polity balance between subunit self-rule and individual expression. Thus, in *Ford v. Quebec*, decision-makers faced an abnormal-justice challenge. How far could Quebec self rule 'flow downstream' without abusing the individual-expression rights of Anglos? How far could Anglos' rights push 'upstream' without undermining Quebec self rule? What, exactly, were the rules of the game?



Because of such abnormality, scholars focusing on trans-polity clashes have urged judges to proceed cautiously. Champions of first-order "compound" arrangements

such as federalism and consociationalism have urged judges to avoid reflexively approaching cases such as *Ford* through the lens of second-order liberal individualism (Pildes 2004, Issacharoff 2008, McCrudden and O'Leary 2013). Issacharoff says it well: "Courts should be wary of following their impulses to treat such ... conflicts about the structure of political systems as familiar claims of individual rights" (2008, 231). Conversely, champions of the rights of migrants and refugees have called for deciders in trans-polity cases to avoid allowing the foundational integrity of states to overshadow second-order pleas for justice (Benhabib 2004 and 2006, Fraser 2009). Either way, due to the "abnormal" nature of trans-polity disputes, Fraser would advise that deciders begin with meta-questions. What is the appropriate "scale of justice" to use? How should justice be framed? Which level of moral agent, the individual or the collective, is the rightful subject of justice?

2.5 Metapolitics

I have shown that trans-polity clashes are vexing. Because of the boundary problem, they involve "transpolitical hydraulics." Also, absent a constitutionally prescribed "trans-polity balance," they encounter "abnormal justice." "Transpolitical hydraulics" again refers to the dynamic interactions between first- and second-order arrangements. Typically, arrangements guarding first-order self-determination "flow downstream," acting on second-order individual rights. However, rights-claims such as Kant's *weltbuergerrecht* press upstream, potentially pushing back against self-determination. Discerning the appropriate balance between downstream and upstream flows – between self-determination and individual rights – may be straightforward if that balance is constitutionalized. If it is not, however, it becomes a question of "abnormal justice." It is "abnormal" because it problematizes pre-political assumptions about the relative priority of self-determination vis-à-vis individual rights – about the rules of the game. It is furthermore "abnormal" because decisions regarding that priority will all but foreordain justice-system outcomes – i.e., who wins the game.

As if such disputes were not thorny enough, I now discuss the third reason I think trans-polity clashes are difficult to adjudicate. It is because of metapolitics. Again, metapolitics, as I use the term, is contestation over what is and is not a polity – over the appropriate bounds of demoi and territory. Metapolitics thus involves disagreement over the answer to those core first-order questions, "who are the people and where is rightfully theirs?" Metapolitical inquiry, in turn, attempts to discern whether, and where, "us" and "ours" differ from "them" and "theirs." In this way, metapolitical inquiry seeks to identify the existence and extent of "others." To highlight how metapolitics relates to trans-polity dilemmas I turn now to an example not from Canada, but the United States – the same example I used in several of my dissertation articles.

The U.S. is of course federal, and so, like Canada, "overrepresents" low-population federal subunits. Due to the aforementioned Great Compromise, Wyoming, the state with the fewest residents, and California, with the most, are constitutionally guaranteed equal representation in the Senate. In this way, they are equal *qua* polity. But consequently, they are unequal *qua* voter. Individual Wyomingites are dramatically overrepresented in the Senate vis-à-vis individual Californians. For decades, many U.S. states, including Alabama, mimicked this practice in their state legislatures, overrepresenting low-population counties. Then came the 1964 U.S. Supreme Court case *Reynolds v. Sims*. In that case, residents of a high-population Alabama county charged that this practice diluted their relative voting power, violating the Constitution's Equal Protection Clause. The state responded with the "federal analogy": The U.S. Senate does it, so why can't we? The plaintiffs challenged this "federal analogy," noting that unlike the demotic equality enjoyed by states in the U.S. Senate, the demotic equality of counties is never mentioned in the U.S. Constitution.

In the Supreme Court's ruling, Chief Justice Warren agreed, deeming the federal analogy "inapposite." He wrote, "Political subdivisions of states – counties, cities, or whatever – never were and never have been considered as sovereign entities"

(*Reynolds* 1964, 377). The court in effect held that Alabama's counties lack first-order status. Unlike Wyoming, their equality – indeed, their *existence* – as sovereign polities was not constitutionalized. In *Reynolds*, the sole legitimate subject of justice was deemed to be individual voters, owed "one person, one vote." Suddenly, every Alabama county was, I suggest, demotically "unbound." No longer recognized as collective "selves," they were of course not owed self-determination. Hence, they could in no way condition the voting rights of individuals. As history shows, the *Reynolds* decision flooded upstream. The "structure of democracy" of almost every state legislature was upended, with representation, and thus power, flowing to urban areas.

As can be seen, in trans-polity cases such as *Reynolds*, the sort of balancing that Kant in my view proposes, between second-order individual rights and first-order polity rights, may quickly elide into a dispute not about *where* but *whether* – not about where to strike the balance between the first-order and second-order claimant but about whether the first-order claimant is in fact a legitimate polity. Put another way, the challenge here seems to be not simply a trans-polity one, requiring weighing the voting rights of urban Alabama voters against the representational rights of rural Alabama counties. Rather, the dispute is about whether rural Alabama counties are the sort of entities owed representational rights in the first place. As such, *Reynolds* in my view is a question of metapolitics.

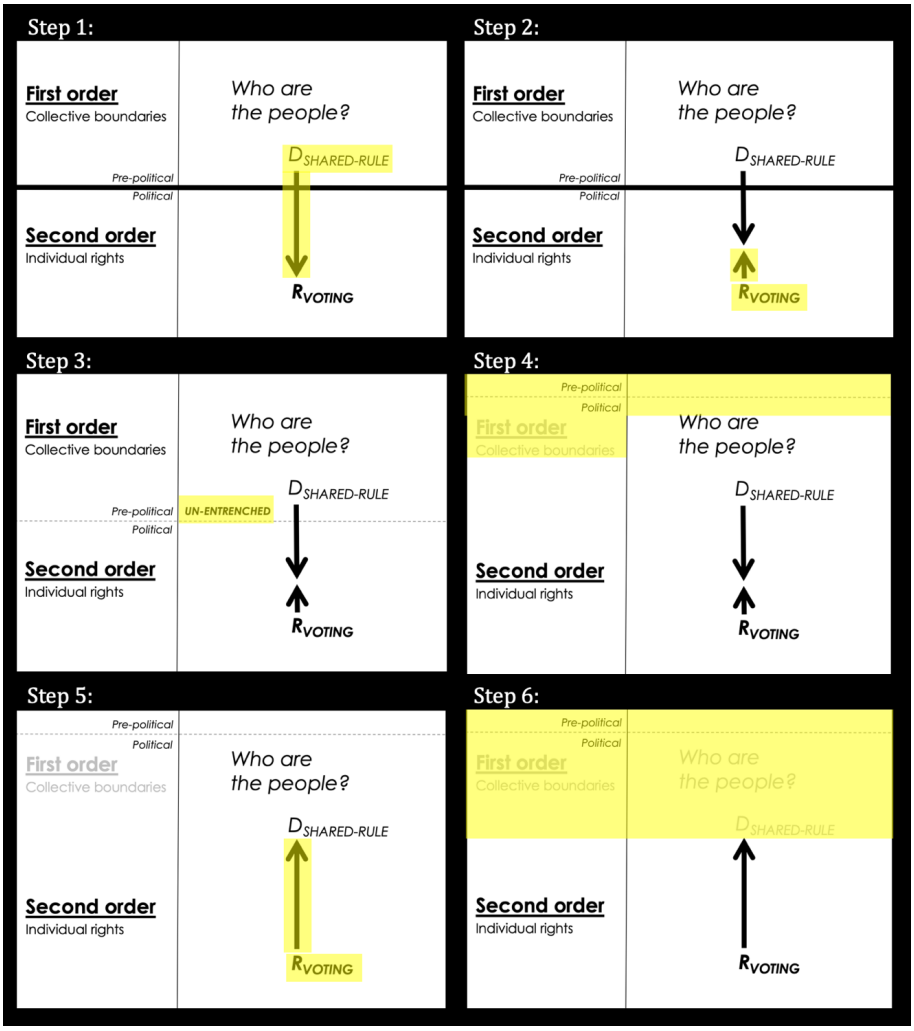
Like non-constitutionalized trans-polity challenges, metapolitical challenges, I suggest, require abnormal justice. As noted, in cases of abnormal justice, deciders must first recognize that the conflict before them is occurring not *within* the first or second orders, but *across* them. Then, like in non-constitutionalized trans-polity challenges, deciders must ask reflexive questions. In metapolitical challenges, however, I would maintain that the reflexive questions are not just about *where* to strike the balance between the first and second orders – between upstream and downstream flows. Rather, in metapolitical challenges the reflexive questions begin with *whether* to strike such a balance. Is the collective-rights claimant a valid first-

order polity, such as Wyoming? Or is it a pretender to the throne, as with low-population Alabama counties? If decision-makers conclude the former, then first-order rights will flow some distance downstream, conditioning liberal democracy. If on the other hand decision-makers conclude the collective is *not* a valid first-order polity, individual trans-polity rights will flow *all the way* upstream. They will not just condition the collective's self-determination but will eliminate its self-constitution. In this manner, as happened in the case of Alabama's counties in *Reynolds*, the purported polity will be metapolitically unmade.

I believe *Reynolds* imparts one more lesson – the core lesson, I feel, of this dissertation. In trans-polity clashes, because of transpolitical hydraulics, and because of the confusion inherent in situations of abnormal justice, individual rights *may be leveraged to strategic advantage*. This is done to frame the dispute as *intrapolity* rather than *trans-polity* – as a case of co-citizens demanding equal rights in a universal demos, rather than as a boundary-crossing case contraposing first-order and second-order rights. In this manner, plaintiffs harness individual liberal rights, which are the core rights *within* polities, to problematize boundaries *between* polities, challenging the legitimacy of demotic and territorial difference.

That is what happened in *Reynolds*. The plaintiffs indeed won voting equality – a second-order victory. But that was not their prime goal. The plaintiffs were reformers, for whom voting equality was a means to an end (Eskew 1997). Their objective was to metapolitically reconstitute Alabama, upending its structure of democracy so as to swing state politics leftward. By leveraging second-order rights, and framing Alabama as a universal demos, they aimed to achieve not a trans-polity balance but to score a metapolitical triumph. They did so, redrawing the demotic boundaries of Alabama to their own political advantage. Put another way, by promulgating "one person, one vote," the *Reynolds'* plaintiffs did not merely secure equality *qua* individuals, but rewrote the answer to "who are the people?" Employing individual rights to unbound Alabama's counties, they shifted power to more politically progressive urban areas. These steps are depicted in Figure 4.

Figure 4: The metapolitics of *Reynolds v. Sims*
In Alabama, demotic bounding provided shared rule ($D_{SHARED\ RULE}$) to low-population counties, constraining voting rights (R_{VOTING}) of individual Alabamans (Step 1). Plaintiffs launched an individual-rights challenge (Step 2). Plaintiffs noted county-based shared rule was not entrenched in the U.S. constitution – in effect, that counties were not a 'self' owed self-determination (Step 3). In this manner, plaintiffs framed the dispute not as *trans-polity*, between individuals and a self-determining polity, but *intrapolity*, between second-order co-citizens. The court agreed with this framing (Step 4). Thus, when the plaintiffs' claims pushed 'upstream,' they encountered no first-order resistance (Step 5). The claims, rather than constraining shared rule by way of a trans-polity balance, metapolitically undermined the counties' first-order self-determination (Step 6).



As I will now show, trans-polity clashes – and, in turn, metapolitics – have become far more salient over the past several decades, in this post-Westphalian age.

2.6 Post-Westphalianism: outsiders' just inclusion, insiders' just exclusion

In Europe, prior to the seventeenth century, "systems of political authority were characterized by tangled networks of feudal obligations and overlapping spheres of imperial or ecclesiastical rule" (Whitt 2014, 563). The 1648 Treaty of Westphalia, however, carved Europe's map into fixed sovereign units demarcated by hard external borders (Agnew 1994). For more than 300 years, Westphalianism framed the international order, making states the paradigmatic political unit.

Then, in the past several decades, this framework began to weaken. This was likely for multiple reasons: neoliberalism, which freed the movement of labor, goods, and capital; instant communications; planetary ecological challenges; the rise of trans- and international political actors; and, as shall be discussed in greater detail later, the "rights revolution." "Historically given" borders became more permeable, rendering international trans-polity conflicts more salient. If Kant's advocacy of trans-border rights opened the door to post-Westphalian thought (Benhabib 2006, 23), now, by necessity, theorists crowd through that door. As Benhabib observes, "We are at … a historical juncture where the problem of political boundaries has once more become visible" (2004, 18). Whitt agrees, suggesting we have entered a "crisis of territoriality" (2014, 566). The crisis is multifaceted, involving not just travelers requesting foreign hospitality but refugees appealing for shelter, peasants demanding trans-boundary water rights, islanders pressing for action on climate change, and workers chasing jobs that are chasing capital.

Yet I see all these trans-border appeals as sharing a common quality. They involve individuals seeking consideration by foreign polities. Put another way, they feature outsiders seeking to have their liberal-democratic interests counted – to be "bound in." It is largely for this reason that the past few decades have seen an explosion of research into the boundary problem (Whitt 2014, 566). This boundary-problem

work focuses on the question of "just inclusion," well-summed-up by Bauböck: "Who has a claim to be included in a democratic polity?" (2017, 3). Human-rights champions such as Bauböck, Benhabib and Fraser commonly challenge the hegemony of state boundaries, calling for consideration of the trans-polity rights of exogenous individuals. Common, too, is a lament shared by these scholars: that individuals seeking "just inclusion" have so far achieved little justice. Despite post-Westphalianism, when individuals fight states, states still tend to win. Even two centuries after Kant's conceptualization of *weltbuergerrecht*, I suggest the international transpolitical current continues to flow mostly "downstream." Outsiders remain largely bound out; the Westphalian status quo endures.

Of course, Westphalianism does not just frame the international order. It also structures the domestic realm, making states *containers* (Shaw 2008). Outside is "them" while inside is "us" (Walker 1993). In unitary states, "us" is constituted to mean universal citizens, while in compound states, "us" is additionally constituted to mean fixed constituent polities. And here too the past several decades have been disruptive. Internal borders have also been shaken up. But unlike in the international realm, domestically the post-Westphalian pressure has been for *more* borders. This pressure comes from sub-state collective actors whom I call "(re)emergent." Their first-order status was not entrenched at the time of state-making, either because they did not claim such status or because their claims were overlooked or rejected. Subsequently their claims have (re)emerged. Increasingly, (re)emergent sub-state actors appeal for domestic self-determination – for new federal units, autonomous zones, consociational arrangements, devolved powers, and the like. This causes conflict between those (re)emergent actors and the presently constituted "us" (Benhabib 2004, 82; Issacharoff 2008).

I suggest this disruption of the internal order has led to the obverse of the disruption of the international order. As noted, the post-Westphalian weakening of outside boundaries has prompted individuals to appeal for just inclusion in foreign polities. Conversely, I think, the breaching of inside boundaries has spurred calls for

what I call "just exclusion." That is because, when (re)emergent internal first-order claimants seek to self-constitute and self-determine, they necessarily strive to bound out exogenous individuals or groups. Put another way, demarcating and empowering their collective political selves requires excluding, demotically and/or territorially, those they consider "others."

In such cases, which should prevail: the time-honoured rights of "us" – the state's universal individuals and already-constituted polities – or the fresh bounding demands of (re)emergent groups? Though I have not seen them discussed as such, I would characterize these too as trans-polity conflicts. Unlike the trans-polity conflicts being waged across external boundaries, pitting the established first-order claims of collectives against the emergent liberal-democratic rights-claims of refugees or victims of environmental destruction, internal trans-polity conflicts work the opposite way, pitting the established second-order claims of individuals against the (re)emergent first-order claims of restive internal collectives. And here is the rub: As my research demonstrates, these trans-polity conflicts often elide into metapolitics – into efforts by the established second-order actors to frame (re)emergent claimants as undeserving of first-order status.

Where this sort of metapolitical clash arises, I would argue decision-makers find themselves deep in abnormal justice. Those who reject out of hand the (re)emergent claims of internal groups exhibit a double standard: Again, as Van Dyke observed, majority rule is no more fair domestically than it would be internationally (1985, 172). Yet politically, action is trickier than inaction. First-order claims often revisit fraught pre-political bargains struck, or awkward realities sidestepped, at the time of state-making. Rekindled, these disputes cannot be tackled in the vacuum of a constitutional convention. They can only be grappled with on the fly, with demoi already dug in, powers divvied up, individual rights entrenched, and turf jealously guarded (Requejo and Nagel 2017, 14). It is thus no wonder states often prefer to "let sleeping dogs lie rather than invite a confrontation over inclusion and exclusion"

(Tierney 2012, 58). With any luck, rather than blazing hotter, the (re)emergent claims will grow quiet, perhaps smothered by democratic majoritarianism.

Though far less well-theorized than international trans-polity conflicts concerning the "just inclusion" of migrants, refugees, and the like, certain internal "just exclusion" trans-polity conflicts have also received scholarly attention. Most notable was a clash a decade ago over domestic power-sharing in Bosnia and Herzegovina, where members of non-consociating ethnic groups claimed electoral discrimination (McCrudden and O'Leary 2013, Graziadei 2016). The clash eventually appeared in the European Court of Human Rights as the 2009 case *Sejdić and Finci v. Bosnia and Herzegovina*. Again, the status quo won out. In that case, however, the status quo favored "us" – individual citizens, wielding second-order rights, resisting first-order compound arrangements. Here, in my conception, the transpolitical current pushed upstream. Contrary to the advice of the likes of Pildes (2004), Issacharoff (2008), and McCrudden and O'Leary (2013), in *Sejdić and Finci* the interests of the second order were found to condition the first.

As noted, it is my contention that such abnormal, internal, "just exclusion" trans-polity clashes are theoretically akin to the more familiar "just inclusion" trans-polity clashes tackled by the likes of Kant, Fraser, Benhabib and Bauböck. Both confront the boundary problem, though as I see it they encounter the boundary coming from opposite directions. It is furthermore my contention that internal trans-polity clashes are far more common than scholarship would suggest. As noted, they occur when power-sharing is imposed, as in Bosnia, in redistricting conflicts, as in Alabama, and in self-determination campaigns, as in Quebec. They also arise when states join supra-national federations like the EU (Pildes, 2004, 34), and when municipalities combine or divide (Briffault 1993). Most relevant to this dissertation, such abnormal battles over just-exclusion happen when people from one place seek to assert jurisdiction over prior sovereigns, as in settler colonialism.

2.7 Settler colonialism, Indigenous (de)colonization and settler rights

Colonialism, as conventionally understood, occurs where developed-world powers exert economic, political and cultural control over exogenous subaltern territories, exploiting the inhabitants' labour, in combination with the land and resources, for the benefit of the metropole. Typifying this dynamic was Europe's centuries-long dominion over the Global South. Since the Second World War, colonialism of this sort has retreated – "a seismic shift in the international system" (Trinidad 2018, 21) that has seen more than 80 former colonies, encompassing 750 million residents, declare independence.

Far more resilient than conventional colonialism, and no less pernicious, has been that variant famously conceptualized by Wolfe (2006) as "settler colonialism." Settler colonies may have begun conventionally, as imperial possessions yoked for profit (Veracini 2010, 1). But distinctively, these possessions were at some point flooded with metropolitan and other developed-world settlers. Impelled by a "logic of elimination," settlers strived to kill, expel, confine or assimilate the locals, seize their homelands, and found "a new colonial society on the expropriated land base" (Wolfe 2006, 388). Wolfe emphasizes this is a two-phase process – that "settler colonialism destroys to replace" (2006, 388), with Indigenous dissolution preceding settler installation. In this manner, Wolfe says, settler colonialism supplants Indigenous civilizations with new versions of the settler motherland. Where conventional colonialism was common in Africa, Asia, Latin America, and the Caribbean, settler colonialism gave birth to the United States, Canada, Australia and New Zealand – pioneers, ironically, of liberal democracy. Wolfe moreover emphasizes that settler colonialism "is a structure, not an event" (2006, 388) – a mechanism not just for causing but for preserving domination over Indigenous peoples.

Still, in recent decades, a political shake-up has rippled through democracies across the globe. Where once states, including settler-states, were near-total sovereigns, "rights" have become sacrosanct and domestic and international legal arenas have

become sites of political contestation. This transformation goes by many names. Tate and Vallinder call it the "judicialization of politics" (1995, 13). Hirschl terms it the "trend toward juristocracy" (2004b, 6). Epp, perhaps most famously, dubs it "the rights revolution" (1998). As noted, this revolution has helped weaken Westphalian borders, both inside and out. This revolution has seen rights become weaponized; they are brandished to advance innumerable political causes. Political actors use rights, law and litigation to champion international human rights, traditional civil rights, the liberation of women, gays, and ethnic minorities, religious freedom, prisoners' rights, the right to die, the right to a healthy environment, and so forth.

In settler-colonial states such as the United States, Canada, and Australia, Indigenous peoples, inspired by the retreat of colonialism overseas, and empowered by the "rights revolution," have mobilized against settler colonialism. They have become, in my conception, (re)emergent first-order rights claimants. Invoking inherent, treaty-based, or contemporary Indigenous rights, they resist or seek to reverse their political assimilation into overarching state demoi, pressing instead to be acknowledged as demotically and territorially discrete first-order polities. In short, they strive to self-constitute. Further, Indigenous peoples press for recognition of their first-order authority over their territories and demoi, striving for self-determination (Hixson 2016, 172).

Yet, given the unique nature of settler colonialism, (re)emergent Indigenous rights-claims present a problem. Where in conventional decolonization the colonist "goes home," settlers, almost by definition, remain. As Wolfe observes, "settler colonizers come to stay" (2006, 388). Under all but the most radical conceptions of "settler decolonization," settlers continue to inhabit, and in almost all ways dominate, settler states. They retain substantial interests concerning voting, mobility, land and so forth. It seems to me that calls for Indigenous self-determination have thus opened a Pandora's Box concerning the structure of settler-state democracy, with normative, legal and political consequences. Normatively and legally, I believe, such calls challenge existing liberal understandings of "who are the people," by insisting the

settler-state's citizens are not universal but plural – that the state is home to more than one people. Further, politically, calls for Indigenous self-determination have placed the ambitions of Indigenous collectives on a collision course with the dominant interests of settlers. This clearly is disruptive. But I contend Indigenous mobilization has resulted in something even more dramatic. It has prompted a settler "backlash," with settlers themselves joining the rights revolution, weaponizing second-order rights.

Scores of volumes have detailed past settler-state resistance to Indigenous rights – how states like the U.S., Canada or Australia employed political, economic or even military might to dispossess and disempower Indigenes. Too, many scholars have explored how settler states defended these colonial projects using the language of rights (Hoxie 1984, Mackey 2005, McHugh 2008, Blackhawk 2019). Often it was claimed these colonial projects would *secure* Indigenous rights. For example, Hoxie shows how the most notorious U.S. land-alienation effort, the *Dawes Act*, was hailed by officials as the "Indians' Magna Carta" (1984, 70). To a more limited extent, such settler-state rights-talk has been documented in modern times. Researchers have revealed how settler-colonial powers, by framing Indigenes as racialized individuals in need of liberal equality, rather than as discrete polities in need of collective boundaries, deny Indigenous sovereignty (McHugh 2008), hamper Indigenous self-constitution (Gover 2014), and even impair Indigenous self-understanding (Porter 1999).

Yet it is also well-documented that, in response to the modern Indigenous-rights movement, settler states have gone some way in accommodating (re)emergent Indigenous claims. In states such as the United States, Canada and Australia, Indigenous first-order demotic and/or territorial boundaries have received greater recognition and protection (see, for example, Kymlicka 1995, McHugh 2004, Gover 2015). This has come both through interpolity agreements – honoring old treaties or crafting new ones between settler and Indigenous sovereigns – as well as through what are in effect trans-polity balances (Berger 2010; Gover 2015), such as were

struck in the U.S. Supreme Court decision *Morton v. Mancari*. To a greater extent than any time in the past century, many Indigenous groups now exercise something like real self-government. Several such groups, especially in remote areas, have also gained ownership and/or jurisdiction over vast swaths of their historic territories.

However, little scholarship has focused on the contemporary settler-rights backlash – on how, in response to recent Indigenous successes, settlers now invoke "rights" in in the name of their own equality, and deploy such invocations in the arenas of politics and the courts. One of the few academic exceptions is Berger (2010, 2013, 2019), who has focused broadly on the rights-based attack on U.S. Federal Indian Law. As Berger notes, "Today, measures seeking to restore Indigenous peoples to meaningful self-governance … are challenged as violating prohibitions on equal protection" (2010, 1196). Other scholars, activists and journalists have focused on specific American (and in a few cases Canadian), examples (see, for instance, Rÿser 1992, Toole and Kaufmann 2000, Goldberg 2001, Grossman 2003, Johansen 2004, Mackey 2005, Levy 2007, Goldstein 2008, Smith and Mayhew 2013, Rohrer 2016, Arnett 2017, Wolkin and Nevins 2018, O'Malley and Kidman 2018). With this dissertation I try to expand this academic focus, exploring how settlers in a variety of settler states, pursuing what could be called the "logic of elimination," have come to resist (re)emergent, first-order Indigenous claims by brandishing second-order individual rights – especially rights concerning voting, mobility, and property.

2.8 Settler metapolitics

I contend that when settler rights are weaponized, the battles that ensue should be understood as, potentially, internal trans-polity rights conflicts, contraposing established second-order settler rights and the (re)emergent first-order boundary claims of Indigenes. I have found, however, that these trans-polity conflicts often elide into metapolitical battles, over the "who" and "where" of democracy. I suggest when Indigenous peoples claim sovereignty, settlers may *leverage individual rights to strategic advantage*. Settlers may use those rights not merely to limit (re)emergent claims of Indigenous sovereignty, by appealing for a sort of trans-

polity balance, but to quash Indigenous-sovereignty claims entirely, by denying Indigenous peoples' status as sovereigns. In this manner, settlers may absorb "them" into "us."

How do such settler/Indigenous trans-polity disputes elide into metapolitics? I suggest that, as Wolfe might predict, this occurs through a two-phase process, as settlers in effect "destroy to replace."

This process mirrors *Reynolds v. Sims*. As traced in Figure 3, above, (re)emergent Indigenous first-order claims to "just exclusion" flow downstream, conditioning the second-order individual rights of settlers. Settlers thus launch individual-rights-based challenges to those conditions. They do so ignoring the question of whether those conditions are the epiphenomenal effect of Indigenous first-order rights. Rather than framing the Indigenous claimants as pre-political first-order agents (re)asserting self-determination in a state comprising plural demoi, settlers frame the Indigenous claimants as illiberally discriminating against their fellow (settler) citizens in a universalistic demos. In this manner, the settlers frame the dispute as *intrapolity* rather than *trans-polity*.

Intrapolity disputes, as noted, involve balancing justice among a single level of moral agents, second-order individuals. If decision-makers are convinced by this framing, and decide to treat Indigenes "as ethnic enclaves not entitled to the prerogatives of governments" (Berger 2010, 1169), Indigenous first-order claims are removed from consideration. Denied sovereign status, they are in my view metapolitically "destroyed." Hence, Indigenous collective rights can no longer push downstream. The second settler move is to appeal for the law to treat all individuals in the universal demos equally. In this way, liberal democratic second-order rights wash all the way upstream, metapolitically "replacing" the Indigenous collective, absorbing all Indigenous individuals into the broader, settler-dominated demos.

I will put this process another way, belaboring my earlier sports analogy. Again, conflicts between settler individuals and Indigenous collectives are trans-polity contests, and are thus "abnormal," akin to a competition between a team playing soccer and a person playing chess. The elision from transpolitical competition to metapolitical competition begins by the settler soccer team charging the Indigenous chess player with a rule violation – for example, with impermissibly using their hands. In this way, the settlers seek to frame the contest as a soccer match, where hands are forbidden, rather than as a chess game, where hands are required.

