Beyond Multiculturalism:
Indigenous Normativity and the Search for a Legitimate Constitution

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In late 2012, 'Idle No More' gained force as outrage, sparked by unilateral federal legislation dramatically reducing environmental protections over waterways, swiftly grew to reflect "the historical and contemporary legacies emerging from colonization and violence throughout North America and the world. These involve land theft, treaty violations, and many misunderstandings" (Kino-nda-niimi Collective 2014: 22). While some felt 'Idle' implied inactivity, Indigenous peoples have always shown perseverance most evident when they endure lengthy and burdensome legal processes and government negotiations or engage in difficult debates with Canadians, not to mention the everyday challenges that come with living under colonialism's long shadow. Ongoing Indigenous frustration stems largely from a belief that contemporary approaches misunderstand or fail to take seriously longstanding normative claims related to restitution for historical and ongoing colonial injustices, treaties, prior occupancy, unceded sovereignty, and nationhood – collectively called *Indigenous normativity*.[1] When the associated constitutional changes needed to secure meaningful self-determining authority over their territories are not denied for overtly moral reasons, they are simply deemed unreasonable, impractical, or irrelevant in the present-day. [2] Bernard Williams (2005: 8) suggests that "now and around here the BLD[3] together with the historical conditions permit only a liberal solution: other forms of answer are unacceptable. In part, this is for the Enlightenment reason that other supposed legitimations are now seen to be false." Questioning liberal modernity and the foundational legitimacy of Western forms of government would appear futile (Fukuyama 1992; Wolfe 2009).

Some specifically sacrifice Indigenous normativity at the alter of modernity (Cairns 2000; Kymlicka 2001a). Kymlicka initially appears sympathetic, writing that "Indigenous peoples do not just constitute distinct cultures, but they form entirely distinct forms of culture, distinct 'civilizations', rooted in a premodern way of life that needs protecting from the forces of modernization, secularization, urbanization, 'Westernization,' etc." (Kymlicka 2001a: 128–129). Civilizational differences give them *prima facie* claims to self-determination and political authority greater than national minorities like the Québécois. However, they end up with less because the ultimate basis for "international protection of indigenous peoples is not so much the scale of mistreatment in the past, but rather the scale of cultural difference [today]" (ibid.: 129). Instead of reinforcing Indigenous normativity, (ongoing) colonialism, decimating Indigenous communities and alienating many from their lands, devalues central Indigenous claims to such an extent that they are no longer seen as requiring or even capable of exercising self-determination, at least in some modern Westphalian way. The dominant modern grammar of the state cannot or will not accommodate numerically reduced, territorially dispersed, or culturally assimilated communities (Oklopcic 2014). The possibility for alternative ways of imagining, structuring, and exercising political authority loses out because they no longer matter, no longer exist, or have been irreparably damaged. In what can only be construed as a hegemonic vicious circle, Indigenous

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1 I am not suggesting a monolithic or universal Indigenous normativity exists. The term captures instead many different claims by different peoples.

2 By constitutional, I am not referring simply or primarily to the idea of a written foundational legal document in the sense of the Constitution of Canada. I am more broadly interested in the changing and living, even unwritten and understood, "set of basic principles and rules by which members of a community cooperate, make decisions, engage with each other and the world around them, distribute and exercise authority, and set about trying to get things done" (Cornell 2015: 2).

3 The *basic legitimacy demand* is Williams's influential two-fold account for determining the legitimacy of a constitution order, i.e., an acceptable answer to that the "first political question": (1) the establishment of a co-operative political order that can handle profound disagreement and conflict with (2) "a legitimation offered which goes beyond the assertion of power" (Williams 2005: 11).

"protection" *against* liberal modernity is irrelevant *because of* liberal modernity.[4] Anyone who denies modern "truths that destroy those fantasies that once provided the fabric of pre-modern legitimation stories" are justifiably treated as "anarchists, or utterly unreasonable or bandits or merely enemies" (Williams 2005: 96, 136). The state lets itself off the hook. Colonialism becomes its own reward.

This chapter is based on a fundamental refutation of this view; Indigenous normativity cannot be dismissed, at least not so easily or completely, for a number of reasons. First, liberal modernity cannot ground uncontestable claims of ultimate authority because it is itself contestable. "'History' is not a black box" (Larmore 2013: 292). Indeed, Indigenous normativity historicizes modernity and corresponding notions of statehood, sovereignty, legitimacy, etc., seeking to provincialize them for having Eurocentric and unreflective biases (e.g., Chakrabarty 2000; Hobson 2012; Tickner 2013; Picq 2015). Some even argue that there is no modernity without or beyond colonialism – without or beyond a corresponding 'coloniality' that still illegitimately imposes modern forms of authority on Indigenous people (Mignolo 2011). Second, Indigenous constitutional orders, though pushed to the brink, persist as a matter of fact. The answer to who has legitimate constitutional authority "now and around here" often remains uncertain (Ladner 2005). When you travel to Waglisla (also known as Bella Coola) are you visiting Heiltsuk lands (or Canadian lands)? If you hunt grizzly bears do you honour the moratorium enacted according to Gvi'ilass[5] or hunt using a permit that derives its authority from Canadian law? While most Canadians affirm the latter, you might get a different answer should you ask locals which laws seem natural and self-evident to them. Lastly, following from the others, modernity is neither fixed nor is its continued ascendance inevitable or even universally desirable. This is not to say that modernity is rotten to the core, but that it is neither totalizing nor irrefutable. Rather, it represents one set of ideas, what Raymond Geuss (2008: 46) calls a "kind of conceptual innovation that has put down roots and created a psychic, and somatic, reality," susceptible to change and in competition with other conceptualizations. As Mario Blaser (2014: 55) summarizes well, we live in a "pluriverse" of "partially connected unfolding worlds … not sealed off from each other, with clear boundaries – they are certainly connected, yet there is no overarching principle that can be deduced from these connections and that would make this multiplicity a universe."

Taking Indigenous normativity's strength and constitutional implications largely for granted, different approaches are evaluated in an effort to differentiate between better and worse ways of establishing constitutional legitimacy from an Indigenous (if not broader) perspective given non-ideal conditions of state hegemony. I first suggest that the liberal multicultural status quo imposes an illegitimate political framework on Indigenous peoples. Despite a noticeable shift from overt exclusion and assimilation to recognition and constitutional accommodation, dominant Canadian governments continue to load the dice, subverting fundamental questions concerning their legitimacy and locking Indigenous peoples into unjust constitutional conditions (Section I). Next, I contrast multiculturalism with James Tully's agonistic account, arguing that the latter better captures the fundamental nature of political conflict based on the reasonable and unavoidably

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[4] I refer to the existing relationship between Indigenous peoples and the settler state as one of power imbalance, power asymmetry, hegemony, or domination, using them interchangeably to avoid repetition as I consider them to be roughly equivalent. The first two, however, tend to be more descriptive, while the latter two suggest that the more powerful group unfairly exploits this imbalance or asymmetry to its advantage.

[5] *The Declaration of Heiltsuk Title and Rights* (n.d) defines this as "our governing authority over all matters related to our lands and people." See, http://www.heiltsuknation.ca/wp-content/uploads/2015/11/declaration_title_rights.jpg (accessed 30 December 2015). For a discussion of its application to grizzly bears, see Housty *et al.* (2014).

contested nature of Canada's constitutional legitimacy. Establishing legitimacy demands pursuing a different political project and normative line of reasoning than the one liberal multiculturalism proposes of finding a counterfactual justification for imposing an ideal-theoretic framework as legitimate on all 'reasonable' citizens. Part of our collective quest might therefore be seen as cultivating civic virtues that help guide fundamental disagreements towards more consensual constitutional ends rather than forcing 'agreement' once and for all (Section II). I do nevertheless suggest that Tully's agonism could be strengthened by showing greater consideration for realist concerns. Though civic virtues would undeniably go a long way in counteracting state hegemony, Tully's robust constitutional vision must nevertheless be taken as one among all the others that will inevitably – and with great difficulty – need to compete in the naked game of power politics as opposed to displacing it. Though Tully understands such challenges well, I suggest (counterintuitively perhaps) that explicitly adopting a more realist form of agonism could put Indigenous peoples and their supporters on better footing (Section III).

