

Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationships in
Europe and on Turtle Island

by

Keith Cherry

M.A., University of Ottawa, 2012.

B.A., University of Ottawa, 2010.

A Dissertation Submitted in Partial Fulfillment
of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY
in the Faculty of Law

© Keith Cherry, 2020
University of Victoria

All rights reserved. This Dissertation may not be reproduced in whole or in part, by
photocopy or other means, without the permission of the author.

We acknowledge with respect the Lekwungen peoples on whose traditional
territory the university stands and the Songhees, Esquimalt and WSÁNEĆ
peoples whose historical relationships with the land continue to this day.

Supervisory Committee

Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationships in
Europe and on Turtle Island

by

Keith Cherry

M.A., University of Ottawa, 2012.

B.A., University of Ottawa, 2010.

Supervisory Committee

Jeremy Webber, Faculty of Law

Supervisor

John Borrows, Faculty of Law

Departmental Member

Oliver Schmidtke, Department of Political Science

Outside Member

James Tully, Department of Political Science

Additional Member

Abstract

This dissertation is a comparative analysis of the ways in which contemporary practices of pluralism are challenging, and being shaped by, concepts of state sovereignty. I explore two very different contexts; the relationship between First Nations and Settlers on that part of Turtle Island sometimes called Canada, and the relationship between the European Union and its Member-States. In both contexts, I explore how political, legal, and economic practices are generating forms of social order that depart to varying degrees from the total, exclusive authority associated with sovereignty.

On Turtle Island, First Nations-Settler relations were initially characterized by overlapping, non-exclusive forms of authority that allowed all actors to contest and coordinate their respective claims. Over time, two important shifts occurred. First, military, economic, and demographic changes reduced Settler need for their First Nations partners. Second, emerging concepts of sovereignty began shaping Settler conceptions of authority. As a result, Settlers sought increasingly asymmetrical and unilateral forms of relation, seeking to forcibly absorb First Nations polities, legalities and economies into their own. First Nations have exercised agency within Settler systems and also persisted in enacting their own forms of political, legal and economic authority, thereby preserving forms of pluralist practice.

In Europe, practices of pluralism were initially quite modest, limited forms of functional cooperation between sovereign units. Over time, however, Europeans have cultivated mutual need between actors, gradually giving rise to sophisticated practices of political and legal pluralism that facilitate ongoing compromise and mutual accommodation in the face of persistent difference. However, state and Union actors have coordinated to insulate the economic structure from popular contestation, stifling the open-ended compromises otherwise characteristic of European pluralism.

Ultimately, I argue that actors in both settings have developed two remarkably similar practices – interpenetrating institutions or co-decision mechanisms, and conditional authority claims. Together, these practices enable actors to contest and coordinate their respective authority claims in ways that do not rely on an overarching sovereign or even a shared understanding of their relationship. Instead, practices of interpenetration and conditional authority make all parties responsive to multiple standards of conduct, allowing actors to seek justice over time in conditions of persistent difference and conflict.

In particular, I contend that such practices are most likely to emerge and to function in non-oppressive ways where all parties can contest the terms and content of their relationships, and where all parties are in need of one another in substantive ways. Contestability and mutual need therefore provide two initial criteria through which practices of interpenetration and conditional authority might be assessed developed.

Finally, I argue that the concept of sovereignty leads us away from conditions of mutual need and contestability, stifling or mis-shaping pluralist practice and producing deeply asymmetrical relationships. I contend that future research may benefit by turning away from institutional forms like the state and capitalist market, which revolve around a sovereign ideal. Instead, I point towards forms of community which revolve around interdependence, arguing that these provide conceptual and institutional resources more likely to foster practices of pluralism.

Table of Contents

Supervisory Committee	ii
Abstract	iii
Table of Contents	iv
Acknowledgments	vii
Introduction: Pluralism, Sovereignty, and Trans-Systemic Relationships	1
1. Law(s) and Order(s)	1
2. Sovereignty and Pluralism	3
3. Project Proposal	5
3.1 Extant Challenges: Case Selection	7
3.2 Apples to Oranges: A Comparative Approach	10
3.3 Objections	11
3.4 Theoretical Approach	12
3.5 Methodology	14
3.6 Structure	17
Part 1: Practices of Pluralism on Turtle Island	21
[Chapter One] Political Practices	25
1. Five Phases of Interrelation	27
1.1 The Middle Ground: Contact and the “Peace-and-Friendship” Treaties (Contact - ~1700)	27
1.2 The Battle Ground: Military and Commercial Competition (~1630- ~1763)	29
1.3 The Divided Ground: British Dominance, the Royal Proclamation and Treaties of Land Secession (~1763- ~1850)	31
1.4 Uneven Ground: Post-Confederation Treaties and Assimilation (~1850- ~1982)	35
1.5 Grounds for Recognition: The Constitution Act 1982 and the Modern Treaty Process (1969-Present)	38
1.6 Summary	41
2. Practices of Note	43
2.1 Modern Treaties	44
2.2 Impact-Benefit and Co-Management Agreements	48
2.3 Federal Legislation and Regulation	49
2.4 Enacting Pluralism through Disobedience	51
3. Discourses of Sovereignty in Settler-First Nations Relations	53
4. Case Study: The Kunst’aa Guu – Kunst’aayah Reconciliation Protocol	56
5. Conclusions	59
[Chapter Two] Legal Practices	62
1. Four Phases of Legal Relation	64
1.1 The Early Period: Justice of the Peace (Contact - ~1800)	64
1.2 The Middle Period: Lazy Suzerainty (1800 - ~1840)	67
1.3 The Late Period: A Cold Reception (~1820- ~1970)	70
1.4 The Modern Period: Rights and Wrongs (~1970-Present)	75
2. Practices of Note	79
2.1 Status, Hierarchy and Equality	80
2.2 Doctrinal Gaps	82
2.2 Discretionary Exceptions	85
2.3 International Law Appeals and Exclusions	88

3. Discourses	91
4. Case Study: The Barriere Lake Algonquin and the Quest for a Tripartite Agreement	95
5. Conclusions.....	98
[Chapter Three] Economic Practices	101
1. Four Phases of Economic Relations	103
1.1 Reciprocal Incorporation and Geopolitics: the Early Colonial Period (Contact- ~1725)	103
1.2 Serfs Up – Agricultural Expansion and Economic Competition (~1725- ~1840)	106
1.3 Work/Force – Wage-Labour and Disciplinary Hierarchy (~1840- ~1970)	109
1.4 Invisible Hands and Inconvenient Indians – Discipline, Neo-liberalism and Neo- Colonialism (~1970- Present)	113
2. Practices of Note	117
2.1 Treaties and Reserves	118
2.4 Aboriginal Title.....	126
3. Discourses	128
4. Case Study: the Hudson’s Bay Company	133
5. Conclusions.....	137
[Chapter Four] Conclusions: Pluralism and Sovereignty on Turtle Island	140
1. Connecting Political, Legal and Economic Practices on Turtle Island	142
2. Understanding Pluralism on Turtle Island through Symbiogenesis.....	145
3. Developing Pluralism on Turtle Island: Some Concluding Remarks	149
Part 2: Practices of Pluralism in Europe	151
[Chapter Five] Political Practices.....	154
1. An Overview of the Political Relationship (~1950-Present)	157
1.1 Describing an Elephant: Two Positions on the Nature of European Integration	157
1.2 From World War to Tug of War: A Brief History of European Integration	158
1.3 If I May Interrupt: Non-State Actors and European Integration.....	165
2. Practices of Note	172
2.1 Functional Bracketing: The Elephant in the Room.....	172
2.2 Variable Geometry: A Reply to Archimedes.....	175
2.3 Functional Legitimacy: <i>The Prince’s</i> New Clothes	179
3. Discourses of Sovereignty: “Pooled” or “Shared” Sovereignty	181
4. Case Study: Unity in Diversity – Sovereign Ambiguity in the Constitutional Treaty	183
5. Conclusions.....	187
[Chapter Six] Legal Practices	190
1. An Overview of the Legal Relationship (1952-Present).....	192
1.1 The View from the Mountaintop: Sovereignty in the European Court of Justice.....	192
1.2 Voluntary Servitude: Sovereignty in National Courts	195
1.3 Three’s Company: Sovereignty and the European Court of Human Rights	203
2. Practices of Note	206
2.1 Multilateral Conditionality.....	207
2.2 Variability	208
2.3 Interpenetration	209
3. Discourses of Constitutional Pluralism.....	212
4. Case Study: Constitutional Dialogue in Europe	215
5. Conclusions.....	219
[Chapter Seven] Economic Practices	222
1. An Overview of the Economic Relationship	224
1.1 Post-War Reconstruction and the “Economic Constitution” (~1950- ~1970)	224

1.2 The Crisis of the 1970s and the Neo-Liberal Turn (~1970 - ~2008)	226
1.3 The 2008 Financial Crisis and Post-Ordoliberalism (~2008- Present)	229
1.4 Economic Constitutionalism and the Fourth Branch	231
2. Practices of Note	232
2.1 The Law of the Market: Structural Asymmetry in the Integration Process	232
2.2 It's all About the Benjamins: Sovereignty, Currency and Monetary Union	236
2.3 Big Brother is Watching: Economic Surveillance and Disciplinary Neo-Liberalism....	238
2.4 Commons Wealth: Contestation, Occupation, and Alternative Economies.....	240
3. Discourses: "New Constitutionalism", Sovereignty and Material Contestation.....	244
4. Case Study: Sovereign Debts and Democratic Deficits – The Greek Crisis.....	249
5. Conclusions.....	251
[Chapter Eight] Conclusions: Pluralism and Sovereignty in Europe	254
1. Connecting Political, Legal and Economic Practices in Europe.....	255
2. Understanding Pluralism in Europe through Sympoiesis	258
2.1 A Limited Sympoiesis.....	263
3. Developing European Pluralism: Some Concluding Remarks	265
Part 3 - Practices of Pluralism in Comparative Context.....	267
[Chapter Nine] A Comparative Analysis of Pluralism in Europe and on Turtle	
Island.....	267
Introduction – A Bridge too Far.....	267
1. Summary – A Tale of Two Agonisms?	273
1.1 – An Overview of the Relationship between the EU and its Member-States	273
1.2 - An Overview of the First Nations/Settler Relationship	276
2. Comparison – Apples to Apples after All?	280
2.1 Sovereignty's Claims	281
2.2 Practices of Pluralism	283
2.3. Theorizing Pluralism: Contestation, Need, and Social Order	300
3. Towards a Post-Sovereign Pluralism	307
3.1 The State and Capitalist-Market are not Helpful Models	308
3.2 A Research Agenda.....	312
4. Conclusions – A Bridge Over Troubled Water.....	324
Bibliography	328

Acknowledgments

First, I would like to thank my committee. When I look back at older drafts of this text it is immediately clear how much your interventions have helped me grow. Jim, your confidence in me is a source of reassurance in trying times, and our dialog a source of inspiration. Oliver, your careful eye has helped me feel solid in the parts of this work that are most foreign to me. John, your always prompt replies and ability to see the big picture helped keep me oriented when I most needed direction. Last, thank you to my supervisor, Jeremy. Your thoughtfulness, honesty, and commitment to rigour helped take arguments which were felt intuitively and nurture them into defensible academic work. I can't thank you enough for what you have each brought to this dissertation.

I would also like to thank my parents Don and Shirley for your ceaseless and unconditional support. To my father in particular, who spent countless hours proofreading this dissertation in recognition of my long and troubled relationship with spelling, grammar, and all things detail-oriented. I coul'dnt have done it without you.

Thank you to my partner Vanessa, whose commitment and drive inspire me when I feel spent. Thank you to the friends who supported me along the way. In particular Ryan, Susan, James, Courtney, Katherine, and Isabelle – my writing group, who saw my earliest, most embarrassing drafts and never failed to respond with generosity. I would also like to thank Mark Zion and the *Lost Causa* reading group for pushing my thought in unexpected but influential ways. A particular thank you to Aaron Mills, my deepest and surely my gentlest interlocutor.

I would also like to thank the climate justice and Indigenous solidarity organizing communities in Victoria. My comrades in these movements have kept me sane, providing hope and agency in times of despair, and most of all gifting me the sort of the community I needed to do this very isolating, abstract work in a good way.

Last, I would like to thank the taxpayers of Canada, who supported this work through their Social Sciences and Humanities Research Council, and the Center for International Governance Innovation for their generous financial support. A very heartfelt thank you to my colleagues at the University of Hamburg's Center for Globalization and Governance for their influence during a formative stage, to the University of Victoria's Center for Global Studies for all its support, and to my fellows at the Cedar Trees Institute for the intellectual home they have provided. Thank you all so very much.

Introduction: Pluralism, Sovereignty, and Trans-Systemic Relationships

1. Law(s) and Order(s)

I am at a rally against the Trans-Mountain pipeline. The march has just ended but all of the sudden there are people with construction supplies everywhere. In a matter of hours, they have built a traditional Coast Salish *Watch House* right beside the Trans-Mountain pipeline terminus¹. As they work, a Tsleil-Waututh woman tells the crowd that her people have never ceded legal authority over their traditional lands. She tells us that the only legitimate laws on this land are Tsleil-Waututh laws. She tells us that the Canadian government has violated those laws and must be stopped. The pipeline companies are criminals. The police and the government are criminals. We are building today, she tells us, so that we can enforce the law and put an end to an illegal pipeline project.