At this point it is possible the referee will not follow Fraser's admonition to begin with meta-questions concerning the appropriate framing of justice. Rather, the referee may unquestioningly accept the settler soccer team's framing. If the settlers convince the referee to indeed forbid the chess player from using their hands, the chess player will be effectively blocked from playing chess – again, for the purposes of this competition, they will be "destroyed." The soccer team, now playing soccer against the erstwhile chess player, will score the most goals and be declared victorious. In this way, I suggest, the Indigenous contestant will be "replaced."

2.9 Resolving settler metapolitical disputes

I have proposed that decision-makers presented with settler-metapolitical conflicts face three challenges. They must recognize that such cases are possible trans-polity cases. Moreover, they must do this even if settlers, seeking to leverage second-order rights as a "tool of elimination," veil trans-polity cases as run-of-the-mill intrapolity cases. Finally, they must recognize such cases are "abnormal," requiring they choose first what "scale of justice" to use before striving to level the balance.

So what scale of justice *should* decision-makers use to resolve settler-metapolitical disputes? Thus far in my theory I have said much about how decision-makers might better understand and approach such disputes, but nothing about ways they might resolve them. Here I will – very roughly – lay out one way they might do so.

As I have argued, settler-metapolitical disputes turn on the question of "just exclusion." Under what circumstances, and to what degree, may (re)emergent collective Indigenous right-claimants exclude settlers from Indigenous demoi and territory? I have argued this question is the inverse of the more familiar just-inclusion questions animating recent scholarship on the boundary question. My strategy, then, will be to review "just inclusion" solutions proposed by boundary-question theorists, select from among these a quite promising recent proposal, and invert it. In this way I will propose a "just exclusion" solution for resolving settler-metapolitical disputes

Again, to me the boundary question is: How may *we* self-constitute and self-determine in a way that fairly distinguishes us from *them?* Of course, this problem is vexing. Whereas second-order arrangements guarding individual rights are typically *nested within* first-order arrangements facilitating and preserving collective self-constitution/determination, the boundary problem instead *places these arrangements in tension*. This tension presents difficulties not just with regards to *how* to bound demoi and territory – a transpolitical dilemma – but *whether* to bound them – a dilemma of metapolitics.

Blanket solutions to these dilemmas are lacking. Few thinkers would suggest second-order rights must always prevail. To argue this would be to deny collective self-determination. Conversely, few would say all first-order claims should flow unimpededly "downstream." As was decided in *Reynolds v. Sims*, certain collectives may not be first-order polities in the first place. Moreover, even first-order polities should probably not be omnipotent. Most thinkers agree with Kant that self-determination should not quash, but merely condition, liberal democracy.

With blanket solutions to the boundary problem unavailable, scholars have offered more nuanced solutions. These solutions provide accounts concerning when, and to what degree, the second order can rightfully limit the first. That is to say, these solutions propose trans-polity balances. Very generally these balances fall into two

categories, based on the different principles animating them. These animating principles can be termed "all subjected to coercion" and "all affected interests."

Advocates of the "all subjected to coercion" principle propose that first-order collectives owe inclusion to all individuals over whom they exercise coercive power (Abizadeh 2008). At first blush this might seem in line with states' common practice of accommodating nested, second-order individual rights. But this is not quite so. Most liberal democracies limit the democratic rights of a wide range of individuals under their authority: minors, tourists, legal and illegal aliens, felons, the mentally ill, and so forth (López-Guerra 2014, 1).

Compelling arguments have been made for relaxing at least some of these limitations – for demotic liberalization that constrains, but does not quash, self-determination, thus achieving a more just trans-polity balance. But other consequences of the "all subjected" principle seem to defy the possibility of such a balance. A collective's coercive power is not limited to its own territory. Borders, for example, are coercive, potentially repelling migrants, including settlers. Should demotic bounds be liberalized such that settlers may vote on their own exclusion? This might upset any trans-polity balance, quashing self-determination.

A further difficulty with the all-subjected principle is that *coercion* is not the only form of power. A collective that imposes trade sanctions on its neighbors, or subjects them to pollution – or, more relevant to this dissertation, dilutes their voting power through establishment of a power-sharing arrangement – does not coerce them, but it surely *affects* them. Such is the logic behind the second category of boundary-problem solutions, based on the principle of "all affected interests."

Proponents of the all-affected-interests principle suggest collectives owe liberal-democratic consideration not merely to individuals they coerce, but also to individuals they *affect* (Dahl 1989). This argument too can be compelling, but it also encounters difficulties. For one, it is even more inclusive than the all-subjected

principle. Taken to extremes, a collective's decisions may touch nearly everyone on Earth. Granting everyone demotic inclusion would again quash self-determination.

There is another weakness of both the all-subjected and all-affected principles – a more fundamental one, to my mind. It is that they do not fully resolve the boundary problem. As I noted at the outset of my theory, the boundary problem is one both of inputs and outcomes – of how to fairly instantiate and maintain a first-order political self, on one hand, while fairly treating second-order individuals, on the other. The all-affected and all-subjected principles address the latter dimension but not the former. They propose how to avoid illiberal outcomes but say nothing about inputs – about how to identify a political self, imbue it with popular legitimacy, and maintain its self-constitution and self-determination.

Why do these theories ignore the input dimension of the boundary problem? I suggest it is because many boundary-problem scholars, focusing on just *inclusion,* take the input dimension for granted. As noted, just-inclusion scholarship is primarily concerned with establishing whether, how, and to what degree individuals are owed liberal-democratic rights within the first-order Westphalian state system. That state system is all but fixed – it is the status quo. Westphalian states are already constituted and self-determining, and for the most part are already seen as legitimate. What is *emergent* in just-inclusion disputes are claims by individuals to Kantian *weltbuergerrecht* – to liberal treatment at the hands of Westphalian states.

But just-*exclusion* disputes work the other way around. Again, in just-exclusion cases, which typically take place *within* liberal-democratic states, the status quo is the *second* order – liberal-democratic individual rights. In most cases these individual rights have long been entrenched. In just-exclusion cases it is the *first*-order claimants who are (re)emergent. Seeking to self-constitute and self-determine, restive internal minorities appeal for the just exclusion of individuals they see as "others." Because these (re)emergent claimants are *not* the status quo,

accounts of just exclusion cannot ignore the input dimension of the boundary question.

As noted, the input dimension of the boundary question involves resolving not one but *two* stages of challenges. The first-stage input challenge is metapolitical, concerning determining whether the (re)emergent claimant is a genuine first-order polity. If it is determined to be so, then the second-stage input challenge is transpolitical, concerning striking a balance allowing for second-order rights while *also* facilitating the (re)emergent claimant's self-constitution and self-determination.

Firmly resolving this first challenge is difficult. As already noted, there are few questions more contentious than who may self-determine. Except where sovereign status is etched in law – as in the case of states and constitutionalized subunits such as Wyoming and Nunavut – it is hard to say who is a legitimate first-order self. Numerous guiding principles have been proposed. Some are pre-political, such as nationalism (Walzer 1983, Gellner 1983). Others are political, such as Lockean contractarianism. Still others, such as Bauböck's concept of "all citizenship stakeholders" (2017, 42), Kymlicka's "liberal nationalism" (1995), or Miller's "principle of nationality" (1997), seem either to balance or straddle the two.

It is beyond the scope of this theory to assess the relative merits of these principles. I think it is enough to make two observations. The first observation is based in logic. It is a general observation, applying to all (re)emergent first-order claimants, including Indigenous peoples. Logically, it is unclear why in disputes involving just exclusion, but not just inclusion, the burden of proof must be on first-order claimants to justify their metapolitical existence. As noted already, the bounds of present Westphalian states commonly lack moral grounding. (Re)emergent peoples' claims to first-order status often have no *less* moral grounding than do Westphalian states, and may have *more* grounding – not just morally, but legally and otherwise.

Apropos this first observation, my second observation is specific to the case of Indigenous peoples. Though this dissertation does not dwell on the distinctive grounds for Indigenous peoples' claims to first-order status, I suggest Indigenous peoples are the sort of collectives whose first-order claims may be especially well-grounded, both morally and legally. Morally, Indigenous peoples' claims to first-order status are typically asserted within states that are settler-colonial, and that dispossessed and disbanded Indigenous collectives through acts of historical (and, arguably, enduring) injustice. Indigenous peoples may thus have strong moral claims to have their first-order status reinstated. As well, legally, many Indigenous claims to first-order status are, if not *etched* in law, then at least hinted at in law. Often, such Indigenous claims are based on historic treaties, terms of confederation, domestic-court rulings, or international law. Hence, Indigenous peoples frequently have legal claims to have their first-order status reinstated.

Given these logical, moral and legal observations, and given the aforementioned warning that "abnormal" cases must be adjudicated with caution, I suggest decision-makers should at least give Indigenous first-order claimants metapolitical *consideration*. By this I mean Indigenous claims should not be quashed unless it can be *proved* they fail first-order criteria. Certainly, Indigenous claims should not be quashed *pro forma* simply because, at the time of settler state-making, they were denied constitutional recognition as first-order rights-bearers. Nor should those Indigenous claims be quashed simply because today they run afoul of downstream settler rights. To quash Indigenous claims for either of these reasons would, in my view, put the second-order cart before the first-order horse. It would allow "power politics" and historical contingency, along with the contemporary strategic deployment of individual rights, to govern metapolitics – to decide who may rightfully self-determine.

Having addressed the boundary problem's first-stage input challenge, concerning metapolitics, I will now move on to its second-stage input challenge. If an Indigenous claimant deserves at least *consideration* as an upstream first-order

rights-bearer, and if subjected and/or affected individuals downstream deserve respect for their second-order rights, how should these transpolitical currents be reconciled? How should decision-makers resolve the apparent tension between the input and output dimensions of the boundary problem? How should they strike an appropriate trans-polity balance?

I suggest they might not need to strike such a balance – at least not in the way most boundary-problem scholars have imagined. Instead, they might apply to just-exclusion dilemmas an innovation Bauböck has recently laid out for just inclusion.[2] Bauböck's innovation, I feel, makes great progress toward resolving the boundary problem. He does this by suggesting there is not one single answer to the boundary problem but several complementary ones. This is because there are several motives for demotic bounding, justifying several sorts of boundaries. These several sorts of boundaries, Bauböck maintains, are not antagonistic but integral.

Bauböck suggests boundary-problem scholarship has overlooked this fact by focusing too much on only one sort of boundary, drawn for one purpose – the demarcation of citizenship in modern Westphalian states. Scholars have sought to redraw this sort of boundary, and only this sort, in more inclusive ways. Hence they have searched for a singular theory to reconcile, in all times, places, and circumstances, the input and output dimensions of state citizenship. Doing this has led them to ignore motives for bounding other than the demarcation of citizenship, and to ignore forms of jurisdiction other than that of states.

Bauböck does not disagree that democratic inputs and liberal outputs are in tension when bounding state citizenship. But he denies we must focus *solely* on citizenship

[2] I employ Bauböck's theory only as an example. His is by no means the only theory that might help us work through "just exclusion." For example, Miller, though not explicitly addressing the boundary problem, articulates criteria for gauging the permissibility of secession, including that individuals who would be "minoritized" by secession (for example, Spaniards in a sovereign Catalonia) should continue to enjoy human rights, legal equality, and distributive justice (1997).

and states, suggesting we should instead consider the boundary problem more broadly. He maintains that, considered more broadly, the input and output dimensions of the boundary problem are "not rivals but friends" (Bauböck 2017, 6). Thus, he argues, the boundary problem cannot be solved by way of a single trans-polity balance concerning the boundaries of state citizenship. Rather, he proposes what amounts to three separate trans-polity balances, implemented sequentially. These three balances would be struck according to three integral principles, satisfying three distinct purposes of liberal democracy, justifying three distinct forms of jurisdiction. I will roughly sketch them out here.

The first trans-polity balance would indeed concern citizenship. That is because, according to Bauböck, the first and deepest purpose of liberal democracy – the purpose justifying the creation of self-ruling jurisdictions such as states (as well as, I think, of *state-like* entities such as "national" federal subunits like Nunavut and Quebec) – is to provide first-order, collective peoples with democratic self-determination. Hence Bauböck suggests a first-stage trans-polity balance be struck in a manner that allows the first-order collective to self-constitute and self-determine. This collective becomes the citizenry of the constituted polity. The citizenry author the polity's government; that government is accountable to them. Membership in this citizenry is limited to "stakeholders" – to individuals whose autonomy hinges on the polity's democratic self-determination. Membership may in turn be denied to individuals whose inclusion would threaten the polity's self-determination. In this manner the first boundary, of citizenship, would be drawn.

Bauböck maintains that the second purpose of liberal democracy – which in my view is part of the justification for creating not just state-like entities but also non-"national" federal subunits such as Ontario or Wyoming – is to provide individuals with equal protection of the laws. Hence Bauböck suggests that a second-stage trans-polity balance should be struck in a manner insuring that individuals subject to the coercive power of the polity enjoy legal protection (as well as the right to contest any lack of such protection). These individuals would not all be citizens of

the polity but might alternatively be resident aliens (at least until they accrued enough "stake" to be naturalized as citizens). Regardless of their non-citizen status, they would be guaranteed second-order rights guarding them from wrongful coercion. I suggest they might also be guaranteed other second-order rights – including voting, mobility, and property ownership – *so long as those rights respect self-determination*.

According to Bauböck, the third and final purpose of liberal democracy – justifying the formation not just of states and state-like entities such as Nunavut and Quebec, nor just of sub-state entities such as Ontario and Wyoming, but also of purely functional jurisdictions such as counties and municipalities – is to provide individuals with a voice in making and revising policies that affect them. Hence a third-stage trans-polity balance would be struck to insure individuals affected by the decisions of the polity would have their interests represented in relevant policy-making processes. These individuals would include not just citizens and resident aliens but even affected aliens abroad. Their voice would not necessarily be a vote, but it *would* be a right to have their policy interests considered.

So far then, following Bauböck, I have described three distinct, sequenced acts of bounding, demarcating three differently situated groups, corresponding to three different purposes of, and three different jurisdictional forms within, liberal democracy. That is to say, I have described a polity with three different boundaries. The first boundary, again, would demarcate citizens. Given these citizens' distinct stake in the democratic self-determination of the polity, only they could, for example, draft, ratify, and amend the polity's constitution. The second demotic boundary would demarcate not just citizens but also other individuals under the coercive authority of the polity; for them, just inclusion would mean equal protection of the laws. The third demotic boundary would demarcate all those affected by the polity's decisions, including non-resident aliens. For them, just inclusion would mean consideration in policymaking. Three different groups, each

differently bounded, such that each enjoys just inclusion – that, very roughly, is Bauböck's innovative solution to boundary question.

But this solution only addresses the "who" dimension of the boundary question. As noted earlier in my theory, bounding also contains a "where" dimension. Where may "the people" rightfully self-determine? Here I provide an even rougher answer. Like Bauböck's answer to the "who" question, both Moore (2015) and Stilz (2019) have suggested answers to the "where" question that are multipart. Stilz proposes that where "occupancy of a particular place is of central importance for an individual's life plans and projects" that individual is owed "foundational title" (2019, 40). Moore posits that where a particular territory is "central to the aims and projects and relationships" of a group, that group enjoys a "moral right of residency" (2015, 120). In the estimation of both Stilz and Moore, within at least parts of the same territory, other individuals or collectives may have lesser territorial rights – rights that do not amount to "foundational title" or a "moral right of residency." In this manner, various, different situated groups might each in their own way enjoy just territorial inclusion.

It is not difficult to take these multipart "who" and "where" solutions to the just-inclusion dimension of the boundary problem, turn them inside out, and apply them to cases involving just exclusion. Again, the settler-metapolitical cases considered in this dissertation involve the juxtaposition of Indigenous and settler interests. As I will show in the next section of this dissertation, in many of those settler-metapolitical cases, the Indigenous interests seem to be of the sort Bauböck associates with the first and deepest purpose of liberal democracy, and that Stilz and Moore associate with the most fundamental sort of territorial attachment – that which provides first-order peoples with self-determination. Meanwhile, the settler interests in many of the cases considered in this dissertation seem to belong more to the secondary or tertiary tiers of concerns – concerns regarding securing equal protection of the laws, or of having a say in the making of relevant policy, and so forth. As Bauböck, Stilz and Moore all seem to discern, it would seem unreasonable –

indeed, unjust – to attempt to encompass these differently situated, differently motivated peoples into a single, universally bound demos and territory. Rather, different and complementary trans-polity balances should be struck, establishing different and complementary demotic and territorial boundaries.

As will be seen in the next sections, in clashes juxtaposing (re)emergent Indigenous first-order claimants and settler individual-rights-bearers, decision-makers may be able to find resolutions that "justly exclude" the latter from first-tier demotic and territorial bounds while including them in secondary or tertiary bounds. Put another way, decision-makers may solve settler-metapolitical dilemmas by striking a sequence of trans-polity balances, protecting Indigenous "citizenship" while insuring that settlers have protection of the laws and a say, if not a vote, in policy matters that affect them.

3.0 METHODS

This dissertation is the product of political theorizing, informed by traditional social science and legal research. In this section I discuss how I conducted this research – how I searched for, identified, categorized and compared cases of settler metapolitics in order to build theory therefrom.

I begin with a general introduction, discussing my hypotheses, data, and methods. I then discuss in detail the four steps of my research. The first step is my *scoping inquiry*, by which I sought potential cases of settler metapolitics. I then present, and explain the logic behind, the *taxonomic system* I developed to test whether such cases were indeed metapolitical and, if so, to classify them. Next I present my *data* – the cases I confirmed to be metapolitical – and discuss their taxonomic varieties. Finally, I discuss my *case selection* – how I picked sets of cases from my data to employ in the comparative case studies that make up my four articles.

3.1 Introduction

As noted previously, I began my dissertation with a single, fuzzy "hypothesis": that when certain rights of non-Indigenous individuals encounter certain rights of Indigenous collectives, things get weird. Over time I updated this hypothesis, positing that my theory of settler politics can help make sense of this weirdness. Along the way I developed at least two sub-hypotheses: that, at least in some instances, settlers have orchestrated such encounters strategically, to advance collective interests, and that such encounters have become more common over time.

Developing and testing my hypotheses required gathering and analyzing data. The data I gathered, and the manner in which I gathered it, were straightforward. My research was almost exclusively document-based. Such documents included primary government publications, legislative transcripts, legal decisions and briefs, meeting minutes, media reports, podcasts, videos, and even advertisements, as well as secondary sources including academic articles, political histories and memoirs. I gathered this data online and through research visits to courts, archives and

libraries in Australia, Canada, the United States and Norway. Largely in the aim of tracking down such documents, I interviewed several actors involved in the relevant cases.

Analyzing this data was more complicated. It could be said I employed just one method: applying my evolving theory to the data so as to make sense of settler metapolitics. But doing this involved solving another sort of "boundary problem." I first needed to *build* my theory, which required analyzing data, which could not be analyzed, or even identified, without a theory. Hence I proceeded iteratively. As noted in Section 2, I began with a single case from Canada's Northwest Territories. From this case I developed a rudimentary theory, which I used to identify other potential cases. Analyzing these cases helped me construct a rough taxonomy, which helped both refine my theory and search for, test and classify additional potential cases. Along the way, I selected four sets of confirmed cases for use in comparative case studies, which I conducted by examining them through the lens of my developing theory. The findings of these studies helped me identify even more potential cases – ad infinitum.

3.2 Scoping inquiry

The initial challenge of my dissertation, then, was to uncover potential cases of settler metapolitics. Again, I began with a single, familiar case. At that time I had no certainty that other such cases existed, and very little language with which to understand, describe, or inquire about them. Certainly there was no existing casebook, theory, or expert to turn to. I began by groping in the dark.

I first hunted in Canada, and focused on electoral districting, examining scholarship, caselaw, public documents and media reports. I uncovered a handful of promising cases involving conflicts between individual voting rights and the representation of minority "national groups." I then moved toward specifically settler/Indigenous conflicts – first in Canada, then in the U.S., then elsewhere.

In Canada, Australia and New Zealand, I found several potential cases by poring over works dealing with Indigenous peoples and the common law, such as by Gover (2017) and McHugh (2004, 2008). In the U.S., many potential cases were mentioned in legal works on federal Indian Law, or were referenced in various media or activist-group reports dealing with the "anti-treaty" or "anti-Indian" movement, or were discussed in articles by law professors such as Berger (2010, 2013, 2019).

Elsewhere, several of the potential cases I identified had come before supranational courts such as the European Court of Human Rights or the Southern African Development Community Tribunal. Other potential cases, especially in Alaska, northern Canada, northern Australia, and Fennoscandia, are ones I tracked down in the course of parallel research on contemporary settler colonialism in the "frontier" regions of developed democracies.

My scoping inquiry was of course not exhaustive. As noted, it was iterative and, indeed, is ongoing. So far I have focused largely on the Global North, and especially on North America, the Australo-Pacific, and Europe. Even in these places I am certain further exploration and analysis would turn up more potential cases.

3.3 Taxonomic system

As my scoping inquiry began to reveal potential cases, my next challenge was twofold. First, I needed to analyze each case to discern the theoretical or legal logic motivating the relevant Indigenous and settler actors. This was sometimes challenging, as the actors' beliefs and goals were often diverse, inexplicit and even veiled. Second, and barely less difficult, I needed to discern the political inputs and outcomes of each case. In these two ways, I worked to determine whether each case involved metapolitical conflict.

To assist in this, I developed an original taxonomic system – a framework for classifying settler-metapolitical clashes based on the various actors and rights-assertions involved. Table 1 presents my taxonomic system. Below I explain its logic.

Table 1: A taxonomy of potential settler-colonial metapolitical clashes

Indigenous boundaries	**Settler rights**	**Political inputs**	**Political outcomes**
A: Demotic	C. Universalism	E: Settler colonization	G. Settler success
A1: Self-rule	C1: Differentiated citizenship	F. Settler resistance to	H. Settler failure
A2: Shared rule	C2: Devolution of authority	Indigenous decolonization	I. Mixed/undetermined
B: Territorial	C3: Legal/territorial jurisdiction		
B1: Property	D. Egalitarianism		
B2: Mobility	D1. Voting		
B3: Resources	D1a: Disenfranchisement		
	D1b: Durational residency		
	D1c: Referendums		
	D1d: Power sharing		
	D1e: Co-management		
	D2. Property		
	D2a: Land alienation		
	D2b: Land claims/redistribution		
	D2c: Hunting, fishing, resources		
	D3. Mobility		
	D4. Other (e.g., language, religion)		

3.3.1 The boundaries at stake

The first column of my taxonomic system, headed "Indigenous boundaries," identifies the relevant boundaries at stake in each case. As can be seen, I divided the sort of boundaries at stake into two categories, demotic boundaries and territorial boundaries. Demotic boundaries relate to that core pre-political question "who are the people?" Demotic boundaries are further subdivided into boundaries relating to self-rule (the boundaries of a sovereign state, autonomous zone, federal subunit, and so forth) and those relating to shared rule (for example, to consociational arrangements, guaranteed overrepresentation, or co-management).

The second sort of boundaries at stake are territorial boundaries, relating to that other core pre-political question, "where is rightfully theirs?" Territorial boundaries are further subdivided into boundaries relating to property (the ownership or exercise of sovereignty over territory), to mobility (the regulation of access to territory), and to "resources" (the regulation of the use of natural resources in a territory).

3.3.2 The liberal principles invoked

The second column of my taxonomic system, headed "settler rights," identifies the relevant liberal principles invoked in each case. As can be seen, I divided these principles into two categories, universalism and egalitarianism. Universalism, again, is the principle "affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms" (Gray 1995, xii). I further divide assertions of universalism into three classes. The first class are assertions of universal citizenship – that all citizens of the relevant polity are legally undifferentiated. Such assertions directly challenge the *self-constitution* of (re)emergent demoi. The second class are assertions of universal authority – that the authority of the relevant polity is indivisible. Such assertions directly challenge the *self-determination* of (re)emergent demoi. The third class are assertions concerning the *territorial jurisdiction* of demoi. Such assertions typically challenge the authority of demoi to govern non-members, as when the United States has contested the power of Indian tribes to subject non-Indians to tribal law (Berger 2010, 1167).

The second liberal principle is egalitarianism. Egalitarianism, again, holds that all individuals are moral equals and deserve legal parity (Kymlicka 1989, 140). Unlike assertions of universalism, assertions of egalitarianism *indirectly* challenge first-order boundaries, by way of the aforementioned "transpolitical hydraulics." I divide assertions of egalitarianism into four classes: voting, property, mobility, and "other."

Assertions of egalitarian voting rights were the most common class of rights-assertions I encountered. I divided these assertions into five sub-classes, relating to the sort of democratic process being challenged. The first sub-class of egalitarian voting-rights challenges relate to disenfranchisement – as, for example, when non-Indians contest their exclusion from tribal elections. The second sub-class are challenges to more *covert* disenfranchisement, especially due to durational-residency requirements. In such cases, newcomers might contest rules limiting voting to long-term residents. The third sub-class of challenges relate to the

exclusion of certain voters from special elections like referendums (particularly referendums on decolonization). The fourth sub-class of challenges are to the under-weighting of certain voters in comprehensive power-sharing arrangements, such as consociational regimes. The fifth and final sub-class of egalitarian voting-rights challenges are to the under-weighting of certain voters in non-comprehensive power-sharing arrangements, such as environmental co-management bodies.

Assertions of egalitarian property rights were the second-most common class of rights-assertions I encountered. I divided these assertions into three sub-classes, relating to the sort of territorial process being challenged. The first class of property-rights challenges relate to land alienation. In such cases, for example, settlers might challenge prohibitions on acquiring Indigenous land. The second class of challenges relate to land-redistribution, as when individual landholders contest the post-colonial seizure and redistribution of their property. The third class of property-rights challenges relate to hunting, fishing and use of other resources – as, for example, when settlers contest treaty-based Indigenous harvesting rights.

Assertions of egalitarian mobility rights were the third-most common class of rights-assertions. Such assertions typically challenge limits on physical access or occupation of territory owned or claimed by Indigenous peoples.

Assertions of "other" rights cover liberal egalitarian rights not related to voting, property or mobility. Such rights-assertions may relate to language (as when Anglos protested Quebec's French-language sign law), to expression (as when individuals maintain they have been barred from certain kinds of political "speech"), or religion (as when individuals maintain their preferred form of worship has been barred by a first-order collective).

3.3.3 Political inputs

Column Three, "political inputs," identifies two inverse categories of relevant political inputs. The first involves efforts by settler actors that would result in the

expansion of settler demotic and/or territorial authority – i.e., settler colonization. The second category of political inputs involves resistance by settler actors to the assertion of demotic and/or territorial authority by Indigenous groups – i.e., resistance to decolonization.

3.3.4 Political outcomes

Column Four, "political outcomes," identifies three categories of relevant political outcomes – whether the clash was won by settler actors, lost by those actors, or was mixed or indeterminate.

3.4 Data

Having developed my taxonomic system, my screening of potential settler-metapolitical cases became more straightforward. If a case fit the taxonomic framework, I added it to my data collection. If it did not seem to fit, I discarded it. For example, early on in my research I considered as a potential case the Supreme Court of Canada's landmark 1973 *Calder* judgement, which found that Nisga'a First Nation land-title had survived colonization. But as my taxonomy evolved I recognized that *Calder*, having turned largely on questions of historical fact rather than liberal rights, was not a case of metapolitics. I thus discarded it. Working through such decisions helped inform my theory. It simultaneously established a data set from which to select cases for use in my case studies.

In the end I identified and taxonomized 56 cases of settler metapolitics. Appendix 1 presents this data set, organized according to my taxonomic system. I do not pretend this data set is comprehensive. I am certain that scores more cases of settler metapolitics exist. My hope is, by disseminating this data set, other scholars may add to and refine it.

Below I discuss the variations within this data. First I discuss the variations by state and case, and then by my four taxonomic categories – Indigenous boundaries, settler rights, political inputs and political outcomes.