I. Official Multiculturalism and its Limits

When Prime Minister Pierre Trudeau ushered in official multiculturalism by patriating the Constitution in 1982, domestic and international pressure had grown to such an extent that 'existing Aboriginal and treaty rights' were included despite federal and provincial resistance (Miller 2005). The proclaimed intent, then as now, has been to give constitutional force to Indigenous normativity by creating spaces for Indigenous identities, constitutional visions, and self-determining authorities while diminishing the assimilative and exclusionary character of public institutions in the process. Multiculturalists see this as vital to securing Canada's constitutional legitimacy, giving it an acquired, voluntary, and consensual character. The process has not been easy. Indigenous peoples and the state struggle to define the Constitution's specific meaning through government policies, negotiations, and the courts within an evolving and "complex dialectic of state nation-building (state demands on minorities) and minority rights (minority demands on the state)" (Kymlicka 2001b: 49).

This section examines Canada's multicultural policy framework to determine whether it establishes an inclusive and therefore legitimate constitutional order. Despite the appearance of having an acquired character, I hope to show that supporters of Indigenous constitutions should cautiously approach multiculturalism with an instrumental intent, if at all, given two serious types of risk. First, multiculturalism consistently betrays its own paradoxical nature when giving Indigenous normativity its due; despite adamant claims to the contrary, it fails to break with the state's assimilationist past of arbitrarily imposing foreign institutions on Indigenous peoples. Particularly when state control over land and access to resources is in question, debate is curtailed as power relations take over, leaving important issues off the agenda and thus unresolved.[6] This is compounded by the second: multicultural approaches put meaningful self-determination further out of reach to the extent that the state successfully entrenches a social imaginary of 'permanent' solutions, effectively depoliticizing ongoing constitutional struggles. When combined, this one-two punch – of arbitrariness and claiming permanency – advances solutions to fundamental conflicts that Indigenous peoples need not accept with any finality even when they are difficult to

[6] Parallels exist with the idea of external versus internal exclusions developed by Young (2000). She believes some states have shifted from overt exclusion to forms of exclusion that create the appearance of formal inclusion. She notes that when political conflict is particularly high within shared deliberative institutions, as it is in Indigenous-state relations, the dominant groups will simply impose their social assumptions as well as forms of reasonableness and dialogue while marginalizing and excluding those of dominated others.

avoid given existing power asymmetries. These risks will be shown to exist across three prominent multicultural approaches: modern "treaty" negotiations; redress; and, the Constitution and courts.[7]

Modern "treaty" negotiations

Every 'final agreement' ratified under the British Columbia Treaty Commission (BCTC) process describes "a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*."[8] Representatives of Canada, British Columbia, and some Indigenous communities feel that the process is exemplary. Speaking to the Nisga'a Final Agreement, Chief Joseph Gosnell stated that "this treaty proves beyond all doubt that negotiations – not lawsuits, not road blockades, not violence – is the most effective, the most honorable way to resolve aboriginal issues" (CBC News 1998). But do such agreements give the relationship between Indigenous peoples and the Constitution a voluntary and final character? Or do they more-or-less mirror existing relations of domination, representing the best possible terms of surrender, if you will, given the circumstances?

Interpreting Indigenous support as entirely voluntary overlooks the unfair dilemma that they alone face when asked to ratify agreements under duress – i.e., their way of life is threatened. More than two decades of negotiations – and nearly a century of being ignored by the Province of British Columbia before that – left the Nisga'a community with just two options: support the Agreement, surrendering over 90% of their traditional lands and tax-exempt status in exchange for $200M in compensation and control over 1,992 square kilometers under "an Aboriginal right of limited, Western-style self-government, with more powers than a municipality yet less than a province" (Tully 2008a: 275); or, reject the Agreement and hope to secure better terms by renegotiating and/or going back to the courts, direct confrontation, or community revitalization. It is not difficult to imagine that many of the 61% who supported the Agreement did so *not* because they disagreed with dissenters who felt that it fell short of securing Indigenous self-determination, but because it would provide some immediate (if only partial) relief from their immeasurable suffering under the colonial status quo.[9] Multiculturalists might believe that ratification equates to consent rather than harm reduction, or that it escapes colonialism rather than reflects the need to cope with its ongoing impact. The outcomes suggest, on the contrary, that modern treaties struggle to rise above power asymmetries, reflecting instead the pressure to compromise given them.

In addition to both 'options' having an imposed character, the state makes a difficult situation worse by also attempting, and largely succeeding, to inject a sense of finality. Echoing

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[7] The word treaty is a misnomer when applied to such domestic agreements as they are not international agreements between sovereign states under international law as found, for example, in the *Vienna Convention on the Law of Treaties* (1969). The misuse of the term speaks primarily to the state's desire to inflate the legitimacy of such agreements.

[8] The Nisga'a Final Agreement (taking effect in 2000) was technically a forerunner of the BCTC process, setting the standard for the four that have since followed using the process: Tsawwassen First Nation Final Agreement (2009), Maa-nulth First Nations Final Agreement (2011), Tla'amin Final Agreement (2016), and Yale First Nation Final Agreement (2016).

[9] The Legislative Assembly of British Columbia ratified the Nisga'a Final Agreement in April 1999 by a narrower margin. Opposition members felt *too much* had been given to the Nisga'a. The choice from the provincial perspective was thus between whether to buy exclusive rights to over 90% of the Nisga'a's traditional territory (using revenues largely raised from resource extraction on unceded Indigenous territories) or hope that the state could continue to get away with ignoring or at least downplaying Indigenous normativity. With nearly everything to gain and little to lose, at no point did British Columbians feel anything approaching the immediate threat faced by Indigenous peoples when voting on ratification – a point that only reinforces the idea of an unfair and unacceptable dilemma related to state domination.

Canada's colonial past, it insists on extinguishing any Indigenous rights not covered under such agreements through seemingly non-negotiable "release" clauses that protect (mostly) the state from any "known or unknown" outstanding claims and a statement that the agreement exhausts their section 35 rights.[10] Even those who doubt extinguishment clauses will stand up to emerging international legal norms – now prominently found in the UN Declaration on the Rights of Indigenous Peoples (2007) – cannot deny that the Canadian state will still enforce them in the meantime, defending their interpretation to the bitter end. Should the state eventually succumb to international (and domestic) pressure, much of the damage may already have been done.

Some will nevertheless insist that modern treaties have a voluntary and final character. Though the debate will persist, my goal has instead been to suggest that the matter is not so cut and dried, recognizing the real possibility that even for many who supported ratification (and most that did not) such agreements come across as opportunistic, imposed, and ultimately rooted in state efforts to alienate Indigenous peoples from lands and resources they once had and still need to secure meaningful self-determination. Speaking of this challenge, Jeff Corntassel (2008: 106–107) concludes that "the land-settlement strategies employed by Canada extinguish original indigenous title to their territories and force community members to accept monetary payouts for their unrecovered land. … [putting] the community at risk by leading them into an unsustainable future." Perhaps the most obvious evidence of the unacceptable risks that come with modern negotiations is the small number of final agreements ratified since the BCTC's doors opened in 1992. Only half of British Columbia's Indigenous communities are engaged in the process and less than 8% have reached a final agreement.[11]

Redress

Redress also falls short of its expressed intent of setting things right with the victims of wrongful and wilful state actions. In 2008, Prime Minister Stephen Harper officially apologized for atrocities committed within residential schools and launched the Truth and Reconciliation Commission of Canada. Yet, serious problems stem from what Matt James (2013: 37) calls 'neoliberal heritage redress' whereby the state "seek[s] actively to construct popular understandings of injustice in ways congenial to the neoliberal project of remaking the public sphere devoid of critical dissent … singular past government acts [are] abstracted from any deeper consideration of the long-term structural and attitudinal racism that tends to give rise to historical wrongs in the first place." Exposing yet another link between domination and arbitrariness, the state resists redress unless claims are reduced to something amenable with liberalism, capitalism, and ongoing resource extractivism.