All along the periphery of the crowd, RCMP officers listen nervously. Only Canadian law is properly law in their minds. The Trans-Mountain pipeline expansion project has been legally approved, they tell us. There is an injunction in place and it is now illegal to protest on Trans-Mountain property, they tell us. The *Watch House* lacks the proper permits. It is the protestors and the Tsleil-Waututh who are criminals.

Neighbours, many of them living a stone's throw from both the *Watch House* and the disputed pipeline, seem unsure of how to react. I don't blame them. In this place, a great deal feels unsure. We are confronted with two distinct rule sets, and the relationship between them is not clear. Am I standing on private property, or on the lands of a title holding Tsleil-Waututh family? Are the pipeline workers criminals, or are the protestors? Are the RCMP a domestic

¹ Protect the Inlet, "Kwekwecnewtxw," accessed Nov 12, 2019, <https://protecttheinlet.ca/structure/>.

police service, or an occupying force? What about me? Should I follow Tsleil-Waututh law? Canadian law? Both? Certainly, I am in a position to ignore neither.

I have studied Canadian law and politics my entire adult life. I am used to questions of federalism – questions like “Who is empowered to make the law on this topic?”. I spent my Masters’ degree studying how judges choose between competing interpretations of the law in court. “The Law” - singular. You obey it, or you don’t. It’s federal, or it’s provincial. You interpret it one way, or another. Regardless, “The Law” involves only one set of rules, one source of authority. Surrounded by the dull whirl of power tools, I find that the presence of multiple legal orders raises questions for which my education has not prepared me.

Indeed, my education has largely accepted the premise that legal orders are, or at least ought to be, watertight compartments. In any given place, a single law. This is the logic behind state sovereignty - the authority of the state is both total and exclusive². The appeal of this vision is obvious – by dividing the world into territorially exclusive legal orders, we can prevent the sort of conflict I am presently experiencing – the conflict of competing legal claims.

Of course, state sovereignty has always been more of an aspiration than a reality³. In reality, every state grapples with the presence of multiple, overlapping sources of legal authority. Whether these come from First Nations or international organizations, national minorities or transnational corporations, local norms or global standards, states the world over *do* navigate the coexistence of multiple legalities. This requires answers to questions that sovereignty simply does not ask. It compels us to ask what the relationship between legalities is, and what it could

² Albert Dicey, *Introduction to the Study of the Law of the Constitution*, 3rd ed. (London: MacMillan & Co., 1889) at 38-39. For discussion see Jonathan Havercroft, *Captives of Sovereignty* (Cambridge: Cambridge University Press, 2011).

³ Stephen Krasner, “Westphalia and All That,” in *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, eds. Judith Goldstein and Robert Keohane (Ithaca: Cornell University Press, 1993).

be. As a scholar, I am fascinated. How do we navigate situations where there are multiple rule-sets at play, multiple sources of authority, multiple accounts of legitimacy, and no clear mechanisms for how they should interact? What practices emerge in these spaces? How are our practices challenging, and challenged by, the sovereign ideal which is so central to western legal thought? The following dissertation explores these questions in an effort to better understand the lived reality of pluralism and what it means for our concepts of law, social order and justice.

2. Sovereignty and Pluralism

According to Havercroft, state sovereignty arose as a response to ongoing conflicts between multiple sites of authority in medieval Europe⁴. A range of religious and secular actors appealed to different, even contradictory sources of authority, and this occasioned frequent conflict – as with the Tsleil-Waututh and the RCMP. Sovereignty provided a simple solution – vest ultimate power in a single authority which would rule over all the others, thereby preventing competition and conflict. Dicey therefore lays out two features of sovereignty – a sovereign’s power is total, and it is exclusive⁵. Webber refers to this conception as Sovereignty 1 – or sovereignty as final decision-making power⁶. On this account, the role of the sovereign is to prevent conflict by ensuring that there is only one source of authority, one set of laws, one account of legitimacy.

Accordingly, any claim to an alternative source of authority is a threat, not only to the sovereign,

⁴ Havercroft, *Captives of Sovereignty* at 4.

⁵ “sovereignty means neither more nor less than this, namely...the right to make or unmake any law whatever; and, further, that no person or body is recognized...as having a right to override or set aside the legislation”. Dicey, *Constitution* at 38. Quoting Blackstone with approval, Dicey refers to sovereign power as “absolute despotic power” and “omnipotence” at 39, and further stresses “the absence of any competing power” at 48.

⁶ Webber usefully distinguishes this conception of sovereignty from 3 other senses of the word: Sovereignty 2 – Sovereignty 2 - having the attributes of a state in international law, Sovereignty 3 - being an independent site of legal authority which is not derivative of any other source of authority, and Sovereignty 4 - having the standardized, rationalized institutional package associated with the modern sovereign state. See Jeremy Webber, “We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty,” in *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, eds. Patrick Macklem and Douglas Sanderson (Toronto: University of Toronto Press, 2016) especially at 75-84.

but to social order itself. Sovereignty and pluralism are therefore at odds – the presence of one presupposes the absence of the other⁷. Indeed, the entire purpose of sovereignty is to prevent the uncertainty that trans-systemic questions create.

There is a certain comfort in this theory of sovereignty – by unilaterally resolving any competition between different sites of authority, it promises to prevent violent struggle. Maintaining sovereignty, however, requires an enormous amount of violent effort. People are meaning-making creatures, we naturally produce norms and structures and institutions as a normal part of our everyday lives⁸. These law-making or juris-generative practices are an inevitable part of human existence. As a result, states occupy a social landscape already densely layered with law, and also a landscape where new sites of authority are constantly being produced⁹.

In order to maintain sovereignty, the state must suppress, eliminate, absorb or subordinate these competing legalities. Historically, this has been an extraordinarily violent process, deeply tied to global patterns of empire, capital accumulation, and colonization¹⁰. It has also been deeply tied to what Santos terms epistemicide – the deliberate suppression of First Nations and subaltern worldviews and their aggressive assimilation into European ways of thinking and knowing¹¹. Thus, Cover describes the state as “jurispaethic” – its role is to kill alternative sources of law, so that only state law remains¹².

⁷ This is not to say that all power must be wielded by a single actor. Rather, it is to say that all sources of power must ultimately be answerable to a single, higher authority. Provincial autonomy is perfectly acceptable, even First Nation’s autonomy, but only so long as these sources remain answerable in the final instance to the Supreme Court (or some other final decision-maker).

⁸ Robert Cover, “Nomos and Narrative,” in *Narrative, Violence and the Law*, eds. Martha Minnow, Mark Ryan, Austin Sarat (Ann Arbor: University of Michigan Press, 1995) at 110.

⁹ Cover, “Nomos and Narrative” at 103.

¹⁰ James Tully, “Lineages of Contemporary Imperialism,” in *Lineages of Empire: The Historical Roots of British Imperial Thought*, ed. Duncan Kelly, (Oxford: Oxford University Press, 2009).

¹¹ Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm, 2014) especially at 92, 153, 209, 238.

¹² Cover, “Nomos and Narrative” especially at 139-141, 155-163.

Sovereignty is therefore inescapably tied to historical and ongoing material and epistemic violence. When state institutions teach students like me that there is only one law, what they are really saying is that the proper way to engage with alternative legal orders is to oppress, deny or ignore them. If we accept the theory of sovereignty, this is all just an unfortunate reality. The predicable, patterned violence which maintains order is arbitrary and perhaps regrettable, but it is nevertheless preferable to the chaotic violence of pluralism¹³. State sovereignty may empower a specific elite unfairly, but this is preferable to a state of competition between elites. Arbitrary hierarchy is, according to this view, simply the cost of social order. Standing in the presence of the Tsleil-Waututh, the RCMP, and the good people of the surrounding neighbourhood, this account hardly seems satisfactory.

3. Project Proposal

As a privileged young student with a fierce belief in social justice and a natural aversion to authority, arbitrary or otherwise, the experience at the *Watch House* made me deeply uncomfortable with the theories of law I had been schooled in. I was not ready to resign myself to a world of arbitrary hierarchy. I was not ready to accept the police baton as the only acceptable response to Tsleil-Waututh assertions. I wanted to test sovereignty's claims. Does social order really break down in the absence of an arbitrary concentration of power? Are there other ways of dealing with a plurality of social authorities? Are there other ways to seek justice in a world where multiple normative standards coexist?

Fortunately, I quickly discovered that I was not alone in my discomfort. Despite the broad hegemony of the sovereign framework, critical discourses were proliferating, attaching

¹³ Cover, "Nomos and Narrative at 106-107, 163-172.

modifiers like post-sovereignty, shared sovereignty, divided sovereignty, or earned sovereignty¹⁴. In diverse contexts around the world, the realities of pluralism were challenging the sovereign framework, even provoking decidedly non-sovereign forms of social order for which western legal thought had no adequate descriptors. In short, there was no need to *imagine* a non-sovereign social order; communities all around the world were actively struggling to *enact* them, here and now.

Drawing on Tully's approach to Public Philosophy¹⁵ and Santos' concept of a sociology of emergences¹⁶, I felt that the best way to explore questions of sovereignty and pluralism is not to engage in abstract theorization in the hope that social actors may find them useful, but rather to study the actual, extant practices people have already developed on the ground. By carefully theorizing existing practices, by bringing scholarly attention to them, Santos suggests we can help participants to better understand their own institutions, while at the same time helping open the canon of legal thought to new ideas. In this way, we enter into a cycle of reciprocal elucidation, learning from and contributing to ongoing social practices in a mutually enriching partnership¹⁷.

I therefore set out to investigate sites where pluralism and sovereignty were being contested – to attempt to map the ways in which contemporary practices of pluralism are challenging the sovereign framework, to see how far and in what ways it is possible to think

¹⁴ In Neil Walker's excellent collection *Sovereignty in Transition* (Portland: Hart Publishing, 2003), for example, Walker, Hans Lindahl, Richard Bellamy, Michael Keating, Miriam Aziz, Bruno de Witte, Cesary Mik, Anneli Albi, and Miguel Maduro all discuss terms like these in their contributions.

¹⁵ James Tully, *Public Philosophy in a New Key: Volume 1* (Cambridge: Cambridge University Press, 2009) especially Chapter 1: Public Philosophy as a Critical Activity.

¹⁶ Boaventura de Sousa Santos, "A Non-Occidental West? Learned Ignorance and Ecology of Knowledge," *Theory, Culture & Society* 26 no.8 (2009) at 109.

¹⁷ Tully, *Public Philosophy*, at 3.

otherwise about social order, and to ask whether we can't find ways to pursue justice in contexts of plurality.

3.1 Extant Challenges: Case Selection

Of course, there are many sites where sovereignty is being contested and alternatives asserted – from the rise of supranational institutions to the increasing prevalence of sub-state and non-state actors, from the sprawling web of international finance to resurgent Indigenous communities and international coalitions of civil society¹⁸.

I focus on two cases in particular: the relationship between First Nations and the Canadian state, and the relationship between the European Union and its member-states. I choose these particular cases for three reasons: first, each features at least one actor that does not conform neatly to the standard institutional package associated with state sovereignty¹⁹; second, in each case, the contest between actors strikes to the very foundation of their respective sovereignty claims; and third, each case has seen a wealth of scholarly, political, legal and civic attention, making them rich sites of reflection about sovereignty, and also poignant sites where the introduction of new ideas and analyses may have real, concrete impact on lived political struggles.

¹⁸ Note that I do not include federations on this list. While federations involve multiple independent authority claims, they typically also include a constitutional division of powers such that each level of government retains sovereign powers in its own zone. These provisions work precisely to avoid, rather than to manage, overlapping claims. Where claims have the potential to conflict, federations typically feature a mutually accepted court to decide constitutional questions and prevent the conflict. In comparison, the cases I have listed above feature conflicting claims that are neither discreet nor subject to a mutually accepted final arbiter, and which therefore raise the sort of uncertainty sovereignty is meant to prevent in ways that federations do not.

¹⁹ For a discussion of the institutional forms associated with Webber's 'Sovereignty 4' see Webber, "Age of Encounter" at 82.

Consider the relationship between First Nations²⁰ and the Canadian state. First, First Nations have historically organized themselves in ways that contrast radically with European notions of sovereignty, and many contemporary communities root their struggles against the state in these traditional forms²¹. In that sense, their struggle is not just a struggle for a sovereignty that has been usurped by the state, but also a struggle against the very notion of sovereignty itself²². Second, the political claims made by First Nations – namely that their political authority over their territories was never ceded and therefore continues into the present – cuts to heart of Canada’s sovereignty claims. If accepted, First Nations’ claims position ‘Canada’ as a place where multiple, radically different forms of social organization must overlap, coexist, and to some extent, co-govern. Likewise, Canada’s sovereignty claim is understood by many to preclude any claim of First Nations’ sovereignty. Both actors’ claims are therefore in question. Third, this field has experienced a veritable explosion of academic, judicial, political and social attention in recent decades. The status quo is becoming increasingly untenable, as the legal fictions on which it relies are becoming increasingly unviable²³. New practices of resistance are emerging, and very old ones are resurging. In short, this is an area which is ripe for change, and which is therefore experiencing a surge of sophisticated attention. Together, these factors make First Nations-Settler relations a hotbed of contestation around issues of sovereignty and pluralism. Lastly, this is a political struggle in which I, as a Settler-Canadian, am personally

²⁰ For reasons of scope, my project will not meaningfully analyze the Metis or Inuit relationships to Settlers. While I regret the erasure this choice performs, the confines of a doctoral project require difficult choices, and I thought it better to omit these topics than to overstretch and risk doing them violence.

²¹ For a discussion of sovereignty and Indigenous political organization see Taiaiake Alfred, “Sovereignty”, in *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005).