3.4.1 States

As can be seen, at least half of the cases I collected are from the U.S. This is the state where, due to historical, cultural and constitutional factors, individual rights have been most salient. The U.S. is also the only major settler state where Indigenous peoples have long enjoyed something like first-order status – i.e., "domestic dependent nationhood." Hence it is no surprise that it is the U.S. in which settler metapolitical clashes have been most common. The second-greatest number of cases are from Canada. There, the "repatriated" constitution of 1982 recognized both individual, second-order rights and also collective, first-order rights of Indigenous peoples and Francophones. The contraposition of these rights has generated a number of settler-metapolitical clashes. The third-greatest number of cases are from Australia and New Zealand. These are the states that, along with those noted above, comprise the quartet of famous Anglo-settler states. The remainder of the potential settler-metapolitical conflicts I found come from either other states with a history of settler colonialism – of Indigenous peoples (New Caledonia, Norway, Sweden), Africans (Namibia, South Africa, Zimbabwe), or Baltic peoples (Estonia, Latvia) – or, alternatively, from European states with a history of internal multinational conflict (Belgium, Bosnia, Cyprus, Italy).

3.4.2 Cases

Most of the cases in my data table are listed as lawsuits. I list them this way largely as shorthand. While these cases did involve legal contests, they usually began, and often either ended or endure, as political contests, waged in legislative, executive or other non-judicial fora. Other of the cases in my data table center around constitutional conventions (such as the Australian "NT statehood" case [Murphy 2005]), public referenda (such as the Canadian "B.C. treaty referendum" case [Eisenberg 1998]), state legislation (such as the Norwegian "Finnmark Act" case [Spitzer and Selle 2019]), or ongoing political debates (such as over the rights of ethnic Russians in Latvia [Alijeva 2017] and land reform in South Africa [Hirschl 2004a]).

3.4.3 Indigenous boundaries

A slim majority of the cases I gathered relate to challenges concerning Indigenous demotic boundaries – to pre-political decisions concerning Indigenous self-constitution and self-determination. Many of these decisions involve self-rule, such as the Canadian "Campbell" case (*Campbell* 2000), in which a First Nation sought to establish an Indigenous "self-government." Others involve shared rule, such as the New Zealand "Maori seats" case (McHugh 2004), in which Indigenous peoples defended their designated parliamentary seats. A minority of the cases related, either additionally or alternatively, to challenges concerning Indigenous territorial boundaries – to pre-political decisions concerning "where is rightfully theirs." Most of these related to claims to property, as in the Zimbabwean "Campbell" case (Kriger 2007), where Afro-Zimbabweans pressed for post-colonial land redistribution. Fewer of these cases related to resource rights, as in the U.S. "walleye wars" case (Lipsitz 2008), in which a tribe sought to exercise treaty-protected fishing rights. The fewest involved cases related to Indigenous power to limit settler mobility, as in the Australian "Indigenous constitutional conventions" case (Indigenous Constitutional Convention Secretariat 1998), involving control of access to Indigenous territory.

3.4.4 Settler rights

Most of these cases related to settler demands for egalitarianism. Of these, many involved egalitarian voting claims. These included claims of disenfranchisement generally (such as the "Aziz" case in Cyprus [Charalambidou 2013]), of disenfranchisement in referendums (such as the U.S. "Guam" case [*Davis* 2017]), of disenfranchisement by way of durational-residency requirements (such as the New Caledonia "Py" case [Şen 2017]), of vote dilution by way of power-sharing arrangements (such as the Canadian "Raîche" case [Leger-Haskell 2009]) and vote dilution by way of co-management regimes (such as the Norwegian "Finnmark Act" case [Spitzer and Selle 2019]).

Slightly fewer of these egalitarianism cases involved inegalitarian property claims. These included claims related to land alienation (such as the U.S. "Wabol" case [*Wabol* 1990]), to land claims/redistribution (such as the Namibian "Kessl" case [Harring and Odendaal 2008]), and to hunting, fishing and other resources (such as the Sweden "From" case [Koivurova 2011]).

A minority of these egalitarianism cases involved inegalitarian mobility restrictions (such as the U.S. "Torres" case [*Torres* 1979]) or other inegalitarian limitations (such as the Latvian "Podkolzina" case [Alijeva 2017]).

The other cases related not to settler demands for egalitarianism but for universalism. These cases related to challenges to differentiated citizenship, to devolution of authority (such as the Canadian "B.C. treaty referendum" case [Eisenberg 1998]), and to non-universal legal/territorial jurisdiction (such as the U.S. "Oliphant" case [Barsh and Henderson 1978]).

3.4.5 Political inputs

Classifying these cases by political inputs – by whether they involved a settler attempt at colonization or, instead, settler resistance to an Indigenous attempt at decolonization – turned out to be more difficult than expected. Many of the cases played out (or continue to play out) over an extended time period and involve an array of thrusts, parries and counter-thrusts. In the end I classed a case as involving settler colonization if the specific lawsuit in question was precipitated by a contemporary effort by settlers to extend their authority. Conversely, I classed a case as involving settler resistance to Indigenous decolonization if the lawsuit was precipitated by Indigenous peoples seeking to entrench or recover their authority.

3.4.6 Political outcomes

As with political inputs, political outcomes were sometimes unclear. This is because many of the political battles are ongoing. However, many of the individual case could be classed as a settler victory or settler defeat, especially when they involved a

clear court verdict. Where such outcomes were clear, I classed them as such. Where they were unclear or ongoing I classed them as mixed/indeterminate.

3.5 Case selection

As I added cases to my taxonomy I considered them for inclusion in one of the comparative case studies that make up the articles of my dissertation. Twelve cases, composing four case studies, were ultimately selected. They are presented taxonomically in Appendix 2.

As can be seen from column one of Appendix 2, my case studies involved only Anglo-settler states – two in Canada, one in the United States, and one in Australia. This was done in part because Australia, Canada and the US are the three most iconic settler states, where settler/Indigenous conflicts are highly salient.

For each case study, cases were selected and organized around five variables – *state*, *time*, *political actors*, *sub-state political unit*, and the *nature of the rights-conflict* at hand. In each case study, *state* was held constant; hence each study focuses on a single state. As well, in each case study at least one other variable was held constant.

Thus, *Reconciling shared rule* compares five cases, involving similar rights-conflicts, during a similar time period, between settlers and different sub-state minorities in different sub-state jurisdictions. *Colonizing the demos?* compares two cases, involving different rights-conflicts, waged across time by the same Indigenous and settler contestants in the same sub-state jurisdiction. *"A wolf in sheep's clothing"* compares three cases, involving similar rights-conflicts, during a similar time period, waged by similar Indigenous and settler contestants, in different sub-state jurisdictions. And, *Constituting settler colonialism* compares two cases, involving countervailing rights-conflicts, waged almost simultaneously, by the same Indigenous and settler contestants in the same sub-state jurisdiction.

Across the four cases studies, there is variance in all five variables. As well, across the case studies there is variance among my taxonomic categories. Of the five types of Indigenous boundaries identified in Table 1, my case studies examine four. Of the 13 types of settler rights identified in Table 1, my case studies examine seven. Both types of political inputs are examined, as are all three types of political outcomes.

It can be seen, then, that each of my case studies individually was structured to isolate and examine discrete variables, while collectively my cases studies were organized to examine a wide range of variables and taxonomic categories. I did this not with the aim of drawing objective conclusions concerning causation or relationships between variables. (Given the nature of my data, this would likely have been impossible.) Rather, I did it for the purpose of theory-building. By isolating and examining discrete variables in each individual case study, I was able to tease out specific dimensions of my theory. As well, by examining a wide range of variables and taxonomic categories in my case studies collectively, I was able to make my theory as comprehensive as possible. Hence, my theory acquired both depth and breadth.

4.0 INTRODUCTION TO THE ARTICLES

In this section I present my case studies – the four articles of my dissertation. I begin with a general overview of the articles. I then discuss each one individually, explaining my general contributions in each article and the ways each advanced my theory of settler metapolitics.

4.1 Overview

My first article is "Reconciling shared rule: Liberal theory, electoral-districting law and 'national group' representation in Canada." It appeared in the *Canadian Journal of Political Science* in 2018. It identifies a pattern of legal and political battles pitting individual voting rights against the electoral overrepresentation of Francophones and Indigenous peoples, and compares how lawmakers and courts understood and responded to those clashes.

My second article is "Colonizing the demos? Settler rights, Indigenous sovereignty, and the contested 'structure of governance' in Canada's North." It appeared in *Settler Colonial Studies* in 2019. Comparing two political contests-turned-lawsuits in Canada's Northwest Territories, it explores how settlers employed individual rights protecting voting, mobility and expression to challenge Indigenous partition and power sharing, and how lawmakers and courts understood and responded to those challenges.

My third article is "'A wolf in sheep's clothing': Settler voting rights and the elimination of the Indigenous demos in U.S. Pacific territories." It appeared in *Postcolonial Studies* in 2019. Comparing a trio of lawsuits brought against Hawaii, the Northern Mariana Islands and Guam, it studies how settlers used individual voting rights to challenge Indigenous tribal formation, property protections and decolonization, and how courts understood and responded to those challenges.

My fourth and final article is "Constituting settler colonialism: The 'boundary problem,' liberal equality, and settler state-making in Australia's Northern

Territory." It appeared in *Postcolonial Studies* in 2019. Focusing on the battle over statehood in Australia's Northern Territory, it explores how settlers sought to de-legitimize Indigenous demotic and territorial authority, and to "constitute" settler-colonial authority, through a state charter based on universal, egalitarian rights.

4.2 'Reconciling shared rule'

"Reconciling shared rule" is the first article of my dissertation. In it I focus on electoral districting in Canada, examining five cases selected from my taxonomic table pitting the individual voting rights of Anglophone settlers against appeals by Indigenous peoples and Francophone Minority Communities (FMCs) for what I term "national group" apportionment. By "national group" apportionment I mean apportioning an outsized share of legislative seats to Indigenous peoples and FMCs on the grounds that, as Canada's two constitutionally recognized minority "national groups," they are owed a measure of shared rule.

In this article I make a number of original contributions. First, I document the rise of appeals for "national group" apportionment in Canada, which, in the case of Indigenous peoples, spiked in the 1990s, and which for FMCs has become common in the past few years. I observe that these appeals have spurred political and legal challenges by Anglophone settlers alleging violation of their Charter-protected individual right to "effective representation." I show that the reaction by political and judicial decision-makers to these challenges has either been to find "national group" apportionment unconstitutional (in the case of Indigenous peoples) or to evade the matter (in the case of FMCs). I introduce a rough "liberal theory of electoral apportionment." And I begin developing my theory of settler metapolitics, exploring how it can help decision-makers better understand, and resolve, these challenges.

Hence in the article I strive to lay out a normative framework for thinking about, and working through, clashes juxtaposing individual rights and "national group" apportionment. I do so by considering electoral districting through the lens of

liberal thought. I show that while the familiar liberal principles of individualism and egalitarianism figure large in governing fair districting, the less familiar liberal principle of universalism also plays a key role.

To that end I show that federal, consociational or otherwise compound states such as Canada are non-universal, apportioning disproportionate representation to less-populous constituent polities. I argue this is done to protect what Issacharoff might call those polities' first-order status – to facilitate their self-determination. This, I suggest, has "knock-on effects" on what I call "second order" rights, including by diluting the voting power of residents of more-populous polities. These knock-on effects are of course tolerated if they were entrenched at the time of state-making. But when (re)emergent rights-claimants, such as Indigenous peoples and FMCs, *assert* first-order status – when they press for "a seat at the power-sharing table" – the knock-on consequences may be controversial.

I display this was so in Canada, reviewing five key legal cases against the backdrop of my theory. I show that the legal and theoretical logic undergirding Canada's one key decision on Indigenous shared rule, *Friends of Democracy v. Northwest Territories* (1999), was at odds with the logic of the key decision on Indigenous self-rule, *Campbell v. British Columbia* (2000). While the latter decision approached the clash through what I argue was the appropriate, first-order lens, finding knock-on effects on individual voting rights constitutional, the former wrongly "placed the 'second order' cart before the 'first order' horse," striking down shared rule.

Meanwhile, I show that Canada's three recent "national group" apportionment cases involving FMCs – *Raîche v. Canada* (2004), *L'Association francophone des municipalités du Nouveau Brunswick et al. v. New Brunswick* (2014) and *Reference re the Final Report of the Electoral Boundaries Commission* (2017) – were also wrongly approached through a "second-order" lens. Yet despite legal logic I deem muddled and evasive, the rulings permitted Francophone overrepresentation.

I end by suggesting judges and political officials apply my theory when facing first-order-versus-second-order clashes: "If decision makers wish to resolve emergent appeals for power sharing by national groups, they need to think about those appeals clearly and address them squarely. To dismiss or side-step such appeals for failing to fit neatly into existing conceptions of purely individual rights will ultimately erode the legitimacy of governance in multinational states like Canada."

4.3 'Colonizing the demos?'

"Colonizing the demos?" is the second article of my dissertation. In it I focus on two cases selected from my taxonomic data table pitting the individual rights of settlers in Canada's Northwest Territories against what I call the region's "Indigenous structure of governance." By "Indigenous structure of governance" I mean first-order arrangements facilitating Indigenous demotic and territorial authority.

In this article I make several original contributions. I suggest settler "frontiers" be thought of as places featuring "unstable structures of governance," where "constitutionally prior questions" are in dispute. I observe that, around the world, such questions are emerging more frequently, taking diverse forms. I catalogue some of those questions and forms – a preliminary step in developing my taxonomic data table. I note such questions are increasingly coming before the courts, making theorization more pressing. And, I show that my developing theory applies beyond the realm of shared rule, to cases involving Indigenous self-rule and territorial mobility.

I add significantly to my theory. First, I show that clashes juxtaposing first- and second-order claims encounter political theory's notorious "boundary problem." I begin teasing out components of the "boundary problem," including the question of how to identify "we, the people." I note that answers to this sort of pre-political question, while foundational, are also fragile – and that when such answers "become contested, regimes may come tumbling down."

Too, I introduce to my theory elements of Fraser's thinking on justice and political inclusion. I note that conflicts juxtaposing first- and second-order arrangements fall within her concept of "abnormal justice," where proper adjudication requires choosing from amongst conflicting "scales of justice." I thus agree with her that decision-makers in such conflicts must begin reflexively, asking first, "What is the appropriate scale to use? … How should justice be framed?"

I also incorporate elements of Wolfe's work on settler colonialism. I suggest settler colonialism, at its most elemental, aims to make "theirs" ours. One way of doing that is by "revising the pre-colonial 'structure of governance,' to make 'them' us." I note settlers may pursue this goal by asserting their individual rights – "a novel tool of elimination." I suggest this tool is employed in two phases, "destroying to replace," with Indigenous dissolution preceding settler installation.

I refine my theory in other ways. I note that while the aforementioned "knock-on effects" of first-order arrangements may "wash downstream," individual-rights assertions may conversely "wash upstream." I also sharpen my use of Issacharoff's theories. If, as he says, "structures of government" are first-order arrangements, I suggest his concept of the "law of democracy" should be thought of as a complementary, nested, conditional second-order arrangement.

Using my theory, I analyze the two selected cases. The first involved a 1982 plebiscite on whether to split the Northwest Territories in two, forming a new Inuit-majority territory. The matter was racially polarized. Indigenous leaders restricted voting in the plebiscite to residents of three years or more – a thinly veiled effort to limit settler participation. Settlers sued, launching *Allman v. Northwest Territories* (1983), in which they alleged violation of their individual rights to expression and mobility. The court found otherwise, ruling largely on technicalities.

The second case involved an effort to institute Indigenous shared rule in the Northwest Territories, in part to prevent a majoritarian takeover by the booming

settler population. That effort ultimately failed with the aforementioned ruling in the lawsuit *Friends of Democracy v. Northwest Territories* (1999) – which held that Indigenous collective rights could not condition individual settlers' right to an equal vote.

I begin my conclusion by highlighting three hazards of adjudicating "Indigenous structure of governance" disputes. First, such disputes "revisit potentially fraught bargains that were struck … at the time of state-making" – meaning they re-open formerly settled first-order decisions. Second, such disputes can be hard to distinguish from run-of-the-mill second-order cases, meaning adjudicators can unwittingly stumble into fraught, "abnormal" terrain. Third, such disputes "may be strategically *camouflaged* as second-order cases," with settlers intending their individual rights to "wash upstream," undermining Indigenous governance.

And indeed, I show how settlers in both cases wielded rights in just such a manner, employing them as a "tool of elimination." As Wolfe might expect, this was done through a two-phase process, first "destroying" Indigenous authority by impugning its effects as unconstitutional, and then "replacing" Indigenous authority with that of the undifferentiated, universal (but increasingly settler dominated) territorial demos. I further show that the success of that settler strategy hinged, at least in part, on how justice was framed – on whether the court saw the relevant rights-bearers as second-order universal individuals or as the first-order Indigenous demos. Finally, I conclude that where justice is framed so as to validate that settler strategy, settlers may – as they did in the Northwest Territories – "colonize the demos."

4.4 'A wolf in sheep's clothing'

"A wolf in sheep's clothing" was the third of my articles. In it I focus on self-determination and decolonization in U.S.-controlled Pacific island territories, examining three cases selected from my taxonomic table pitting the individual rights of settlers against the collective rights of Indigenous islanders to form tribal governments, protect land from alienation, and vote on self-determination.

In this article I make several original contributions. I reveal a pattern of recent settler challenges to Indigenous authority in U.S. Pacific territories, and show that at least one of these challenges was facilitated by a national conservative non-profit and backed by the U.S. Department of Justice. I further show court rulings in two of those cases departed from the U.S. Supreme Court's *Insular Cases* precedents. And, I show my developing theory extends beyond Canada, to the United States, and beyond cases involving Indigenous self- and shared rule to those involving Indigenous land alienation. I observe again that, around the world, such questions are emerging more frequently, taking diverse forms. I catalogue more of those questions and forms – adding to my taxonomic data.

Also in this article I continue to build my theory. For the first time I incorporate the concept of metapolitics, identifying the "boundary problem" as, at base, a metapolitical dilemma, and conceptualizing settler colonialism as "a metapolitical coup." I use this concept to sharpen my thinking about settler-colonial "frontiers," characterizing them as contested spaces – places "in metapolitical limbo."

I begin to deconstruct the "boundary problem," showing it is vexing both to democrats (because boundaries cannot be drawn democratically) and to liberals (because bounding is non-universal and almost inevitably inegalitarian). I refine my understanding of the core pre-political questions raised by the "boundary problem," adding the "where" question: *where* may "we, the people" rightfully rule?

For the first time I recognize that Issacharoff's "structure of governance" scholarship and Fraser's "abnormal justice" work are two sides of the same, trans-polity coin. I note that, while "Issacharoff warns of the danger of overlooking first-order implications …. Fraser fears the opposite, that the foundational integrity of the state will overshadow second-order pleas for justice."

And, building on my previous theorizing, I identify a fourth reason why demotic bounding cases are thorny: because "where first-order questions are emergent, they

cannot be tackled in the vacuum of a 'constitutional moment'. They must be grappled with on the fly, in the hurly-burly of everyday politics …."

I apply my theory to the three cases at hand. In *Rice v. Cayetano* (2000), the U.S. Supreme Court found the state of Hawaii violated settler voting rights by organizing an Indigenous-only vote on whether to form a tribal government. In *Davis v. Commonwealth Election Commission* (2016), the US Court of Appeals for the Ninth Circuit ruled the Commonwealth of the Northern Mariana Islands violated settler voting rights when planning an Indigenous-only vote on whether to prohibit land alienation. And, in *Davis v. Guam* (2017), the District Court of Guam held the government of Guam could not violate settler voting rights to organize an Indigenous-only referendum on self-determination.

As in my preceding article, I find in all three cases settlers employed a novel "tool of elimination" to challenge Indigenous authority. I again show this strategy involved dual moves, "destroying to replace." I show that in all three cases, the courts' findings hinged on how justice was framed – on whether second-order individual rights or first-order Indigenous authority were deemed the "rightful subject of justice." Finally, I show that, "when settler colonists strategically assert individual voting rights, and where justice is framed so as to validate that strategy, a meta-political conquest may result."

4.5 'Constituting settler colonialism'

"Constituting settler colonialism" was the fourth and final of my articles. In it I focus on the clash in 1998 between Indigenous peoples and settlers over whether the Northern Territory should become Australia's seventh state. I examine two cases: First, settlers' attempt to draft and entrench a founding charter constituting the new state in the image of Australia's other, settler-colonial states, and second, Indigenous peoples' countervailing effort to craft a constitution guarding their self-determination.

In this article I make several original contributions. I show that my developing theory extends beyond Canada and the U.S., to the third iconic settler state, Australia, and that it extends beyond legal conflicts, to conflicts surrounding constitution-making. I thoroughly analyze original documents, media reports and other records concerning two Indigenous constitutional conventions in the Northern Territory. And I argue that the Northern Territory is a "metapolitical frontier, where demoi and territory are in limbo, torn between 'theirs' and 'ours.'"

I further build on my theory. Having previously noted that the "who" dimension of the "boundary problem" can be determined neither democratically nor liberally, I now establish the same for the "where" dimension: "staking territory cannot happen democratically. How can voters vote on their voting district? Similarly, despite attempts by liberal thinkers … few justice problems remain so intractable as how to divide up the world." Too, I recognize for the first time that while bounding is "primordial," it must also, for a state to endure, be perpetual.

With my theory in hand I then analyze the two selected cases. I show that at the Northern Territory Statehood Convention, settlers made statements and drafted and approved resolutions decrying Indigenous difference as illiberal – as "'discrimination', 'segregation', even 'apartheid.'" Instead they championed colorblind universalism, drafting and approving a charter that "made no mention of self-determination or land-rights protection, thus framing the territory as a single, holistic demos committed to individual equality and majority rule."

I further show that at two subsequent Indigenous constitutional conventions, Indigenous peoples responded to the boundary question far differently. Rather than defining "who are the people" as all "Territorians," Indigenous delegates insisted that constitutional boundaries demarcate their own specific demoi. Opposing universalism, they called for recognition of their political selfhood, so as to self-determine. And, rather than defining "where do they rule" as coextensive with the

territory as a whole, they called for the bounding of their own discrete homelands and sacred sites.

In this way, similar to my two previous articles, I showcased how settler colonization is a metapolitical campaign – an attempt to dissolve Indigenous demotic and territorial boundaries and constitute new boundaries that in effect enthrone settlers. Too, I displayed that these metapolitical attacks were in many cases waged through appeals to second-order liberal rights. Third and finally, I showed that when Indigenous peoples resisted, what ensued was a clash over the appropriate "framing of justice" – over whether first-order Indigenous boundaries, or second-order liberal rights, should prevail as the legitimate "subject of justice" in the constitution of the Northern Territory.

4.6 Conclusion and future directions

The core goal of my dissertation, again, was to develop a theory of settler metapolitics. Hence, the main conclusion of my dissertation is in fact Section 2, my theory section. Here, however, I will provide a few brief remarks concerning other, non-theory-related conclusions from my research. First, I will comment on my conclusions concerning the motives of settler metapolitics, then on my conclusions concerning its consequences. Finally, I will discuss avenues for future research.

First, concerning the motives of settler metapolitics: In this dissertation I have concluded that settler metapolitics is *strategic*, with settlers leveraging individual rights to challenge the constitutional legitimacy of Indigenous demoi and territories. I do not mean to suggest that all – or, perhaps, any – of the individual settler actors involved in the cases I discuss were motivated by bad faith. My research did not, and likely could not, discern these individuals' motives. I have no doubt many of them simply felt that inegalitarianism is wrong, and stood up for the interests of themselves, their families and their neighbors as local minorities in (historically or currently) Indigenous regions. I mean that settler metapolitics is strategic not at an individual level but at a system level. This sort of system-level strategy was

articulated by both Hirschl (2004a) and Wolfe (2006). Hirschl, in his exploration of the rise of "juristocracy" in states where minorities are politically ascendant, shows that bills of rights almost inevitably serve the interests of those sectors of society that author and interpret them – that they protect the powerful. Where power is at stake it would be shocking if the case were otherwise. Wolfe, meanwhile, shows that throughout history, settlers have reached for whatever device is at hand to wield as a "tool of elimination," advancing their interests vis-à-vis Indigenes. I suggest the fact that such tools are wielded unwittingly, in countless small and normatively sanctioned ways, makes their effects no less predictable, and serves only to veil, not disprove, the greater strategy at hand.

Second, concerning the consequences of settler metapolitics: Having gathered and analyzed nearly five dozen settler metapolitical cases from 16 countries, and having conducted four comparative studies of sets of those cases drawn from three countries, I can conclude that settler metapolitics are (increasingly) common, widespread, and important. Settler metapolitics has figured large in several key Indigenous-rights campaigns in iconic settler-colonial states, constricting opportunities for decolonization in the Northwest Territories and Hawaii, and possibly thwarting Canadian Indigenous "consociational representation," Guamanian independence, and CNMI land-protection. At the same time, settler metapolitics did not manage to inhibit the creation of Nunavut Territory. It has so far not facilitated statehood for Australia's Northern Territory, nor blocked the "consociational representation" of Canadian Francophone Minority Communities. While it is difficult to prove a trend, it seems safe to say that settler metapolitics began to flourish after (and presumably in reaction to) the Indigenous "rights revolution" of the past half-century. Particularly, settler metapolitics exploded in the U.S. Pacific after *Rice v. Cayetano*, and has proliferated of late in Canadian electoral apportionment. Given the clear political salience of settler metapolitics, it seems safe to say it has received too little attention. I hope my work will change this.

Concerning directions for further investigation, I believe my research opens several paths forward. First, as I have already noted, my collection and analysis of settler metapolitical cases is by no means complete. Again, I have so far primarily focused on the Global North, and particularly on Europe, North America and the Australo-Pacific. I hope (perhaps in collaboration with other scholars) to continue collecting and analyzing cases, especially from other regions – the Middle East, Asia, Africa, South America, and so forth. Gathering and analyzing more cases may either bolster or challenge my theory, but at the very least it will help me test and refine it.

Second, I hope to employ my theory to explore not merely contemporary cases of settler metapolitics but historic ones. I postulate that metapolitics figures large in the historic structuring of settler states. As noted, metapolitics today primarily takes place in spaces I call "frontiers" – i.e., spaces that are in metapolitical limbo, torn between "theirs" and "ours." Over the past several centuries nearly the entire Western Hemisphere and Australo-Pacific passed through this frontier stage, shifting from "theirs" to "ours." I suspect the processes and timing by which this happened involved countless metapolitical clashes – shaping, for example, whether Manitoba became Metis-dominated or white-dominated, whether U.S. Indian Territory became the state of Oklahoma, at what time historically Hispanic territories in the U.S. Southwest were granted statehood, and so forth. Exploring and revealing the historic workings of settler metapolitics will tell us much, I suspect, not just about past settler-colonialism, but about settler-colonialism in the present.

Finally, I hope to extend my metapolitical theory (or devise a similar theory) to explore the dimension of time. It seems to me the dimension of time is a critical element of metapolitics. This seems true in regards to both the past and the future. In regard to the past, it seems to me metapolitics are at play in the "bounding in" or "bounding out" of past events that effect the present, such as acts of historical injustice that have shaped present Indigenous circumstances. Meanwhile, in regard to the future, it seems that metapolitics are at play concerning the "bounding in" or "bounding out" of "future peoples" whose circumstances may be shaped by

contemporary decisions. Put another way, in the same manner that boundaries can be strategically adjusted across space, redefining the relevant "who" of politics in order to favor certain political outcomes, boundaries can also, for the same reason, be adjusted across time. Questions concerning the "just bounding" of time seem today to be especially salient, and deeply undertheorized.