The general conclusion within Indigenous communities and academia has been that the apology fell short of atoning for the ways residential schools irreversibly disrupted and harmed individuals, families, and communities by forcibly separating children from their parents and subjecting them to inhumane conditions. According to Jennifer Henderson and Pauline Wakeham (2013: 12-13), the apology

[10] In an interesting twist, some suggest greater certainty *shields Indigenous peoples* from those who deny the existence or force of 'Aboriginal treaties and rights' (see, Dickson 2004). While technically true from a legal perspective, at a political level this could be considered fear mongering, as Charles Taylor (1998) suggested at the time, designed to get otherwise reluctant Indigenous individuals and communities to support the treaty process and ultimately ratify final agreements that go against their longer-term interests.

[11] http://www.bctreaty.net/files/updates.php

> occluded broader consideration of the long history of colonial genocide and its other constitutive components such as the establishment of reservations, the expropriation of land and resources, the deliberate suppression and distortion of Indigenous languages, beliefs, and cultural practices, and the disruption of kinship networks. Not to mention the present conditions of poverty, incarceration, and compromised health lived by many Aboriginal people.

Eva Mackey (2013: 54) also expresses doubt: "instead of the apology accounting for Canada's calculated expropriation of resources and the use of cultural genocide practices as a means to hold on to those resources, the apology is framed as regret for a well-meaning set of acts that caused damage to culture and families." How else could Harper proclaim, months later at the 2009 G20 meeting, that Canada has "no history of colonialism"?[12] All signs suggest that the act of apology is used to promote not meaningful and lasting redress, but duplicity; remembering *and forgetting*, action *and inaction*.

Seemingly driven more by guilt and self-interest than justice and restitution, the state pursues redress so that it – rather than its victims – can move forward unencumbered.[13] Yet, apologies perceived as deficient by victims provide little closure no matter how much victimizers wish otherwise. It should come as no surprise that Indigenous peoples generally did not give the apology *moral* weight even if they acknowledged the attempt as a matter of *fact*. [14] Responding directly in the House of Commons, Chief Phil Fontaine (2008) was guarded yet hopeful saying: "the significance of this day is not just about what has been but, equally important, what is to come"; "There are many fights still to be fought"; "We still have to struggle, but now we are in this together. I reach out to all Canadians today in this spirit of reconciliation." He appears to believe that meaningful redress requires greater work through enduring struggle and continual positive engagement. He also subtly suggests that Canadians have yet to meet Indigenous peoples who 'reach out' hoping to find an equal and willing partner. For many individuals, and certainly

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[12] For the record, and just to be sure that this point is not being taken out of context, here is the broader quote: "There are very few countries that can say for nearly 150 years they've had the same political system without any social breakdown, political upheaval or invasion. We are unique in that regard. We also have no history of colonialism. So we have all of the things that many people admire about the great powers, but none of the things that threaten or bother them about the great powers." Totally overlooking the ongoing conflict between Indigenous peoples and the state, spanning the entire time period mentioned, he then talks about Canadian diversity in terms of its "two founding peoples" and successive waves of immigrants as if Indigenous peoples do not exist also saying that "We also are a country, obviously beginning with our two major cultures, but also a country formed by people from all over the world that is able to speak cross-culturally in a way few other countries are able to do at international forums" (Wherry 2009).

[13] Boldt (1993) makes the astute observation that because of existing power asymmetries state actions tend to fall short of what justice demands, only going as far as needed to absolve itself of any feelings of guilt. I might add that this is perhaps better understood as addressing 'perceptions' of guilt, whether domestically or internationally. Given that such perceptions of guilt change, so does the nature and extent of the state's response. See, also, Valentini (2011).

[14] The distinction between apology as fact and apology as morally significant is a crucial one. Consider Chief Fontaine's opening words: "Prime Minister, Chief Justice, members of the House, elders, survivors, Canadians: for our parents, our grandparents, great grandparents, indeed for all of the generations which have preceded us, this day testifies to nothing less than the achievement of the *impossible*." What has been achieved that was once impossible? One interpretation, based on the rest of Fontaine's words and the reaction of most Indigenous leaders and scholars, is that simply getting the state to admit that they did wrong seemed impossible only 20 or 30 years earlier. However, the media and perhaps others might naïvely wish to believe that Fontaine is suggesting that morally significant reconciliation was once impossible but has now been achieved.

at the community level, the apology has not closed the wound, as "it will take much more than an apology to help our communities move beyond the dark times that many of us are facing as a direct result of the residential-school experience" (Gray 2008). By refusing to accept apologies that deny aspects of historical and ongoing suffering, they fight to keep the possibility for meaningful redress alive against a resistant state that wants to believe it has permanently settled the matter. It would seem that existing redress practices simply leave Indigenous peoples wondering whether things changed and how they fit, if at all, in a 'new' Canada that looks like the old on important issues related to treaties, lands, resources, and the environment, once again protecting rather than challenging and transforming state hegemony.

The Constitution and courts

The Supreme Court plays a crucial role, with some recent rulings suggesting that the burden of proving sovereignty should shift to the Crown.[15] Many now believe costly, lengthy, and emotional Supreme Court battles have tremendous emancipatory potential given that they expose deep cracks in powerful colonial assumptions underlying the state's unilateral sovereignty claims. Indigenous leaders hailed a recent ruling as a "game-changer", "a strong message to all provincial leaders and Stephen Harper to deal with us in an honourable and respectful way" (APTN 2014). While undeniable progress has been made, I nevertheless suggest that it is much more likely that the Supreme Court and the Constitution will continue to limit Indigenous self-determination into the future, leaving its own, as well as the state's, colonial foundations and reasoning largely untouched.

Presently, the Constitution neither formally recognizes the right of Indigenous peoples to self-determination nor provides them with any formal way of initiating constitutional change, pinning almost all hopes on section 35. With near certainty and little risk, some believe it will eventually grant meaningful self-determination as powerful arguments rooted in Indigenous normativity admitted by the Supreme Court will eventually wake Canadian governments from their colonial slumbers, successfully – even if with great difficulty – encouraging them to negotiate in good faith (Hoehn 2012; Henderson 2013). Others are more cautious, seeing both the opportunities and risks associated with the limited window section 35 provides. Kiera Ladner (2005, 2009) and John Borrows (2010) normatively affirm its *potential* for promoting positive and productive Indigenous-state relations, though they also express concerns about its ineffectiveness, indecisiveness, and lack of clarity. Borrows (2010: 199) notes that section 35 is "increasingly used to justify government infringements of Aboriginal rights." Their focus on section 35 is perhaps best understood as pragmatic, working with the best tools available even if they are not entirely up to the job. This is only reinforced by the negligible appetite for constitutional change among the Canadian majority upon whom it depends.[16]

The legal-constitutional avenue comes with numerous risks that, even if harder to delineate, should not be overlooked. For starters, past progress is no guarantee of eventual success, and may even put ultimate success further out of reach (Lawford-Smith 2011). In the most optimistic of

[15] For the most promising rulings, consult *Haida Nation v. British Columbia* (2004); *Taku River Tlingit First Nation v. British Columbia* (2004); *Tsilhqot'in Nation v. British Columbia* (2007); and, *Tsilhqot'in Nation v. British Columbia* (2014).