²² See e.g. Alfred, “Sovereignty”; Patricia Monture, “Notes on Sovereignty,” in *Justice for Natives: Searching for Common Ground*, eds. Andrea P Morrison & Irwin Cotler (Montreal: McGill-Queens University Press, 1997).

²³ For discussion of such fictions see John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*,” *Osgoode Hall Law Journal* 37, no.1 (1999).

implicated. I benefit from, and in a myriad of ways am complicit with, the ongoing dispossession and oppression of First Nations. Governments acting on my behalf routinely struggle to reaffirm their own sovereignty in ways I cannot accept. This case therefore allows me to ground my writing in concrete moral and political struggles.

I focus on Europe for similar reasons. Here, several sovereign states came together to create a new body – one which subsequently developed a mind of its own and began to pursue its own interests and expansionist agendas. As a result, the EU has become a unique creature, something more than a typical international organization, yet something less than a typical federal state. This situation is largely unprecedented, and is commonly considered *sui generis*. In this sense, the EU challenges the normal institutional forms associated with the state. Second, the presence of this novel political object is fundamentally challenging the sovereignty of the member-states, with many aspiring to a future in which the member-states all but disappear, eclipsed by a continental government. Conversely, many state-partisans envision a future where the EU disappears altogether or at least sheds any pretension to sovereign authority. The struggle between state and EU actors is therefore such that it throws the claims of each actor into question at a fundamental level. Third, this situation has occasioned a rich and extensive literature and a vibrant political, legal, economic and social debate at all levels of European society, making Europe a rich site of reflection about sovereignty, and also a social milieu where new insights might find life.

Both cases therefore represent sites where non-state forms of political authority are operating, where their presence is perceived as a fundamental challenge to the sovereign state and vice versa, and where this pluralism has birthed rich literatures and practices of contestation.

3.2 Apples to Oranges: A Comparative Approach

Comparing these two milieu offers additional benefits, not least because the comparison crosses a number of unusual lines. First, First Nations communities challenge the state “from below” so to speak, while the EU launches its challenge “from above” the state²⁴. Second, First Nations-Settler relations have been forged largely through force and fraud, while the EU has been at least notionally consensual. Third, First Nations-Settler interactions cross an epistemological and ontological divide, while inter-European relations do not. For all these reasons, the two fields exist in relative isolation from one another. Typically, First Nations-Settler relations in Canada draw comparisons to First Nations-Settler relations around the globe. Similarly, the EU is widely considered *sui generis* to such an extent that it is ill-suited to comparative work. When comparisons are drawn, they are typically made to international organizations, on the one hand, or to federal states, on the other²⁵. Both literatures are thus to a meaningful extent closed off from one another.

I believe there is much to be gained from putting these two highly advanced, but for the most part discrete, literatures on sovereignty into conversation. First, by exploring two very different conversations, rather than two very similar ones, I increase the likelihood of finding something novel and interesting. Second, the very act of comparison allows us to perceive the specific features of each comparator more clearly. In the language of Wittgenstein, “perspicuous contrasts” allow us to see what might otherwise be taken for granted, escaping our conscious

²⁴ Subnational actors are also contesting state sovereignty in much of Europe with their own authority claims, and these have complex and varied relations to both EU and national claims. However, the scope of this dissertation is already enormous, such that including subnational actors would mean treating supranational questions in less depth. Given that supranational issues are what make Europe so distinctive, I have chosen to focus on these and to omit serious discussion of subnational actors in Europe.

²⁵ For discussion see Thomas Hueglin, “Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union,” *Canadian Public Administration* 56, no.2 (2013).

attention²⁶. Third, comparison can also result in cross-fertilization²⁷, as actors from each field learn from one another's strategies and debates.

A comparative approach therefore allows me to escape the internal logic of each case by placing it in perspicuous contrast to another, radically different, set of assumptions, institutions, theories, and practices.

3.3 Objections

It may be objected that because these two cases are so different – one is marked by force while the other is not, one crosses abyssal lines²⁸ and the other does not, and one is characterized by a deeper asymmetry between actors than the other – this comparison will be largely useless to those engaged in on-the-ground struggle in either setting.

If my goal were to construct a single, general model and recommend it to both settings, these concerns would be poignant. Even if my intention were to facilitate a more limited transplantation of particular ideas from one site to the other, these concerns would be significant. However, my intention is not to develop such universalist proposals. Rather, I am interested in sovereignty, and in seeing how far and in what ways it is possible to imagine and enact a non-sovereign pluralism. My two cases, and the contrasts between them, are designed to help me re-

²⁶ Ludwig Wittgenstein, *Philosophical Investigations*, tr. G. M. Anscombe (Oxford: Basil Blackwell, 1967) especially at 122. For a discussion to which I am much indebted see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) especially at 103-116.

²⁷ For discussion see Ulf Linderfalk, "Cross-fertilisation in International Law," *Nordic Journal of International Law* 84, no.3 (2015).

²⁸ Santos's concept of abyssal lines refers to the construction of binaries between the global north as a zone of law and emancipation, and the global south as a zone of appropriation and violence. For Santos, the two sides of this binary constitute one another, such that the privileging of western knowledges, interests, and institutions is enacted through a parallel subordination of southern knowledges, interests and institutions. The relationship between colonizers and Indigenous peoples is paradigmatic of such lines. Thus, we might say that pluralism on Turtle Island crosses abyssal lines, while pluralism within Europe is contained to one side of the abyssal divide. See Boaventura de Sousa Santos, "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges," *Fernand Braudel Review* 30, no.1 (2007) generally, and especially at 51, 53.

think sovereign social organization. In this sense, my cases do not need to be directly comparable to one another – they are each directly comparable to sovereignty. To the extent that the two sites are compared, it is in reference to this intervening concept. I am interested in exploring the overall logic animating each relationship in order to help us see more clearly how they are, and how they might be otherwise. It is my hope that contrasting these logics could inspire new ways of thinking, allowing even differently constituted comparators – who cannot pursue the same institutional arrangements – to open their minds to new conceptual and institutional possibilities which were previously unthinkable²⁹.

3.4 Theoretical Approach

In order to interrogate sovereignty and explore other possible responses to the presence of pluralism, I will conceive of sovereignty not as a theoretical abstraction, but as a situated process and practice.

Following Cover, communities constantly generate plural sources of authority, while the sovereign constantly works to subordinate, absorb, or eliminate them. Sovereignty is therefore a process, rather than a static state. It is an aspirational goal, never complete; indeed, impossible to complete³⁰. In this sense, sovereignty or sovereigntizing processes are always defined in relation to counter-processes. Together, these processes and counter-processes are what constitute the practice of pluralism. Relations between these constitutive processes can be complex. Aspiring sovereigns oppress and coopt competing social structures, to be sure³¹. Yet sovereign orders also depend on non-state communities for the multitude of social functions they serve – the

²⁹ I would also stress that sowing the seeds of institutional alternatives is a secondary goal. Unsettling contrast is the core of the project, and I believe that it is unimpeded in this regard.

³⁰ Cover, “Nomos and Narrative” especially at 106-12.

³¹ Peter Kropotkin, *Mutual Aid: A Factor of Evolution* (Mineola: Dover, 2006) generally and especially at 226.

hierarchies of the state would be impossible without the care, social cohesion, and unpaid support that families, friends, and communities provide for one another³². Likewise, many communities receive forms of material or ideological support from the sovereign. The practice of pluralism thus involves a complex range of potential relations, from the oppressive to the cooperative, and everything in-between. The power of each actor is not simply inherent, it is a power-in-relation-to particular constellations of actors and relationships³³. In this sense, sovereignty expresses one possible idealtical outcome of the complex relational practice which is pluralism.

The agency of various non-sovereign actors is thus critical in establishing, sustaining, and challenging sovereignty. Pluralist practice is not defined by the practice of the sovereign, but by the interaction of its practice with the practices of various other groups. Each of these groups have their own ways of relating to pluralism and their own practices and institutions, which are just as germane to the overall practice of pluralism.

The neat theoretical answer that sovereignty provides to the question of pluralism is therefore a simplification. Sovereigns do react to pluralism by elevating their own claims above competing claims, but they do so in complex and non-linear ways that involve a range of other practices. This dissertation is an attempt to take the practices that the theory of sovereignty describes and place them alongside the practices of competing authorities, to see both as involved in intertwining processes, and to thereby unearth the broader range of actual and potential responses to pluralism as they are enacted on the ground in specific contexts.

³² Kropotkin, *Mutual Aid* generally and especially at 117-123.

³³ For a discussion of power-in-relation-to, and a comparison to other forms of power, see War Resisters International, *Handbook of Nonviolent Campaigns* (London: War Resisters International, 2014) at 35.

This project partakes in a tradition of legal and political pragmatism, drawing off the scholarly traditions of Foucault, Rorty, and others³⁴. It takes practices of action coordination and contestation to be primary, and prior to the theoretical explanations we construct to explain them. For Foucault, the goal of this endeavour is to unsettle inherited theoretical understandings, to use practice in order to “to know how and to what extent it might be possible to think differently”³⁵. Similarly, my goal is to see in what ways pluralist practices exceed the theoretical descriptions that sovereignty makes – to see how far, and in what ways, it is possible to respond differently to pluralism³⁶.

3.5 Methodology

In keeping with this theoretical frame, this project will adopt a flat ontology, an interdisciplinary approach, and a historical method.

A ‘flat ontology’ is one that rejects scalar assumption that give precedence to large scale and centralized actors³⁷. Instead of envisioning the global, national, provincial, and local in descending order of importance, a flat approach sees all actors as engaged in complex networks of governance, without giving priority to any type or scale of practice³⁸. Accordingly, my project will engage with the European Union, its member-states, the Canadian state, and First Nations

³⁴ For discussion see Chantal Mouffe, "Rorty's Pragmatist Politics" *Economy and Society* 29, no.3 (2000); Joan Reynolds, "'Pragmatic Humanism' in Foucault's Later Work," *Canadian Journal of Political Science* 37, no.4 (2004); Chandra Kumar, "Foucault and Rorty on Truth and Ideology: A Pragmatist View from the Left," *Contemporary Pragmatism* 2, no.1 (2005).

³⁵ Michel Foucault, *The History of Sexuality, Vol. 2: The Use of Pleasure*, tr. Robert Hurley (New York: Random House, 1990) at 8-10.

³⁶ I am not therefore recording the self-understandings of the participants in these practices of action coordination and contestation. It may be that many actors, particularly supposed sovereigns, would not employ the descriptions I do. The point is not to better understand how each actor understands itself, but rather to use their practices to unsettle their self-understandings and open new ways of conceiving of their relationships.

³⁷ For discussion see Jenny Cameron and Jarra Hicks, "Performative Research for a Climate Politics of Hope: Rethinking Geographic Scale, 'Impact' Scale and Markets," *Antipode* 46, no.1 (2014).

³⁸ Cameron and Hicks, "Performative Research" at 5-7.

without prior assumptions as to their relative position or importance, looking instead to the actual practices of coordination and contestation among actors who possess powers of self-government and mutual influence to different degrees.

Although sovereignty is obviously a legal concept, this thesis will take a broad, interdisciplinary framework, recognizing that various fields of practice are not isolated from one another, but rather constitute interpenetrating and mutually reinforcing social systems³⁹. As Hunt puts it, “social relations are necessarily complex sets of connections between social agents that exhibit a range of potential dimensions. Thus, rather than "legal relations" and "economic relations", the claim is that social relations exhibit, among other potential dimensions, legal and economic dimensions”⁴⁰. As a result, “Law is to be understood not in itself, through the introspection of self-referentiality, but rather from addressing the connectedness of law, from viewing law in its location interacting with and interpenetrating other social processes”⁴¹. Hunt therefore introduces the concept of an “assemblage” – an intersection of multiple semi-autonomous social processes which do not necessarily constitute a totality or system, but which work together to co-create social meaning⁴². Thinking of sovereignty in this way, we might say that sovereignty is a type of social relation which exhibits not only legal, but political, economic, and other dimensions.

³⁹ Alan Hunt, “Encounters with Juridical Assemblages: Reflections on Foucault, Law and the Juridical,” in *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder (New York: Routledge, 2012) at 71. Thompson further stresses that social systems are not only semi-autonomous and inter-penetrating, but also mutually reinforcing. See E.P. Thompson, *The Poverty of Theory* (London: Merlin Press, 1995) at 130. At the same time, the delicate interaction between mutually supporting discourses can make the overall system susceptible to unpredictable cascading effects in response to relatively minor stimuli. See Richard Gregg, *The Power of Non-Violence* (New York: Fellowship Publications, 1959) at 114.

⁴⁰ Hunt, “Law as a Constitutive Mode of Regulation” at 326.

⁴¹ Hunt, “Law as a Constitutive Mode of Regulation” at 303.

⁴² Hunt, “Juridical Assemblages” at 71.

As the structure of Dicey's seminal work makes clear, both political and legal dimensions are particularly central to the practice of sovereignty⁴³. Yet as Cohen and others have shown, economic relations are also central dimensions of sovereignty. This is true in at least four ways. First, the claims that owners make over their property are in many ways comparable to the claims sovereigns make over their subjects – namely, a claim to exclusive and total authority⁴⁴. Second, ownership of property is not only a relation between an object and its owner, but also a relation between the owner and others who wish to use the object⁴⁵. Ownership is the power to decide who may use an object and on what terms. In that sense, ownership is a form of rule. Third, because people need objects to live, those who own objects can compel subservience from those who do not⁴⁶. Fourth, this form of private sovereignty depends on the existence of public political and legal structures that will enforce property claims. The nature and distribution of political and legal authority is therefore meaningfully structured by the nature and distribution of private authority (and vice versa)⁴⁷. Both conceptually and materially then, *Dominion*, or the control over objects, is inseparable from *Imperium*, the rule over people.