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APPENDIX 1
Taxonomic table of data

State	Case	Indigenous Boundaries	Settler Rights	Political Inputs	Political Outcomes
Australia	Gerhardy v. Brown (1985)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Settler failure
Australia	The NT Statehood Convention (1998)	Demotic -Self-rule Territorial -Property -Mobility	Universalism -Diff. citizenship Egalitarianism -Mobility -Land alienation	Settler colonization	Settler failure
Australia	Indigenous Constitutional Conventions (1998)	Demotic -Self-rule Territorial -Property -Mobility	Universalism -Diff. citizenship Egalitarianism -Mobility -Land alienation	Settler resistance to Indigenous decolonization	Settler failure
Australia	Bruch v. Commonwealth (2002)	Demotic -Self-rule	Egalitarianism -Other *Education*	Settler colonization	Settler failure/ mixed
Belgium	Mathieu Mohin and Clerfayt v Belgium (1987)	Demotic -Shared rule	Egalitarianism -Voting *Disenfranchisement*	Settler resistance to Indigenous decolonization	Settler failure
Bosnia and Herzegovina	Sejdić and Finci v. Bosnia and Herzegovina (2009)	Demotic -Shared rule	Egalitarianism -Voting *Disenfranchisement*	Settler colonization	Settler success
Canada	Allmann v. Commissioner (1983)	Demotic -Self-rule Territorial -Mobility	Egalitarianism -Voting *Durational residency* *Referendums* -Mobility -Other	Settler resistance to Indigenous decolonization	Settler failure
Canada	Ford v. Quebec (1988)	Demotic -Self-rule	Egalitarianism -Other *Language*	Settler resistance to Indigenous decolonization	Settler success
Canada	Catham-Kent Community Network (1998)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Mixed/ indeterminate
Canada	Friends of Democracy v. NWT (1999)	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler success
Canada	Campbell et al. v. British Columbia (2000)	Demotic -Self-rule	Egalitarianism -Voting *Disenfranchisement*	Settler resistance to Indigenous decolonization	Settler failure
Canada	British Columbia Indigenous treaty referendum (2002)	Demotic -Self-rule	Universalism -Devolution of authority	Settler resistance to Indigenous decolonization	Mixed/ indeterminate
Canada	Raîche v. Canada (2004)	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler resistance to Indigenous decolonization	Settler failure
Canada	Nacho Nyak Dun v. Yukon (2005)	Demotic -Shared rule	Universalism -Devolution of authority	Settler resistance to Indigenous decolonization	Settler failure

Taxonomic table of data (continued)

State	Case	Indigenous Boundaries	Settler Rights	Political Inputs	Political Outcomes
Canada	R. v. Kapp (2008)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler colonization	Settler failure
Canada	L'Association francophone des municipalités du Nouveau Brunswick v. New Brunswick (2014)	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler resistance to Indigenous decolonization	Settler failure
Canada	Reference re the Final Report of the Electoral Boundaries Commission (2017)	Demotic -Self-rule	Egalitarianism -Voting *Power sharing*	Settler resistance to Indigenous decolonization	Settler failure
Cyprus	Aziz v. Cyprus (2004)	Demotic -Self-rule	Egalitarianism -Voting *Disenfranchisement*	Settler resistance to Indigenous decolonization	Settler success
Estonia	Limitations on citizenship/ language rights of ethnic Russians (1991-present)	Demotic -Self-rule	Egalitarianism -Voting *Durational residency* *Disenfranchisement* - Other *Language*	Settler resistance to Indigenous decolonization	Mixed/ indeterminate
Italy	Polacco and Garofalo v Italy (1997)	Demotic -Self-rule	Egalitarianism -Voting *Durational residency*	Settler colonization	Settler failure
Latvia	Limitations on citizenship/ language rights of ethnic Russians (1991-present)	Demotic -Self-rule	Egalitarianism -Voting *Durational residency* *Disenfranchisement* - Other *Language*	Settler resistance to Indigenous decolonization	Mixed/ indeterminate
Latvia	Podkolzina v. Latvia (2002)	Demotic -Self-rule	Egalitarianism -Voting *Disenfranchisement* - Other *Language*	Settler resistance to Indigenous decolonization	Settler success
Namibia	Kessl v. Ministry of lands and resettlement (2008)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Settler success
New Caledonia	Py v. France (2005)	Demotic -Self-rule	Egalitarianism -Voting *Durational residency* *Referendums*	Settler resistance to Indigenous decolonization	Settler failure
New Zealand	Amaltal Fishing v. Nelson Polytechnic (1996)	Demotic -Self-rule	Egalitarianism -Other *Employment*	Settler colonization	Settler success
New Zealand	Principles of the Treaty of Waitangi Deletion Bill (2007)	Demotic -Self-rule	Universalism -Diff. citizenship	Settler colonization	Settler failure
New Zealand	Critique of designated Maori seats in Parliament (2009)	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler failure

Taxonomic table of data (continued)

State	Case	Indigenous Boundaries	Settler Rights	Political Inputs	Political Outcomes
Norway	Sirum v. Esslan Reindeer Pasturing District (2005) ['The Selbu case']	Territorial -Mobility -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler colonization	Settler failure
Norway	Finnmark Act (2005)	Demotic -Shared rule	Egalitarianism -Voting *Co-management*	Settler resistance to Indigenous decolonization	Settler failure
South Africa	Land reform process and possible amendment of Section 25 (1994-present)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Mixed/ indeterminate
Sweden	Halvar From v. Sweden (1997)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler resistance to Indigenous decolonization	Settler failure
Sweden	Handölsdalen Sami Village and Others v. Sweden (2009)	Territorial -Mobility -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler colonization	Settler failure/ mixed
United States	Reynolds v. Sims (1964)	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler success
United States	Morton v. Mancari (1974)	Demotic -Self-rule	Egalitarianism -Other *Employment*	Settler colonization	Settler failure
United States	State v. Adams (1974)	Demotic -Self-rule	Egalitarianism Settler success *Durational residency*	Settler colonization	Settler success
United States	Oliphant v. Squamish Indian Tribe (1978)	Demotic -Self-rule	Universalism -Legal/terr. jurisdiction	Settler colonization	Settler success
United States	Torres v. Puerto Rico (1979)	Demotic -Self-rule	Universalism -Legal/terr. jurisdiction Egalitarianism -Mobility	Settler colonization	Settler success
United States	Washington v. Washington State Commercial Passenger Fishing Vessel Association (1979)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler colonization	Settler failure
United States	Craddick v. Territorial Registrar (1980)	Territorial -Property	Egalitarianism -Property *Land alienation*	Settler colonization	Settler failure
United States	Washington imitative to ban commercial fishing of Steelhead Trout (1984)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.* -Voting *Co-management*	Settler resistance to Indigenous decolonization	Mixed/ indeterminate
United States	The Wisconsin walleye wars' (1987-91)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler resistance to Indigenous decolonization	Settler failure
United States	McDowell v. State (1989)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler resistance to Indigenous decolonization	Settler success

Taxonomic table of data (continued)

State	Case	Indigenous Boundaries	Settler Rights	Political Inputs	Political Outcomes
United States	Wabol v. Villacrusis (1990)	Territorial -Property	Egalitarianism -Property *Land alienation*	Settler colonization	Settler failure
United States	Williams v. Babbitt (1997)	Territorial -Resources	Egalitarianism -Property *Hunting, fishing, etc.*	Settler colonization	Settler success
United States	Alaska v. Native Village of Venetie Tribal Government (1998)	Territorial -Property	Egalitarianism -Other *Taxation*	Settler resistance to Indigenous decolonization	Settler success
United States	Rayphand v. Sablan (1999)	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler failure
United States	Rice v. Cayetano (2000)	Demotic -Self-rule	Egalitarianism -Voting *Referendums*	Settler resistance to Indigenous decolonization	Settler success
United States	The Seneca Nation of Indians v. New York (2002)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Settler success
United States	Cayuga Indian Nation of N.Y. v. Pataki (2005)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Settler success
United States	City of Sherrill v. Oneida Indian Nation of N. Y. (2005)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Settler success
United States	Congressional amendment of the CNMI Covenant (2007)	Territorial -Mobility	Egalitarianism -Mobility	Settler colonization	Settler success
United States	Davis v. CEC (2016)	Demotic -Self-rule Territorial -Property	Egalitarianism -Voting *Referendums* -Property *Land alienation*	Settler colonization	Settler success
United States	Davis v. Guam (2017)	Demotic -Self-rule	Egalitarianism -Voting *Referendums*	Settler resistance to Indigenous decolonization	Settler success
United States	Brackeen v. Zinke and Cherokee Nation (2018)	Demotic -Self-rule	Egalitarianism -Other *Adoption*	Settler colonization	Settler success
United States	Fitisemanu v. US (2019)	Demotic -Self-rule Territorial -Property	Universalism -Diff. citizenship Egalitarianism -Other *Citizenship*	Settler colonization	Settler success
Zimbabwe	Campbell v. Zimbabwe (2008)	Territorial -Property	Egalitarianism -Property *Land claims/ Redistribution*	Settler resistance to Indigenous decolonization	Settler success

APPENDIX 2

Taxonomic table of selected cases

State	Case	Year	Sub-state unit	Indigenous Boundaries	Settler Rights	Political Inputs	Political Outcomes
Reconciling shared rule							
Canada	Friends of Democracy v. NWT	1999	Northwest Territories	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler success
Canada	Campbell et al. v. British Columbia (2000)	2000	British Columbia	Demotic -Self-rule	Egalitarianism -Voting *Disenfranchisement*	Settler resistance to Indigenous decolonization	Settler failure
Canada	Raîche v. Canada (2004)	2004	New Brunswick	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler failure
Canada	L'Association francophone v. New Brunswick	2014	New Brunswick	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler failure
Canada	Reference re Final Report of the EBC	2017	Nova Scotia	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler failure
Colonizing the demos?							
Canada	Allmann v. Commissioner	1983	Northwest Territories	Demotic -Self-rule Territorial -Mobility	Egalitarianism -Voting *Dur. residency* *Referendums* -Mobility -Other	Settler resistance to Indigenous decolonization	Settler failure
Canada	Friends of Democracy v. NWT	1999	Northwest Territories	Demotic -Shared rule	Egalitarianism -Voting *Power sharing*	Settler colonization	Settler success
'A wolf in sheep's clothing'							
United States	Rice v. Cayetano	2000	Hawaii	Demotic -Self-rule	Egalitarianism -Voting *Referendums*	Settler resistance to Indigenous decolonization	Settler success
United States	Davis v. CEC	2016	Northern Mariana Islands	Demotic -Self-rule Territorial -Property	Egalitarianism -Voting *Referendums* -Property *Land alienation*	Settler colonization	Settler success
United States	Davis v. Guam	2017	Guam	Demotic -Self-rule	Egalitarianism -Voting *Referendums*	Settler resistance to Indigenous decolonization	Settler success
Constituting settler colonialism							
Australia	The NT Statehood Convention	1998	Northern Territory	Demotic -Self-rule Territorial -Property -Mobility	Universalism -Diff. citizenship Egalitarianism -Mobility -Property *Land alienation*	Settler colonization	Settler failure
Australia	Indigenous Constitutional Conventions	1998	Northern Territory	Demotic -Self-rule Territorial -Property -Mobility	Universalism -Diff. citizenship Egalitarianism -Mobility -Property *Land alienation*	Settler resistance to Indigenous decolonization	Settler failure

I

Reconciling Shared Rule: Liberal Theory, Electoral-Districting Law and "National Group" Representation in Canada

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Introduction

In representative liberal democracies, the right to vote is sacrosanct. According to section 3 of Canada's Charter of Rights and Freedoms, "Every citizen has a right to vote in an election of members of the House of Commons or of a legislative assembly." Upholding this right presents myriad challenges, including determining by what principles representation should be apportioned. In Canada, representation is apportioned through territorially based districts. These districts must be periodically reshaped and their number and composition of electors thereby adjusted in a manner that guards voting rights while still facilitating expression of the popular will. In the Charter era, Canada's courts have become key players in this balancing act (Courtney, 2001). Their electoral-boundaries jurisprudence figures large in redistricting efforts, not least because the courts have proved willing to strike down "discriminatory treatment of voters under a particular set of electoral boundaries" (53).

Drawing non-discriminatory districts is challenging even in unitary states, where individuals are the sole rights bearers. Additional complexities arise in federal states, where representation attaches not only to individuals but also to territorial polities. Even where the relationship between individual and polity-based representation is inscribed in law, as in the overweighting of less populous regions in Canada's Senate, the consequences may be controversial. Thornier still is the case of apportionment in consociational states, where rights-bearing polities are not (or not solely) territorially

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Canadian Journal of Political Science / Revue canadienne de science politique
Page 1 of 20 doi:10.1017/S0008423918000033

defined, but are discrete ethnic, cultural, linguistic or religious "peoples." From Afghanistan to Macedonia, from South Africa to Northern Ireland, consociational arrangements are on the rise (McCrudden and O'Leary, 2013). Indeed, observes McCulloch, "Nearly all the peace accords signed in the last two decades have included power sharing" (2014: 1). Also on the rise, consequently, are constitutional clashes between the rights of "peoples" and the rights of individuals (Issacharoff, 2008).

Such clashes arise in diverse circumstances. They emerge when states assert jurisdiction over new ethnocultural polities, as when the United States claimed sovereignty over Pacific territories (Katz, 1992). They arise when states enter new power-sharing arrangements, as European states did following the Maastricht Treaty (Pildes, 2004: 34). They appear when power sharing is externally imposed, as in the peace plan for Bosnia (McCrudden and O'Leary, 2013). And likely most frequently, clashes between individual and consociational apportionment appear when restive internal groups demand changes to the terms of their constitutional participation (Issacharoff, 2008: 232). Such is the case in Canada, where conflicts between the existing rights of individuals and emergent appeals for representation by Indigenous peoples and francophone minority communities outside Quebec (FMCs) have, in recent decades, become fraught.

Like all federal democracies, Canada apportions representation both to individuals and federal subunits. But Canada also comprises three constitutionally recognized "distinct national groups" (Kymlicka, 1995: 12), anglophones, francophones and Indigenous peoples. Though these "national groups" are protected and empowered in part through federalism (Quebec for francophones, Nunavut for Inuit), federalism does not exhaust their rights. Ethnonational power sharing finds expression outside Canada's federal framework, through consociation. Consociation has become particularly relevant in the wake of the adoption of the *Constitution Act, 1982*, the Charter of Rights and Freedoms, and associated developments in Indigenous and "official-language minority" jurisprudence. Thus, in Canada, courts are increasingly compelled to grapple with appeals for polity-based representation in a consociational dimension.

In such cases, which should prevail: the time-honoured rights of individuals, or fresh demands of "national groups"? Such clashes are vexing. Scholars focusing on this topic have urged judges to proceed cautiously, avoiding reflexively approaching such cases through the lens of liberal individualism (Pildes, 2004; Issacharoff, 2008; McCrudden and O'Leary, 2013). Issacharoff says it well: "Courts should be wary of following their impulses to treat such … conflicts about the structure of political systems as familiar claims of individual rights" (2008: 231). Scholars such as Katz (1992) and White (1993a) have observed that, where courts thwart consociational accommodations in multinational states, they may compromise the state's legitimacy.

Abstract. Canada, like all representative democracies, apportions representation to individuals; also, like all federal states, it accords polity-based representation to federal subunits. But Canada is additionally a consociational state, comprising three constitutionally recognized "national groups": anglophones, francophones and Indigenous peoples. These groups share power and bear rights beyond the bounds of the federal system. In recent decades, Indigenous peoples and francophones have appealed for representation as "national groups," leading to constitutional challenges. Courts have either failed to address the constitutionality of "national group" representation or have rejected it as irreconcilable with individual voting rights. I suggest the former is unnecessary and the latter procedurally illogical. Drawing on the liberal principles of individualism, egalitarianism and universalism, I develop a framework contextualizing such representation within liberal theory. I then deploy this framework to analyze recent Canadian case law. I show that appeals for "national group" representation should be approached not through the lens of individual rights, but rather through the "constitutionally prior" lens of universalism.

Résumé. Le Canada, à l'instar de toutes les démocraties représentatives, répartit la représentation entre les individus; de plus, comme tous les États fédéraux, il accorde aux sous-unités fédérales une représentation fondée sur la politie. Mais le Canada est aussi un État consociationnel, composé de trois " groupes nationaux " reconnus par la Constitution : les anglophones, les francophones et les peuples autochtones. Ces groupes partagent le pouvoir et ont des droits dépassant les limites du système fédéral. Au cours des dernières décennies, les peuples autochtones et les francophones ont réclamé une représentation en tant que « groupe national », ce qui a donné lieu à des contestations constitutionnelles. Les tribunaux n'ont pas abordé la constitutionnalité de la représentation des « groupes nationaux » ou l'ont rejetée comme étant inconciliable avec le droit de vote individuel. J'estime que la première position est superflue et que la seconde est illogique du point de vue des règles procédurales. En m'appuyant sur les principes libéraux de l'individualisme, de l'égalitarisme et de l'universalisme, j'élabore un cadre contextualisant une telle représentation au sein de la théorie libérale. Je déploie ensuite ce cadre pour analyser la jurisprudence canadienne récente. Je montre que les appels en faveur d'une représentation du « groupe national » ne devraient pas être abordés sous l'angle des droits individuels, mais plutôt sous celui de l'universalisme « constitutionnellement antérieur ».

In Canada, it is not clear that courts have heeded this warning. Judicial, political and scholarly encounters with the topic have been muddled. This article seeks to contribute theoretical clarity. I begin by tracing the rise of appeals for "national group" apportionment, which, in the case of Indigenous peoples, spiked in the 1990s, and which for FMCs has become common in the past few years. I then develop a normative framework for thinking about, and working through, consociational apportionment. This framework draws on the key liberal principles of individualism, egalitarianism and universalism. I show that the last of these, universalism, is at once the least familiar to students of apportionment and also, when thinking about consociation, the principle of primary importance. This is because universalism is a "first order" principle that must be addressed prior to grappling with individualism and egalitarianism. Finally, I analyze the relevant case law surrounding Indigenous and FMC representation against the backdrop of this theoretical framework, showing how

approaching these cases through "first order" universalism may lend clarity to consociational apportionment in Canada.

National Groups and Consociational Representation

Consociation of "national groups" has long been a feature of Canada; indeed, Noel calls Canada "arguably the first consociational democracy" (1993:46). In sections 93 and 133 of the *Constitution Act, 1867*, the Catholic and Protestant religions and French and English languages were granted distinct legal protection. The Supreme Court, from its inception, has by law been disproportionately francophone. Overweighting of francophones is traditional in institutions such as the federal cabinet. Meanwhile, through historic treaties, Indigenous nations have for centuries been recognized as distinct from the broader Canadian polity. Even consociational apportionment is not new. Guaranteed representation of anglophones was long required in Quebec (Courtney, 2001: 47), while in Nova Scotia, dual-member districts once provided joint anglophone/francophone representation (Royal Commission on Electoral Reform, 1991: 179). However, as I will now show, calls for representation of Indigenous and FMC polities have recently become more common.

Calls for consociational representation for FMCs

The adoption of the Charter of Rights and Freedoms in 1982 provided francophones with a number of explicit consociational guarantees. The Charter's sections 16 to 23 address official-language protections. Building on these protections, courts have progressively expanded the polity-based education and healthcare-management rights of FMCs. According to Foucher, this jurisprudence has in effect affirmed FMCs' right "to live in their own language" (2005: 146).

Theorists, meanwhile, have explored whether FMCs are owed, or indeed already enjoy, constitutionally protected cultural self-rule—what has been termed "non-territorial autonomy" (Chouinard, 2014; Elkins, 1992; Nieguth, 2009; Poirier, 2008, 2012). Representation is often viewed as a corollary of such autonomy (Kymlicka, 1995: 32). Indeed, certain of the above authors (Elkins, 1992: 16), as well as others (Leger-Haskell, 2009: Magnet, 1995), have proposed apportioning polity-based representation to FMCs. Francophone advocacy groups have at times pressed for such representation. For example, during the debate over the Charlottetown Accord, groups recommended that one senator from each province represent the official-language minority of that province (Kymlicka, 1993: 62).

At the same time, traditionally francophone districts have increasingly come under threat. Thrice recently, FMCs in New Brunswick and Nova

Scotia, drawing in part on language rights unique to "national groups," have challenged electoral maps that submerged them into anglophone districts in the name of voter parity. The ensuing cases were all decided in favour of the FMCs. Yet the rulings, and the legislative and scholarly discussions flowing therefrom, lacked theoretical clarity. As I will show, despite appeals by FMCs for representation that flows from their consociational status as a "national group," courts have failed to say whether such rights exist.

Calls for consociational representation for Indigenous peoples

Indigenous peoples, too, are among Canada's "national groups." Prior to colonization they were sovereign; in recent decades they have called for internal self-determination (Coulthard, 2014: 64). Indigenous rights and protections are variously said to be rooted in natural rights, historic proclamations and treaties, international law, and in modern Canadian political, constitutional and jurisprudential developments. In the *Constitution Act, 1982* and the Charter of Rights and Freedoms, two key Indigenous rights were recognized. Section 35 of the *Constitution Act* affirmed certain Indigenous "existing rights," including (per federal government and court interpretations) 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 (Arbour, 2003).

Some scholars have suggested the "inherent right of self-government" carries with it a corollary right to representation in public government (Schouls, 1996: 739). Others have suggested guaranteed representation is owed to Indigenous peoples as a consequence of their cession of sovereignty in the same way British Columbia and Newfoundland acquired seats in Parliament in exchange for joining Canada (Knight, 2001: 1108). At least one scholar has proposed that certain historic treaties may guarantee Indigenous representation (Ladner, 1997). Finally, some thinkers suggest Indigenous peoples are owed power in Parliament because of their unique constitutional status as fiduciary dependents (Royal Commission on Electoral Reform, 1991: 182).

During the 1990s, numerous plans for guaranteed Indigenous representation were drafted. In 1991, the Royal Commission on Electoral Reform proposed creating Aboriginal Electoral Districts (1991: 182). In 1992, the Charlottetown Accord included provisions for Indigenous representation in Parliament. In 1995, the Liberal government's "Inherent Right Policy" urged "specific guarantees" of Indigenous representation in public government. In 1996, the Royal Commission on Aboriginal Peoples suggested Indigenous self-government might include "sharing power in joint governmental institutions, with guaranteed representation for the nations and peoples involved" (1996: 106). In the 1990s, Quebec, New Brunswick,

Nova Scotia and the Northwest Territories explored, but did not implement, guaranteed Indigenous representation (Niemczak and Jutras, 2008).

Today, in three provinces, electoral boundaries laws give Indigenous peoples specific consideration. In Alberta, the presence of "an Indian reserve or a Metis settlement" is among multiple factors that, taken together, qualify up to four districts for "exceptional" departure from voter parity. In Newfoundland and Labrador, one district enjoys special exemption from parity largely on the grounds "that persons of Aboriginal descent form the majority." In Ontario, "representation of Indigenous people" is among the reasons two low-population, heavily Indigenous districts were formed in 2017.

Beyond these narrow exceptions, polity-based Indigenous representation has gone unimplemented, and discussions surrounding it have faded. This is in part due to hesitations among Indigenous peoples to adopt alien institutions (White, 1993b) or legitimize colonial rule (Knight, 2001: 192). But it is also due to vigorous non-Indigenous opposition to, and lack of legal clarity surrounding, the integration of consociational Indigenous representation with existing representational rights of Canadians as individuals (Schouls, 1996: 748).

This clash was exemplified by the first and only charter challenge to confront Indigenous consociational representation. In *Friends of Democracy v. Northwest Territories*, the court in effect condemned the notion that Indigenous power sharing could permissibly compromise the voting rights of Canadians at large. As this article will show, the reasoning of the court sits uncomfortably with liberal theory, and, indeed, is at odds with a seminal subsequent ruling relating to Indigenous section 25 and 35 rights.

Contextualizing Consociational Apportionment in Liberal Theory

As noted above, in recent decades, Canadian electoral boundary makers have encountered appeals for representation of francophone and Indigenous polities. Electoral boundary makers as well as politicians, jurists and scholars have struggled to make sense of these appeals and reconcile them with existing rights of individuals. I suggest these struggles are exacerbated by the absence of a framework contextualizing consociational apportionment within liberal theory. As guarding individual rights is liberalism's raison d'être, liberal theory provides a useful lens through which to explore, and make better sense of, apportionment controversies. Liberal theorists, such as Kukathas, identify three key liberal principles: individualism, egalitarianism and universalism (1992: 108). I suggest apportionment may be usefully studied through the lens of, and the interrelationship between, these three principles. What follows is an exploration of these principles as they relate to Canadian apportionment.

The individualism principle in apportionment

In liberal political theory, individualism is the principle that the irreducible rights-bearing unit is the individual (Kymlicka, 1989: 140). Per this principle, the state should not reward, punish or prescriptively categorize individuals on the basis of group affiliations (for example, race, class, gender) but rather should treat them in a manner that is "difference blind." Assessing apportionment in the light of individualism, then, involves determining whether a districting scheme is "difference blind" versus whether (and in what way) it subsumes individuals into groups.

As individualism hinges on "blindness," a maximally liberal representational scheme might be expected to take no note of voters' affiliations. Yet in many electoral systems, including the first-past-the-post system of Canada, this would be illogical and even intolerable. As Karlan observes, "The instrumental purpose of voting—having one's preferences taken into account in choosing public officials—necessarily involves aggregating the votes of individuals to achieve a collective outcome" (1993: 249). Moreover, for voting to have meaning, apportionment must aggregate not just any electors but those who share politically salient interests.

Achieving meaningful aggregation requires deliberate departure from difference blindness, making apportionment a rare instance where liberalism embraces difference-conscious lawmaking. Hence, few apportionment schemes are individualistic on their face. Indeed, some that *are* ostensibly individualistic have been judged unconstitutional precisely *because* they fail to provide power to, and thus abridge the rights of, voters of certain groups (Issacharoff et al., 2007: 538). For example, in the United States, courts have found that the politically salient interests of residents of racial minority neighbourhoods are denied when their electoral preferences are drowned out via citywide at-large apportionment.

It must be emphasized, however, that liberal tolerance for grouping voters for the purpose of districting is distinct from assigning rights to groups themselves (Gerken, 2001). The US Supreme Court emphatically denied in *Shaw v. Hunt* that the "right to an undiluted vote … belongs to the minority as a group and not to its individual members. It does not" (1996: §917). Instead, aggregating voters who share politically salient interests is said to provide *each voter* with a meaningful vote. Hence, in the above scenario, it is not the racial minority neighbourhood that bears rights, but the individual residents therein.

It must also be noted that, though liberalism embraces aggregation for purposes of representation, it may condemn certain types of aggregations. This hostility typically relates to the kind of group being recognized and, sometimes, to the overtness of that recognition. The most common method of aggregating voters is by territory, which requires eschewing "blindness" only so voters may be grouped based on the commonality of

where they live. Liberalism's acceptance of geographic aggregation is underscored by its embrace of the traditional districting principles of "contiguity" and "compactness."

As well, representation may be apportioned to voters who form a "community of interest." Liberal justice usually condones, and may even insist upon, grouping voters by community-of-interest-related factors that correspond easily with proximity, such as socioeconomic level, cultural heritage, employment type or municipal residence. Such aggregations lead to districts that are, for instance, predominantly blue collar or Italian-American or composed of military personnel or limited to residents of a specific city. More controversial are groupings that hinge on immutable, politically divisive traits like race. In the US, the legality of so-called "affirmative racial gerrymanders" has been hotly contested, especially when such gerrymanders defy geographic compactness, resulting in odd-shaped districts.

In Canada, apportionment questions relating to liberal individualism have provoked legislative, though not constitutional, controversy. As representatives in Canada are elected from geographic districts, voters must be aggregated by proximity. Moreover, in affirming such districting principles as "community of interest" and "minority representation" (Courtney, 2001: 159), courts have confirmed that the Charter rejects "difference blindness" in favour of aggregating individuals by commonalities beyond mere proximity. The limits of such aggregation are contested. As Pal notes, boundary makers have long wrangled over the proper definition of "community of interest," disagreeing as to whether groupings based on race and ethnicity are desirable or, conversely, intolerable (2015: 258). Courts have had little to say on this matter (Courtney, 2001: 168). Even less judicially clear is whether "community of interest" aggregation may, or indeed must, compromise other districting values, such as those that I will discuss next, related to egalitarianism.