[16] The general formula, set out in sections 38 of the *Constitution Act, 1982*, requires that most amendments receive a majority in the House of Commons and the Senate as well as support from two-thirds of the provinces representing more than half the general population according to the latest census. Constitutional change has also proven difficult because the English-speaking, non-Indigenous majority feel at home within the existing constitutional order even if others do not (see, Resnick 1994; Webber 1994).

accounts, Felix Hoehn (2012) draws on Thomas Kuhn's theory of paradigmatic scientific change to suggest that recent rulings have introduced stubborn anomalies – related to Indigenous normativity – that will inevitably force Canada to abandon the 'discovery' paradigm undergirding the state's unilateral assertion of exclusive sovereignty. Facing mounting pressure, the state will have no choice but to reconcile its *de facto* Crown sovereignty with *de jure* Indigenous sovereignty through fairer negotiations that recognize overlapping jurisdictional authority, the need for respectful dialogue, and Indigenous territorial claims. But will the Supreme Court successfully pressure reluctant Canadian governments to make institutional and legal changes that recognize the full implications of these anomalies? Or will progress be asymptotic as state intransigence rooted in power asymmetries and colonial creativity successfully resists anything approaching extensive Indigenous self-determination or sovereignty? Answers can be found by returning to Kuhn's influential work on scientific revolutions. Hoehn dismisses two additional possibilities that deny the inevitability of stubborn anomalies leading to paradigmatic change. First, the state might "[prove] able to handle the crisis-provoking problem despite the despair of those who have seen it as the end of an existing paradigm" (Kuhn 1996: 84) using new arguments and/or asserting its power. Even as legal rulings dismantle Eurocentric colonial arguments rooted in *terra nullius*, discovery, or conquest, the "shape-shifting"[1] state raises new arguments like 'the act of state doctrine' or the need for external recognition by great powers to put its ultimate authority beyond dispute. Second, anomalies – frequent in the natural sciences and endemic in politics – might simply linger as Indigenous concerns are downplayed, set aside, or ignored by a state that would much rather pursue its priorities. The simple fact of the matter is that clashing Indigenous and state perspectives have coexisted, struggled, and adapted for centuries with no clear winner in sight. This dynamic tension even exists within and across recent legal rulings,[17] none of which have clearly and explicitly given Indigenous peoples the *sine qua non* of self-determination, namely free, prior, and informed consent (FPIC) over all matters affecting them and their territories (see, UNDRIP 2007).

Canadian courts also have limited means of enforcement available to them when it comes to recalcitrant governments that refuse to cross their own arbitrary line in the sand – a line that leaves destructive state-building extractive industries running without securing FPIC now or in the past. Even when courts validate Indigenous normativity (and thereby its reasonableness), they fall back on the need for stability and/or renewed political negotiations (Harty and Murphy 2005; Asch 2007). Both put Indigenous peoples back into the painful, messy, and challenging (and always unfair) world of power and politics. Calling for stability effectively defends the status quo, allowing the state to protect its position of power and privilege. Demanding governments pursue negotiations in good faith similarly maintains hegemonic relations closely in line with the earlier discussion that see them drag their feet or only agree to terms that secure their ultimate authority over most, if not all, the land and resources being disputed.

Finally, I would be remiss if I did not mention risks associated with mounting legal challenges using institutions and laws that are not the product of consensual agreement, but that gain their authority from colonial assertions of the settler state's inviolable and exclusive territorial

[17] Even the widely-hailed Tsilhqot'in ruling applies a so-called test for title based on "sufficient," "continuous," and "exclusive" occupation, which arguably could be seen as a new way of arguing *terra nullius* and imposing Westphalian norms in terms of exclusivity. This says nothing of the fact that by default state sovereignty is assumed, while the original occupants of the land have to prove title in the other's court. This can quite easily be seen as backwards, particularly when you consider land that no group can claim as exclusive and that therefore, by default, remains under the ultimate authority of the Crown.

sovereignty.[18] Not only do Indigenous peoples strengthen state claims when they recognize and thereby lend validation to the Constitution and the Supreme Court's ultimate authority, their demands for constitutional recognition and self-determination become judged according to dominant norms. Toby Rollo (2014: 231) writes that "the state's assertion of inviolable sovereignty over the land … pre-determines the range of acceptable conclusions we can hope to achieve through dialogue." Consequently, "for the vast majority of judges, lawyers, politicians, negotiators, and bureaucrats, sovereignty is not simply a reason or consideration that can be disputed; it is the context of relationships against which these disputes are judged and resolved … Indigenous claims are either reconciled with [state] sovereignty or they are dismissed" (ibid.: 232). Dale Turner (2006) surprisingly accepts as imperative the fact that there is currently no way around having non-Indigenous peoples adjudicating Indigenous claims, forcing Indigenous peoples to find ways of expressing themselves and their worldviews within dominant multicultural discourses that people in positions of authority might understand and find acceptable. He pins his hopes on such a possibility and that judges and bureaucrats will become better listeners, granting greater space for Indigenous peoples to express themselves in their own ways. Turner's reasons for pragmatism are not entirely unfounded, even if his hope is likely misplaced.

Taken together, the three policy areas show just how pervasive the state is in curtailing Indigenous claims related to meaningful self-determination, restitution, access to lands, and the need for shared sovereignty, imposing multicultural solutions as a supposedly fair compromise. It can accomplish this not because it represents some pre-political, universally accepted or acceptable answer, but because the vicious circle of domination and injustice makes it possible for the state to enforce its preferred solutions on those who challenge its legitimacy. It is at best an uneven constitutional dialogue, i.e., not between equal co-sovereigns, that permissively assumes rather than radically challenges the state's legitimacy. Multiculturalism therefore appears to be little more than the latest attempt in Canada's long history of containing and suppressing legitimate political struggle.

II. Tully and The Agonistic Alternative

This section depends on a distinction between two political ontologies with differing views of legitimacy. The first aligns closely with multicultural theory and practice, striving to *overcome* political struggle through a counterfactual universal consensus imposed as legitimate. Though multiculturalism provides some room for dissent, significant aspects of Indigenous normativity are pre-politically discredited based on a morality that comes before politics, formulating "principles, concepts, ideals, and values; and politics (so far as it does what the theory wants) seeks to express these in political action, through persuasion, the use of power, and so forth … [it] lays down moral conditions of co-existence under power, conditions in which power can be justly exercised" (Williams 2005: 1). Power – institutional or otherwise – is thus perceived as warranted when displacing and suppressing "unreasonable" disagreement based on abstract understandings of justice rooted in supposed moral truths. Constitutional legitimacy therefore depends less on what actual people endorse and more on what "reasonable" people should endorse (and forms of

[18] For those who might respond that no other institutions sufficiently capture the social imagination, I would ask them to seriously question whether this is an imperative, working assumption that must guide future action. In the pursuit of freedom, Indigenous peoples have many existing avenues including direct action and community resurgence as well as potential avenues that could be developed including the possibility of transnational mediation though the United Nations (e.g. the Special Rapporteur on the Rights of Indigenous Peoples) explored by Pitty (2015).

coercion they should accordingly find acceptable). The second, developed here, claims it a contradiction to speak of "imposed consensus," arguing that overcoming or depoliticizing political struggle through the real or counterfactual establishment of universal agreement is fantasy. Politics is better understood as a discipline autonomous from morality "that takes place in conditions of ubiquitous, perennial, and ineradicable political disagreements and conflicts, including about the very fundamental terms of the political association itself. … pluralism [extends] beyond moral and religious diversity to conceptions of the political ideal" (Sleat 2013: 72). Though equally concerned with normative questions of constitutional legitimacy and the principles and authoritative rules that should gain the force of law, it rejects the idea that we should start from *a priori* truths or moral arguments authoritatively outlining the goods politics should realize. Instead, the validity of laws and institutions are judged *a posteriori* in terms of how well they establish political order and promote co-operation in the face of irreducible conflict with justice being – as much as we can agree – that they are experienced as legitimate by those actually living under them.