This dissertation will therefore address the political, legal and economic dimensions of the practice of sovereignty. Many other dimensions of sovereignty are doubtless relevant. For reasons of scope, however, I will focus on these three fields.

For each field of study, I will take an historical approach, tracing the relationship over time to see how various actors have formulated and reformulated their interactions iteratively, in

⁴³ Dicey's work is divided into two sections, the first on parliamentary sovereignty and the second on the rule of law. See Dicey, *Constitution*.

⁴⁴ Indeed, the two work as a conceptual pair to exclude other forms of authority. See e.g. Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (San Francisco: Berrett-Koehler, 2015) especially chapter 1.

⁴⁵ Morris Cohen, "Property and Sovereignty," *Cornell Law Review* 13, no.8 (1927) at 12.

⁴⁶ Cohen, "Property and Sovereignty" at 13.

⁴⁷ Jeremy Webber and Kirsty Gover, "Proprietary Constitutionalism," in *Routledge Handbook of Constitutional Law*, eds. Mark Tushnet, Thomas Fleiner and Cheryl Saunders (New York: Routledge, 2013).

response to changing power relations, interests, ideologies, and mutual learning processes. In so doing, I will be able to contextualize current practice against its historical origins, and also de-parochialize current practice by seeing how things have been, and could again be, otherwise.

This historical approach introduces some asymmetry into my analysis. Simply put, the relationship between the EU and its member-states is only 70 years old. The relationship between Settlers and First Nations is closer to 500 years old. Placing the Canadian conversation in historical context is therefore a significantly more involved task. For this reason, my analysis of the Canadian context will be somewhat longer than my analysis of the European context.

3.6 Structure

My project will therefore proceed as follows. In Part 1, I will devote one chapter each to exploring the political, legal, and economic practices of pluralism on the parts of Turtle Island⁴⁸ sometimes called Canada (Chapters 1-3). Each chapter will begin with a historical survey, before pulling out some particularly noteworthy practices and discourses for further discussion. Part 1 will conclude with a chapter which attempts to map patterns across the legal, political, and economic fields (Chapter 4). Similarly, in Part 2, I will explore political, legal, and economic practices of pluralism in Europe (Chapters 5-7), and then explore patterns that run through them (Chapter 8). In Part 3, I will compare the practices analyzed in Parts 1 and 2 and explore the ways they challenge, and fail to challenge, the logic of sovereignty (Chapter 9).

⁴⁸The term ‘Turtle Island’ is drawn from the occurrence of the turtle in many Indigenous creation stories, including the Anishinaabe and Haudenosaunee. It is commonly used to refer to North America while implicitly calling into question the European prerogative to name, govern and exploit a land which was already occupied and governed when they arrived. Gary Snyder, “The Rediscovery of Turtle Island,” *Deep Ecology for the 21st Century*, ed. in George Sessions (Boulder: Shambhala, 1995) especially at 11, 12. Note that while Turtle Island refers broadly to the North American continent, I will be referring only to those parts of Turtle Island now known as Canada.

Briefly, the argument will unfold as follows. With respect to Turtle Island (Chapters 1-4), I contend that the practices of pluralism that connect Settler and Indigenous communities were initially quite multilateral, with forms of interpenetrating institutions and conditional authority claims in the political, legal and economic realms preventing any actor from expecting total, exclusive authority. Economic and military interdependence made these institutions reasonably responsive to the needs of all parties. As time went on, however, two important shifts occurred. First, as imperial military competition on the continent ended and the fur trade gave way to an agricultural and then industrial economy, Settler need for their First Nations partners declined dramatically. Second and at the same time, Settler concepts of authority were gradually becoming more deeply influenced by concepts of sovereignty, as Settler governance moved towards the modern state and capitalist-market. As a result of these concurrent shifts, practices of pluralism have gradually transformed as Settlers sought more asymmetrical and unilateral practices, working to incorporate First Nations polities, legalities, and economies into their Settler counterparts. First Nations have both leveraged agency within Settler institutions and continue to enact their own independent political, legal, and economic forms in a prolonged attempt to maintain multilateralism. Contemporary governance is therefore a deeply asymmetrical form of pluralism that is both shaped by, and at some distance from, traditional concepts of sovereignty.

In contrast, the European context (Chapters 5-8) begins from a place of state sovereignty and gradually moves towards more novel conceptions of political community. By gradually working to cultivate political, legal, and economic need between parties, European actors have been able to develop practices that challenge sovereignty to a considerable degree. In particular, European actors have developed interpenetrating political institutions and conditional forms of

legal authority that allow all actors to contest and revise the relationship over time, creating patterns of shared authority that defy a sovereign framework. However, economic practices constitute a coordinated attempt to limit contestation, such that pluralism effectively takes place within an entrenched economic framework. As a result, economic contestation often exceeds institutional channels and creates structural conflict. Economic practices therefore represent an important closure to the otherwise open-ended European multilogue. Overall then, contemporary European pluralism is in some ways quite advanced, but it remains problematically limited in scope.

In both settings, two specific sets of practices seem especially important. First, actors in both settings have developed interpenetrating political structures that allow for co-decision between actors without exhausting the political agency of either party. Thus, both parties retain their own independent claims to legitimate political authority and their own capacity for independent action while nevertheless committing to cooperation. Second, in both settings, actors have developed practices of conditional authority – where each actor recognizes the authority of the other(s) subject to certain fundamental conditions. Once again, this allows each actor to maintain distinct conceptions of political authority and scope for autonomous action while nevertheless facilitating mutual accommodation over time.

Where mutual need prevails between parties and all actors have the ability to contest the structures of cooperation, interpenetrating institutions and conditional forms of authority often model genuine multilateralism. Where need is one-sided or the ability to contest the structure is not well distributed, both practices can be technologies of rule by dominant parties who retain a decisive say.

This connection between mutual need, contestability, and multilateralism helps explain why there appears to be an inverse relationship between concepts of sovereignty and genuine multilateralism. In essence, the concept of sovereignty presents need and contestation as threatening, making us fearful of the very conditions in which pluralism flourishes. To the extent that we embrace institutions based on a logic of sovereignty – institutions like the state and the capitalist-market – we embrace a conceptual scheme that encourages asymmetrical forms of pluralism that always seek to retain a degree of unilateralism and power asymmetry at their core. I therefore conclude that we need institutions which are conceptually based not in sovereignty, but in concepts of interdependence. I identify three particularly promising conceptual resources: traditions of political community that pre-date sovereignty, conceptions of political community which have been built in explicit opposition to state and capitalist-market structures, and forms of ecological community. Because these traditions are based on concepts of interdependence, they provide a logic more conducive to pluralism.

It is my hope that the institutional and conceptual resources these three sites provide can help change the way we think about cases like the *Watch House*, furnishing tools which enable us to explore trans-systemic questions without recourse to arbitrary hierarchies and institutionalized oppression, but which rather allow us to seek justice in a world of persistent plurality.

Part 1: Practices of Pluralism on Turtle Island

As we have noted, the present national and international order is based on the concept of sovereignty. In essence, the system works to prevent destabilizing competition between different forms of social order by separating them into mutually exclusive compartments, such that there are no overlapping claims to sort out.

Despite this foundational role, the practice and theory of sovereignty are currently being challenged⁴⁹. More and more, transnational flows of people, capital, information, and corporate and civic actors are undermining the vision of watertight social units, revealing practices which do not conform to the sovereign frame. Scholars around the world are struggling to modify or transcend the language of sovereignty in describing these arrangements.

One important site where these challenges are playing out is through relations between states and sub-state entities who make their own claims to authority. So-called national minorities and First Nations, who can trace their own authority claims back to a time before modern states existed, pose a particular problem for state sovereignty claims because they re-assert a layered, pluralistic social order. Around the world, sovereign-states are struggling to negotiate these claims, experimenting with new forms of autonomy and confederation and reformulating new accounts of hierarchy and interrelation. Settler states are particularly challenging examples of the dynamic because First Nations often have conceptually distinct forms of political order which are difficult to accommodate within a sovereign frame.

The following four chapters are an attempt to take stock of how First Nations claims are challenging, and being challenged by, state sovereignty in that part of Turtle Island sometimes

⁴⁹ See e.g. *Sovereignty in Transition*, ed. Neil Walker (Portland: Hart Publishing, 2003).

called Canada. They explore political, legal and economic contests between First Nations and Settler peoples in order to understand how sovereignty is transforming and being contested. I begin with the political dimensions of sovereignty, exploring how sovereignty has been asserted and resisted through the treaty relationship (Chapter One). Next, I look to the legal dimensions of sovereignty, exploring how Settler courts understood their relationship to First Nations law, and how First Nations have troubled this understanding (Chapter Two). Third, I examine the economic dimensions of sovereignty, exploring how economic contestation has contributed to the solidification and contestation of sovereignty claims (Chapter Three). Finally, Part 1 will conclude by reflecting on how these contested dimensions of sovereignty connect, what sort of practices they are co-creating, and how they can help us think critically and productively about authority in pluralist contexts more generally (Chapter Four).

To briefly summarize the argument, I contend that political, legal and economic practices in the early phases all suggest a multilateral space characterized by mutual need. Together, the parties developed interpenetrating institutions and conditional forms of authority which allowed them both to contest and revise the relationship over time. As time went on, however, two important shifts occurred. First, the balance of power tilted decidedly in favour of Settlers, undercutting the mutual need that had underwritten the early encounter. Second, concepts of sovereignty gained salience in Settler society and Settler conceptions of authority became more total and exclusive and less amenable to contestation. As a result, political, legal and economic practices began to more closely resemble practices of sovereignty. This led Settler authorities to re-conceive of First Nations not as external actors, but as internal components of the settler polity, economy and legality. First Nations have exercised agency within these Settler structures, but have also continued in political, legal and economic practices which exceed Settler

institutions, thereby signalling continued multilateralism. Ultimately, their persistent advocacy has recreated a degree of mutual need, giving rise to renewed forms of co-decision, now re-imagined as a set of more or less self-imposed limits on Settler action. This practice has allowed Settlers to account for First Nations agency in a manner consistent with the sovereign frame, giving rise to a deeply imbalanced form of multilateralism which both challenges and affirms the sovereign frame in important ways.

Chapters 1-3 proceed historically, giving a brief overview of the political, legal, and economic relationship through time before extracting some central practices and discourses for further reflection. A word of caution is needed in reference to the historical overviews. Each spans most of a continent for some 500 years, and as such is necessarily schematic. There is also a daunting degree of variation across regions, over time, and according to the particular interests, political contexts, and actors involved. Rather than proceeding through strict historical periods then, it is more helpful to think of contact as involving a number of sequential patterns which play out at different times in different regions, subject of course to local variations. Instead of thinking of a contact as an event, Mary Louise Pratt offers the more useful idea of a “contact zone” – a shifting space where patterns of contact occur over time⁵⁰. While allowing for local variation, the concept also stresses how certain general, imperfect patterns seem to hold broadly across contact zones, repeating themselves in different ways and at different times in different places, like variations on a theme. The following chapters therefore move through a series of phases. I have indicated very rough time frames as an aid to readers, but these phases did not occur at the same time or even in the same way across Turtle Island. Indeed, the attentive reader will note that the date-ranges for many periods overlap considerably. The phases are not discreet

⁵⁰ See Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation*, (London: Routledge, 1992) especially at 4.

historical periods, they are simply analytical devices designed to help make sense of the shifting relationship through time, allowing us to map how different dimensions of sovereignty have been developed and resisted over time.

[Chapter One] Political Practices

The political dimensions of the relationship between First Nations⁵¹ and European Settlers is complex, contested, and at times downright contradictory⁵². From the very beginning, it has been marked by coercion and fraud, but also consent, mutual learning and mutual accommodation – often in complex constellations that defy simple binaries. Different traditions of thought and practice have been woven together pragmatically and in ad hoc ways, often reflecting significant variation over time and across space.

Nevertheless, certain broad trends emerge. While imperfect, these phases help us make sense of the encounter, providing a schema against which local differences can be made meaningful. Broadly speaking, treaties can be understood through five successive eras⁵³: the peace and friendship treaties of early contact; the competing commercial and military alliances of the 1700s; the land cession treaties following the war of 1812; the domestic policy treaties and assimilatory legislation of the post-confederation period; and the modern treaties following the patriation of the Canadian constitution⁵⁴.

⁵¹ The Indigenous Peoples of Canada include Inuit and Metis populations alongside First Nations. For reasons of scope, however, the following chapters will focus only on the latter. See *Supra* note 20.

⁵² As the Royal Commission on Aboriginal Peoples puts it: “Relations between the British colonies and aboriginal peoples were complex and diverse, with strong elements of contradiction and paradox that often defy understanding even today” Canada, Georges Erasmus, and René Dussault. *Report of the Royal Commission on Aboriginal Peoples - Volume 1: Looking Forward, Looking Back* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 107.

⁵³ Once again, I must stress that the phases discussed here did not occur at the same time or in the same way across Turtle Island. Indeed, the attentive reader will note that the date-ranges for many periods overlap considerably. The phases are not discrete historical periods, they are simply analytical devices designed to help make sense of the shifting relationships through time.