The egalitarianism principle in apportionment

In liberal theory, egalitarianism holds that all individuals are moral equals and should be treated as such, enjoying legal parity vis-à-vis one another (Kymlicka, 1989: 140). Assessing apportionment in the light of egalitarianism requires determining whether an electoral map treats individuals as equals or whether (and to what degree) it instead overrepresents some and underrepresents others.

As liberalism rests on the political equality of individuals, then a maximally liberal apportionment scheme would provide representation that is "equal." But as Pitkin famously observed (1967), representation is a concept understood in multifarious ways. How one understands it affects whether one feels it has been apportioned equally. I suggest there are many dimensions of representational egalitarianism, of which three are

relevant here: formal equality, substantive equality and "community of interest" equality.

Formal equality is said to result when apportionment adheres to representation by population. Under strict "rep by pop," representatives are elected by and/or represent equal numbers—of people, citizens, qualified voters, or some other subset of individuals. This practice purportedly gives electors equal "power" or provides constituents equal "weight." Where districts are not equipopulous, they are "malapportioned." Individuals in districts with a greater population than average are "underrepresented" and their voting power "diluted." Individuals in low-population districts are in turn "overrepresented."

Of course, formal egalitarianism is not the only way representation may be "equal." Another way is via "substantive egalitarianism," valuing equality of outcome. In Canada, this value is captured in the concept of "effective representation." In *Dixon v. British Columbia,* the BC Supreme Court identified two essential functions of representation: the "legislative role," performed when legislators cast votes, and the "ombudsperson role," where representatives act as liaisons between constituents and government (1989: 29). The ombudsperson role is often said to be unusually difficult in certain types of districts, such as those that are geographically large or remote. Egalitarian liberals may thus insist that voters in large or remote districts be numerically overrepresented. In Canada, such overrepresentation is common. It eschews formalistic parity in favour of "substantive" parity, in which it is not the "weight" or "power" of voters that is equal but the "effectiveness" of representation they receive.

A third dimension of representational egalitarianism is "community of interest" equality. As noted previously, voters who share politically salient concerns form communities of interest. Where such communities are split between multiple electoral districts ("cracked"), or drowned within a larger district ("stacked"), voters' ability to elect their favoured candidate, and thus to have their politically salient interests heard, may be thwarted. They consequently suffer unequal treatment vis-à-vis members of unimpaired communities of interest. As Dixon observes, apportionment that achieves perfect numeric parity and yet preferences the politics of voters belonging to only certain interest groups is nonetheless inegalitarian (1968: 272). As with substantive egalitarianism, community of interest egalitarianism may in Canada permit, or even require, non-equipopulous districting (Stephanopolous, 2013: 816). Some scholars have speculated that the Charter not only allows but may even *mandate* creation of districts for small but distinct communities of interest (Knight, 2001: 1109).

Unlike apportionment questions relating to individualism, questions concerning egalitarianism have in Canada been legally contentious. Departure from formal egalitarianism was once considerable. Adoption of the Charter resulted in malapportionment challenges, including the

landmark *Reference re Provincial Electoral Boundaries (Saskatchewan)*, better known as the *Carter* case. The Supreme Court of Canada's sole apportionment decision, *Carter* held that the right to vote guarantees "not equality of voting power per se, but the right to 'effective representation.'" While "relative parity" is the principal requirement of effective representation, such representation must also take into account substantive equality and must consider the "effective representation" of members of various sorts of aggregations, including communities of interest.

As a consequence of *Carter*, Canada eschews the strict US standard of "one person, one vote." Formal equality and meaningful aggregation are balanced. Still, subsequent lower-court decisions have affirmed a rough guideline for permissible deviation from parity of +/−25 per cent. (Parliament and the majority of Canada's provinces employ this standard. A few provinces have tighter guidelines.) Under the +/−25 per cent standard, "effective representation" may be pursued through the formation of districts that vary in population as much as 25 per cent above or below average. Courts have suggested deviations beyond this limit are highly suspect, except in "exceptional circumstances."

The universalism principle in apportionment

Disputes involving individualism and egalitarianism will be familiar to students of voting rights. In Canada, conflicts over apportionment typically relate to one or the other of these principles. However, apportionment must be considered in an additional dimension, informed by universalism. This is because, like all federal, consociational or otherwise "compound" states, Canada is not "universal."

Universalism, according to Gray, is the liberal principle "affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms" (1995: xii). Universalism holds that peoples (nations, linguistic groups, religious groups and so on) are not politically primordial; they do not bear rights qua group. Rather, the sole rights-bearing collectivity, and thus the only proper demos, is the whole. "Universal" political systems consider their citizens to form a single, indivisible polity. Asch calls universalism "the true 'one person-one vote' orientation to democracy" (1990: 94).

In theory, of course, universalism precludes statehood. But universalism may be seen to stand at odds with another cherished political principle, self-determination. Self-determination holds that peoples may freely choose their political status. For a plethora of reasons, there has come to exist what Margalit and Raz call a "core consensus" supporting the right to self-determination (1990: 439). Liberals are key members of this consensus; despite universalist convictions they typically accept and even champion certain expressions of self-determination (MacMillan, 1998: 127). Self-

determination, in turn, gives rise to non-universalism, of both an external and internal variety.

State formation is the clearest manifestation of external self-determination. Many states, particularly those comprising a single self-determining people, constitute themselves so representation attaches solely to individuals. Other states, constituted by multiple collaborating polities, choose "compound" arrangements, which preserve for each polity a measure of *internal* self-determination. Federal non-universalism provides shared and self-rule to polities encapsulated in territorial units; in the subspecies of "multinational" federalism, such as that of Canada, certain encapsulated polities are peoples, who thereby enjoy de facto internal self-determination. Consociational non-universalism, meanwhile, provides direct and de jure internal self-determination to peoples even when they are territorially diffuse. Consociations may feature elaborate "grand coalitions" of ethnic blocs, as in Lebanon, or may involve more limited ethnonational power sharing, as in Canada.

When polities join to constitute a compound state, be it federal, consociational or otherwise, they must determine how to subdivide power. This requires confronting a thorny puzzle of democratic theory. Democracy is "the people deciding," but how should they decide? Paradoxically, the "how" of democracy cannot be resolved democratically. Issacharoff calls this a "first order" dilemma, as it involves defining the powers of the self-determining demoi upon which democracy is based (2008: 232). "First order" dilemmas are ideally resolved before, or at least rendered moot by, the instantiation of the state. In the classic US case, power was divided pre-politically, with framers striking an agreement and etching it into an inviolable charter.

Only after "first order" questions are dealt with can framers formalize what may be considered "second order" rights, rights that address how power should be distributed to individuals *within* polities. "Second order" rights, of course, include difference-blind and egalitarian apportionment. It may thus be said that decisions related to the principle of universalism are "constitutionally prior" to those concerning individualism and egalitarianism. As the case of Canadian federalism makes clear, "first order" apportionment produces knock-on effects on "second order" principles. The fact that Newfoundland and British Columbia have the same number of senators violates egalitarianism, by providing Newfoundlanders nine times more senatorial clout per capita than British Columbians.

While these knock-on effects are not without controversy, theorists seem to view them as more tolerable than those generated by other non-universal forms, such as consociation. Consociation is not only inegalitarian but also flies in the face of individualism (McCrudden and O'Leary, 2013: 35; Steiner, 1990: 1551; Wippman, 1998: 231). Consociation, like federalism, accords power to non-equipopulous groups, but unlike

federalism, it assigns individuals to those groups based not on where they live but on *who they are*, their ethnicity, religion, language and so forth. In this way, consociation is distinctively and unapologetically difference-conscious. Hence, classical liberals such as Barry (1975) seem especially critical of consociation.

Regardless of such opinions, when non-universal structures are constitutionally entrenched, their knock-on effects are ipso facto constitutional. The overweighting of small provinces in Canada's federal scheme, or the overrepresentation of Quebec on the Supreme Court, is effectively beyond challenge. Likewise, the world's best-known consociation has thus far proven legally immune. Belgium's power-sharing arrangement apportions representation directly to French and Walloon polities, producing consequent distortions of individual and egalitarian rights. Twice, lawsuits challenging these distortions have come before the European Court of Human Rights; both suits were unsuccessful. In effect, the court deemed these distortions unavoidable "second order" results of a non-universal scheme that was constitutionally prior (McCrudden and O'Leary, 2013).

Far more vexing are cases of *emergent* non-universalism (Pildes, 2008: 173). Such cases, though common, are not well theorized (Requejo and Nagel, 2017: 9). They arise where new claimants to the right of self-determination emerge in states that are already constituted. States that reject emergent claims out of hand exhibit a double standard: As Van Dyke observes, "[In] a multinational state, it is as inappropriate to think of majority rule as it would be in the world as a whole" (1985: 172).

Yet addressing such emergent demands requires engaging with even thornier challenges than those resolved by constitutional framers. This is for two reasons. First, emergent claims arise where rules concerning the "how" of democracy are already entrenched. In Canada, all the seats at the power-sharing table were long ago assigned to individuals and federal polities. Where occupants possess seats by right, they are likely to jealously guard them (Requejo and Nagel, 2017: 14). Emergent polities, such as Indigenous peoples and FMCs, do not enjoy the luxury of pressing their claims pre-politically, in the vacuum of a constitutional convention. They must instead jockey for space at a table that is already full.

The second reason emergent claims are tricky is because they problematize not just the "how" of power sharing, but also the "who." If democracy is "the people deciding," and the "people" are not universal, then who are the peoples? Are emergent claimants legitimate rights-bearers, or pretenders to the throne? The aforementioned "core consensus" on the right of self-determination is, Margalit and Raz note, "but the eye of a raging storm concerning the precise definition of the right, its content, its bearers, and the proper means of its implementation" (1990: 439). Thinkers feud endlessly not merely over whether this or that group deserves this or that degree of sovereignty, but over what principles should guide the investigation.

Theory, then, like democracy, cannot resolve the "who" of power sharing. Still, I think we can carve it down to size.

Canada, it seems, features three categories of emergent power-sharing claimants. The first are groups who are owed self-determination—by their constitutional status, international law, or otherwise—but wish not to share power within the public institutions of the state. This is perhaps because they deem the state illegitimate or seek secession or demand power sharing confederally (*with* the state, not within it) or wish merely for internal autonomy without shared rule. At various times, for various reasons, certain Indigenous and francophone groups have identified with this category. I cannot assess the validity of their secessionist, autonomist or decolonial demands. What I think is certain is that, if they wish not to share power within Canada, they should not be forced to do so.

The second category of emergent power-sharing claimants are the inverse of the first: groups that *do* wish to share power but are clearly not owed it. Such a group was at the centre of the famous US apportionment case *Reynolds v. Sims.* There, the Supreme Court condemned Alabama's practice of assigning state senate seats by county rather than population. Chief Justice Warren, deeming analogies to the special case of the federal Senate "inapposite," blasted the notion that counties are rights-bearing polities. He stated, "Political subdivisions of states … never have been considered as sovereign entities" (1964: 377). Similarly, in Canada's aforementioned *Carter* case, the court's minority condemned the non-universalism of Saskatchewan's "strict quota of urban and rural ridings" in which the latter was protected qua polity. (The majority found the Saskatchewan map sufficiently egalitarian and thus, in effect, declared concerns about non-universalism moot.)

The final emergent claimants in Canada are the ones relevant to this article: those who wish to share power within the state and seem morally and/or legally owed it. As noted previously, FMC claimants might be owed internal self-determination based on constitutional guarantees; Indigenous claimants might be owed it on constitutional grounds as well as due to natural rights, historic proclamations and treaties, and international law. Yet "who" questions remain. If Indigenous peoples are owed self-determination, are they owed it collectively, or are First Nations, Metis and Inuit owed it separately? Are FMCs one polity, or are Acadians distinct from Ontario francophones? Also, might additional groups be valid claimants? Do African-Nova Scotians deserve internal self-determination? Do Doukhobors? These are questions I must leave for further study (or legal challenge). My purpose, after all, is not to prove that "national groups" are owed power sharing, but merely to show that *if* they are, and *if* they want it, their claims should be approached through the lens of non-universalism. This, I will now show, has not been done.

Adjudication of "National Group" Representation in Canada

As has been displayed, appeals by emergent groups for consociational power sharing pose "first order" dilemmas related to the structure of democracy. Though such dilemmas cannot be resolved democratically, courts long resisted getting involved, staying clear of the proverbial "thicket" by deeming these dilemmas non-justiciable. Often, the underlying conflicts festered or were obviated by brute *realpolitik* or triggered violent conflict. Increasingly, however, judges are responding to these emergent demands, thus wading into the "who" and "how" of democracy (Hirschl, 2004; Issacharoff, 2008; Pildes, 2004). As will be shown, FMCs and Indigenous peoples have several times brought "first order" cases before the courts of Canada.

Adjudication of Indigenous representation

In the 1999 case *Friends of Democracy v. Northwest Territories*, the Northwest Territories' Indigenous-majority legislature was accused of violating the section 3 voting rights of residents in the predominantly non-Indigenous city of Yellowknife. There, several electoral districts were severely underrepresented, one exceeding parity by +152 per cent. The territorial government defended the scheme, citing "substantive" and "community of interest" needs of districts outside Yellowknife. Indigenous interveners, meanwhile, presented a non-universal defense. They maintained that the existing balance of ethnonational power in the territory was protected by sections 35 of the constitution and 25 of the Charter, rights that would be violated by providing additional seats to Yellowknife. In effect, the interveners argued that Indigenous peoples, as a consociating "national group," possessed a non-universal right to a fixed share of representation in the Northwest Territories government. Without such a right, they feared their homeland would be swamped and democratically dominated by "settlers."

The court disagreed. Ruling in Yellowknife's favour, it decreed that the legislature's apportionment scheme was impermissibly inegalitarian. It expressed doubt that section 35 provides a guarantee of non-universal Indigenous representation, and, moreover, questioned whether section 25 in fact trumps individual voting rights. Analyzed through the lens of liberal theory, the court in effect ruled that "second order" egalitarianism (requiring that districts be of relatively equal size) trumps "first order" non-universalism (requiring that Indigenous rights not be "derogated from"). Unsurprisingly, the ruling was controversial. It precipitated a "constitutional crisis" in the Northwest Territories (Northwest Territories, 1999a: 66), with the territory's umbrella First Nations organization calling for Ottawa to dissolve the territorial legislature—a move that would thwart "settler" takeover. It also ended longstanding efforts to

devise a territorial constitution that would formally enshrine ethnonational power sharing (Northwest Territories, 1999b: 4).

At least one legal scholar deemed the *Friends* interpretation of section 25 "the only possible exception" to the common judicial understanding of the non-derogation clause (Morse, 2002: 421). Indeed, the *Friends* interpretation was soon rejected in *Campbell v. British Columbia*. Handed down by the British Columbia Supreme Court in 2000, *Campbell* has been called Canada's most significant case involving Indigenous peoples and section 3 (Morse, 2002: 394). In it, applicants accused the Nisga'a First Nation self-government agreement of abridging charter-protected voting rights of non-Nisga'a. The court affirmed that this was true—but, in effect, it held that such "second-order" abridgement was protected under the "first-order" non-derogation guarantees of section 25 (Isaac, 2002: 444).

While *Campbell* involved Indigenous self-rule rather than shared rule, the decision suggests that, if guaranteed Indigenous representation is indeed a right under section 35, the "first order" shield of section 25 should protect that right from charges of epiphenomenal section 3 inegalitarianism. This view presents a challenge to much of the scholarly and legal discourse on guaranteed Indigenous representation. Again, as Schouls (1996) has observed, attempts to apportion polity-based representation to Indigenous peoples have foundered due to incompatibility with egalitarian representational requirements. Arguably, the "second order" cart has been placed before the "first order" horse. Ladner discerned this perverse circumstance when she noted that most "studies have focused on integrating Aboriginal representation within the existing electoral scheme. … If they had examined guaranteed representation as a pre-existing right … they might have arrived at different, more consistent conclusions" (1997: 86).

Adjudication of FMC representation

Charter cases have also arisen concerning non-universal representation rights of francophones. The first case, *Raîche v. Canada*, was a 2004 challenge in which FMC voters in New Brunswick protested a federal apportionment plan that, to increase parity, transferred them from a francophone-majority district to an anglophone one. The Federal Court of Canada agreed, determining that the boundaries commission had erred in two respects. First, the commission violated the *Electoral Boundaries Readjustment Act* by placing too much importance on parity and too little on preserving "communities of interest." Second, it violated the *Official Languages Act*, which requires that the federal government "enhanc[e] the vitality of the English and French linguistic minority communities."

In discussing both errors, the court called the aggrieved francophones a "community of interest." It is not clear this description fits. Again, in apportionment, a "community of interest" comprises voters who share politically

salient interests, aggregated to provide each voter with a voice. Yet the protection of francophone representation under the *Official Languages Act* does not operate in this manner. The protection attaches not to individuals but group—and not just any groups, but exclusively to two "national groups." Similarly, much of the scholarly discussion surrounding *Raîche* has focused on whether boundary commissions must accord greater import to preserving "communities of interest" (Pal, 2015: 253). While this may be so, insufficient attention has been paid to *Raîche*'s "first order" implications. In *Raîche*, the *Official Languages Act* provided New Brunswick FMCs with a similar sort of consociational protection that, in *Campbell*, section 25 provided to the Nisga'a: a shield, buffering "national groups" from charges of individual voting-rights abuse. *Raîche* in part succeeded because FMCs are not a run-of-the-mill "community of interest" whose aggregation and overrepresentation merely facilitate "effective representation" (per *Carter)*, but rather are a distinct polity whose right to representation flows from, and is guarded by, Canada's antecedent non-universalism.

Since *Raîche*, two more court cases have explored alleged violations of FMC representational rights. *L'Association francophone des municipalités du Nouveau Brunswick et al. v. New Brunswick* challenged a 2013 New Brunswick provincial redistricting map that increased formal parity by submerging several FMCs into anglo districts. The plaintiffs claimed the plan breached multiple charter provisions, including section 3 ("effective representation") and section 16.1, requiring that New Brunswick promote the equal "status, rights and privileges" of anglo and francophone communities (New Brunswick Court of Queen's Bench, 2014: 5). The suit was settled out of court, with the province amending its apportionment legislation. Henceforth, New Brunswick boundaries commissions "shall consider the effective representation of the English and French linguistic communities in complying with section 3" (New Brunswick, 2014). In the case of other "communities of interest," meanwhile, commissions merely "may" depart from voter parity. Arguably, then, the province has singled out official-language minorities as deserving particular attention when balancing "second order" values of parity versus "community of interest." Yet it remains unclear whether francophones, qua polity, are recognized as bearing "first order" rights.

The most recent case, decided in January 2017, was *Reference re the Final Report of the Electoral Boundaries Commission*, arising from Nova Scotia's 2012 provincial reapportionment. There, the legislature had tasked the boundaries commission with insuring that no district exceeded parity beyond +/−25 per cent. This constraint compelled the commission to erase all three of the province's significantly overrepresented FMC "protected seats," which had existed for 20 years. The Nova Scotia attorney general submitted a reference to the provincial court of appeals inquiring about the constitutionality of the new map. Nova Scotia's francophone

association intervened, blasting the province for treating French speakers as no different from other communities of interest. The interveners suggested section 3 of the Charter must be interpreted in the context of other charter provisions, such as sections 16 through 23, protecting official-language minority communities.

In its ruling, the court held that the province had indeed breached section 3, but for reasons related to process, not content. The court maintained that the constraint placed on the boundaries commission had prevented it from weighing parity against other constitutional requirements, including providing effective representation to "communities of interest." Having condemned this process, the court did not bother to assess the constitutionality of the resulting map. It thus did not explore whether the new boundaries violated the rights of FMCs, either as a run-of-the-mill "community of interest" or as a non-universal polity.

It can thus be seen that, since *Raîche*, francophones have demanded protection of their representation on the grounds that FMCs bear polity-based rights as a "national group." It can also be seen that courts and legislators have not acknowledged or fully responded to these appeals, instead conceiving of FMCs as a "community of interest" that at best is owed distinctive "second order" attention. It therefore appears that, in the eyes of the court, the rights of FMCs may diverge in degree, though not in kind, from those of non-"national groups."

Conclusion

In this article, I do not attempt to say whether, or precisely how, "national groups" in Canada should be issued consociational representation. I merely seek to lay out a clear framework for thinking about and adjudicating this topical, complex, poorly theorized dilemma. I have shown that conflicts involving consociational apportionment and liberal rights can be usefully analyzed in relation to the foundational liberal principles of individualism, egalitarianism and universalism. While apportionment dilemmas involving the former two principles present what may be called "second order" challenges, dilemmas related to universalism should logically be resolved first, as such issues are "constitutionally prior." This poses a particular challenge when "first order" claims are emergent. Such cases require reconciling the freshly asserted rights of "national groups" with the established rights of individuals. As providing space for the former requires jostling the latter, such reconciliation will inevitably be controversial. Boundary-makers, legislators and jurists should recognize, however, that while in consociational democracies non-universal apportionment may produce electoral maps that are epiphenomenally group-conscious and inegalitarian, such consequences are distinct from cases involving rights abuses in a unitary polity. Decision

makers should be cautious of approaching such cases solely from an individual-rights perspective.

As I have further shown, it is not clear that, in Canada, this warning has been heeded. In the case of Indigenous peoples, non-universal guarantees of self-rule have been confirmed to exist within section 35 of the *Constitution Act, 1982* and to be buffered or even shielded by the Charter's section 25 non-derogation clause. However, the stepwise logic of *Campbell*, which dismissed claims of section 3 inegalitarianism in cases of Indigenous self-rule, has so far not been extended to discourse on Indigenous shared rule. I suggest that this may be procedurally illogical, placing decisions concerning "second order" egalitarianism ahead of decisions involving "first order" non-universalism.

As I have further shown, calls for non-universal representation of FMCs have been largely conflated with egalitarian concerns regarding "communities of interest." First-order polity-based rights and second-order "community of interest" rights are, despite superficial similarities, theoretically and constitutionally distinct. Recognizing these distinctions, I suggest, will help scholars, political leaders and jurists grapple with apportionment demands of emergent polities.

I would finally echo a caution issued by Pildes: "Democratic institutions and processes have constantly been revised … as changing contexts have generated demands to make democracy more responsive, more legitimate or better adapted to new circumstances. Yet as courts find more aspects of politics to be matters of constitutional law, they risk inappropriately curtailing this process of self-revision" (2004: 48). If decision makers wish to resolve emergent appeals for power sharing by national groups, they need to think about those appeals clearly and address them squarely. To dismiss or side-step such appeals for failing to fit neatly into existing conceptions of purely individual rights will ultimately erode the legitimacy of governance in multinational states like Canada.

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II

SETTLER COLONIAL STUDIES
2019, VOL. 9, NO. 4, 525–541
https://doi.org/10.1080/2201473X.2019.1603605

Routledge
Taylor & Francis Group

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 *Reynold*s – 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.

Notes

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Disclosure statement

No potential conflict of interest was reported by the author.

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III

POSTCOLONIAL STUDIES
2019, VOL. 22, NO. 2, 131–149
https://doi.org/10.1080/13688790.2019.1591569

Routledge
Taylor & Francis Group

'A wolf in sheep's clothing': settler voting rights and the elimination of the Indigenous demos in US Pacific territories

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ABSTRACT

Settler colonialism eliminates Indigenous sovereignty, enthrones itself, and thereby makes Indigenous land 'ours'. It may do this meta-politically, by absorbing 'them' into 'us'. This article explores three recent lawsuits brought by settlers against Indigenous demoi in US Pacific territories. I show that in each lawsuit, settlers brandished a novel 'tool of elimination': individual voting rights. I trace how settlers wielded this tool to deliver a 'one-two punch', first condemning as 'illiberal' restrictive voting laws flowing from Indigenous sovereignty and then championing race-neutral laws that would in effect enthrone settlers. I show that courts hearing these cases were faced with choosing the appropriate 'framing of justice' – with whether the relevant rights-bearer was the universal individual voter or the 'constitutionally prior' Indigenous demos. Finally, I show that, because the courts ultimately framed these disputes as individual-rights cases, settlers extended control of meta-politics on the US Pacific frontier.

KEYWORDS

Settler colonialism; Indigenous sovereignty; voting; US Pacific territories; liberal theory; constitutional law

1. Introduction

Because there are many of us, says Jeremy Waldron, there is politics.[1] But who is 'us'? Are some instead 'them'? Can the former absorb the latter, and if so, how and when? It is because of questions like these that there is meta-politics, the focus of this paper. Meta-political questions may seem esoteric, but that is far from the case. They are elemental, generating the foundation stones upon which polities are built. Undergirding any self-governing community are subjective assertions about who 'we, the people' are and how and where 'we' should rule. If those meta-political foundations erode – or indeed, if they are strategically undermined – a polity may be brought to its knees.

That is one way to think about settler colonialism in the United States. Just four centuries ago, what is now the United States was home to an array of self-ruling Indigenous peoples who presided over territories and citizenries they considered their own. Then came the tide of Europeans, deposing Indigenes and enthroning themselves. Their tools were diverse – treaties, Bibles, boarding schools, Gatling guns. But their goal was simple: make 'theirs' ours.

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By 1890, this meta-political coup was largely complete. The Indian Wars were over, the frontier was closed, the West was won. Native Americans were wards of the United States, and Indian Country was a domestic rather than foreign jurisdiction.

Arguably, however, Manifest Destiny did not cease at the western ocean. That same decade, the United States acquired its first offshore territories in the Pacific. These too were Indigenous jurisdictions. Some of them, in some sense, remain that way. Hawaii was of course swallowed into the American body politic, but its Indigenous people, unlike mainland Native Americans, have an ambiguous constitutional status. Similarly, colonies like the Commonwealth of the Northern Mariana Islands (CNMI) and Guam are in meta-political limbo. They are not exactly 'ours', nor securely 'theirs'. Insofar as native sovereignty in, and of, Hawaii, CNMI and Guam is disputed, these places may be seen as still-active fronts of US settler colonialism.

I suggest that key dynamics of modern settler colonialism may be revealed by examining settler/Indigenous clashes on these Pacific frontiers. I sort these dynamics into four strands.

First, I suggest that in the Pacific we can see settlers brandishing a new 'tool of elimination': individual voting rights, asserted in opposition to Indigenous anti-colonial efforts. Except in the work of scholars like Judy Rohrer,[2] this tool has received little attention. Second, building on her work, I suggest that settlers wielding this tool in effect deliver a 'one-two punch', condemning as 'illiberal' those voting laws flowing from Indigenous sovereignty and then swapping them with ostensibly race-neutral laws that serve to enthrone the settler demos. Third, building on Nancy Fraser's[3] theory of 'abnormal justice', and on the 'structure of democracy' work of the likes of Samuel Issacharoff[4] and Richard Pildes,[5] I suggest that how these rights cases are resolved hinges on how they are framed – on whether courts see the appropriate subject of justice as the universal individual or the 'constitutionally prior' native demos. Finally, I contend that, where such disputes are framed as individual-rights cases, settlers may achieve control of frontier meta-politics. Having problematised the existence of a discrete 'them', they may dissolve Indigenous political selfhood into the broader American 'we'. In this manner, settler rights, though asserted under the guise of liberalisation, may thwart Indigenous liberation.

This article seeks to examine these dynamics by analysing three recent lawsuits in the US Pacific. In all three, settlers charged that their rights were violated as a result of Indigenous assertions of self-determination. My argument proceeds in the following way. In Section 2 I lay out a theory of the meta-politics of settler colonialism. In Section 3 I examine the Hawaiian case *Rice v. Cayetano*, decided by the US Supreme Court in 2000. In Section 4 I study *Davis v. Commonwealth Election Commission*, involving CNMI, decided in 2016. In Section 5 I look at the 2017 case *Davis v. Guam*. In Section 6 I analyse and conclude.