Building on challenges identified earlier, this section suggests that supporters of Indigenous normativity can resist imposed solutions rooted in the first ontological understanding by pursuing political strategies honed to the second. They should (and usually do) recognize that when multicultural governments define and control the terms of engagement, pre-politically leaving certain fundamental matters aside, they circumvent the ever-dialogical and unavoidably disputed nature of constitutional politics, imposing and institutionalizing their version of the good while excluding those – the 'unreasonable', the 'enemies', the 'unmodern' – who challenge the existing order's legitimacy. As arch-agonist Chantal Mouffe (2005: 3) warns,

> the belief in the possibility of a universal rational consensus has put democratic thinking on the wrong track. Instead of trying to design the institutions which, through supposedly 'impartial' procedures, would reconcile all conflicting interests and values, the task for democratic theorists and politicians should be to envisage the creation of a vibrant 'agonistic' public sphere of contestation where different hegemonic political projects can be confronted.

Canada, it seems, has been on the wrong track for quite some time, earlier ignoring and now explaining away Indigenous dissent, even using (the threat of) force, when it tells us that the answer is *not* a multiculturalism that denies the most significant impacts of colonialism and refuses to question ultimate state sovereignty.

Lacking the space to explain more fully why agonists believe consensus is ultimately a chimera, even under ideal circumstances,[19] I sense that those who understand Canada's situation well will almost intuitively feel that the second ontological understanding better captures a relationship of overt and covert – but never absent – political struggle. Indeed, if multiculturalism delivered on its promises we would not have seen Idle No More or state-sponsored violence used against Elsipogtog First Nation in 2013. In line with the second account, James Tully's work provides a guiding example of agonistic theory applied to Indigenous-state relations and the establishment of constitutional legitimacy. I first examine his belief that legitimacy in deeply

[19] This is mostly against Habermasian ideas that deliberation under ideal (institutional) conditions can guide us towards a rational consensus (see, Mouffe 1997; 1999; 2000; 2005) and Tully (1995; 2008a). If I may, one quote might help readers get the idea they convey: "Short of calling in the police and imposing uniformity in use by fiat, as Hobbes famously recommended, critically reflective political argument in an open society (and more courageously in a closed one), even when it does not involve the refusal of the terms of the argument, folds back on itself and calls into question the acceptable uses of the agreed-upon terms of the debate" (Tully 2008a: 60).

pluralistic societies depends on securing *civic virtues* capable of guiding fundamental disagreement towards more legitimate and stable constitutional ends. Given multiculturalism's limits, I then examine the ways in which Tully sees such conflict playing out, particularly in terms of how those feeling constitutionally excluded can channel disagreement towards more legitimate constitutional ends *through* struggle using what he calls the *practices of freedom*.

Civic Virtues & Ancient Constitutionalism.

Tully believes 'modern constitutionalism' – rooted in liberalism, communitarianism, and nationalism – unjustly imposes 'an empire of uniformity' based on some historically imagined and comprehensive constitutional narrative of 'all the people' that excludes or assimilates other ways of thinking, being, and acting (Tully 1995: 62-70). He contrasts this with organic 'ancient constitutionalism' found within common law and Indigenous legal traditions. Despite the best efforts of 'moderns' to eradicate it through theoretical reasoning working in tandem with political practice, 'pre-modern' traditions persist in evolving form. The challenge we increasingly face involves reconciling fundamental political diversity with ancient constitutional values. On this, Tully suggests that an ideal and legitimate society is one where

> the diversity of our fellow citizens evokes a sense of belonging to a constitutional association in which one's own culture (or cultures) is recognised as a constituent and interrelated part of the justice of the whole association. This specific sense of belonging and civic pride would be lost if one's culture were excluded, identified in isolation from the others or imposed on all the members. The sense of belonging comes from being associated with the other cultures. The good of belonging typical of ancient constitutionalism is thus transformed in a manner appropriate to a culturally diverse age. … This is more than a civic awareness that citizens of other cultures exist in one's polity. One's own identity as a citizen is inseparable from a shared history with other citizens who are irreducibly different; whose cultures have interacted with and enriched one's own and made their mark on the basic institutions of society. The loss or assimilation of any of the other cultures is experienced as an impoverishment of one's own identity (ibid.: 204-205).

What remains the same is that ancient constitutionalism necessarily leaves the evolving constitutional order underdetermined; ideally filled in as diverse peoples politically engage one another in respectful ways by honouring important *dialogical civic virtues*.

When taken up by citizens, civic virtues establish constitutional legitimacy. He places particular emphasis on three 'conventions': mutual recognition, continuity, and consent.[20] Early Indigenous-Crown relations best exemplified their usage through a form of ancient constitutionalism called 'treaty constitutionalism' (ibid.: 116ff). Tully praises early colonialists who considered Indigenous peoples co-equal nations, resisting the urge to "redescribe the Aboriginal peoples in the forms of recognition constructed by the armchair European theorists. Instead, they simply listened to how the Aboriginal negotiators presented themselves" (ibid.: 119). Such recognition was extended by both sides despite their different forms of government, legal traditions, and political customs ("civilizational" differences). The convention of consent – "what touches all should be agreed to by all" – was also initially honoured in many Indigenous-state

[20] More recent work talks of the five principles of mutual recognition, intercultural negotiation, mutual respect, sharing, and mutual responsibility (Tully 2008a: ch. 7). Though some of the names are different, the general spirit is the same.

relations as a form of *mutual* consent whereby all parties came to agree, through dialogue, to the shared rules and principles that should gain the force of law. This naturally lends itself to the establishment of the third convention of continuity, highlighted in relation to the first two:

> the treaty system is expressly designed not only to recognise and treat the Aboriginal people as equal, self-governing nations, but also to continue, rather than extinguish, this form of recognition through all treaty arrangements over time. Indeed, the legitimacy of non-Aboriginal governments in America depends on this continuity, for it is the condition of Aboriginal consent to recognise them (ibid.: 124).

In emphasizing these virtues, Tully suggests that the now-prevailing modern constitutional drive to assimilate or expel unilaterally even part of the full extent of their ways of being in the world can only be seen as imperialistic and unenlightened.[21]

The strength of the virtues comes through dialogue, not simply lending a given (pre-determined or historically contingent) constitution credibility, but dynamically creating one that can more widely be perceived as legitimate in deeply pluralistic societies.[22] It is through dialogue that societal norms "come into being and come to be accepted as authoritative in the course of constitutional practice, including criticism and contestation of that practice" (ibid.: 116). Even the virtues themselves are unavoidably up for debate, as part of Wittgensteinian language games, rather than imposable rules that must be strictly followed. As Tully (1995: 106) summarizes,

> even if a theorist could provide a theory which specified the exhaustive conditions for the interpretation and application of the general terms of constitutionalism in every case, as modern theorists from Hobbes to Rawls have sought to do, this would not enable us to understand constitutionalism. For interpretative disagreements would arise over how to apply and follow the conditions, as indeed they do over the interpretation of the classic and contemporary theories, thereby pragmatically proving Wittgenstein's point.

Legitimacy thus stems from honouring and defining a shared constitution through dialogical processes that progressively elaborate (and thereby strengthen) norms that can be taken as authoritative in order to identify and resolve justice and legitimacy claims, albeit always subject to challenges and reinterpretation. This is necessary because "reasonable disagreement and thus dissent are inevitable and go all the way down in theory and practice" (Tully 2008b: 96).

The differences with multiculturalism – particularly when it shows its arbitrary and final character – go a long way in explaining why Tully is unenthusiastic about present-day Canada's constitutional treatment of Indigenous peoples. Our modern history is nothing short of a fall from grace as colonialists abandoned the civic virtues once power shifted in the 19th century, leaving behind centuries of successful 'ancient constitutionalism' as self-interested and disruptive settler colonial governments gained enough strength to successfully supplant recognition and consent using coercion, force, and fraud (Tully 1995: ch. 4; 2008a: 225-228). Despite – or because of – multiculturalism, Indigenous peoples now find themselves "unfree," dominated by hegemonic

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[21] See Tully (2003) for his understanding of the Enlightenment.