⁵⁴ J.R. Miller’s influential division uses four phases: commercial compacts, peace and friendship treaties, territorial treaties, and modern treaties. The seminal Royal Commission on Aboriginal Peoples (RCAP) also uses four phases: Separate Worlds, Contact and Co-operation, Displacement and Assimilation, and Negotiation and Renewal. These map fairly well onto Miller’s divisions. See J.R. Miller, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 1989); Canada, *Royal Commission*. I have chosen to break the territorial phase in two because, from the point of view of sovereignty, the domestication of the treaty process and the consolidation of legislation following confederation are particularly significant. On the significance of the domestication of treaties see Joshua Nichols, “Sui Generis Sovereignities: The Relationship between Treaty Interpretation and Canadian Sovereignty,”

In the early phases, a high degree of mutual need prevailed between the parties, and trans-systemic relations were characterized by multiple overlapping but independent political authority claims which were coordinated through practices of conditional acceptance, and through shared or interpenetrating decision-making structures. Together, these practices allowed both sides to contest and revise their relationship over time. As the relationship moved through various phases, however, two important shifts occurred. First, Settlers became physically dominant and their need for multilateralism declined. Second, Settler conceptions of political authority became more total and exclusive. As a result, Settler authorities began to move away from shared structures that coordinated independent political claims, seeking instead to re-imagine First Nations as components of the Settler polity. First Nations have leveraged their position within the Settler polity strategically, and have also persisted in forms of political agency that exceed Settler institutions. In so doing, they have worked to re-create a degree of mutual need and thereby establish shared institutions and practises of co-decision. The result is a sort of constrained unilateralism, where First Nations' advocacy forces concessions from Settler institutions, and where Settler institutions understand those concessions as something closer to auto-limitation than to nation-to-nation multilateralism.

Overall, this story reflects the growing influence of the centralized, bounded and unitary forms of political authority associated with the sovereign-state, and a parallel decline in multilateral institutions⁵⁵. We might therefore describe the process as the sovereignization of First Nations-Settler relations. Importantly, this process is both incomplete and ongoing. It has

Reflections on Canada's Past, Present and Future in International Law, eds. Oonagh Fitzgerald, Valerie Hughes, and Mark Jewett (Waterloo: CIGI Press, 2018).

⁵⁵ For complementary discussions of this transition see e.g. John Borrows, "Canada's Colonial Constitution," in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, eds. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017); Joshua Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2019).

been, and continues to be, aggressively contested by First Nations and by heterodox forces within Settler society, as they fight to preserve spaces of multilateralism. The following chapter will explore this sovereignization process. Section 1 attempts to trace the relationship between First Nations and Settler polities from its inception through five successive phases: peace and friendship, military alliance, land cession, assimilation, and recognition. Section 2 explores some of the major and enduring practices through which the relationship has been managed and transformed. Section 3 discusses the discourses that arise from the relationship. Finally, Section 4 provides an illustrative case study through the example of the Kunst'aa Guu - Kunst'aayah Reconciliation Protocol. Section 5 offers some preliminary analysis.

1 Five Phases of Interrelation

1.1 The Middle Ground: Contact and the “Peace-and-Friendship” Treaties (Contact - ~1700)

Early agreements and treaties, generally known as “peace and friendship” treaties, were primarily military and economic. Though they often contained sweeping claims of European sovereignty, “Aboriginal people did not infer or accept a relationship of domination, nor did the Europeans, in practice, try to impose one”⁵⁶. Rather, treaties served to coordinate independent but overlapping authority claims, particularly through the establishment of shared or interpenetrating political institutions, like treaty councils, and through the conditional acceptance of one another’s autonomy, as treaties laid out acceptable parameters for autonomous action.

For example, Settler officials solemnly took part in First Nations ceremonies, engaged in traditional gift exchanges, and took on First Nations names and kin relations⁵⁷. In all these ways,

⁵⁶ Canada, *Royal Commission* at 120.

⁵⁷ See e.g. Miller, *Skyscrapers* at 37.

First Nations drew Settler officials into their political structures, offering them a voice within their system of kin-based, clan-based, and locality-based authority structures. Similarly, Settlers offered First Nations medals, uniforms, and titles within their own political and military institutions, seeking to bring First Nations into the network of Settler authority structures as well⁵⁸. Together, these mutual incorporations allowed Settler and First Nations political systems to interpenetrate, providing the rough conceptual and political resources for coordinated decisions. Through this interpenetration, First Nations and Settler peoples established a sort of middle ground – an imperfectly shared political space managed primarily through ad hoc treaty councils and emergent norms which drew on both Settler and First Nations diplomatic traditions and forms⁵⁹.

Treaties could also lay out a series of conditions on which cooperation hinged. For example, European powers often asked First Nations not to trade or ally militarily with any other colonial powers. First Nations often insisted they be able to hunt, fish, and harvest in Settler-occupied zones, or required regular gifts to reaffirm relations. Provided both sides lived up to conditions like these, neither would need to interfere in the autonomy of its partner.

In this sense, Peace and Friendship treaties were not designed to divide territory or establish hierarchy, but to facilitate coordination. Multiple, overlapping authority claims were the norm, as they were within both First Nations and Settler societies at the time⁶⁰. Mutual need incentivized the parties to coordinate those claims through interpenetrating authority structures. Even early treaties, however, often have a Janus-faced character. From the beginning, treaties

⁵⁸ Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 2010) at 179.

⁵⁹ White, *Middle Ground* especially the Introduction.

⁶⁰ John Darwin, *The Empire Project: The Rise and Fall of the British World-System, 1830-1970* (Cambridge: Cambridge University Press, 2011) at 3.

frequently contained sweeping claims of Settler sovereignty or dominance which were either not properly explained to their First Nations signatories or else carefully finessed⁶¹. These grand statements were not meant to reflect reality on the ground, but rather to buttress claims against rival colonizers⁶². Still, they preview an odd mixture of oppression and negotiation which would prove an enduring feature of the treaty order.

1.2 The Battle Ground: Military and Commercial Competition (~1630- ~1763⁶³)

As the fur trade grew, two competing commercial and military alliances emerged, with the French, Huron and Algonquin peoples in the northern Maritimes and St. Lawrence valley, and the Dutch and later British along with their allies the Haudenosaunee to the south⁶⁴.

Just as First Nations and Settler peoples had incorporated one another into their domestic political structures, so too they become more deeply embroiled in one another's geopolitics. Dutch, English and French authorities used the fur trade as an extension of their longstanding conflicts in Europe, and First Nations drew Europeans into their own longstanding conflicts in the eastern woodlands⁶⁵. During this period, it is difficult to speak of the relationship in simple cross-cultural terms, as an encounter between Settlers and First Nations. Neither side self-identified as a cultural unit⁶⁶. Rather, cross-cultural blocks were the operative unit of competition.

⁶¹ See e.g. Harald Prins, *Storm Clouds Over Wabanakiak: Confederacy Diplomacy Until Dummer's Treaty (1727)* (Amherst: The Atlantic Policy Congress of First Nations Chiefs, 1999) at 12; or more generally, Canada, *Royal Commission* Part 1, Chapter 5 – Contact and Cooperation.

⁶² See David E. Wilkins, and Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2002) especially at 19-63.

⁶³ The period runs roughly until the fall of New France. The commencement of major commercial-military conflict varies widely.

⁶⁴ Miller, *Skyscrapers* at 51.

⁶⁵ Prins, *Storm Clouds* at 6.

⁶⁶ Robert Nichols, *Theft Is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2019) especially Chapter 3.

Conceptions of hierarchy throughout this period reflect its competitive, militaristic orientation, with the relative position of each party largely tied to military prowess and commercial importance. For example, the powerful Haudenosaunee refused to position themselves as children to the British; but when their position worsened, they accepted the French King as their father⁶⁷. When they thought the Wabanaki weak, they offered to be their father⁶⁸. After a series of military defeats, they joined hands as brothers instead⁶⁹. Similarly, several New England colonies recognized legal differences between allied and tributary tribes depending largely on their war-making capacities⁷⁰. Indeed, nations on all sides were keenly aware of this, and engaged in a balance of power politics designed to maintain their own strategic importance⁷¹.

Multilateral institutions and co-decision processes therefore remained prominent – at least where diplomatic, military, and commercial need between partners was high. Where the balance of power was more asymmetrical, so too were the processes of co-decision.

Miller argues that relationships to land and exclusivity were becoming a major driver of geopolitics during this period⁷². While the French maintained an extensive trade network that stretched far into the interior, they did not undertake extensive agriculture. As a result, they had less need for unilateral control over land than the British, whose agricultural economy depended more heavily on exclusive possession and use. As a result, the French developed a stronger set of shared institutions – what White calls the “infrastructure” of the Middle Ground, while the

⁶⁷ Jon William Parmenter, “Pontiac's War: Forging New Links in the Anglo-Iroquois Covenant Chain, 1758-1766,” *Ethnohistory* 44, no.4 (1997) at 619.

⁶⁸ Prins, *Storm Clouds* at 7.

⁶⁹ Prins, *Storm Clouds* at 7.

⁷⁰ Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples,” *Osgoode Hall Law Journal* 33, no.4. (1995) at 643.

⁷¹ Saliha Belmessous ed., *Empire by Treaty: Negotiating European Expansion, 1600-1900* (Oxford: Oxford University Press, 2014) at 11.

⁷² Miller, *Skyscrapers* especially Chapter 4.

British remained more physically and politically distant⁷³. In other words – the French had greater need of their allies, and this generated more sophisticated multilateralism. Miller contends that First Nations largely preferred the French style, and allied themselves accordingly⁷⁴. Nevertheless, British naval dominance and Houenshaune victories eventually led to the fall of New France, signalling a new phase of relations where territorial exclusivity would feature more prominently.

For Settlers and First Nations alike, then, this was an era where exclusive and overlapping conceptions of territoriality co-existed, as did more and less asymmetrical political relationships. Both spectrums turned more on the character of the geopolitical relationship and the presence of mutual need than on cultural identity. Interpenetrating institutions and treaty conditions remained prevalent within each block, though they were more entrenched among the French than the British.

1.3 The Divided Ground: British Dominance, the Royal Proclamation and Treaties of Land Secession (~1763- ~1850⁷⁵)

The fall of New France and its allies to the British and their allies marked the beginning of a major shift. Without military and economic competition between colonial powers creating two cross-cultural blocks, relations took on a decidedly more inter-cultural character. They also became considerably more asymmetrical, with military, commercial and demographic balances shifting dramatically. At the same time, the ascendancy of the British, with their more exclusive,

⁷³ White, *Middle Ground* especially at 248, 309-310, 312. Miller discusses in particular how the French used gifts and mediation to draw themselves into local First Nations' political systems.

⁷⁴ Miller, *Skyscrapers* especially at 67-70, 76-78.

⁷⁵ This range runs roughly from the fall of New France to the Robinson-Huron Treaties, which mark the transition towards the post-confederation treaty model.

agricultural land-use and proto-capitalist conceptions of land ownership signalled the ascendancy of a more unitary, territorially bounded, and exclusive conception of political authority.

The shift towards exclusive and unilateral understandings of political authority was not even or consistent. When the British entered into treaties with France's erstwhile allies, it sought to position British courts as the unilateral arbiters of disputes, instead of playing a mediating role like the French⁷⁶. Yet, at the same time, British Indian policy was being centralized in an effort to recreate the network of French Chiefs that had served the French so well⁷⁷. Similarly, British General Thomas Gage ordered germ warfare and military expeditions, producing treaties that were essentially terms of surrender⁷⁸. Superintendent of Indian Affairs William Johnson, however, rejected these treaties precisely on the grounds that "some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles"⁷⁹. Thus, increasingly hierarchical and exclusive conceptions of authority continued to co-exist with more layered conceptions, but the balance of power was shifting such that the former could now be more assertively pursued.

For example, the treaty of Paris, which ended French-English competition on Turtle Island, is notable in comparison to its predecessors for its focus on firm territorial boundaries and the centralization of formerly overlapping authority structures and legal statuses⁸⁰. Likewise, the Royal Proclamation, which laid out Britain's post-conquest Indian policy, explicitly divides the continent into Settler and First Nations zones⁸¹. Instead of a system where multiple overlapping

⁷⁶ White, *Middle Ground* at 343.

⁷⁷ White, *Middle Ground* at 312.

⁷⁸ Parmenter, "Pontiac's War" at 634.

⁷⁹ Jeremy Patzer, *Histories that Bind: Doctrinal Productivity and Legal Governance in Canadian Aboriginal Law* (PhD. Diss., Carleton University, 2016) at 63

⁸⁰ Robert Hamilton, *Sovereignty, Terra Nullius, Crown Lands, and Indian Reserves* (PhD. Diss., University of Victoria, 2016) at 81.

⁸¹ For discussion see Alan Taylor, *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution* (New York: Knopf, 2006) at 40-41.

authority claims are coordinated through shared institutions, the text of the Proclamation suggests territorially discrete zones of authority. A Proclamation is also unilateral in nature, rather than negotiated. Even if the Proclamation was intended by its imperial authors to be unilateral, however, Johnson undertook concerted efforts to gain consent for its terms and to express them in the relational terms of his negotiating partners, convening perhaps the largest treaty gathering ever held in the area, exchanging gifts, and recording the agreement in Wampum in an attempt to maintain shared political institutions⁸².