2. Theory

2.1. Meta-politics and law

Democracy is 'rule by the people', but who are the people? This is the meta-political 'boundary problem' vexing to theorists of liberalism and democracy. Democracy provides no solution to the boundary problem; as Ivor Jennings observes, 'The people cannot decide until someone decides who are the people'.[6] Liberalism is not much more helpful. Most

liberals support the right of peoples to collective self-determination, yet are troubled by how self-determination harms outsiders who want in and insiders who want out.

It is no wonder, then, that demos-bounding takes place external to normal politics. The line between the political 'self' and others typically emerges from deep history, or is dictated by brute *realpolitik*, or is crystallised in some hallowed 'constitutional moment'. Issacharoff[7] describes bounding as 'constitutionally prior' to democracy; he thus calls it a 'first order' exercise. Ideally, boundaries 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 exactly as it sounds – a meta-political bargain, hashed out between the big and small states, so everyone could get on with other business.

Other business like what? For one, formalising what could be called 'second order' political arrangements, dealing with how power is to be exercised once governance is underway. Second-order matters include rules and rights that fall under the so-called 'law of democracy'[8] – the guidelines of the democratic process. These guidelines govern campaign funding, durational-residency requirements, electoral districting and so forth. Unlike first-order arrangements, which attach to demoi, second-order laws of democracy attach to individuals. Rather than enshrining collective self-determination, they protect liberal values such as difference-blindness and egalitarianism.

Yet meta-political choices complexly entwine with political ones, as is evident from the case of the aforementioned Great Compromise. Due to it, Wyoming, the state with the lowest population, and California, with the highest, enjoy equal representation in the US Senate. This first-order arrangement has staggering consequences 'downstream' for the second-order law of democracy. There, the federal voting power of individual Wyomingites dramatically exceeds that of Californians. Normally this would be unacceptable – an affront to 'one person, one vote'. However, because the Great Compromise is constitutionally entrenched, the underrepresented citizens of California have no legal recourse. Any attempt to correct downstream malapportionment would wash upstream, impermissibly eroding the federal order.

Yet collective self-determination is not always entrenched at the time of state-making – or it does not always stay entrenched. When there develops a fervent demand to re-level the foundations of governance, first-order demotic battles may erupt into everyday politics.[9] Such constitutionally prior questions take diverse forms. What is to be done when a faction employs gerrymandering to achieve a stranglehold on power? How should power be divvied up among consociating polities? Should annexed peoples be merged into the broader state demos, or retain a measure of sovereignty? May sovereigntists break away?

As noted, democracy is incapable of answering such first-order dilemmas. Hence, courts are increasingly stepping in.[10] Ran Hirschl calls this the 'judicialization of mega-politics'[11]; Pildes, the 'constitutionalization of democratic politics'.[12] Fraser would situate it within the field of 'abnormal justice'.[13] Familiar first-order cases include the European Court of Human Rights' decisions on the legality of power sharing in Belgium[14] and Bosnia,[15] the German Federal Constitutional Court's ruling on joining the Maastricht Treaty,[16] the Supreme Court of Canada's *Quebec Secession Reference*,[17] and the US Supreme Court's revolutionary redistricting decisions, such as *Reynolds v. Sims*.[18]

All demotic-bounding cases are thorny. They dredge up potentially fraught bargains that were hammered out, or awkward realities that were dodged, at the time of state-making. (Rhetorically, Stephen Tierney suggests, 'why not let sleeping dogs lie rather than invite a confrontation over inclusion and exclusion'.[19]) Moreover, where first-order questions are emergent, they cannot be tackled in the vacuum of a 'constitutional moment'. They must be grappled with on the fly, in the hurly-burly of everyday politics, with demoi who are already dug in, powers divvied up, and turf jealously guarded.[20]

Even more confoundingly, first-order cases can be hard to distinguish, or disentwine, from second-order cases. Individuals may contest ethnic discrimination that ensues from an upstream demotic compromise, as in the aforementioned Bosnian *Sejdić and Finci* case. Or, they may allege that their voting power has been watered down by a first-order power-sharing deal, as in the German Maastricht case. In such cases, courts may find themselves at sea. 'Normal justice', states Fraser, is about balancing the proverbial scale of justice until equilibrium is achieved. But in 'abnormal' conditions, where 'constitutionally prior' assumptions are in dispute, she suggests courts must begin with meta-questions. What is the correct scale to use? How should justice be framed?

Such questions are fundamental because in abnormal justice the frame may foreordain the result. The Supreme Court's aforementioned *Reynolds* case makes this clear. In that case, an Alabama resident charged that malapportionment of the state senate diluted his voting power, violating the Constitution's Equal Protection Clause. The state responded with the 'federal analogy': the US Senate is malapportioned, so why can't Alabama's senate be likewise? 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'.[21] The court in effect ruled that Alabama's political subdivisions lack first-order demotic rights. In *Reynolds*, the sole legitimate subject of justice was deemed to be the individual voter, owed 'one person, one vote'. As history shows, this finding flooded upstream. The first-order 'structure of democracy' of almost every state legislature was quickly upended.

It can be seen, then, that what is 'constitutionally prior' complexly entwines with what is 'constitutionally post' – that the 'structure of democracy' and the 'law of democracy' are interlinked in an upstream/downstream dynamic. Hence, scholars have urged courts to wade into this thicket with caution.[22] 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'.[23] 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 cognisant of how justice is framed. To do this, they must adjudicate 'reflexively', grappling first with what scale of justice to use before trying to level the balance.[24]

I suggest there is even greater cause for judicial caution. First-order cases may be tactically disguised as second-order cases. Despite claims to the contrary, plaintiffs' objective may not be to liberalise the law but, quite conversely, to undermine the foundations of governance so their own group rises to the top. This might occur where remedying second-order injustices would have an upstream effect, eroding 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.

2.2. Settler colonialism and meta-politics

Colonialism, as conventionally understood, occurs where developed-world powers exert economic, political and cultural control over exogenous subaltern territories, exploiting the inhabitants' labour, in combination with the land and resources, for the benefit of the metropole. Typifying this dynamic was Europe's centuries-long dominion over the Global South. Since the Second World War, colonialism of this sort has retreated, with more than 80 former colonies, encompassing 750 million residents, declaring independence.

As Patrick Wolfe[25] famously observed, a colonial variant called settler colonialism has proved far more resilient. The United States is an archetypal settler colony; others include Canada, Australia and New Zealand. Settler colonies may have begun conventionally, as imperial possessions yoked for profit.[26] But distinctively, they were at some point flooded with metropolitan and other developed-world settlers. Motivated by what Wolfe calls a 'logic of elimination', these settlers strived to assimilate, confine, expel or kill the Indigenes, take their homelands, and establish 'a new colonial society on the expropriated land base'.[27] He states that settlers employ a sort of one-two punch. 'Settler colonialism destroys to replace',[28] with native sovereignty first dissolved and then settlers installed. In this manner, Wolfe says, settler colonialism supplants Indigenous jurisdictions with new versions of the settler motherland.

Over the past several decades, inspired by the retreat of colonialism overseas, and empowered by domestic and international 'rights revolutions',[29] Indigenous peoples have mobilised against settler colonialism.[30] By harnessing law and politics they now resist demotic assimilation, pressing for acknowledgment as constitutionally discrete polities and asserting the right to enjoy group-differentiated treatment and to exercise self-determination and autonomy.[31]

Yet, given the nature of settler colonialism, assertions of Indigenous political rights encounter a distinctive challenge. Where in conventional decolonisation the colonist 'goes home', under all but the most radical conceptions of settler decolonisation, settlers remain. In the United States, settlers continue to numerically dominate, retaining substantial interests concerning mobility, land, voting and so forth. What is more, settler colonialism too has joined the rights revolution, brandishing individual liberal rights in opposition to decolonisation.

Much has been written about how Western individual rights, though ostensibly neutral, may further the subjection of subalterns. Marx, of course, felt exalting liberty promoted selfishness and distance, protecting the bourgeoisie.[32] Communitarians like Michael Sandel and Charles Taylor see rights as atomistic, dissolving the bonds of community that cradle the less well off.[33] Feminists such as Carol Gilligan suggest 'rights-talk' centres the 'masculine voice' and foregrounds male campaigns for 'justice' over female 'ethics of care'.[34] Students of Indigenous law, such as Val Napoleon, argue liberal constitutionalism is hostile to legal pluralism, crowding out Native legal orders.[35]

As well, much has been written about how, even *within* the logic of Western liberalism, rights have been employed to Indigenous disadvantage.[36] Will Kymlicka observes that when states engage in 'demographic engineering', moving settlers into restive subaltern regions, they may condemn as illiberal those arrangements that guard subaltern autonomy. He thus concludes, 'where ethnocultural justice is absent, the rhetoric and practice

of human rights may actually worsen the situation'.[37] Similarly, Avigail Eisenberg notes that the expansion of settler-state constitutionalism into minority jurisdictions may be passed off as liberalisation when in fact it is the opposite – a tool 'aimed at advancing the collective cultural dominance of the majority'.[38]

This tool has been employed recurrently in settler states. In the United States, policies such as reserve-land allotment,[39] tribal termination,[40] and the imposition of American citizenship[41] were in part rationalised as providing Native Americans with equal rights. One of the most notorious such policies, the *Dawes Act*, was in its time hailed as the 'Indians' Magna Carta'.[42] In Canada, the declared aim of the 1969 White Paper proposing elimination of Indigenous status was to let Indians 'be free – free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians'.[43] In New Zealand, champions of the Treaty of Waitangi Deletion Bill vowed to spare Maori from a 'destructive path of separate development' akin to apartheid.[44]

Once Native sovereignty is eliminated, Indigenous collectives are left with two unhappy options. The first is absorption into the settler body politic. The second is staying different – no longer as a political order, but as a distinct racial group. Many scholars have observed how Indigenous group-difference, once racialised, is often condemned as discriminatory. Some scholars have even noted how, for Indigenous groups, racialisation may be *self*-destructive. Robert Porter argues that in the United States, political *Ongwehoweh* misperceive themselves as ethnic 'Native Americans', impairing tribal vitality.[45] Kirsty Gover shows that rules policing tribal citizenship in Canada,[46] and disregard for Indigenous sovereignty in Australia,[47] compel Indigenous peoples to bound their own demoi in a manner that leaves them vulnerable to racial-discrimination claims.

Yet little research has considered how settlers, pursuing a 'logic of elimination', have in recent decades weaponised liberalism, moving it from the realm of rhetoric into the arena of the courts – and how, in doing so, settlers assert rights in a manner that undermines the foundations of Indigenous governance, altering the answer to 'who are the people?' Where Indigenous peoples assert sovereignty, settlers may strive to eradicate that sovereignty, delegitimising the pre-colonial 'them' and replacing it with 'us'.

As Wolfe might predict, settlers weaponise voting rights through a two-phase approach. Rohrer discerns this approach when she observes that in *Rice v. Cayetano* settlers sought first to 'problematize collective native identity' and then 'naturalize white settler subjectivity via a color-blind ideology'.[48] Specifically, settlers first charged that existing laws of democracy – laws that were the epiphenomenal, downstream effect of first-order Indigenous sovereignty – violated second-order individual rights. By framing Indigenous peoples as seeking to illiberally subject fellow citizens to racial discrimination, rather than as a pre-political sovereign exercising self-determination, Indigenous polities were attacked at their demotic foundations. The second settler move was to appeal for the law to be reformed to treat individuals equally. Such liberalisation, of course, had transformative upstream impacts, opening Indigenous jurisdictions to domination by the greater settler demos.

Hence I suggest that, per the aforementioned warnings, courts should be cautious about (mis)framing settler-constitutional challenges as second-order appeals to liberal fairness. Rather, such challenges may sometimes be more coherently understood as camouflaged attacks on Indigenous structures of governance, with settlers deploying rights in a manner that serves less to liberalise than to dominate – to 'colonise the demos'.

In the following three sections I show how this dynamic played out in a trio of recent settler-voting-rights cases in the US Pacific.

3. The Hawaiian case, Rice v. Cayetano (2000)

Hawaii, the largest island group in Polynesia, occupies just over 4,000 square miles of land in the central Pacific Ocean. Its population is 1.4 million, of which Native Hawaiians and other Pacific Islanders comprise 10%, Asian-Americans 37%, whites 27%, and mixed-race people and 'others' 26%.[49]

Native Hawaiians have inhabited Hawaii for well over a millennium. The first outsider, Captain James Cook, arrived in 1778. Yet for more than a century thereafter, Hawaii remained sovereign, governed by Native Hawaiian monarchs and eventually boasting a constitution, foreign consulates and formal recognition by the United States and European powers. In 1893, American settlers, backed by US troops, overthrew Queen Lili'uokalani. US annexation followed. Native Hawaiians, unlike mainland Native Americans, were not granted federal recognition as a 'semi-sovereign tribal entity'.[50] Still, Congress at times acted as their guardian, including by reserving 200,000 acres for Native homesteading. In 1959 the residents of Hawaii, most of whom by then were settlers,[51] voted for statehood. The United States thus successfully petitioned the United Nations to removed Hawaii from its list of colonised territories.[52] The Native homesteading lands were entrusted to the state 'for the betterment of the conditions of native Hawaiians'.

In the 1960s, Native Hawaiians mobilised for self-determination, with some calling for federal tribal status like Native Americans and others demanding reestablishment of Hawaiian sovereignty. They enjoyed a number of qualified successes. In 1978, the state of Hawaii amended its constitution to create the Office of Hawaiian Affairs (OHA), a semi-autonomous agency that would be the principal administrator of programmes targeting Native Hawaiians and would manage their entrusted lands. The OHA was to be governed by a board of trustees elected exclusively by 'Hawaiians', defined as descendants of persons inhabiting Hawaii when Europeans arrived in 1778. In 1993, the centennial of Lili'uokalani's overthrow, Congress apologised for this injustice and conceded that Native Hawaiians had not legally relinquished sovereignty. The US departments of Interior and Justice issued a report calling for government-to-government relations with Native Hawaiians in the same manner as with mainland tribes. At the time, the most logical Native Hawaiian governing body was felt to be the OHA.[53]

But, observes J. Kēhaulani Kauanui, these Native Hawaiian victories prompted a settler backlash: 'a series of lawsuits by white Americans … attempting to eradicate Hawaiian-specific institutions in the name of civil rights'.[54] The most prominent was *Rice v. Cayetano*.

3.1. The case

Rice v. Cayetano was filed by Harold 'Freddy' Rice, a non-Native Hawaiian who had applied to participate in an election for OHA trustees. His application was rejected because, though he was a fifth-generation state resident, he lacked Hawaiian ancestry dating from 1778. Rice sued, alleging violation of his Fourteenth Amendment right to equal protection of the laws and his Fifteenth Amendment right to vote regardless of

race.[55] The District Court of the State of Hawaii ruled against Rice, as did the Ninth Circuit Court of Appeals. Rice appealed again, to the US Supreme Court. Supporting *amici curiae* were filed by conservative attorneys, including former Supreme Court nominee Robert Bork and now-Justice Brett Kavanaugh. In 2000 the Supreme Court took up his case.

The State of Hawaii, in its statement to the high court, maintained that its impugned voter-classification scheme hinged on lineage, not race. It argued that, with the requisite in-state roots, a person who by blood was almost fully white could vote in the OHA election; without those roots, a full-blood Polynesian could not. The state further argued that, even if the court found the voting scheme to be race-based, it was nonetheless constitutionally defensible, on three grounds.

First, the state noted that in *Morton v. Mancari* the Supreme Court had upheld certain federal preferences for Native Americans. This is because tribes retain 'quasi-sovereign authority', respect for which requires group-differentiated treatment of tribal members. Second, the state argued that OHA elections were 'special purpose elections' not unlike that which the Supreme Court, in *Salyer v. Tulare*, had exempted from 'one-person, one vote'. (*Salyer* involved a regional water-use board created to manage irrigation; the court had decided that voting for board members could be weighted in favour of larger landowners). Third, the state argued that its voting scheme was necessary to ensure proper alignment between the fiduciaries of the OHA trust and the beneficiaries, Native Hawaiians.

3.2. The ruling

In a 7–2 decision, the Supreme Court disagreed. Justice Anthony Kennedy, writing for the majority, ruled that the state had abridged the Fifteenth Amendment. That amendment, Kennedy stated, affirms 'the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise'.[56]

Dismissing the state's argument that its OHA-election qualifications hinge not on race but lineage, Kennedy declared, 'Ancestry can be a proxy for race. It is that proxy here'.[57] He found that both the purpose and effect of limiting voting to 'Hawaiians' was to treat them as a race. He noted that the court, in numerous Jim Crow-era rulings, had expressly forbidden voting restrictions that, while race-neutral on their face, were racial in intent and outcome. Kennedy characterised such restrictions as demeaning to 'the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities', and 'corruptive of the whole legal order democratic elections seek to preserve'.[58]

Kennedy went on to attack the state's argument that, even if its voting scheme was found to be race-based, it should be upheld regardless. He questioned whether *Mancari* applies to Hawaii, noting that Congress had neither clearly assigned quasi-sovereign status to Native Hawaiians nor clearly authorised the state to treat them as such. Even if it had, he stated, Congress may not empower a state to conduct race-based public elections. 'If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign', he wrote. 'The OHA elections, by contrast, are the affair of the State of Hawaii'.[59]

Kennedy then challenged the state's other arguments, in effect maintaining that racial classifications could not be excused by the narrowly tailored nature of 'special purpose elections', nor by the goal of aligning the interests of 'the fiduciaries and the beneficiaries

of a trust'. Finally, while acknowledging Native Hawaiians' ambitions for decolonisation, Kennedy insisted the Constitution prevails:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.[60]

Writing for the minority, Justice John Paul Stevens disagreed. He maintained that even if Congress never formally recognised Native Hawaiians as a tribe, it had long treated them as such, most notably when it issued the 1993 apology. Stevens wrote, 'there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs'.[61] To find otherwise, he argued, placed them in a perverse bind. 'It is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government – a possibility of which history and the actions of this Nation have deprived them'.[62]

Following the decision, settlers launched further lawsuits attacking state and federal programmes containing provisions relating to Native Hawaiian education, health and housing. According to Linda Zhang, the 'threat to the very existence of these programs led to a frantic rush to attain federal recognition for Native Hawaiians'.[63] In 2000, US Senator Daniel Akaka, a Democrat from Hawaii, proposed the 'Akaka Bill', to establish a Native Hawaiian governing body and acknowledge Native Hawaiians' right to self-determination. Republicans condemned the bill as a 'plan for a race-based government'.[64] Conversely, some Native Hawaiians argued that the bill did not go far enough in righting past wrongs and securing self-determination.[65] Akaka's proposal has since been repeatedly amended, including to preclude Hawaiian secession. Still, Congress has so far rejected it.

4. The CNMI case, Davis v. Commonwealth Election Commission (2016)

CNMI consists of 14 islands, comprising 184 square miles of land, in the Marianas chain of Micronesia. Its population is approximately 54,000, of which 24% are Indigenous Chamorro, 11% other Pacific islanders, 50% of Asian origin, and 15% mixed-race people and 'others'.[66]

Chamorros occupied the Northern Marianas for at least four millennia before coming under Spanish dominion in the sixteenth century. After the Spanish-American War, Spain sold the islands to Germany, which lost them to Japan in the First World War. Following Japan's defeat in the Second World War, the United Nations included the Northern Marianas in a trust territory administered by the United States. The trusteeship agreement required that the United States promote territorial self-government and protect inhabitants 'against loss of their lands'.[67] Though the trust's other jurisdictions (the Federated States of Micronesia, the Marshall Islands and Palau) eventually gained independence, the Northern Marianas opted to become a US commonwealth.

This status was sealed by a 1976 covenant between the Northern Marianas and the United States as two sovereigns. The covenant established CNMI self-government by a

popularly elected governor and legislature. As well, despite the Supreme Court's *Insular Cases* doctrine, which limits application of the Constitution in unincorporated territories to those rights deemed 'fundamental', and blocks application in circumstances that would be 'impractical and anomalous',[68] the covenant explicitly applied the Fourteenth and Fifteenth Amendments to CNMI.

Yet the commonwealth covenant further required that CNMI draft a territorial constitution in which certain distinctive provisions would be enshrined.[69] Among these was Article XII, prohibiting acquisition of land by persons not 'of Northern Marianas descent'. This ban on alienation of Indigenous land mirrored US policy under trusteeship. It also paralleled guarantees in federal Indian Law relating to mainland Native Americans.[70] Per the covenant, Article XII is necessary 'in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency'. The covenant forbids the US government from unilaterally altering the land-alienation prohibition, and explicitly exempts it from the US Constitution.

The 1990 federal appeals court ruling *Wabol v. Villacrusis* substantiated this exemption. When a plaintiff charged that Article XII violates the Fourteenth Amendment, the court found otherwise. It held that the right of outsiders to buy land is not 'fundamental', and thus, per the *Insular Cases*, not constitutionally protected in CNMI. Further, the court declared that the United States ought not be forced to break the terms it agreed to in the covenant.[71] Wrote the court, 'The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. … Its bold purpose was to protect minority rights, not to enforce homogeneity'.[72]

In the same year, the United Nations removed the Northern Marianas from its list of colonised territories. However, land-alienation efforts continued. Article XII had been written to be potentially time-limited. Unless renewed by a referendum, it would expire twenty-five years after the dissolution of US trusteeship. Trusteeship officially ended in 1986. In 1999, the CNMI legislature amended the territorial constitution so only electors of 'Northern Marianas descent', defined as those with roots in CNMI dating back to 1950, could vote in referenda concerning amending Article XII. In 2011, for the purposes of such a referendum, the legislature established an official registry of voters of Northern Marianas descent. In 2012, the case *Davis v. Commonwealth Election Commission* was filed, challenging the exclusion of non-Marianas descendants from Article XII referenda.

4.1. The case

Davis was filed in the federal district court of CNMI by John Davis Jr, a non-Chamorro CNMI resident excluded from the official registry of voters of Northern Marianas descent. He charged that this contravened his voting rights under the Fourteenth and Fifteenth Amendments. The district court agreed, citing *Rice v. Cayetano*. The commonwealth government then appealed that ruling to the US Court of Appeals for the Ninth Circuit.

In its statement to the appeals court, the commonwealth maintained that its voting scheme differed in at least two significant ways from the Hawaiian scheme invalidated by *Rice*. First, it argued that 'Northern Marianas descendants' was not a race-based classification. Where Hawaii sought to enfranchise only voters with roots pre-dating European

contact, CNMI's scheme encompassed a multi-ethnic political community 'who rebuilt the Northern Mariana Islands after the devastation of the Second World War' and 'the descendants of those individuals that remained in the Northern Mariana Islands and improved the work of their forebears'.[73] The commonwealth showed that not just Chamorros but various races inhabited CNMI in 1950; hence, referendum voters would not be mono-ethnic.

Second, the commonwealth maintained that the Fourteenth and Fifteenth Amendments are not germane. That is because CNMI, unlike Hawaii, is an unincorporated territory where, per the US Supreme Court's *Insular Cases*, the Constitution does not fully apply. Though the 1976 covenant imported those amendments to the islands, it simultaneously exempted land-alienation restrictions from Constitutional scrutiny. The commonwealth argued that, as controlling land alienation is intimately related to controlling who can vote on land alienation, the impugned voting qualifications should likewise be constitutionally exempt.

Finally, the commonwealth maintained that even if the court deemed 'Northern Marianas descendants' to be a racial group, and even if the Fourteenth and Fifteenth Amendments were found to apply in this case, the restrictions should nonetheless stand. This is because they were narrowly tailored to fulfil a compelling state interest – namely, to insure that the group whose lands were protected in the covenant will control any changes to that protection.

4.2. The ruling

In December 2016, in a unanimous decision, the appeals court found in favour of Davis. Chief Judge Sidney Thomas penned the terse decision, condemning CNMI's voting scheme as both race-based and offensive to the Fifteenth Amendment.

Thomas declared the court's findings to be controlled by *Rice.* He ruled that, similarly to *Rice*, the category 'Northern Marianas descendants' functions as a proxy for race. As well, he found that analogies to American Indian tribes are, in the Marianas as in Hawaii, inapplicable. CNMI's Indigenous people were never congressionally recognised as a 'quasi-sovereign'; thus they do not enjoy constitutionally distinct political status. As well, Thomas scoffed at the notion that Northern Marianas descendants' exclusive participation in the proposed land-alienation referendum is justified by their supposedly greater stake in the outcome. All CNMI residents, he declared, will be affected by the referendum, and thus deserve to vote.

Thomas additionally maintained that, unlike the prohibition on land-alienation at issue in *Wabol*, the present infringement is not shielded by the commonwealth covenant. 'Limits on who may own land are quite different – conceptually, politically, and legally – than limits on who may vote in elections to amend a constitution'.[74] As well, Thomas argued that the *Insular Cases* do not apply. Per the covenant, he found the Fifteenth Amendment is fully applicable in CNMI and thus 'fundamental'.

Following Thomas' ruling, the commonwealth government petitioned the US Supreme Court for reconsideration. In October 2017 the high court denied that petition.

5. The Guam case, Davis v. Guam (2017)

At 212 square miles, Guam is the largest island of Micronesia and the southern-most island in the Marianas chain. Its population is approximately 167,000, of which

Indigenous Chamorros comprise 37%, other Pacific Islanders 12%, people of Asian origin 34%, whites 7%, and mixed-race people and 'others' 10%.[75]

As with neighbouring CNMI, Guam has for millennia been a Chamorro homeland. Chamorros began experiencing 'cultural genocide' after Spaniards arrived in the sixteenth century.[76] Between 1668 and 1740 the Chamorro population dropped from approximately 80,000 to 5,000.[77] The United States assumed control of Guam following the 1898 Spanish-American War. In 1950, Guamanians – of whom at the time almost 99% were Chamorros[78] – were made US citizens under the *Organic Act*. At the same time there was 'an express acknowledgment by Congress, in the relevant congressional reports surrounding the enactment of Guam's Organic Act, of its "international obligations" to usher the territory toward a fuller measure of self-government'.[79] In 1968 an amendment to the *Organic Act* extended various sections of the US Constitution to Guam, including the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment.

Guam, unlike CNMI, has not officially exercised self-determination. It thus remains on the United Nations' list of colonised territories. Its relationship with the United States has been neither voted upon by Guamanians nor enshrined in a covenant. This is not for want of trying. In a 1982 plebiscite open to all registered voters, Guamanians supported commonwealth status. Guam's legislature thus submitted a draft commonwealth act to Congress. The draft included a requirement that final ratification of commonwealth status be limited to Chamorros. Congress opposed this limitation and negotiations broke down. Guam has resubmitted the draft act in every subsequent Congressional session, to no avail.[80]

Guam's legislature thus began the decolonisation process on its own, mandating that there be held 'a political status plebiscite to conform to the international obligations of the United States in administering Guam as a non-self-governing territory'.[81] As laid out in United Nations General Assembly Resolution 1541, which concerns compliance with the principles of self-determination, the plebiscite would offer three choices: independence, 'free association' with the United States, or statehood.

To this end, Guam's legislature established a Commission on Decolonization and set up the Guam Decolonization Registry, enrolling voters who would be permitted to participate in a non-binding plebiscite. Enrolment was initially limited to 'Chamorro people of Guam'. Immediately after the *Rice* ruling, that wording was changed to 'native inhabitants of Guam', defined as those Guamanians who became US citizens under the 1950 Organic Act and their descendants. By law, the plebiscite must be conducted when 70% of 'native inhabitants of Guam' join the registry. So far that threshold has not been reached.

5.1. The case

Davis v. Guam was filed in 2011 by Arnold Davis (no relation to John Davis Jr), a non-Chamorro Guamanian blocked from the Guam Decolonization Registry. He was represented by the Centre for Individual Rights, a Washington, DC-based conservative non-profit known for its anti-affirmative action work. Citing *Rice,* Davis charged the government of Guam with 'audacious racial discrimination'[82] contravening the Fourteenth and Fifteenth Amendments. The district court of Guam initially found his claim 'unripe' and lacking legal standing. The Ninth Circuit Court of Appeals reversed, prompting the district court to revisit the case.