[22] On this, Tully (1995: 69) writes that a "modern constitution thus appears as the precondition of democracy, rather than a part of democracy. This anti-democratic feature is mitigated by the assumption that the people gave rise to it at some time, and by the elaborate theories of modern constitutionalism from Hobbes to the present which serve to persuade us that we would consent today if we were reasonable. In this respect, the ancient constitution appears more democratic." He also writes that we should "question the imperial and monological form of reasoning … constitutive of modern constitutionalism" (ibid.: 113).

states and living under imposed institutions and laws. The primary implication is that latent forms of ancient constitutionalism need strengthening with the question being: how can Indigenous peoples and supporters of ancient or treaty constitutional overcome multiculturalism's constraints?

Practices of freedom.

What can be done in the face of modern constitutions that insufficiently honour the civic virtues? Tully's later work provides crucial hints as to how Indigenous peoples can pursue the freedom promised by ancient constitutionalism in less-than-ideal conditions of domination. Through dialogical struggle understood broadly as comprising various forms of participation, negotiation, and contestation, we can (re)discover and (re)build constitutional legitimacy by bringing "oppressive and unjust governance relationships under the on-going shared authority of the citizenry subject to them; namely, to civicise and democratise them from below" (Tully 2008a: 4). Thus, Tully develops approaches in line with Mouffe's call for confronting 'hegemonic political projects.' Non-ideal dialogical struggle occurs within a threefold typology of *practices of freedom* designed to overcome obstacles blocking ancient constitutionalism's realization: negotiation, direct confrontation, and acting otherwise.

Negotiation, as Tully describes it, works best using the civic virtues – i.e., without being corrupted by power – as respectful dialogue provides everyone the ability to challenge and modify existing rules, institutions, or societal norms, giving them an acquired character. Direct confrontation is a last resort in the face of state intransigence. He writes that "if the Crown pretends that the treaty negotiations take place within its overriding jurisdiction … then it fails to recognise the status of Indigenous peoples, incorporates and subordinates them without justification, thus rendering the negotiation illegitimate" (Tully 2008a: 279).[23] Acting otherwise is less intuitive, though complementary. It involves thinking and acting differently when co-operating *within* existing rules and institutions in an effort to reinterpret or challenge an existing rule or norm, all the while resisting co-optation's nefarious pull. Though Tully gives few concrete examples of such "infrapolitical resistance,"[24] Findlay (2013: 219, emphasis added) writes about Indigenous legal scholars who apply an "Aboriginal hermeneutic [that] works by a *double gesture of compliance and circumvention* … Aboriginal resistance habitually entails cultural as well as legal performance *while refusing entrapment* in either law or culture (or the relations between them) as Eurocentrically understood." Legal wins come from this dance with co-optation. Tully believes acting otherwise, or changing rules *en passant*, is often overlooked and holds the most promise for freeing Indigenous peoples from state hegemony (Tully 2008a: 23-24, ch. 8).

This is perhaps because, above all, Tully is optimistic that Canadians are gradually rediscovering their ancient constitutional roots not just with Indigenous people, but also with women, the Québécois, and immigrants, providing an increasingly favourable canvass for Indigenous practices of freedom to work upon. He cites Canada's separation from the British imperial age through the adoption of a new flag, the repatriation of the constitution, and citizenship rights that embrace rather than exclude immigrants and foreigners (ibid.: 230-231, 252). When combined, Indigenous 'acting otherwise' and greater Canadian openness provide windows that

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[23] This applies to the BCTC process, which he believes could eventually be challenged under international law.

[24] "Indigenous peoples have developed a vast repertoire of arts of infrapolitical resistance to survive and revitalise their cultures, nations and federations, to keep Indigenous ways of being in the world alive and well for the next generations, to adapt these ways and stories to the present strategic situation, to comply with and participate in the dominant institutions while refusing to surrender, to regain degrees of self-rule and control over their territories when possible, and so to seek to transform internal colonisation obliquely from within" (Tully 2008a: 265).

allow for critical intercultural engagement where "members of the dominant society can begin to free themselves … and take a critical stance. These intercultural dialogues are the best and most effective way, for they enable Westerners to see their conventional horizon as a limit and the dialogues are themselves the intimations of and indispensable groundwork for a future non-colonial relationship" (ibid.: 277).[25] In this regard, he is part of a Canadian school of globally recognized non-Indigenous scholars that believes the people, if not the state, are warming up to the idea of change.[26]

III. Realist Considerations in the Search for Greater Legitimacy

Tully offers sympathetic readers much to draw upon in their desire for a constitutional order where Indigenous peoples feel equally at home. The practices of freedom provide a political toolkit that instils a sense of agency, revealing approaches that many individuals and groups might otherwise overlook. Moreover, he gives a convincing normative account of how dialogical civic virtues can peacefully guide fundamental and inescapable conflict towards legitimate constitutional ends. Though the road ahead will be fraught with challenges, it is indeed a strength that he resists the urge to simply graft his proposals onto the existing institutions of power because we have good reason to believe that they impose solutions that fail to respect Indigenous normativity and therefore do little to tackle to roots of constitutional conflict. In this sense, Tully's earlier normative work on ancient civic virtues provides us with the goal, while his later political work provides us with the tools given contemporary challenges related to imposed modern constitutionalism. This section picks up where Tully's work leaves us, attempting to provide a more granular assessment of the situation Indigenous peoples face while reflecting on the suitability of the practices of freedom and the attainability of ancient constitutionalism more generally. In taking a closer look, I fear that overemphasizing difficult-to-achieve ideals might prove distracting, even counterproductive, causing us to undervalue supporting 'political' virtues more attuned to the rough ground of politics. Greater consideration should be given to how we bring such civic virtues (or some imperfect approximation or substitute) into being and consequently maintain them in the face of – or transformation of – hegemonic relations. Thus, I argue instead for the priority of critically examining and continually asking the dynamic, daily, and immensely difficult question of 'where to begin' tackling hegemonic relations head on rather than rushing to any answer of what constitutional relations might ideally look like after hegemony has been (hypothetically) tamed or overcome.

I. Ancient v. Modern Constitutionalism

The root of my concerns relates to ancient constitutionalism's morally demanding nature and the fact that it itself cannot escape the same fundamental political contestation endemic of politics. Simply put, there is a tension between the ontological claim that political disagreement and struggle *is* unavoidable and the normative claim that ancient constitutionalism *should* prevail. Recall that ancient constitutionalism rests on a shared sense of belonging such that every citizen considers it offensive even when those with fundamentally different political perspectives are not

[25] He goes on to say that "A next-best approach is to draw on the resources of critical self-reflection available within the dominant Western language of political thought to challenge the comfortable and unexamined prejudices of self-understanding and present a non-colonial alternative" (Tully 2008a: 277).

[26] This is a popular trend with leading non-Indigenous political theorists from Canada (see Taylor 1998; Kymlicka 2007: 67; and, Tully 2008: 230–231, 252). As I have been trying to show, I believe they put too much stock into how far this change will take us.

accorded equal respect within the greater whole. So while Tully clearly subscribes to the idea that fundamental conflict cannot be avoided, he also makes "the normative claim that agonism *should be* valued because of its ability to uphold the pluralistic nature of society" (Rummens 2009: 385, emphasis in original).[27] Implicit in Tully's work is the idea that supporters of modern constitutional visions who place less value on (certain fundamental forms of) diversity are themselves 'unreasonable,' which seems to reverse the normative polarity in favour of the dominated rather than rejecting domination as such. Agonists from Connolly to Mouffe, and even Tully himself, argue that no doctrine or vision can legitimately (and unquestionably) claim to occupy the constitutional centre. This belief is so strong that they extend it to the idea that dialogue *even under ideal conditions* cannot secure a shared constitutional vision with any finality (see Connolly 2000; Mouffe 2005; Tully 2008a: ch. 2; cf. Habermas 1996). Bonnie Honig (2011) calls Tully on this point, claiming that he slips into seeing his solution as the only reasonable option and thereby making the same 'modern' mistake of seeing it as above – i.e., predetermining – the important role political contestation plays in establishing widespread legitimacy. Tully seems willing to bite the bullet on this point, though I suggest that the implications nevertheless make it difficult to retain an optimistic perspective of ancient constitutionalism going forward both in terms of seeing citizens adopting the civic virtues or translating the practices of freedom into actual freedom for Indigenous peoples. As will become clearer, Tully does not always seem fully attuned to the challenges that arise from the unavoidable and uneven political struggle taking place between ancient and modern constitutionalists.