In practice, the Proclamation system blends exclusive and shared conceptions of authority such that Settler authority is exclusive while Indigenous authority is not. The Proclamation split the continent into British and Indigenous zones, each with its own boundaries, and required Settler authorities to purchase or treat for any new land before occupying it⁸³. However, the document also proclaimed First Nations people to be under British protection and sovereignty. As such, the Proclamation extended certain rules and restrictions even over “Indian lands” and British authorities continued to claim jurisdiction over Settlers who committed crimes there⁸⁴. In a sense, authority was exclusive within the Settler zone in that it largely excluded competing First Nations institutions, but beyond the Settler zone First Nations authority continued to be viewed as non-exclusive of overlapping Settler claims.⁸⁵ First Nations beyond British borders

⁸² *Royal Proclamation*, 1763, RSC, 1985, App II, No 1.

⁸³ It also forbade private parties from purchasing land from First Nations, ensuring that all such transactions were undertaken by the Crown. While ostensibly intended to protect First Nations from sharp dealing by local officials, this provision also solidifies the nascent state’s monopoly on foreign relations and curtails the external sovereignty of First Nations. *Royal Proclamation*.

⁸⁴ John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997) at 4.

⁸⁵ In part, the proclamation represents a solidification of existing colonial ambiguities, reflecting both the international status of First Nations, here cast in the European mold of territorially discrete units, and also their supposed pre-sovereign status, captured by their presumed subordination even within those territories and their inability to alienate said territory to anyone but the Crown. For a complimentary discussion see Borrows, “Wampum” at 4.

were thereby positioned as holding a sort of diminished sovereignty, free to do anything but engage in foreign alliance, trade, or land cession, while those within British borders were increasingly seen as having little sovereignty at all. In this sense, the relationship was not only becoming increasingly territorialized, but also increasingly hierarchical. Settlers were by no means sovereign, but the ability to participate in final decisions was certainly becoming lopsided.

Where kin relations between Settler and First Nations institutions had once varied according to local power relations, now treaties contained boiler-plate language positioning the British as parents and every First Nations group as children, standardizing the cross-cultural relationship⁸⁶. To the British, differences between nations became less salient⁸⁷. Rather than dealing with First Nations one-on-one or in their self-organized confederacies, for example, the British began identifying parcels of land they desired, and then gathering all affected nations and insisting on treating with them collectively, even when this cut across traditional diplomatic lines⁸⁸. Conversely, when one group, or even a portion thereof, was willing to treat, British diplomats were happy to recognize whatever political units were most accommodating, again with scant reference to traditional political structures.⁸⁹ In all these ways, treaties became a means by which authority claims were more territorialized, hierarchical, consistent and racialized. More and more, the relationship was informed by the unilateralism inherent in the sovereign frame.

⁸⁶ There are interesting parallels in the treatment of French Canadians and First Nations. Like attitudes towards First Nations, attitudes towards the habitants were conflicted, with British policy oscillating between assimilation and the forcible introduction of British norms, on the one hand, and the accommodation of existing local practices on the other. Ultimately, the choice was pragmatic, with imperial officials opting for limited accommodation, but only as a means of securing their own internal control. See Tully, *Strange Multiplicity* at 158-163.

⁸⁷ Indeed, the Proclamation asserted British sovereignty even over those nations with whom it had never treated.

⁸⁸ Sebastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 358-360.

⁸⁹ Alan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge: Cambridge University Press, 2018) at 228.

First Nations contested these shifts, frequently insisting that treaties did not actually cede land nor establish a hierarchical relationship⁹⁰, such that the political environment still required negotiation between multiple, overlapping authority claims. The Treaty of Paris provides an excellent example. When French and English negotiators settled their political claims to Turtle Island without any First Nations involvement, First Nations outrage forced the British to violate their own peace terms, hanging onto fort Detroit for years after having ceded it and abandoning the fort only once arrangements had been made with local allies⁹¹. In this sense, the increasingly unilateral cast of the relationship was partial, contested, and incomplete, as Indigenous peoples worked to preserve forms of multilateral coordination.

1.4 Uneven Ground: Post-Confederation Treaties and Assimilation (~1850- ~1982⁹²)

The next major shift in the treaty relationship came when the imperial dominions of British North America confederated into the new Canadian state, largely because this process solidified the transition in responsibility for the relationship with First Nations from imperial military authorities to colonial civil authorities.

With the Royal Proclamation asserting both title and sovereignty over First Nations land whether it was treated for or not, a secure military position, and a new civilian administration, the British began to see First Nations increasingly as domestic subjects rather than international

⁹⁰ At Niagara, Anishinaabe chief Minavavana asserted, “Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves.” “These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance, and we will part with them to no one” Joseph Bauerkemper and Heidi Kiiwetinepinesiik Stark, “The Trans/National Terrain of Anishinaabe Law and Diplomacy,” *Journal of Transnational American Studies* 4, no.1 (2012) at 27.

⁹¹ Alan Taylor, “The Divided Ground: Upper Canada, New York, and the Iroquois Six Nations, 1783-1815,” *Journal of the Early Republic* 22, no.1 (2002) at 58.

⁹² This period runs roughly from the Robinson-Huron Treaties to 1969 the White Paper on Indian Policy.

allies⁹³. As such, Settler officials began to view treaties increasingly as deeds of sale whose implications were more proprietary than political. More and more, the terms of the political relationship were set by unilateral legislation, instead of and alongside treaty. In particular, extensive legislation was passed to a) criminalize First Nations political institutions and introduce western counterparts, and b) confine First Nations to reserves⁹⁴.

Indeed, extensive efforts were made to enfranchise First Nations as citizens of the colony – and hence, no longer First Nations in a political sense⁹⁵. Colonial official also began regulating band membership, introducing a regressive set of rules designed to gradually diminish and even eliminate so-called “status Indians” as a political category⁹⁶. This increasingly intrusive social engineering was characteristic of an emerging governmentality within western states more generally, as sovereignty came to be understood in terms of absolute control⁹⁷.

Colonial officials also began regulating the movement of First Nations and confining them to reserves⁹⁸. Efforts were made to encourage individual ownership of reserve lands, and to encourage First Nations individuals to acquire lands in fee simple. Settler authorities also began

⁹³ Miller, *Skyscrapers* at 93. For an excellent discussion of how this line between international and domestic subject has been policed and blurred in practice, see Nicholls, “Sui Generis Sovereignities”.

⁹⁴ Miller, *Skyscrapers* at 193.

⁹⁵ Miller, *Skyscrapers* at 110-114.

⁹⁶ Miller, *Skyscrapers* at 188.

⁹⁷ Indeed, British authorities were also subjecting their domestic population to ever more detailed and intrusive forms of social regulation. Both internally and externally, political conceptions of sovereignty as bounded, centralized state authority were being recreated at the level of the local community, the family, and the individual. In both domestic populations and First Nations communities, for example, legislation worked to create bounded, nuclear families and to centralize power within those families in the male head of household. The patriarchal, nuclear family unit mirrors the image of the state itself, and indeed, was promoted on exactly these grounds. See Michael Braddick, *State Formation in Early Modern England, C.1550-1700* (Cambridge: Cambridge University Press, 2000) especially at 101; Sarah Hanley, “Engendering the State: Family Formation and State Building in Early Modern France,” *French Historical Studies* 16, no.1 (1989). Mechanisms of control were pursued particularly aggressively and coercively on First Nations communities. Indeed, the final report of the Royal Commission on Aboriginal Peoples notes that the Indian Act makes “Indian people subject to penalties and prohibitions that would have been ruled illegal and unconstitutional if they had been applied to anyone else in Canada.” Canada, *Royal Commission* at 236. Nicholls calls the relationship one of “administrative despotism.” Joshua Nichols, *Reconciliation and the Foundations of Aboriginal Law in Canada* (PhD. Diss., University of Victoria, 2016), for discussion see especially note 88.

⁹⁸ Miller, *Skyscrapers* at 192.

unilaterally regulating and curtailing the treaty right to hunt, fish, travel, and pursue a traditional livelihood off reserve⁹⁹. When First Nations insisted on the terms of their treaties, Settler authorities replied that treaties were nothing but the unilateral intentions of the Crown, and thus could be ignored at will¹⁰⁰.

Together, these shifts away from treaty as a trans-systemic practice and towards unilateral legislation, the imposition of Settler forms, and the criminalization of First Nations forms show an attempt to re-understand First Nations polities as subordinate parts of a larger Settler system. Where First Nations and Settler authority was once overlapping and coordinated through treaty, now they were hierarchically arranged and defined unilaterally through legislation. Where there were once multiple sovereigns in interaction, now Settlers saw a single sovereign and its subjects.

This period, perhaps the zenith of traditional state sovereignty, was therefore deeply oppressive and violent towards First Nations. Oppression was, however, contested on all sides. For example, Asch has persuasively argued that Lord Dufferin, then Governor General of Canada, and his chief treaty negotiator Alexander Morris recognized First Nations sovereignty and expected the so-called “numbered treaties” they negotiated to be seen as binding multilateral documents¹⁰¹. In 1876, Dufferin admonished the government of B.C. for its failure to conclude treaties in the interior, saying “before we touch an acre we make a treaty...not until then do we consider that we are entitled to deal with a single acre”¹⁰².

⁹⁹ Yanna Promislow, “Treaties in History and Law,” *University of British Columbia Law Review* 47, no.3 (2014) at 1146.

¹⁰⁰ Promislow, “Treaties” at 1146-1147.

¹⁰¹ Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 164.

¹⁰² Asch, *On Being Here to Stay* at 8.

First Nations also contested the shift towards domestic subject status, consistently centering a nation-to-nation vision which continued to recognize multiple non-derivative authority sites. In 1876, 33 Haudenosaunee Chiefs wrote to the Superintendent of Indian Affairs stating that “we are not subjects but we are allies to the British government” and insisting that they would follow their own leaders and laws, not those of the British¹⁰³. Similarly, when plains Cree and Metis leaders felt their authority claims were not being taken seriously, they began a series of rebellions designed to force Canada to negotiate bringing Manitoba into the federation as a recognized jurisdiction, thereby reasserting a form of layered multilateralism where First Nations authorities were neither derived from, nor exclusive of, Settler claims¹⁰⁴. On the west coast, the Nisga’a, Gitksan and Tsilhqot’in were all using warfare or direct action as means to force Settler governments to back away from their unilateral claims, recognize overlapping First Nations authority, and enter into treaties¹⁰⁵. Thus, the exclusive conceptions of authority that worked to incorporate First Nations polities as subordinate components of the Settler system were subject to continual contestation.

1.5 Grounds for Recognition: The Constitution Act 1982 and the Modern Treaty Process (1969-Present)

This conception of Settler sovereignty as exclusive of and hierarchically above First Nations authority reached a symbolic high-water mark, and underwent another transformation, with Pierre Trudeau’s now infamous 1969 White Paper on Indian policy and the subsequent resistance

¹⁰³ John Borrows and Leonard Rotman, *Aboriginal Legal Issues - Cases, Materials and Commentary, 4th Edition* (New York: LexisNexis, 2012) at 36.

¹⁰⁴ For discussion of the events leading up to the formation of Manitoba see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 109.

¹⁰⁵ John Lutz, *Makuk* (Vancouver: UBC Press, 2009) especially chapter 5. For an excellent example see Robert Galois, “The History of the Upper Skeena,” *Native Studies Review* 9 no.2. (1993).

to it. This document proposed eliminating the legal and political status of First Nations entirely, recognizing instead a common, undifferentiated citizenship for all Canadians¹⁰⁶. Once again, the perfection of this assimilatory logic coincides with the perfection of Canada's own status as a sovereign-state¹⁰⁷, coming as Canada made a series of attempts to repatriate its constitution from Great Britain – participating in a wider process whereby the last vestiges of the old empires disintegrated definitively into a series modern, centralized, bounded nation-states around the world.

The White Paper catalyzed a prolific political response. First Nations political action not only forced the government to withdraw its proposal, but eventually saw the same government enshrine collective First Nations rights in section 35 of the newly repatriated constitution in 1982¹⁰⁸. When the subsequent Meech Lake Accord failed to recognize a right to self-government, Indigenous groups mobilized, helped kill the accord, and then successfully inserted self-government into the subsequent Charlottetown Accord, though this failed to achieve ratification for other reasons¹⁰⁹. Similarly, direct action in Northern Quebec birthed the first modern treaty in 1975¹¹⁰, while blockades across British Columbia – including the largest acts of civil disobedience in Canadian history at Clayoquot Sound – helped prompt the BC Treaty Process¹¹¹. Occupations, blockades, and direct actions across the country – famously including an armed standoff at Oka – further resulted in a Royal Commission to study Crown-First Nations relations in 1991¹¹². In all these ways, First Nations assertions of persisting political authority

¹⁰⁶ For extended discussion see Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1969).

¹⁰⁷ The RCAP refers to repatriation as “completing the evolution of Canada as a self-governing nation”. Canada, *Royal Commission*, at 235.

¹⁰⁸ Borrows, *Freedom and Indigenous Constitutionalism* at 115-129.

¹⁰⁹ Borrows, *Freedom and Indigenous Constitutionalism* at 124.

¹¹⁰ Borrows, *Freedom and Indigenous Constitutionalism* at 63.

¹¹¹ Ben Isitt, *Patterns of Protest: Property, Social Movements, and the Law in British Columbia* (PhD. Diss., University of Victoria, 2018) at 67, 207.

¹¹² Borrows, *Freedom and Indigenous Constitutionalism* at 77.

forced concessions in Settler unilateralism, carving out a degree of continued space for the shared decision-making structures and negotiated autonomy typical of the early encounter.