In its statement to the district court, the government of Guam argued that the Decolonization Registry is not race-based. The registry's intent, the government argued, is to enfranchise a federally created political class: Guamanians, and descendants thereof, who became citizens under the *Organic Act* and to whom obligations are stilled owed under international law. This, the government insisted, made *Davis v. Guam* different from both *Rice* and the CNMI case, *Davis v. Commonwealth Election Commission*. Moreover, the registry's *effect* would be non-racial. Not just Chamorros but various ethnicities inhabited Guam in 1950; hence, enrolees would be multi-ethnic.

Further, the government of Guam maintained that in this case, unlike *Rice*, the Fourteenth and Fifteenth Amendments are not applicable. Guam is an unincorporated territory, where, per the *Insular Cases*, the Constitution does not apply in full force. Hence, voting in the decolonisation plebiscite is not a 'fundamental right'. Moreover, the government argued, applying the Constitution to Guam in a manner that blocks inhabitants from exercising their acknowledged right to self-determination would be 'impractical and anomalous' and 'an outcome proscribed in the *Insular Cases*'.[83]

5.2. The ruling

In March 2017, the court issued its ruling, finding in favour of Davis. Judge Frances Tydingco-Gatewood penned the decision. She ruled that the Fourteenth and Fifteenth Amendments are fundamental in Guam. Despite Guam's unincorporated status, she noted, Congress explicitly extended both amendments to the territory under the *Organic Act*.

Citing *Rice*, she stated that the Fifteenth Amendment forbids ancestry-based voter qualifications that act as a proxy for race. Likewise, it bars qualifications that, though on their face racially neutral, are race-based in intent and effect. The classification 'native inhabitant of Guam', she stated, fails on both counts. Per an analysis of the registry's legislative history, she ruled that legislators clearly intended to preference Chamorros. Further, given that almost 99% of the people made citizens under the 1950 Organic Act were Chamorro, the registry would have precisely that effect.

Tydingco-Gatewood noted that, under the Equal Protection Clause, racial distinctions are permissible only when narrowly tailored so as not to exclude substantially affected parties. Yet, she found, 'ascertaining the future political relationship of Guam to the United States is a public issue that affects not just the Native Inhabitants of Guam but rather the entire people of Guam. Every Guam resident otherwise qualified to vote can claim a profound interest in the outcome of the Plebiscite'.[84]

Finally, the judge addressed the territory's arguments that the impugned voting limitations are necessary for self-determination. As to international obligations, she stated, 'Defendants … failed to provide this court with any legal authority – whether it be international law or a binding international treaty – that allows for this court to disregard or circumvent the U.S. Constitution'.[85] And even if such international obligations were proven, she suggested it would nonetheless be unconstitutional for the Guamanian government – instead of, for example, a non-profit corporation – to conduct a race-based plebiscite.

Tydingco-Gatewood concluded, 'The court recognizes the long history of colonization of this island and its people, and the desire of those colonized to have their right to self-

determination. However, the court must also recognize the right of others who have made Guam their home'.[86]

In August 2017, Guam appealed the decision to the Ninth Circuit Court. It opened its appeal with a dramatic statement: 'This case is a wolf in sheep's clothing. Although styled as a reverse discrimination case … [t]his case seeks to deny the "native inhabitants of Guam" … from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States of America'.[87] Taking an opposite stand was the US Department of Justice, which filed an *amicus* brief supporting Davis. As of September 2018 the appeals court had not ruled.

6. Analysis and conclusion

I contend that these three legal battles in the US Pacific – *Rice v. Cayetano*, *Davis v. Commonwealth Election Commission*, and *Davis v. Guam* – showcase how settler-colonial assertions of rights may in effect colonise Indigenous demoi. From this web, at least four distinct strands may be teased out.

First, *Rice*, *Davis* and *Davis* all highlight the use of a rather novel and understudied settler 'strategy of elimination': the assertion of individual voting rights in a manner that undermines Indigenous sovereigns and replaces them with universal, settler-dominated demoi. This strategy might indeed be seen as 'a wolf in sheep's clothing'. In *Rice*, the settler plaintiff, Freddy Rice, charged that Hawaii's voting scheme, instituted to empower Native Hawaiians in the manner of a 'quasi-sovereign tribal entity' and to provide them with a measure of self-determination, infringed his right to vote under the Fourteenth and Fifteenth Amendments. In *Davis v. Commonwealth Election Commission*, John Davis Jr claimed violation of the same voting rights, attacking as illiberal CNMI's effort to provide people of Northern Marianas descent with control over alienation of their lands. Finally, in *Davis v. Guam*, Arnold Davis cited the same rights to challenge Guam's effort to provide native inhabitants with self-determination.

Second, in all three cases 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'.[88] Even more precisely, I suggest these dual moves were presciently discerned by Rohrer, who, in analysing *Rice*, observed that the plaintiff sought to 'problematize collective native identity' and then 'naturalize white settler subjectivity via a color-blind ideology'.[89] Let me try to trace this dynamic.

In bringing their cases, Freddy Rice, John Davis Jr and Arnold Davis all claimed violation of rights of the second-order variety, concerning what Issacharoff and others call laws of democracy. Again, such laws govern the democratic process and attach to individuals, not polities. Such laws may thus appear quite removed from such meta-political questions as 'who are the people?' But clearly, these impugned laws of democracy in Hawaii, CNMI and Guam were all downstream effects of distinct structures of democracy, designed to treat Indigenous peoples as first-order demoi. In Hawaii, the law governing OHA voting flowed downstream from the state's attempt to acknowledge Native Hawaiians as a tribal entity. In CNMI, the law governing voting in land-alienation referenda flowed from the commonwealth's effort to affirm Northern Marianas descendants as a pre-political polity whose land rights were enshrined in the commonwealth's founding covenant. In Guam, the law limiting who could vote on decolonisation flowed from the

government's attempt to treat native inhabitants as a first-order demos owed self-determination under international law.

In all three cases, the plaintiffs' attacks on downstream voting laws produced effects that rippled back upstream. In this manner, as Rohrer put it, 'collective native identity' was 'problematized'. Consequently, the three courts were called upon to examine these collective identities – to determinate the legal status of the Hawaiian, Marianan and Guamanian Indigenous demoi. Were these demoi, like the US Senate, constitutionally enshrined? Or were they more like the Alabama state senate districts in *Reynolds* – groupings that 'never were and never have been considered as sovereign entities'? In each case the courts concluded the latter, that the Indigenous groups were not first-order rights-bearers. This result undermined Indigenous political selfhood. It may be seen as an example of Wolfe's destructive dimension of settler colonialism.

But of course, Rice, Davis Jr and Davis appealed not merely for Indigenous voter-preferencing to be invalidated, but for voting to be liberalised. As Rohrer again discerned, this move 'naturaliz[ed] white settler subjectivity via a color-blind ideology'. While liberalising voting in each case may have seemed an innocuous second-order reform, the effect of course again flowed upstream. Opening decisions concerning Indigenous affairs to every resident of Hawaii, CNMI and Guam has the consequence of redefining the structure of democracy that governs those affairs. The boundaries of the relevant demoi have been redrawn so as to encompass not just 'Native Hawaiians', 'Northern Marianas descendants' and 'native inhabitants of Guam', but all state voters. Of course, this empowers settlers, who in each case comprise the islands' overwhelming majorities. Settlers now have the opportunity to control management of the Hawaiian OHA, land-alienation in CNMI, and decolonisation in Guam. This may be seen as exemplifying Wolfe's constructive dimension of settler colonialism.

Third, all three cases show how the success of the forgoing settler legal strategy hinged on how justice was framed. Clearly, Justice Kennedy approached *Rice* through a second-order, law-of-democracy frame. Finding Native Hawaiians to lack federally protected status, he concluded that the relevant rights-bearers were downstream individuals, not upstream demoi. From this perspective, the rights of Freddy Rice were clearly abridged. Justice Stevens, meanwhile, approached Rice through a first-order, structure-of-democracy frame, seeing the key subjects of justice as demoi. From his perspective, Native Hawaiians were a rights-bearing demos the protection of which trumps downstream individual voting rights.

Similarly, Judge Thomas approached *Davis v. Commonwealth Election Commission* through a second-order frame. Finding individual voting rights to apply in CNMI due to the commonwealth covenant and despite the *Insular Cases*, and conversely finding 'Northern Marianas descendants' to lack quasi-sovereign status, he too concluded that the only germane rights-bearers in the case were individuals. From this perspective, the downstream rights of John Davis Jr were clearly abridged, while the upstream Indigenous demos had no rights to stand on. This was a dramatically different framing than had been applied in *Wabol*, where the rights of non-Indigenous individuals to buy land were trumped by the aim of averting the 'genocide' of, and fulfilling 'international obligations' to, Indigenous Chamorros.

In *Davis v. Guam*, the framing of Judge Tydingco-Gatewood's decision mirrored that of the Hawaii and CNMI rulings. Citing the *Organic Act*, and despite the *Insular Cases*, the judge framed Arnold Davis as a legitimate bearer of individual voting rights. At the same

time, despite Congressional reports and international obligations, she found Indigenous Guamanians to lack an actionable right of self-determination. Framing the case through a second-order rather than first-order lens, the result was all but foreordained.

Fourth and finally, *Rice, Davis* and *Davis* show that, when settler colonists strategically assert individual voting rights, and where justice is framed so as to validate that strategy, a meta-political conquest may result. Settlers, able to dissolve the Indigenous 'them' into the settler 'we', may achieve power over Indigenous peoples and lands. They may 'colonise the demos'. That is, at least for now, what has happened on the utmost frontier of American settler expansion, the US Pacific.

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Disclosure statement

No potential conflict of interest was reported by the author.

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IV

POSTCOLONIAL STUDIES
https://doi.org/10.1080/13688790.2019.1690763

Routledge
Taylor & Francis Group

Constituting settler colonialism: the 'boundary problem', liberal equality, and settler state-making in Australia's Northern Territory

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ABSTRACT

Between Indigenous sovereignty and settler colonisation lie contested frontiers. I suggest Australia's Northern Territory is one such frontier. This paper explores the 1998 settler campaign for Northern Territory statehood, the key to which was the framing of a constitution designed to eliminate Indigenous autonomy and empower settlers. I make three contributions. First, I showcase how settler colonialism is metapolitical, implicating political theory's notorious 'boundary problem' in an effort to reconstitute Indigenous territories as 'ours' and Indigenous demoi as 'us'. Second, I show that settlers may wage this metapolitical campaign using individual rights, to challenge as illiberal, and thus de-constitute, Indigenous demotic and territorial boundaries. Finally, I show that when Indigenous peoples resist by seeking to constitutionally entrench their own, alternate answers to the 'boundary question', there arises a dilemma over whether settler rights or Indigenous boundaries are the rightful 'subject of justice'.

KEYWORDS

Settler colonialism; constitutions; metapolitics; Northern Territory; boundary question

Introduction

Of all the political units in the developed world, the most dichotomous may be Australia's Northern Territory. On the map it is an arbitrary rectangle, nearly as big as Mongolia, overlaying '*outback par excellence*'[1] – the monsoonal tropics of the Top End, scrubby rangeland, and the parched deserts of the Red Centre. Jurisdictionally it is 'a land left over',[2] the only large swath of Australia lacking statehood. Whereas Australia's states are constitutionally sovereign, the Northern Territory is a ward of the federal government, which adopted it in 1911 after first New South Wales and then South Australia found it too hard to tame. Even today it remains 'the least successfully colonised political unit in Australia'.[3] Vast expanses are *de facto* Indigenous domains where 'settler' Australians still rarely intrude. Thus, the territory has been characterised as an ideational frontier, caught 'between the known and the unknown, the civilized and the rude, the safe and the dangerous, the ordered and the anarchic'.[4] I suggest it is also a *metapolitical* frontier, where demoi and territory are in limbo.

Is the Northern Territory theirs or ours? Are its people us or them? Who decides, and how? Questions like these are the stuff of metapolitics. They may seem esoteric. Far from

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it. I submit they are constitutive, establishing the foundations from which polities rise. Underpinning any political community are subjective claims about who 'we, the people' are and what place is rightfully ours. If those underpinnings erode – or, as I will suggest in this article, if they are deliberately subverted – the community, atomised and dispossessed, will be no more.

This study examines the clash in 1998 between Indigenous peoples and settlers over whether the Northern Territory should become Australia's seventh state, and over the drafting and entrenchment of antithetical charters to either constitute the new state in the image of Australia's other, settler-colonial states, or, conversely, to guard and augment the region's unique degree of Indigenous self-determination.

My aim is threefold. First, by revealing how the Northern Territory government, as a key to its statehood bid, propounded a constitution that would in effect absorb Indigenous demoi and territory, I hope to show how settler colonisation is at base metapolitical, confronting political theory's 'boundary question' in an effort to reconstitute Indigenous territories and demoi as 'ours' and 'us'. Second, I will show that, as on other modern settler frontiers, this metapolitical campaign in the Northern Territory was waged largely by leveraging liberal rights, wielded to impugn as illiberal, and thus de-constitute, Indigenous boundaries. Finally, I will show that, when Indigenous peoples defended their demotic and territorial legitimacy, propounding constitutions that substantiated their own, alternate answers to the 'boundary question', there arose a contest over the 'framing of justice' – over whether individual settler rights, on one hand, or Indigenous boundaries, on the other, were the rightful 'subject of justice'.

I proceed thusly. First I lay out a theory of the metapolitics of settler colonialism. Then I explore the historical, demographic, political and legal circumstances of the Northern Territory. Next, I consider the 1998 Northern Territory Constitutional Convention, examining it – its composition, mandate, speeches, amendments, resolutions, protests, media coverage, and resultant draft constitution – through the lens of settler metapolitics. I then do the same with two subsequent, countervailing Indigenous constitutional conventions. Finally, I analyse and conclude.

Settler colonialism and the 'boundary problem'

The world teems with others – with peoples, occupying places, exercising or demanding to exercise self-determination. Where once the very notion of self-determination was controversial, today most leaders, lawyers and theorists agree it is a right.[5] Yet this agreement is, Margalit and Raz observe, 'but the eye of a raging storm concerning the precise definition of the right, its content, its bearers, and the proper means of its implementation'.[6] Few problems are more vexing: Who is a political self, and where may they self-determine?

This problem is vexing in part because neither democracy nor liberalism can solve it. Indeed, it presents a chicken-and-egg dilemma – political theory's 'boundary problem'. If democracy is rule by the people, who are the people and where do they rule? The first part of this problem was captured by Jennings: 'the people cannot decide until someone decides who are the people'.[7] He meant democracy is useless for identifying political communities. Liberalism is barely more helpful. A core liberal tenet is egalitarianism, holding that all individuals are moral equals.[8] Another common liberal principle is universalism,[9] 'affirming the moral unity of the human species'.[10] Thus liberals, while

backing self-determination in theory, are loathe to discriminate between 'we, the people' and others.

The second part of the problem, 'where do the people rule', is similarly difficult. Typically, self-determination is associated with territorial authority. Indeed, the two mutually reinforce. Americans are those people who govern in America, that place governed by Americans. Yet, as with identifying demoi, staking territory cannot happen democratically. How can voters vote on their voting district? Similarly, despite attempts by liberal thinkers from Locke[11] to Kolers[12] and Stilz[13] to articulate theories of rightful territory, few justice problems remain so intractable as how to divide up the world.

Boundaries, then, are unacceptable yet inevitable – illiberal and undemocratic on one hand, essential to self-determination on the other. Hence Issacharoff calls bounding a 'first order challenge', that must be considered in a manner 'constitutionally prior' to democracy itself.[14] This of course means, to make a political community, bounding must occur first. Bounding is politics' primordial event, constituting the 'who' and 'where' of governance. But it also means for a community to endure, its bounds must remain, if not precisely fixed, then at least under its control. A political community, like an edifice, requires stable underpinnings. If exogenous actors subvert its boundaries, it is unmade.

Due to the boundary problem, democracies' creation stories are often unsavoury. Frequently their boundaries emerged from pre-liberal history, were forged in violence, or were fixed in the extra-legal vacuum of a 'constitutional moment'. Regardless, once 'who are the people and where do they rule' was determined, state-makers could move on to less-messy matters, including 'second order' arrangements. Unlike first-order bounding decisions, which frame demoi and territories, second-order arrangements relate to individuals. Rather than enshrining collective self-determination, they formalise and protect liberal rights.

Yet even in the most venerable liberal democracies, liberal protections are never separable from the state's illiberal roots. Individual rights complexly interact with 'constitutionally prior' demotic and territorial boundaries. Often, these interactions exhibit an 'upstream/downstream' dynamic. A familiar example involves US federalism. Because of the Great Compromise, Wyoming, the least populous state, and California, the most, enjoy equal representation in the US Senate. This first-order deal has staggering consequences 'downstream', on second-order rights. Because senatorial representation is equal *qua* state it is unequal *qua* voter. Individual Wyomingites wield more voting power than Californians, transgressing 'one person, one vote'. Clearly, the illiberalism of America's upstream federal bounding decisions has downstream ramifications, impinging on liberal rights.

Where these bounding decisions are constitutionally enshrined, their effects are unyielding. Despite how Californians may feel about Wyoming's equality *qua* demos, the Great Compromise seems here to stay. But what if boundaries are *not* enshrined? Then a dilemma arises over their legitimacy. As noted, democracy cannot resolve such dilemmas. Nor can liberal justice: Which should prevail, collective self-determination or individual rights? Hence Fraser situates such dilemmas within 'abnormal justice'.[15] 'Normal justice' is about balancing the proverbial scale of justice until equilibrium is achieved. But in 'abnormal' conditions, where 'constitutionally prior' assumptions are in dispute, Fraser suggests deciders must begin with meta-questions. Which is the

correct scale to use? How should justice be framed? Who or what is the appropriate 'subject of justice'? Such questions are fundamental because the frame may foreordain the result.

Consider the 1964 US Supreme Court case *Reynolds v. Sims*. There, voters from populous Jefferson County, Alabama, challenged the apportioning of state senate seats equally *qua* county, arguing it diminished their voting power relative to voters in less populous counties. Alabama responded with the 'federal analogy' – if the US Senate does it, why can't we? But the high court found that, unlike states, 'subdivisions of states – counties, cities, or whatever – never were and never have been considered as sovereign entities'.[16] The court in effect ruled that Alabama's counties are not legitimate first-order polities. Unlike Wyoming, they are not owed collective self-determination. Hence, concern for their demotic integrity did not trump downstream rights. By framing the plaintiffs, not the counties, as the appropriate subjects of justice, the result was foreordained. 'One person, one vote' became the law of the land.

For the purposes of this paper, *Reynolds* imparts three lessons. First, not all boundary questions are resolved at the time of state-making. As in Alabama, such questions may erupt, precipitating clashes between first-order boundaries and second-order rights. Second, where these clashes are won by the second order, the effect may flow *upstream*, impacting the first order. *Reynolds* helped spur the US 'redistricting revolution', compelling almost every state to overhaul its apportionment practices. America's peoples and places were re-bound. The third lesson is these upstream/downstream dynamics may be leveraged to strategic advantage. Yes, the *Reynolds* plaintiffs won voting equality. But that was not their prime goal. They were reformers for whom voting equality was a means to an end: swinging state politics leftward.[17] By leveraging second-order rights they achieved a first-order victory, re-constituting Alabama to their own political advantage.

While the US redistricting revolution was distinctly impactful, rights-versus-boundaries clashes are surprisingly common. They arise when countries enter confederal arrangements, such as the Maastricht Treaty, which triggered charges by German voters that their 'electoral weight' was being invidiously watered down,[18] or when power-sharing is imposed, such as by the Dayton Accords, which prompted claims of electoral discrimination by members of non-consociating ethnic groups in Bosnia and Herzegovina.[19] They occur when restive peoples seek to enhance their internal self-determination, as with Quebecois nationalists and their possibly illiberal *La charte de la langue française*.[20] And most relevant to this paper, rights-versus-boundaries clashes happen when people from one place assert jurisdiction over another, as in settler colonialism.

Settler colonialism is, as Wolfe[21] famously claimed, an insidious, tenacious variant of the sort of conventional colonialism that once flourished in the Global South. Generally speaking, conventional colonialism exploited native populations to enrich the European metropole. Settler colonialism, conversely, aims to *remove* native peoples, making space for settlers to *reproduce* the metropole – to found New Englands, New Zealands, New Caledonias and so forth.

As I have suggested elsewhere[22], settler colonialism can be understood as a metapolitical conquest conducted through demotic and territorial re-bounding. Indigenous dominions, like anywhere, comprise *people* and *places*, demarcated by *boundaries*. Settler colonialism targets those boundaries, undermining them and instituting new boundaries

within which setters dominate. In short, settlers colonialism re-makes 'theirs' as ours, often by making 'them' us.

Historically, settlers did this largely through force and deception. Hence, by the early 1900s, they had absorbed hundreds of Indigenous dominions very nearly spanning whole continents. Since then settler colonialism has been primarily about maintenance. Indigenous boundaries, having been dissolved, were simply kept that way. Still, a few unconquered frontiers endured. Well into the late twentieth century, in Alaska and northern Canada,[23] in US offshore territories,[24] and, as this paper will suggest, in Australia's Northern Territory, Indigenous nations and homelands had not, and perhaps still have not, been definitively reconstituted as 'ours'. In these contested spaces, I suggest that settler colonialism can be observed in a metapolitical offensive, preparing the ground for settler takeover. On these frontiers, where Indigenous peoples cling to *de facto* and even *de jure* control, settlers embark on the primordial act of re-bounding – of de-constituting, and replacing, Indigenous demoi and territories.

More so than in previous eras, such modern settler-colonial re-constitutions work by leveraging liberal rights. Again, first-order bounding arrangements are inherently illiberal. Hence, Indigenous boundaries constrain liberal rights of settlers. In turn, settler challenges to those constraints push upstream, threatening Indigenous boundaries. Such challenges target border regimes that prevent settlers from swamping Indigenous homelands and legal regimes demarcating Indigenous demoi and territories. Indigenous groups, of course, resist. Like the state of Alabama in *Reynolds*, their challenge is to constitutionally entrench, and/or keep entrenched, their metapolitical boundaries. In such contests, between rights and boundaries, what ensues is a conflict over Fraser's 'framing of justice'.

Such conflicts are not uncommon – and often, settlers prevail. For example, recently in the US territory of the Commonwealth of the Northern Mariana Islands, rights-wielding settlers broke down land-alienation protections that guarded Indigenous territorial sovereignty.[25] In the US territory of Guam, settlers asserted their voting rights to block an Indigenous-only vote on decolonisation.[26] And in Canada's Northwest Territories, settlers pushing for voter parity have repeatedly challenged electoral-boundaries regimes guarding Indigenous peoples' share in the territorial 'balance of power'.[27]

In 1998 there played out a similar settler-colonial rights-versus-boundaries conflict in Australia's Northern Territory. As I will show, it was a literal clash of constitution, with settlers and Indigenous peoples duelling to draft and entrench founding charters that would consecrate their own, antithetical answers to the boundary problem. Indigenous peoples sought to fix boundaries that would guard their lands and polities in the last major Indigenous redoubt in Australia. Settlers, keen to tame this 'last frontier',[28] sought to unbound Indigenous lands and polities and constitutionalise new boundaries that would in effect empower settlers. To do this, settlers appealed to liberal rights. Victory would be foreordained by the 'framing of justice' – by deciding whether the appropriate 'subject of justice' was upstream Indigenous sovereignty or downstream settler rights.

Australia's Northern Territory as a settler-colonial 'frontier'

The Northern Territory's residents, numbering barely 250,000, inhabit 'two solitudes'.[29] Seventy per cent are non-Indigenous, mostly bunched into the seaside capital, Darwin.

They are disproportionately young, male and mobile; every year nearly one in six moves into or out of the territory.[30] Indigenous people comprise the other 30%, far more than elsewhere in Australia. They are 'permanent residents among a sea of transient[s]'.[31] Beyond Darwin they predominate, three-quarters living 'out bush', in remote towns and outstations.[32] They belong to dozens of distinct nations, their languages, customary laws and traditional cosmologies relatively intact, inhabiting the same 'countries' their forbears did for 60,000-plus years.

Intact, too, is their sense of political distinctiveness, a perception sharpened by the Northern Territory's fraught history. After European settlement, the territory became one of the continent's last battlegrounds. Like elsewhere in Australia, miners and pastoralists eschewed treaty-making in favour of the doctrine of *terra nullius*, defining the country as empty to claim it for themselves. But, observe Pedersen and Phillpot, 'what was different about northern Australia was the sustained Aboriginal struggle against European incursion'.[33] Spearings of frontiersmen were common. Colonial authorities responded with massacres well into the 1920s. For decades, the territory experienced 'a bloody war'.[34]

Eventually, much of the far north and central desert were deemed unconquerable and made into Indigenous reserves. Elsewhere, cattle stations took root, their solvency hinging on cheap Indigenous labour.[35] In 1966 Gurindji stockmen, fed up with feudal working conditions, walked off the Wave Hill cattle station and demanded their traditional lands back. At around the same time, the Yolngu of the Gove Peninsula, opposing the establishment of a bauxite mine, issued the Bark Petition, a landmark native-title challenge. These protests helped awaken urban Australia to the cause of Indigenous rights.[36]

Flowing from this awakening, two federal laws in the 1970s reshaped territorial politics, placing Indigenous peoples and settlers 'on a collision course'.[37] First, the federal Whitlam government championed Indigenous land reform. Facing opposition from the states, the government initiated reform in the key jurisdiction under its control, the Northern Territory. The 1976 *Aboriginal Land Rights Act* was transformative, giving Indigenous peoples inalienable title to 19% of the territory and opening far more to land claims.[38] Within a few decades, half the territory was Indigenous-owned. A permit system was established to regulate public access to this vastness of Indigenous country. Established as well were the Northern and Central Land Councils, 'para-governmental bodies'[39] answerable to Indigenous voters. The councils became powerful political actors, providing glimmerings of self-determination. Together these reforms placed Indigenous peoples in the Northern Territory in a uniquely powerful position relative to their brethren elsewhere in Australia.[40]

The second federal initiative was countervailing. The Northern Territory, as a federal subject, had for decades been run by Canberra. Local settlers bristled at this 'remote control'.[41] In 1948 the federal government conceded to create a territorial council, though up until 1974 just two-thirds of its seats were elected.[42] Finally, in 1978, came the *Northern Territory (Self-Government) Act*, providing the territory with Westminster-style 'responsible government', and granting it most of the powers of a state. There were, however, exceptions. The Northern Territory received 2, not 12, federal senators. The federal government could override territorial legislation. Most seminally, Indigenous land rights remained under federal purview.