So while we might prefer his vision, we cannot hold it up as anything more than one of many without first engaging in politics *within* relations of domination where dialogical political struggle is not necessarily peaceful and the outcomes are far from certain. Political disagreement goes all the way down, *even on the merits of ancient constitutionalism itself*. There will be no closing of the gap and no eradication of modern social imaginaries, only ongoing struggle between and beyond them. If any consensus arises, it will have to be through politics, not prior to politics. The fact that political agreement can only be achieved through politics drastically changes our focus from the 'what' to include the 'how' of instilling civic virtues and realizing greater forms of constitutional legitimacy. I therefore advocate for a more realist disposition that starts from a place of greater pessimism that I believe, counterintuitively perhaps, puts us on a more hopeful track as it draws greater attention to the challenges – and hopefully the solutions – posed by such conflict.

Negotiation and Acting Otherwise Given Hegemony and Distrust

Of course, Tully argues that ancient constitutionalism might be restored from the 'bottom-up' using the practices of freedom. It is therefore only fair to begin by looking at their potential. Though Tully doesn't go into great detail on how the practices play out in any specific circumstances, instead providing theoretical reasons for adopting different approaches, they rely on a certain willingness to co-operate and a level of trust that simply does not always exist. This could be because, as mentioned, he is generally optimistic that imperialism is waning and that the backdrop such practices operate upon is becoming more favourable. That the dominant majority are willing to surrender their position of privilege does however seem overstated, limiting the potential for negotiations and acting otherwise and forcing us to question – i.e., directly confront – rather than accept the backdrop itself that makes inter-cultural respect and understanding so difficult to achieve. For starters, Tully overlooks just how divided we are and what this might mean

[27] Stefan Rummens makes this comment in reference to Chantal Mouffe, though it would seem to apply equally to Tully.

for balancing the three practices of freedom, particularly given the sense of urgency Indigenous peoples feel and their limited capacity to pursue all avenues at once. As Honig (2011: 140) writes,

> Tully keeps the focus not on the trail of tears but on the history of treaty making, as if they could be prized apart, as if the tears and the treaties are not inextricably intertwined. … His reasonableness is compelling but it displaces from the realm of politics forces of fantasy, inequality, exploitation, rage, resentment, and violence that might bedevil but might also help promote and further his quest for 'justice in a post colonial age.' Progressive politics often depends on pacificism *and* protest, reasonable argument *and* extremism, realism *and* fantasy.

In fairness, there are reasons to focus on the positives, not the least of which is the critical importance of drawing those who sympathize with ancient constitutionalism to the cause. Moreover, protest, extremism, and fantasy could be understood as falling under the three practices of freedom, mostly as forms of direct confrontation. What we should take away from this, however, is that Tully's optimism leads him to overemphasize the emancipatory potential of negotiation and acting otherwise and underemphasizes (and therefore undertheorizes) direct confrontation and related practices. The fear, very much in line with discussions in Section I, comes from engaging a hegemonic state that is quite capable of corrupting the potential of the first two, necessitating the need for prioritizing direct confrontation for reasons related to limited capacity, temporality, incompatible interests, and distrust.

Indigenous peoples have every reason to be weary of negotiations and acting otherwise against a backdrop of state hegemony. Tully suggests that negotiations are useful to the extent that they establish and follow the three conventions. But, in practical terms, this is to overlook a more fundamental concern; these principles have little chance of being achieved unless we first weaken or put a serious check on state hegemony. Negotiations in good faith depend on an abundance of respect and trust that is generally absent. Notwithstanding the fact that the state only pursues negotiations when it wins largely at the expense of Indigenous peoples and their claims (Section I), even if both sides perceive co-operation as beneficial the lack of trust poses an additional challenge that requires a drastic change in circumstances (Chahbound 2015). It seems, then, that in situations of hegemony and distrust, fruitful and fair negotiations require greater forms of security, which in turn requires a greater power balance *or* other assurances that negotiations will be conducted in 'good faith' (Harty and Murphy 2005; Schaap 2006).[28] Speaking hypothetically almost as if hegemony could be set aside, Tully's idealism around negotiations comes through most when he suggests that Indigenous peoples have a responsibility to co-operate with existing colonial laws so long as productive negotiations are ongoing (Tully 2008a: 235). What are the chances that Indigenous peoples will now see this as a productive avenue after so many broken treaties? That settler Canadians will negotiate in good faith or consider compromising against its moral values or economic interests? Moreover, why should Indigenous peoples follow the very imposed laws they bring into question in the meantime rather than continuing to follow their own? Starting off with negotiation emphasizes a process that arguably, even if not in every case, secured benefits for settlers at a cost to Indigenous peoples.

This is not to ignore the fact that some Canadians react to Tully's suggestions in a 'reasonable' way, curious to (re)consider ancient constitutionalism. If a stronger number adopted this view there would be a real chance of success, though I suspect it is more likely that most will

[28] As problematic as it may be, it is for this reason that Pitty (2015) asks us to consider the possibility of trans-national mediation by someone like the UN's Special Rapporteur on the Rights of Indigenous Peoples.

continue to protect their constitutional comfort and privilege. As a consequence, Indigenous peoples and their supporters will have to follow his advice of using direct confrontation, even civil disobedience, to not only "bring the powerful to the table" (Tully 2008a: 310), but more importantly to transform the hegemonic conditions so that sitting at the same table can be productive. For these reasons, I wonder if any negotiation is possible 'in good faith', as the Supreme Court repeatedly demands, without prioritizing such transformation. Until then, negotiation is arguably more likely to exacerbate problems of mistrust, putting meaningful self-determination and ancient constitutionalism even further out of reach.

With respect to acting otherwise, the challenge relates directly to an individual or groups ability to resist co-optation, a challenging endeavour particularly in the face of overwhelming colonial power. It takes great skill and determination to actively and successfully resist co-optation, as Alfred (2009) outlines in detail, and like negotiation only greater balance will make this easier. What Tully also overlooks is that implications that come from the fact that acting otherwise is also a political strategy equally available to members of the hegemonic majority. In spite of the fact that many express tremendous optimism stemming from recent court rulings, I suspect 'modern' politicians, academics, and citizens will generally pursue their own dance with 'co-optation' as they have always done, backed up by powerful forces both domestically and internationally. As seen in Section I, legal rulings uphold new principles like the 'act of state' doctrine undergirding ultimate state sovereignty, still advancing legal tests that separate Indigenous peoples from their lands. Indeed, what I find so paradoxical about multiculturalism is that it acts otherwise, creating the appearance of addressing what it deems to be the 'reasonable' heart of Indigenous claims while resisting the broader implications. This is not to say, however, that the only way to transform power relations is through direct confrontation, though I would argue that it, and not acting otherwise, is the more fruitful approach under the current circumstances. Only practices of direct confrontation can awaken the majority from their apathy on these issues, stressing the dialogical relationships that persists across the landscape and exposing various aspects of the power imbalance and how it is used to discount Indigenous ways of being.