These concessions have helped re-open space for the coexistence of First Nations and Settler political claims. The space they offer is, however, a subordinate space within the Settler system. For example, S35 recognizes aboriginal rights, but these can be overridden by the state in colonial courts¹¹³. Similarly, Aboriginal Title holds out the promise of territorial control, subject to the overarching authority of Settler governments at all levels¹¹⁴. The Modern Treaty process offers limited self-government, but First Nations jurisdiction is subject not only to the Charter of Rights and Freedoms but to the paramount jurisdiction of provincial and federal governments and courts¹¹⁵. In all these ways, the recognition of First Nations political agency is simultaneously a mechanism for positioning First Nations as a subordinate part of the Settler polity¹¹⁶.

Although these concessions are largely attributable to the stubborn persistence of First Nations political advocacy, they are enacted unilaterally through Settler institutions. The Settler government is limited by the Settler constitution, as well as common law and legislation as read by Settler courts¹¹⁷. The shared judicial and political institutions of earlier eras do not figure strongly into the aboriginal rights paradigm. In this sense, aboriginal rights represent a sort of auto-limitation¹¹⁸, working to quietly reaffirm an exclusive conception of Settler authority even

¹¹³ *R. v. Sparrow*, [1990] 1 SCR 1075, [1990] 70 DLR (4th) 385 at 1119.

¹¹⁴ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 extends this power to the provinces at 102.

¹¹⁵ Like the Royal Proclamation, the modern treaty process recognizes asymmetrical authority claims – Settler authority is exclusive in Settler zones, but First Nations authority is not exclusive in First Nations zones.

¹¹⁶ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 2008) at 154.

¹¹⁷ While it is true that Aboriginal rights and treaties are understood by the courts as inter-societal documents that cannot be understood purely in reference to the Settler legality, it nevertheless remains true that Settler courts interpret the existence and content of this inter-societal law unilaterally.

¹¹⁸ “The conditions imposed on any attempt to infringe or extinguish Indigenous rights in *Delgamuukw v. British Columbia* (requiring at least consultation, often some form of compensation or adaptation, perhaps even full

as they offer tangible benefits for many First Nations. In the modern era, Settler approaches are therefore characterized by what Coulthard has termed the politics of recognition – limited forms of political recognition which are simultaneously forms of political unilateralism¹¹⁹.

Several First Nations have used this process to gain greater autonomy within the Settler polity. Others have been advocating a “turn away” from the discourse of recognition, and more generally from state mechanisms for redress, focusing instead on building their own communities, institutions, and *de facto* autonomy outside of the Settler frame¹²⁰.

The modern era therefore extends the reconceptualization of the First Nations-Settler relationship from one defined by multiple distinct but interpenetrating authority claims to one defined by a single authority claim, albeit constrained by self-imposed limitations. Settler authorities continue to assert their will more or less unilaterally, and First Nations continue to enact forms of autonomy that force more multilateral solutions on the ground. To the extent that the system has moved away from a monist conception of legal order, it has blunted many of the most oppressive practices of previous eras in meaningful ways. To the extent that unilateralism continues to underlie these accommodations, they remain deeply colonial. Ultimately, the Janus-faced character of the politics of recognition, offering empowerment and subordination at once, continues a long trend of ambiguous arrangements which blend subjection and consent together.

1.6 Summary

Indigenous consent in some circumstances) represent an auto-limitation, by the Canadian legal order, on its exercise of Sovereignty I [sovereignty as final decision making power]”. Webber, “Age of Encounter” at 78. Though Webber argues that these auto-limitations cause sovereignty as final decision-making power to recede into the background. I see autolimitation precisely as an alternative to multilateralism, one which allows competing claims to be taken into account without challenging the logic of sovereignty.

¹¹⁹ Glen Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minnesota Press, 2014).

¹²⁰ See Glen Coulthard discussing ‘the turn away’ in the thought of Taiaiake Alfred and Leanne Simpson, Coulthard, *Red Skin* at 154-155.

The political relationship between First Nations and Settler communities has therefore reflected a contested and shifting conceptual basis. From the beginning, the relationship shows elements of force and domination alongside aspects of consent and accommodation.

In the early stages, Settler and First Nations political authority overlapped and interpenetrated while remaining distinct. Despite the sweeping claims treaties sometimes contained, mutual need prevailed between the parties, so treaties worked primarily as an ongoing means to contest and revise a broad political relationship. Forms of co-decision and conditional autonomy were the norm. As time went on, however, Settler conceptions of authority became more unilateral. At the same time, war, disease, dispossession and immigration made Settlers physically dominant. As a result of these two trends, Settlers began imposing increasingly exclusive forms of authority. Gradually, treaties came to reflect a logic of territorial division, showing an ongoing recognition of First Nations authority while at the same time denying First Nations polities the sort of exclusive authority Settlers claimed in their own zones. Eventually, the territorial claims of Settler polities became too ambitious to rely on a logic of separation. Instead, exclusive concepts of authority manifested themselves through practices of incorporation and subordination which sought to re-imagine First Nations polities as subordinate but distinct components of the Settler polity. Treaties were largely replaced with unilateral legislation. Recently, naked unilateralism has become untenable and Settler authorities have returned to the treaty process, now re-imagined as a means to incorporate First Nations into the Settler federation. Unilateral legislation and treaty negotiation exist side by side today, showing again a pragmatic mix of recognizing and limiting First Nations political authority at the same time.

In short, Settler authorities used a contradictory mixture of force, fraud and immigration, on the one hand, and treaty, negotiation, and diplomacy on the other to gradually make themselves physically dominant. At the same time, Settler societies transitioned from polyarchic empires to nation-states, and their conceptions of political order became increasingly centered around sovereign, bounded, centralized authority. As a consequence of these concurrent trends, the cluster of norms and practices which define the political relationship between Settler and First Nations has increasingly come to orbit around the logic of state sovereignty. This process, aggressive but always incomplete, continues today.

Throughout this process, First Nations have made pragmatic use of the opportunities that incorporation presented while also centering an alternative understanding of the relationship as a distinctly inter-polity one that eschews both hard territorial divisions and hierarchical relationships and favours a return to co-decision. The overall relationship is therefore marked by competing conceptions – not only of who has authority, but also of how authority works.

2. Practices of Note

Now that we have traced the basic contours of the First Nations-Settler political relationship, we are in a position to review a few of the primary practices through which the political dimensions of sovereignty are managed and contested today. The following section therefore explores modern treaties, non-treaty practices, and legislative practices. Each form has its own specificities and eccentricities, yet all partake in the logic of the most recent phase of the relationship: the recognition of First Nations polities and their simultaneous incorporation into, and subordination to, broader Settler structures.

2.1 Modern Treaties

Modern treaties can be understood as a response to the legal, political and economic uncertainty created by persistent First Nations activism, and by the Settler judiciary's acknowledgement of aboriginal title¹²¹. In essence, the treaties provide a mechanism to exchange potentially expansive but ill-defined aboriginal title for more tightly defined treaty rights. Fundamentally, this involves an agreement by the First Nation in question to "cede and surrender" or "release"¹²² any and all aboriginal title and rights for all time. In exchange, the Nation typically receives ownership of a portion of the land claimed, a cash settlement, various degrees of self-government, and participation in a number of co-management bodies particularly relating to wildlife, hunting, fishing, and environmental protection¹²³.

There are important variations between Modern Treaties. Where settler populations are small and land is readily available, Modern Treaties have been more robust. For example, the creation of Nunavut has created an Inuit-dominated Public government with all the powers of a Settler Territory¹²⁴. In urban settings like Tsawwassen, robust self-government and land bases are considerably more difficult to achieve and powers can be more municipal. This spatial

¹²¹ Paul Rynard, "'Welcome In, but Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada," *Canadian Journal of Political Science* 33, no.2 (2000); Andrew Woolford, "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process," *Canadian Journal of Sociology* 29, no.1 (2004) at 112.

¹²²Originally the Crown insisted that aboriginal rights be "extinguished" or "surrendered" as a consequence of any modern treaty. Indigenous peoples resisted, and the Crown changed strategy. Now, existing rights are "released" or "modified" into new, tightly defined treaty rights. The effect is, however, largely the same. Even the government's own reports note this. See e.g. Douglas Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Indigenous and Northern Affairs Canada, 2015).

¹²³ Hamar Foster, Heather Raven, and Jeremy Webber eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) at 17.

¹²⁴ It is interesting to note that Territories are creatures of federal statute, exercising autonomous but delegated powers. In this sense, Territories stand in relation to the Federal government in much the same way that municipalities stand in relation to Provincial governments – as autonomous but subordinate organs of a higher power. Conceptually, Territories are something akin to Federal municipalities, making similarly derivative authority claims. In practice, however, the range of powers exercised by Territories is much broader than that possessed by municipalities, more closely resembling the authority of a Province.

variation is consistent with longstanding historical trends. Nevertheless, certain broad patterns can be traced from the first Modern Treaty in James Bay through the latest Treaties in B.C.

Typically, claimed lands are split into a number of categories, usually including a relatively small percentage which the nation receives in something like fee simple¹²⁵, a comparatively much larger portion which becomes Crown land, and other portions which become Crown land subject to certain special rights¹²⁶. Thus, treaties work to take vast areas of overlapping Crown and Aboriginal title, and convert them into Crown zones, First Nations zones, and zones where overlapping rights persist. In so doing, they both participate in and contradict an ongoing process where authority over land is becoming more exclusive.

The governance powers accorded to First Nations vary by treaty¹²⁷. A general rule is that matters considered primarily internal – language or education, for example – are within the

¹²⁵ To take an illustrative range, *the Nisga'a Final Agreement* (Sections 48, 62); *The Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Sections 19.1.2, 23.2.1), and *Tsawwassen Final Agreement* (Section 14) all use the term “fee simple”. *The James Bay Northern Quebec Agreement* does not, though Quebec is a civil law jurisdiction and fee simple is a common law concept. Instead, Quebec retains “bare ownership” of Category 1A lands which are “set aside for the exclusive use and benefit of respective James Bay Cree Bands” (Section 5.1.2). For Category 1B lands “The ownership of such lands, under provincial jurisdiction, will vest in such Cree corporations outright, provided that the lands can only be sold or ceded to Quebec”. (Section 5.1.3). See Grand Council of the Crees of Quebec, Northern Quebec Inuit Association, Hyrdo Quebec, Quebec, and Canada, *The James Bay and Northern Québec Agreement* (Ottawa: Indian and Northern Affairs, 1976) accessed Nov.11, 2019 <http://www.naskapi.ca/documents/documents/JBNQA.pdf>; Sahtu Dene and Métis Nations, the Northwest Territories, Canada, *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Ottawa: Indian and Northern Affairs, 1993) accessed Nov.11, 2019 https://www.eia.gov.nt.ca/sites/eia/files/sahtu_dene_and_metis_comprehensive_land_claim_agreement_0.pdf; Nisga'a Nation, British Columbia, and Canada, *Nisga'a Final Agreement* (Ottawa: Federal Treaty Negotiation Office, 1999) accessed Nov.11, 2019 <https://www.nnkn.ca/files/u28/nis-eng.pdf>; Tsawwassen First Nation, British Columbia, and Canada, *Tsawwassen Final Agreement* (Ottawa: Aboriginal Affairs and Northern Development Canada, 2007) accessed Nov.11, 2019 https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf

¹²⁶ For example, the *James Bay Northern Quebec Agreement* (Section 5.2), *Sahtu Dene and Metis* (Section 13.4.10), and *Nisga'a* (Section 9.1) agreements all make provisions for parcels of Crown land where the Nations enjoy special hunting, fishing and harvesting rights. *Tsawwassen* territory is now an urban area, and as such the *Tsawwassen* agreement does not include hunting rights over settlement lands. It does, however, include a category of land in which the nation enjoys a right of first refusal (Section 35). It also includes a *Tsawwassen* Fishing Area, Chapter 9.

¹²⁷ *The James Bay Northern Quebec Agreement* includes provisions dealing with health and social services, education, administration of justice, police, environmental protection, land use, hunting and fishing, and local taxation. *The Nisga'a Final Agreement* provides jurisdiction over Nisga'a governments, citizenship, culture and language; Nisga'a property, lands and assets; public order and safety; Buildings, Structures, and Public Works; Traffic and Transportation; marriages, social services, health services, child and family services, education,

Nation's competence while matters that affect surrounding communities – criminal law or foreign affairs, for example – are federal or provincial jurisdictions¹²⁸. However, First Nations jurisdiction is not typically exclusive, but rather concurrent with federal and provincial jurisdiction. Concurrent powers are managed through paramountcy provisions. As a rough rule, First Nation's laws take precedence where the matter concerns the internal organization of the community, otherwise federal and provincial laws tend to take precedence¹²⁹. In other areas First Nations can pass laws provided they meet or exceed Settler standards in that area. In all cases, First Nations legislation must conform to the Canadian Charter and may be appealed before Canadian courts. The Federal government also typically retains paramountcy for any matter of “peace, order and good government” or “overriding national importance”¹³⁰. Many agreements also include co-management bodies, though these are typically advisory in nature¹³¹ and limited in scope¹³². Federal and provincial governments therefore continue to dominate many co-management processes.

gambling, intoxicants, and cultural property. *The Tsawwassen Agreement* provides jurisdiction over Tsawwassen lands, land management, land access, forest resources, fisheries, wildlife, migratory birds, national and provincial parks, culture and heritage, environmental management, Tsawwassen governance and local taxation. *The Sahtu Dene Metis Agreement* does not deal with self-government, but a subsequent Agreement in Principle on self-government includes Citizenship; language; culture and spirituality; traditional healing; education; adoption; income support; social housing; solemnization of marriage; settlement lands; gaming and gambling; liquor; administration of justice; taxation of Citizens; and local services. See Crown-Indigenous Relations and Northern Affairs Canada, “Self-Government Agreement-in-Principle for the Sahtu Dene and Metis of Norman Wells” accessed Nov 11, 2019 at <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/01/self-government-agreement-in-principle-for-the-sahtu-dene-and-metis-of-norman-wells.html>

¹²⁸ Brian Thom, “Disagreement-in-Principle: Negotiating the Right to Practice Coast Salish Culture in Treaty Talks on Vancouver Island, BC,” *Journal of Marxism and Interdisciplinary Inquiry* 2, no.1 (2008) at 27.