From the start, Northern Territory settlers protested these 'serious and continuing irritants'.[43] The territory's founding governing party, the pro-development Country Liberals (CLP), made patriation of Indigenous land legislation a *cause célèbre*. The CLP became notorious for 'Arcadian populism'.[44] Supporters were cast as rugged, pioneering 'Territorians'. Canberra was an oppressor, strangling the frontier's prospects. And then there was the 'frightening' Indigenous agenda.[45] As Smith observes, for the CLP, 'Whilst the battle was about land, the electoral tactics were about race'.[46] Those tactics worked; the CLP held power for 27 unbroken years, earning it the nickname the 'Territory Party'. (The opposition Labor Party, though more sympathetic to Indigenous concerns, was also predominantly settler-oriented. From 1978 to 1998, Indigenous membership in the territorial legislature never exceeded 2 of 25.[47])

The CLP governed as provocatively as it campaigned. Within months of forming government in 1978, it moved to thwart Indigenous land claims by extending the city limits of major municipalities.[48] Had the plan succeeded, Darwin would have expanded 30-fold, becoming the world's biggest city. In 1983, when the federal government vowed to return the territory's iconic landmark, Uluru, or Ayers Rock, to the Anangu people, the territory's chief minister protested with the rallying cry 'Let's Rock Canberra'.[49] His successor boycotted the hand-over ceremony. In 1994 the territory moved to transfer all Crown land into a territory-owned company, again to defeat land claims. In 1993 another CLP chief minister told international journalists Indigenous peoples were 'centuries behind us in their cultural attitudes and aspirations'.[50] In 1997 a further CLP chief minister, during a media interview at the territorial legislature, called the Northern Land Council chair a 'whingeing, whining, carping black'.[51]

Integral to the territorial government's quest for land-control – talismanic, even – was its push for statehood. In Australia, Indigenous land-rights legislation is typically under state authority. Hence for territorial settlers, statehood was 'the lever through which such control might be wrested from the commonwealth government'.[52] Chief Minister Marshall Perron once characterised statehood as, 'the stuff that dreams are made on. This is especially true here in the Northern Territory where successive generations have been struggling for the degree of control over our affairs that other Australians take for granted'.[53] Unsurprisingly, Indigenous groups opposed statehood. Indigenous leader Galarrwuy Yunupingu observed, 'The rallying cry of "Statehood!" has often been the first sound in a battle to defeat our rights'.[54]

In 1985 the Northern Territory government officially launched a bid for statehood. To that end, the legislature established a bipartisan Sessional Committee on Constitutional Development, comprising three CLP and three Labor members. Public hearings commenced in 1988, with visits to 54 communities.[55] More than 40 of these were primarily Indigenous; in some places 'the entire community of 200 people turned out to have input'.[56] While government and even opposition Labor leaders celebrated these attempts at consultation, others condemned them as disingenuous, poorly resourced and 'farcical'.[57] Constitutional drafting began in 1990 and continued for half a decade.

Around this time, elsewhere in Australia, Indigenous rights were gaining ground. The Australian High Court, in its 1992 *Mabo* and 1996 *Wik* decisions, renounced the doctrine of *terra nullius*, recognised that Indigenous land title had survived European settlement, and opened up Crown lands – including leased grazing lands – to native-title claims. In concession, the federal government passed the 1993 *Native Title Act*, establishing a legal

framework for recognition, protection and compensation of native title. While these developments shook Australia's states, they were of lesser consequence in the Northern Territory. There, under the *Aboriginal Land Rights Act*, Indigenous land-owners had little incentive to make title claims.[58] If anything, these moves toward national reconciliation prompted settlers in the Northern Territory to speed their bid for control.

With the accession of the CLP's Shane Stone to the chief ministership in 1995, the statehood campaign gained momentum. That year the Sessional Committee released a draft constitution, which was tabled in the assembly.[59] In matters of Indigenous rights, the draft was in ways a compromise. It included a non-binding preamble that would be the first in Australia to acknowledge the historical role of Indigenous peoples. Section 2.1.1 proposed to recognise, and perhaps even deem enforceable, Indigenous customary law. Section 7.3 authorised the potential enactment of 'Aboriginal self-determination'. Finally, in Part 7, the draft sought middle ground on Indigenous land rights. Rather than patriating the *Aboriginal Land Rights Act* as regular legislation, as the CLP preferred, or leaving it in federal hands, as Indigenous groups urged, land rights would be protected in territorial 'organic laws'. Unlike regular laws, organic laws would be amendable only by a super-majority of the territorial legislature. However, they would also be amendable by a simple majority of voters in a referendum. Moreover, Indigenous lands would be alienable if a court agreed it was in the landholders' interest. And, the bar would be lowered for the taking of Indigenous lands under 'eminent domain'.[60]

In late 1997, Chief Minister Stone, having resoundingly won re-election on a pro-statehood platform, and with the statehood-friendly Howard government in Canberra, moved to bring statehood to fruition. He called a constitutional convention where delegates would review and finalise the Sessional Committee's draft constitution. The statehood question would then go before territorial voters in a referendum. With a majority 'yes' vote, and with the federal government's approval, the territory would become Australia's seventh state, and the *Northern Territory (Self-Government) Act* would be replaced by the new constitution.

The Northern Territory Constitutional Convention

The convention took place in Darwin over eight days between 26 March and 9 April 1998. Even before it began it was dogged by controversy. Of the 53 convention seats, 27 were reserved for government-appointed delegates. Some were appointed to represent specific interests; others were 'special' delegates with no set constituency. The remaining 26 delegates were chosen by predetermined stakeholder groups. Indigenous stakeholders were offered nine seats, or 17%. The most influential Indigenous stakeholders, the Central and Northern Land Councils, were offered just one seat between them. In protest, they boycotted the convention. Other Indigenous groups, despite reservations, sent delegates 'to get Indigenous peoples' views on the record'.[61]

From the moment of the convention's opening address the tone was confrontational. Keynote speaker Frank Alcorta, a former Darwin journalist, though noting the Northern Territory's bloody history, stated, 'a constitution does not have a past'. He urged that the new constitution not give Indigenous peoples a 'special place' – in effect, that it not recognise them as a distinct, rights-bearing demos:

> [I]f that is done, it will be at a horrendous long-term cost because it will entrench difference and division between the races forever. It will institutionalize Aboriginality precisely at a time when it is becoming less significant than at any other time in our written history … . The constitution should be a document that makes absolutely no distinction, none whatsoever, between one group of people and another.[62]

Next, each delegate gave an opening statement. More than a dozen, echoing Alcorta, championed the principles of liberal universalism and equality. For example, special delegate Kay Rose stated, 'I do not believe there are Chinese Territorians, Aboriginal Territorians, Queensland Territorians. There is just one kind – a Territorian'.[63] Bob VanderWal, representing small-business interests, attacked Indigenous protections as illiberal: 'To give people special rights based on their colour in the constitution would make it a racist document … '.[64] Ed Ferrier, representing seniors, agreed, calling the *Aboriginal Land Rights Act* unjust:

> One quarter of the Northern Territory population, the Aboriginal quarter, now controls half the land area … while the three-quarters of the population who are not Aboriginal cannot enter their half without special permission. … It may not be politically correct to say so, but the present system is discrimination and segregation based on race, and the name of that is apartheid.[65]

Both Pryce Dale, representing youth, and Karen Smith, representing agricultural interests, urged that the constitution infix universalism by referring only to 'we the people'.[66] Gino Antonino, representing ethnic communities, said the same: 'With all due respect to our Aboriginal friends, I do not think there is a place in a constitution for land rights or specific rights … . The wording of the constitution should refer only to 'we, the Australian people'.[67]

Indigenous delegates challenged these ostensibly liberal appeals. For example, Josie Crawshaw, representing the Aboriginal and Torres Strait Islander Commission, condemned settler universalism and proclaimed the justice of Indigenous self-determination: 'All of the efforts through history to define us simply as Australians and to treat us on terms set by the majority culture have, in fact, denied us our rightful place in this land'.[68]

On the morning of the convention's second day, Denis Burke, a CLP government minister, tabled an alternate draft constitution – an ostensibly egalitarian document he called 'as simple as possible',[69] with no mention of land rights, self-determination or customary law. The move outraged non-CLP delegates, including John Ah Kit, an Indigenous Labor Party member of the legislative assembly (MLA), who stated: 'We have the Indigenous delegates coming in here in a spirit of reconciliation. Now we have seen 12 years' work thrown out and a takeover by a document that surfaced … to hijack the process. It is all a set-up'.[70]

After Burke's alternate draft constitution was tabled, delegates continued with opening statements, many similar in tone to the day before, decrying Indigenous difference as illiberal. Eventually Indigenous special delegate Gatjil Djerrkura rose on a point of order, to 'draw a line in the sand and say that enough is enough. … When you talk about a simple constitution, really you are talking about a document that keeps us invisible'.[71] He warned that if Indigenous delegates' concerns were not addressed – if they were not recognised in the constitution as, in effect, first-order rights-bearers – they might leave the convention.

Through the next few days, as delegates discussed the new state's legislative, executive, financial and judicial functions, almost no mention was made of Indigenous matters. Then, on the morning of the fifth day, debate commenced on Part 2 of the draft constitution, concerning the proposed legal system of the new state, including special 'organic' laws. Several delegates expressed opposition, including James Robertson, representing the territorial government, who characterised 'organic' laws as offensive to equal rights:

> Let us not hide from the real reason why organic laws are suggested in the [draft constitution]. It is not an accident. It is to try to accommodate the position that relates to 25 percent of our population. … [They] will have laws relating to their land that will see it dealt with differently from the land of 75 percent of the people that comes under different laws. I simply ask delegates if that is what we want our subsequent generations to inherit. My answer is no.[72]

Special delegate Kay Rose stated, 'I believe firmly that all men and women are created equal. I do not like the thought of a law that would upset that concept … '.[73] Later that same afternoon, George Roussos, representing ethnic communities, moved Motion 25, that the constitution eschew special 'organic' laws. As well, Lawrence Ah Toy, representing agricultural interests, moved Motion 28, endorsing 'the absolute and unqualified equality of all its people as the fundamental platform upon which all laws of the state shall be based … '.[74] Both motions – the former decrying upstream boundaries, the latter cheering downstream rights – were moved to the resolutions group to be drafted into formal resolutions, which would be voted on at the end of the convention.

That afternoon there occurred what for Indigenous peoples was 'the coup of the convention'.[75] Special delegate Djiniyini Gondarra advanced Motion 32, that 'Aboriginal customary law be recognized as a source of law in the constitution'.[76] Six other Indigenous delegates spoke in favour. John Ah Kit stated, 'It is beyond the pale to accept that we should stand by and watch as people try to wind back the clock to the frontier days of this land. … Today we strive for justice'.[77] In the course of the ensuing 90-minute debate, several previous opponents of Indigenous customary law, including Dennis Burke, pronounced themselves converts.[78] Gondarra's motion was advanced to the resolutions group.

The sixth day of the convention was devoted to Part 7 of the draft constitution, dealing with Indigenous rights. Gatjil Djerrkura proposed Motion 45, that land rights remain under federal jurisdiction, constitutionally exempted from the authority of the new state. He stated:

> [W]e have no reason to trust the Northern Territory government … . We say it for the very good reason that the government has spent taxpayers' money to oppose every single land claim made under the *Aboriginal Land Rights Act* since 1976, and we say it because, at every opportunity, the government has said that it would remove some of our rights if it gains control of the act.[79]

Fellow Indigenous delegates spoke in favour, as did Charlie Phillips, a non-Indigenous delegate representing labour interests, who stated, 'I say again you cannot build statehood on the coffin of Indigenous rights'.[80] The motion was referred to the resolutions group.

That same day, in the opposite vein, Motion 51, moved by special delegate Julian Swinstead, called on Indigenous land-rights legislation to be transferred to the territory as

ordinary law without constitutional protection. Supporters included Gino Antonino, who appealed for Indigenous bounding – demotic, cultural, economic – into the settler demos:

> I think all these laws and all these requests for laws do nothing but separate the races. They are all trying to put the Aboriginals back where they came from, in a tribal situation. What is wrong with that? There is nothing wrong, if they were to live by themselves … . But it is very, very wrong because Aboriginal tribal life and culture are the antithesis of the dynamic economy of the year 2000.[81]

Meanwhile, special delegate Nigel Scullion moved Motion 52, 'That the constitution, so as to preserve the indissoluble nature of the Northern Territory, not include a specific clause relating to Aboriginal self-determination'.[82] In defending this motion Scullion stated,

> When I came to this convention, I had a vision of we, as a people … black, white and brindle together, living as one. In terms of sovereignty, that vision does not really include a federation of the Northern Territory made up of a black, independent state … .[83]

Djerrkura disagreed: 'To gain the consent of Aboriginal Territorians to statehood, a new constitution must recognize … as do governments all over the world, that Indigenous people have inherent rights to govern ourselves'.[84] Both Scullion's and Swinstead's motions advanced to the resolutions group.

On the seventh day of the convention, several more controversial motions appeared. Chris Lugg, a CLP MLA, proposed Motion 40, overhauling the preamble to declare, in capital letters, the territory's devotion to holistic equality:

> NOW WE THE PEOPLE OF THE NORTHERN TERRITORY, proudly calling ourselves Territorians, wishing to preserve a harmonious, tolerant, culturally diverse and united society, and affirming our intention that the life and liberty and property of all the people of the Territory should be protected and that all shall stand as equals before the law in enjoyment of that protection, declare this to be the Constitution of the State of the Northern Territory.[85]

Djerrkura protested, asserting justification for Indigenous first-order difference: 'In coming here, we have sought recognition in the preamble … . We have no links to other lands and cultures. It is here that you find our Jerusalem, our London, our Rome, our beginning. This is our land'.[86] Lugg's motion was referred to the resolutions group.

In the afternoon, as the plenary sessions were wrapping up, Djerrkura announced he and his fellow Indigenous-group delegates were leaving. The walkout 'threw the statehood convention into turmoil'.[87] Josie Crawshaw told the media, 'We just aren't going to be conned into colluding in our own oppression'.[88] Labor-appointed delegate Bob Collins called the walkout 'appalling' and 'a real blow to reconciliation and race relations in the territory'.[89] The final remaining Indigenous delegate, Labor MLA John Ah Kit, replied,

> I think the outburst from delegate Collins is appalling. … I have made a quick analysis of motions put up with regard to Indigenous concerns and, for every one of those, there has been a counter-motion knocking or defeating or wanting to defeat it.[90]

Collins retorted, 'That is called democracy',[91] in effect defending the notion that bounding may be done by majority rule.

On the morning of the eighth and final day of the convention, Charlie Phillips declared that in solidarity with Indigenous delegates he too was leaving. The remainder of the day

was devoted to voting on the resolutions. For much of it John Ah Kit abstained, telling the media, 'This is a bulldozing, rubber-stamping exercise I'm not going to be a party to'.[92]

The vote results were no surprise. Concerning the preamble, Resolution 2, based on a motion by Djerrkura, calling for 'recognition that Aboriginal people have continuing rights by virtue of their status as the Northern Territory's Indigenous peoples' and 'a respect for Aboriginal rights in land and for Aboriginal cultural heritage',[93] was defeated through a show of hands. Instead, by a vote of 26 in favour, the convention adopted Chris Lugg's liberal preamble.

Resolution 6, that 'Aboriginal customary law is recognized as a source of law' and that it be enacted as written law following consultations with Indigenous groups, carried with just two dissenting votes. However, support for that resolution was used to justify removing protections for Indigenous self-determination. Said Bob Collins, 'We now have a much stronger proposition in terms of the ultimate self-determination of Aboriginal people than we ever expected to have …. So 7.3 [the self-determination section] simply is unnecessary'.[94] The section was eliminated by a vote of 32–10.

Concerning Indigenous land rights, Resolution 49, resolving that the *Aboriginal Land Rights Act* remain federal legislation and 'the principles underpinning such legislation that protects Aboriginal rights be anchored in the new constitution', was defeated 26–10. Instead, by a show of hands, supermajoritarian 'organic laws' were removed from the constitution, eliminating the possibility of guarding Indigenous lands in that manner. Then, by a 32–10 vote, all references to the protection of Indigenous land and sacred sites were cut.

In the end, following votes on 59 resolutions, much of the work of the bipartisan Sessional Committee was rejected, as were almost all proposals by Indigenous delegates. The revised draft constitution affirmed Indigenous customary law but made no mention of self-determination or land-rights protection, thus framing the territory as a single, holistic demos committed to individual equality and majority rule. The delegates had responded to the boundary question – to 'who are the people and where do they rule?' – with the answer, 'all of us indivisibly, over all of the territory'. In his final act as chair of the convention, Austin Asche gave one last cheer for such universalism, proclaiming: 'We are all Territorians, thank heavens. We are extraordinarily lucky to live in this place and so extraordinarily lucky to have had a hand in pushing this wonderful territory forward to become the seventh and best state of Australia'.[95]

The Kalkaringi and Batchelor conventions

In August 1998 the Northern Territory legislature adopted the statehood convention's revised draft constitution. Australian Prime Minister John Howard then announced his government would grant statehood to the territory subject to a 'yes' vote in a territory-wide referendum. The referendum was scheduled for 3 October 1998. Voters would be asked, 'Now that a constitution for the state of the Northern Territory has been recommended by the statehood convention and endorsed by the Northern Territory Parliament: Do you agree that we should become a state?'.

Indigenous groups 'immediately damned' the statehood convention's revised draft constitution and mobilised in opposition to statehood.[96] Key in that effort were two Indigenous constitutional conventions. The first met from 17–20 August at Kalkaringi. It drew

Indigenous, federal and territorial leaders and more than 700 other attendees from 15 Indigenous nations, who 'camped in the heat and dust for several days and talked of their concern for families, communities and lands, and how to develop their vision of the future and plan for its implementation'.[97]

Delegates unanimously condemned the Northern Territory's bid for statehood under the revised draft constitution. As well, 'Many delegates criticized the government's failure to consult with Aboriginal representatives in relation to statehood, as well as the inadequate acknowledgement of Aboriginal law and Aboriginal rights in the draft constitution'.[98] Galarrwuy Yunupingu told the audience, 'Our voice has not been heard in the NT Government's current proposal. The question is: Will the Northern Territory Government engage with Aboriginal people in a real debate about statehood and the constitution?'.[99] Dennis Burke, the territorial government's representative at the convention, was unapologetic in his commitment to a liberal charter, telling attendees: 'The constitution is for all Territorians. Aboriginal people are 30 percent and are very important, not because you are Aboriginal but because you are Territorians'.[100]

On the final day of the convention, delegates adopted the Kalkaringi Statement. Its preamble began:

> The Aboriginal Nations of Central Australia are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognized on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.[101]

The preamble further noted the decades of hostility directed at Indigenous peoples by successive Northern Territory governments and lamented the failings of the revised draft constitution.

After the preamble, the Kalkaringi Statement made a series of pronouncements. Key among these was that consent to statehood would be withheld until 'good-faith negotiations' with Indigenous peoples 'leading to a constitution based upon equality, co-existence and mutual respect'.[102] The federal government was enjoined to directly fund Indigenous communities rather than entrust such moneys to the territorial government, and to conduct an inquiry into the experience of Indigenous peoples under Northern Territory self-government.

The statement then demanded constitutional recognition of Indigenous peoples' 'inherent right to self-government'. (Dunstan reports that among settlers this demand was a 'bombshell', alienating some who understood it as a call for secession.[103]) The statement insisted the territorial government affirm Indigenous peoples' status as a discrete polity, by negotiating on 'the sharing of power', providing 'effective levels of representation' in the territorial legislature, and insuring 'that any changes to a Northern Territory constitution which concern Aboriginal rights … be approved not only a by a majority of electors at a referendum but also by a majority of people of the Aboriginal nations of the Northern Territory'.[104] Finally, the statement insisted Indigenous land rights remain a federal rather than territorial matter, that sacred sites be protected, and that the territorial constitution 'recognize Aboriginal law through Aboriginal law makers, and Aboriginal structures of law and governance'.

The second Indigenous constitutional convention met 30 November–4 December in the town of Batchelor. More than 120 delegates attended from across the territory. In anticipation of the event Yunupingu told the media, 'Either we get action or we actively fight against statehood'.[105] Chief Minister Stone was invited to attend but declined, telling the media, 'Reconciliation seems to have become a one-way street. It's either done Mr Yunupingu's way or there's no reconciliation. People are sick of being lectured, hectored and stood over'.[106]

The convention endorsed the Kalkaringi Statement and pressed the territorial government to commit to several constitutional principles, including that the outcome of the convention be respected as Indigenous peoples' authoritative political position. The convention further produced 42 'Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development'. Most fleshed out Kalkaringi pronouncements. For example, the Batchelor delegates resolved to explore enhancing political participation in the territory, possibly through first-order means such as 'reserved Aboriginal seats in parliament' or 'special assemblies for Indigenous peoples and issues'. As well, they called for research on reducing 'the impact of white law on Aboriginal people'.[107] Other Batchelor resolutions were entirely new, including rejecting a federal report on the *Aboriginal Land Rights Act* that proposed weakening the permit system regulating access to Indigenous land.

It can be seen, then, that at Batchelor, and before that at Kalkraingi, Indigenous delegates responded to the boundary question far differently than had settlers at the Darwin statehood convention. Rather than defining 'who are the people' as all Territorians, Indigenous delegates insisted that constitutional boundaries demarcate their own specific demoi. Opposing universalism, they called for recognition of their political selfhood, so as to self-determine. And, rather than defining 'where do they rule' as coextensive with the territory as a whole, they called for the bounding of their own discrete homelands and sacred sites. Again, contrary to settler holism, they pressed to infix distinctions between 'ours' and 'theirs', 'us' and 'them'.

Between the Kalkaringi and Batchelor conventions came the 3 October statehood referendum. In the lead-up, Indigenous opposition was intense. The Northern and Central Land Councils targeted Indigenous voters with newspaper and radio advertisements urging a 'no' vote. In the *Land Rights News*, published by the land councils, a cartoon associating statehood with white supremacy was blasted by territorial government leaders as 'racially divisive'.[108] The CLP accused land-council officials of fear-mongering to guard their personal power. The CLP also accused Labor of 'playing a double game' by formally backing statehood while campaigning against it in the bush.[109] Yet because statehood officially had bipartisan support, all public-information materials championed the 'yes' case.[110] Most commentators predicted statehood would win easily.[111]

Yet on voting day statehood was rejected by a 'no' vote of 51.3%. The result was a shock, prompting immediate post-mortems. Labor suggested statehood had been fumbled away by the CLP's arrogance, especially its manipulation of the constitutional convention. The CLP attributed the loss to voters' concerns regarding the future state's finances. Yet ballot returns revealed that in urban areas, 'yes' had won. 'No' votes, meanwhile, were extremely high at remote 'mobile voting booths', serving predominantly Indigenous voters. All but one mobile booth recorded an overwhelming 'no' vote. Overall, 73.3% of mobile voters rejected statehood.[112] According to Heatley, 'there is little doubt Aboriginal opposition

was the strongest factor in producing the negative outcome'.[113] Indeed, the academic consensus was that Northern Territory statehood was 'lost in the bush'.[114]

Analysis and conclusion

This article presented a theory of the metapolitics of settler colonialism, employing it to examine the 1998 statehood campaign in Australia's Northern Territory. In doing so, this article made three contributions. First, it showcased how settler colonialism can be understood as at base metapolitical – how settler colonies are 'constituted' by dissolving Indigenous demotic and territorial boundaries and replacing them with new, broader boundaries within which settlers dominate. Put another way, settler colonialism nullifies Indigenous answers to the 'boundary problem', redefining 'who are the people and where do they rule' so the settler 'us' and 'ours' absorb the Indigenous 'them' and 'theirs'.

As was displayed, the Northern Territory Constitutional Convention was rife with rhetorical attacks on the legitimacy of Indigenous boundaries. Indigenous demotic and territorial difference (e.g. a 'special place', a 'tribal situation', a 'division between the races') was variously condemned as a historical artefact, unsuited to the 'dynamic economy of the year 2000'; as divisive, serving to 'separate the races' and prevent 'black, white and brindle together, living as one'; and as undesirable for 'subsequent generations to inherit'. Instead, settler delegates maintained the new state should constitute a uniform people and place – that it should be 'harmonious', 'indissoluble', a 'united society', making 'no distinction, none whatsoever, between one group of people and another', consisting only of 'we the people' or 'Territorians'.

Such views were then etched into the new state's founding document. By declining to enshrine Indigenous self-determination or guard the *Aboriginal Land Rights Act*, settler delegates framed a constitution that would expunge Indigenous peoples as a collective first-order polity. Instead, politically atomised and territorially dispossessed, Indigenous peoples would be subsumed into a new, all-inclusive, 'Territorian' polity, delimited only by 'we the people'. Within that new polity, settlers, due to the democratisation of property rights, would enjoy unfettered access to land. Moreover, by dint of their greater numbers, they would wield majority rule.

Second, this article displayed how such a transformation may be engineered using liberal rights. During the statehood convention, settlers complained that, under existing law, they were denied both political equality and fair access to land. This, settlers argued, was 'discrimination', 'segregation', even 'apartheid'. The prospect of infixing such mistreatment in the new state constitution was said to be 'horrendous', 'racist', and offensive to the principle 'that all men and women are created equal'.

Yet the right of equality invoked by settlers is, as has been shown, an individual, second-order right. Second-order rights are inevitably constrained by upstream, first-order bounding decisions, made to facilitate the self-determination of political communities. Where such bounding decisions are entrenched or otherwise deemed legitimate, their downstream effects are irreversible. However, where such bounding decisions are not entrenched, then individual-rights charges may push upstream, challenging the legitimacy of, and potentially toppling, extant political communities. If 'they' and 'theirs' are dissolved, the jurisdiction is re-bound.

It seems clear this was the aim of settlers at the Northern Territory statehood convention. The discrimination they cited was not, in their telling, an epiphenomenal consequence of upstream, first-order Indigenous self-determination. Rather, they maintained that Indigenous peoples were, in effect, akin to the Alabama counties in *Reynolds* – entities that 'never were and never have been considered as sovereign'. Instead, Indigenous people were fellow 'Territorians', with no right to invidiously discriminate against their co-citizens. In this manner, settlers attacked the legitimacy of Indigenous difference. They then appealed for the oppressive laws to be reformed – indeed, for those reforms to be anchored in the new state constitution. Going forward, bias would be abolished and all individuals would be equal. Such liberalisation, though pitched as a seemingly innocuous second-order reform, would have transformative upstream impacts, swallowing Indigenous polities into the greater settler demos.

Third and finally, this article showed that when Indigenous peoples resisted such settler manoeuvres by championing the constitutional entrenchment of their own first-order demotic and territorial status, there ensued a clash over the appropriate 'framing of justice' – over whether first-order Indigenous boundaries or second-order liberal rights should be seen as the legitimate 'subject of justice' in the founding of Australia's seventh state.

At the statehood convention, and then at the Indigenous constitutional conventions at Kalkaringi and Batchelor, Indigenous leaders proclaimed their peoples were legitimate first-order political communities, with ancient, sacrosanct ties to their homeland and 'no links to other lands and cultures'. Vowing to 'strive for justice' and secure 'our rightful place in this land', they called for the constitutional affirmation of their special status, including their 'inherent right to self-government', power-sharing, reserved seats in parliament, and the protection of their customary laws, lands and sacred sites. In effect, they likened their position to that of Wyoming in the US Senate – a sovereign, respect for whose boundaries must trump downstream individual rights.

So, would first-order Indigenous boundaries or second-order liberal rights prevail as the legitimate 'subject of justice' in the constitution of the new state? Indigenous actors won this clash, prevailing upon Indigenous voters, and perhaps other supporters, to vote in accordance with the view that the appropriate 'subject of justice' was Indigenous boundaries. Settlers, unable to dissolve the Indigenous 'them' into the settler 'us', failed to achieve power over Indigenous peoples and lands. They could not 'constitute settler colonialism'.

It was a substantial victory. Five months after the referendum, Shane Stone was removed as chief minister. In 2001, for the first time since territorial self-government, the CLP lost power to the Labor Party. Today the Northern Territory is still not a state. Subsequent statehood campaigns have foundered, vanishing into the gulf separating settler and Indigenous ambitions. Nor has the territory patriated the *Aboriginal Land Rights Act*. And a treaty process is underway, perhaps promising recognition of the sort of Indigenous rights demanded at Kalkaringi and Batchelor.

Still, the security of Indigenous boundaries remains elusive. In 2007 the federal Howard government staged the notorious Northern Territory Intervention. Conducted ostensibly to interdict the flow of alcohol and drugs into Indigenous communities, and to stem a purported epidemic of child sexual abuse, Canberra unilaterally suspended elements of the *Aboriginal Land Rights Act* and severely curtailed Indigenous self-determination. At the

same time, the territorial government in Darwin introduced its 'super shires' reforms, dissolving community level governments often controlled by Indigenous people in favour of more expansive, regional-level governments where settlers dominate. On Australia's 'last frontier', the metapolitical contest wears on.

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Disclosure statement

No potential conflict of interest was reported by the author.

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Graphic design: Communication Division, UiB / Print: Skipnes Kommunikasjon AS

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ISBN: 9788230869215 (print)
9788230864784 (PDF)