We should not be surprised that a new generation of Indigenous scholars believe that any interaction with the state is a trap (Simpson 2011; Coulthard 2014). As Glen Coulthard (2014: 24) sees it, Indigenous peoples should "collectively redirect our struggles *away* from a politics that seeks to attain a conciliatory form of settler-state recognition for Indigenous nations toward a *resurgent politics of recognition* premised on self-actualization, direct action, and the resurgence of cultural practices that are attentive to subjective and structural composition of settler-colonial power."[29] This resurgent turn away from the state not only aims to prefigure Indigenous futures, but also develop sound, necessary, and even catalytic *strategies* for revitalizing Indigenous communities, giving force to Indigenous constitutions in ways that they can come to see as legitimate that are preferable to tacitly accepting power imbalances and naïvely seeking state support. Rejecting approaches that rely on negotiation and acting otherwise, however, forces supporters of Indigenous constitutions to walk the rough ground of politics in ongoing efforts to reformulate and reshape constitutional essentials – beyond the formal Constitution and existing state practices – in more legitimate ways. More concisely, the political divide is greater than Tully

[29] Leanne Simpson (2011: 22) puts it more diplomatically than most when she says "those that chose to participate in reconciliation processes do so believing that participation could potentially bring more positive change than non-participation. They may be right. ...[However,] for reconciliation to be meaningful to Indigenous peoples and for it to be a decolonizing force, it must be interpreted broadly. To me, reconciliation must be grounded in cultural generation and political resurgence."

imagines between the majority who prefers exclusive forms of modern constitutionalism and Indigenous peoples who refuse to concede on important aspects of Indigenous normativity. If the two were in greater balance, incentives might exist on both sides to abandon exclusive constitutional ideas in favour of co-operation using the civic virtues. Unfortunately for ancient constitutional supporters, privilege and survival respectively keep non-Indigenous and Indigenous peoples apart. As a result, the political challenges ahead are much rougher than Tully imagines as the civic virtues he advances are less available to us.

Balancing Civic and Political Virtues

Given that ancient constitutionalism cannot pre-politically claim the constitutional centre, the civic virtues are themselves subject to political contestation. This is not to say that the dialogical nature of constitutionalism is also up for debate; on the contrary, dialogue of a sort goes beyond peaceful debate when civic virtues fall to the wayside and certain individuals and groups wanting change seek out other means to challenge institutions perceived as illegitimately imposed. Relying solely on ancient constitutionalism is therefore susceptible to the charge that it represents utopian thinking. I do not mean this in the sense that it is universally impossible; I believe Tully and others convincingly argue that treaties *under certain circumstances* served Indigenous peoples and settlers well (also, Henderson 1994; Ladner 2003; Asch 2014). It therefore meets the first criteria of Rawls' 'realistic utopia' given that it provides a constitutional order that is appealing even if it differs from the status quo. However, it remains to be seen whether it is feasible (see Rawls 2001: 4-5). In this sense, it seems utopian to the extent that it assumes full or near-full compliance with its civic virtues is possible. Put differently, it lacks a full account of how it is to be established *and* maintained.

In seeking an answer to what can be established an maintained, realists tend to believe that just as much, if not more, can be learned from studying why ancient constitutionalism worked in the first place and why it eventually lost favour. Many factors determine the rise and decline of different political orders over time. This depends on the availability of resources, institutions, societal norms, security, desire, ambition, demographics, and so on. Ancient constitutional 'moments,' when they occur, are complex and contextual, borne of political necessity and reinforced by civic virtue. Tully speaks strongly of the latter, but skims over the former. He recognizes that settlers honoured treaties when they needed help – when their survival and happiness depended on them. But the other story offers a more telling account of where we are today and what might be possible moving forward. Once fed, secure, and robust in number, non-Indigenous settlers turned their backs on the treaties. Narrowly emphasizing peace and sharing ignores the fact that some see war, conflict, or even simply an inherited ability to coerce as furthering their aims even if it must come at another's expense. It is to this story that the realist is more drawn, which contains different lessons on establishing and maintaining alternative constitutional visions between peoples by establishing favourable conditions through struggling with others even when it seems all odds are against us. A realist, in short, draws our attention as much to political virtues as civic virtues. They might draw lessons from studying Machiavellian *virtù* or, more likely, Weberian trade-offs requiring political judgement – refining political virtues of rhetoric, leadership, interests, alliances and so on – as a means of establishing their conception of a well-ordered society. These lessons are considered in light of our individual and collective values and goals (and the tensions that arise between them), while working with and against those of constitutional others with whom we – willingly or not – find ourselves living. While we may appeal to principles of peaceful co-operation, we must prepare for conflict. This need not

necessarily mean violence and war must or should follow. Idle No More and Tibetan independence movements show us that, though there are those who see an unwillingness to engage in more radical forms of confrontation as explaining their limited success.[30]

Most of all, I worry that ancient constitutionalism is idealistic in the sense that it may not easily be (re)established or, worse, could misguide us as we engage in political struggle. We should seriously consider whether we can replicate conditions that (fleetingly) served us in the past because the conditions of today differ. We cannot return to a time before broken treaties, residential schools, or environmental degradation – the modern social imaginary has emerged with force and cannot simply be put back into its box. To be sure, some of this can be addressed, but no two conditions are alike. We must face the real possibility that non-agreement will endure and that while many disagreements might be resolved through respectful dialogue, many will not be. Our actions might be better guided by recognizing this fact. In what might seem like an extreme example, and to highlight this point, Indigenous peoples and their supporters might be better served by pursuing political *virtù*, even (if only temporarily) rejecting some of the civic virtues and their own peaceful ways in an effort to bring down capitalism and save their territories from further environmental destruction. While such an extreme example should be avoided at all costs, it serves to highlight how imperative it is that we creatively consider alternative constitutional approaches and arrangements more in tune with our present realities and the reluctance of 'modern' citizens to surrender their monological ideas, which they continue to impose on Indigenous peoples.

Realism is nevertheless not a form of pessimism devoid of hope; indeed, I believe that greater hope can be found from giving present political concerns their due. There is something else that is positive about taking a more realistic disposition; attuning our normative arguments to present realities provides more fruitful answers to the question of 'where to begin' than "elaborating our favoured utopian ideals, values or virtues and imagining an empowered agent who can enact whatever we please" (Hall 2015). We saw Dale Turner and others suggest this should be done from *within* Canada's legal system, though I challenge readers to imagine what this looks like in terms of strategies more attuned to tackling hegemony itself. Though I leave the details for another time, Indigenous activists might best apply their limited resources (especially given seemingly unlimited state resources) to not only pursue community resurgence, but consider whether and when it is worth it to use resurgence to also break down barriers with settler Canadians from the 'bottom-up' in ways that do not require Indigenous peoples to compromise their values as they typically do when engaging the state. Indigenous peoples and their supporters typically argue that Canadians should educate and therefore awaken themselves, with the only 'reasonable' conclusion being an ancient constitutional one. This strategy seems unlikely to work, and indeed has not worked as multiculturalism further entrenches itself. A broader approach, appealing to settler self-interests, dispelling illiberal myths about Indigenous worldviews, and slowly and strategically breaking down essentialist barriers used by Indigenous communities to protect themselves from state pressures seem like good places to start.

Finally, I would say that the same ubiquitous world of political conflict and change that led to the decline of treaty constitutionalism could – and very well might – lead to the decline of modern constitutionalism. The better view a hopeful agonist can have of this possibility, as far as I can tell, is a realist one. A more legitimate future depends not only on political struggle using the practices of freedom – specifically direct confrontation when faced with significant domination – in order to both establish and maintain more stable and less hegemonic constitutional orders (the

[30] For example, Rob Dickinson (2015) suggests that violence played a determining role in Kosovo and Bangladesh securing self-determination while Tibet's pacifism at least partially explains its lack of success.

"goal"). It also depends on its supporters having a keen understanding of present circumstances, moral psychology, and the uncertainties of politics recognizing it is also through broader and more fundamental political struggle and opportunism that we will get somewhere more legitimate as well as discover what it will look like exactly (the "process"). In this regard, Indigenous peoples have few options but to try to convince more of their own people as well as settler Canadians (and even individual and institutional actors globally) of their views both within and outside existing state institutions that try to do the same against them. As Sleat (2013: 173) reminds us, those who disagree "are effectively struggling against the state, a struggle that is clearly in no way equal. This inequality can undoubtedly lead to despair, resentment, anger, bitterness, and even hatred." The challenge, that Indigenous peoples know all too well, involves channelling those emotions in the right direction, recruiting more people to the cause by being attuned to the variety of reasons that might make people more willing to join.

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