¹²⁹ Thom, “Disagreement-in-Principle” at 28.

¹³⁰ Brian Crane, Robert Mainville and Martin Mason, *First Nations Governance Law* (New York: LexisNexis, 2008) at 99.

¹³¹ Michael Murphy ed., *Canada: The State of the Federation: Reconfiguring Aboriginal-State Relations* (Kingston: Institute of Intergovernmental Relations, 2005) at 135.

¹³² M.A. Smith, “Natural resource co-management with Aboriginal peoples in Canada: Coexistence or Assimilation,” in *Aboriginal Peoples and Forest Lands in Canada*, eds. D.B. Tindall, Ronald Trosper and Pamela Perreault (Vancouver: UBC Press, 2013) at 95.

Measured against a baseline of the Indian Act, the authority granted by modern treaties is considerable. In some areas, First Nations' authority is even paramount over that of Settler governments¹³³. In others, co-management bodies all but replace the discretion of Settler ministers. Even where a Nation's outright political control appears minimal, administrative and bureaucratic control can be significant forms of community empowerment¹³⁴. Moreover, the process of negotiation itself can catalyze forms of political organization which outlive the treaty process, iteratively building capacity and progressively facilitating more assertive self-government¹³⁵. For many signatory Nations, the Treaties constitute skilful efforts to carve as much autonomous space as current political circumstances allow. Modern Treaties also retain some important features from earlier, more balanced eras of Indigenous-Settler relations, including forms of co-management, limited overlapping rights, and concurrent authorities. To this extent, Modern Treaties constitute an exception to exclusive forms of authority inherent in the concept of sovereignty.

However, Modern Treaties also incorporate First Nations into the Settler polity in a number of ways. First, by exchanging aboriginal title for various estates under Canadian law, First Nations' territories are absorbed into the Settler land tenure system¹³⁶. Second, by establishing representative, constitutional, public governments and corporate bodies, First

¹³³ Though not over Settler courts, who will ultimately arbitrate any contested exercise of jurisdiction.

¹³⁴ This is a running theme of Ignatius La Rusic, Serge Bouchard, Alan Penn, Taylor Brelsford, Jean-Guy Deschênes and Richard Salisbury, *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement* (Ottawa: Department of Indian and Northern Affairs, 1979).

¹³⁵ See Harry Tulugak, "Governance in the James Bay and Northern Québec Agreement: an Inuit Perspective," in *Reflections on the James Bay Northern Quebec Agreement*, eds. Alain Gagnon and Guy Rocher (Montreal: Québec Amérique, 2002) for an example of this position.

¹³⁶ As Woolford puts it in regard to the BCTP, "contemporary treaty-making occurs through a liberal discourse of property in which Indigenous ecologies are translated to complement European understandings of land ownership". Andrew Woolford, "Transition and Transposition: Genocide, Land and the British Columbia Treaty Process," *Journal of Marxism and Interdisciplinary Inquiry*, no.2 (2001) at 70.

Nations' governments are absorbed into the Settler political system¹³⁷. Finally, by accepting federal and provincial paramountcy, the Canadian Charter, and the jurisdiction of Canadian courts, modern treaties position First Nations' authority as internal to the Settler polity. In this way, the concurrent jurisdictions and overlapping claims contained in these agreements resemble questions of federalism – divisions of power which are conceptually internal to, and therefore compatible with the overriding assumption of Crown sovereignty. Modern Treaties are therefore both a challenge to, and an expression of, the processes of incorporation which this chapter has attempted to map.

2.2 Impact-Benefit and Co-Management Agreements

Alongside formal treaty practices, the relationship between First Nations and Settler political structures is also increasingly playing out through interim measures, impact-benefit agreements, and co-management structures. Often, these strategies appear where groups prefer not to engage in a treaty process which extinguishes their inherent rights, have court cases pending, or are faced by immediate and pressing resource conflicts¹³⁸.

Impact-Benefit Agreements are perhaps the most straightforward. They work to ensure a certain proportion of the economic benefits of resource extraction, jobs and profits, are shared with local First Nations communities. In this sense, they are concerned with ensuring that the costs and benefits of Settler governance are distributed fairly, and do not otherwise work to throw the dominance of these governance structures over their First Nations counterparts into question. In essence, financial incentives are offered in place of decision-making authority.

¹³⁷ For discussion see Carly Dokis, "Modern Day Treaties: 'Development', Politics, and the Corporatization of Land in the Sahtu Dene and Métis Comprehensive Land Claim Agreement," *Geography Research Forum* 30 (2010).

¹³⁸ Murphy, *State of the Federation* at 137.

Co-Management practices, which place resource development under the control of a joint council, are far more promising in this regard. Here, political power is shared. Co-management therefore represents an enclave of the interpenetrating political structures typical of the early encounter. However, most co-management structures have a primarily advisory role, leaving ultimate authority with the relevant Settler cabinet minister¹³⁹. Their efficacy is primarily a matter of (predominantly Settler) public opinion, rather than structural authority. Smith further notes that such arrangements are geared at the outset towards Settler goals – First Nations input is limited to how and where those goals will be achieved¹⁴⁰. Thus, co-management also works to reaffirm Settlers as final decision makers. In fact, political analysis reveals that such practices usually arise only in response to First Nations activism, and that governments are prone to abuse, undermine, and ignore them when political pressure is not sustained¹⁴¹.

Co-management structures therefore represent a limited success in First Nations' push towards renewed multilateralism. Like Modern Treaties, co-management agreements offer financial benefits and limited political control within an overarching frame of Settler sovereignty¹⁴². These practices do, however, depart from a territorially exclusive conception of political authority to re-embrace the sort of mutual interpenetration that characterized early relationships, and which have been a persistent feature of First Nations claims ever since.

2.3 Federal Legislation and Regulation

While treaties and non-treaty negotiations have always been fundamental to the relationship between Settler and First Nations, colonial governments have also sought to define the

¹³⁹ Murphy, *State of the Federation* at 135.

¹⁴⁰ Smith, "Co-management" at 95.

¹⁴¹ Murphy, *State of the Federation* at 137.

¹⁴² McCreary and Lamb, "Ecology of Sovereignty" at 606.

relationship extensively, and unilaterally, through legislation. Indeed, the current legislative framework can trace its roots back to pre-confederation imperial policy.

One of the early milestones in the development of this framework was The Gradual Civilization Act of 1857¹⁴³. It detailed the enfranchisement of First Nations persons, who would trade in their treaty status as members of a First Nations polity for the status of a Canadian citizen. Only one First Nations person is known to have been voluntarily enfranchised under this act¹⁴⁴. The 1869 Gradual Enfranchisement Act therefore took matters a step further, allowing for enfranchisement against an individual's will. It also went beyond transferring individuals from one political system to another, and set in place an elaborate system of colonial interference with tribal government, including regulating movement between reserves¹⁴⁵, replacing traditional leaders¹⁴⁶, defining band membership¹⁴⁷, and the industrial-scale indoctrination of First Nations youth¹⁴⁸. The governing authority of bands was circumscribed to the most minor matters, and enforcement of their decisions relegated to Settler courts and police forces¹⁴⁹. Moreover, such decision-making power that remained was subject to the approval or veto of the federal cabinet or sometimes even the local Indian agent¹⁵⁰. Eventually, these acts would be consolidated into the 1876 Indian Act, which remains in place with some modification to this day¹⁵¹.

More than any other practice, this legislation reflects the logic of incorporation into, and subordination to, Settler institutions. First Nations, for their part, have continued to assert

¹⁴³ For a detailed discussion of these acts and their eventual consolidation see Canada, *Royal Commission* Chapter 9.

¹⁴⁴ Miller, *Skyscrapers* at 105.

¹⁴⁵ Miller, *Skyscrapers* at 192.

¹⁴⁶ Miller, *Skyscrapers* at 114.

¹⁴⁷ Canada, *Royal Commission* at 250.

¹⁴⁸ Truth and Reconciliation Commission of Canada, *Final report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

¹⁴⁹ Canada, *Royal Commission* at 253.

¹⁵⁰ Frances Abele, *Like an Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary Indian Act* (Ottawa: National Centre for First Nations Governance, 2007) at 8-10.

¹⁵¹ Some modifications have been made over the years, notably in 1952, but Miller contends that the fundamental structure of domination continues. Miller, *Skyscrapers* at 222

traditional leadership practices alongside the imposed Indian Act band councils, and consistently object to both the asymmetry of the legislative relationship and its unilateralism.

2.4 Enacting Pluralism through Disobedience

Another major practice which has shaped the relationship between First Nations' and Settler political structures has been First Nations strategies of persistence and resistance. In essence, First Nations persist in their own political structures even as Settlers deny them, and they use the persistence of those structures to resist Settler unilateralism. This double strategy forces a recognition of plurality and is frequently designed to bring Settler authorities to the negotiating table, or to reassert the joint decision-making structures and conditional forms of authority that were typical of the early relationship.

For example, when the potlatch system of governance and its associated gifting and dancing practices were criminalized, many nations began holding ceremonies on Christmas to mask their intent, others disguised feast halls as food banks, while others separated dancing and gift-giving phases of the ceremony in order to evade colonial laws¹⁵². The Sundance ban on the prairies saw similar patterns. When the Sundance, an important political institution of the prairies, was criminalized many nations masked it as a rodeo while others began observing the ceremony on the 1st of July, as an ostensible show of patriotism¹⁵³. By persisting in their own forms of political organization, First Nations put the lie to Settler pretensions of unilateralism and reassert a pluralistic political landscape.

¹⁵² Christopher Bracken, *The Potlatch Papers: A Colonial Case History* (Chicago: University of Chicago Press, 1997) at 228.

¹⁵³ Blanca Tovias, "Navigating the Cultural Encounter: Blackfoot Religious Resistance in Canada" in Dirk Moses ed., *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (New York: Berghahn Books, 2008) at 289.

Sometimes, First Nations have chosen to dramatize the persistence of their political structures, rather than disguise them. Faced with an imposed band council system, for example, the Mohawk simply locked the doors to their council chambers, preventing elected councillors from entering and sparking a long series of court cases and political contests that persist to this day¹⁵⁴.

Often these strategies are designed to not only enact plurality, but also to force negotiation. For example, when Kwakwaka'wakw concerns about open-net fish farms failed to garner a provincial response, hereditary chiefs initiated a series of occupations which ultimately saw the B.C. Premier visit their Big House, hear their concerns, and enter into negotiations¹⁵⁵. Likewise, when Ontario issued development permits for tracts of land claimed by the Mohawk, ignoring centuries of requests for direct negotiations, hereditary leaders led a series of blockades, occupations and court cases until the Province agreed to trilateral negotiations with the federal government¹⁵⁶. And when Settler authorities ignored Kitchenumaykoosib Inninuwig (KI) requests for negotiations and issued mining permits, they too launched a series of blockades, once again triggering court cases, until courts ordered negotiations¹⁵⁷.

In each of these cases, First Nations have engaged in acts that are not permitted by Settler authorities, used these acts to assert the persistence of their own political authorities, and ultimately forced some form of multilateral engagement, thereby reasserting a pluralistic political

¹⁵⁴ Donald Bourgeois, "The Six Nations: A Neglected Aspect of Canadian Legal History," *The Canadian Journal of Native Studies* 6, no.2 (1986) at 255.

¹⁵⁵ Hanna Petersen, "Premier John Horgan talks salmon farms in Alert Bay," *North Island Gazette* Oct 12, 2017, accessed Nov. 11th, 2019 <https://www.northislandgazette.com/news/premier-john-horgan-visits-alert-bay-to-talk-salmon-farms/>; Office of the Premier, "Premier John Horgan's statement on his visit to 'Namgis First Nation in Alert Bay," accessed Nov 11, 2019 <https://news.gov.bc.ca/releases/2017PREM0096-001713>.

¹⁵⁶ Ryan Newell, "Only One Law: First Nations Land Disputes and the Contested Nature of the Rule of Law," *First Nations Law Journal* 41, no.1 (2012) at 51.

¹⁵⁷ For discussion see Newell, "Only One Law"; Rachel Ariss and John Cutfeet, "Kitchenuhmaykoosib Inninuwig First Nation: Mining, Consultation, Reconciliation and Law", *Indigenous Law Journal* 10, no.1 (2011).

landscape. This strategy has been a recurring and important practice in Settler-First Nations relations, playing a role in major developments like the Royal Proclamation, the constitutionalization of First Nations rights, the development of the Modern Treaty process, and the adoption of UNDRIP.

3. Discourses of Sovereignty in Settler-First Nations Relations

The relationship between Settlers and First Nations has therefore undergone important changes. Relations were once characterized by mutual need and regulated through interpenetrating and conditional authority structures that allowed the parties to contest and revise their relationship iteratively. As the military and demographic balance of power shifted however, mutual need declined. At the same time, emerging concepts of state sovereignty led Settlers to seek more unilateral, less contestable institutions and practices. However, persistent First Nations political agency complicated Settler attempts at unilateralism, forcing some continued concessions. The end result is a series of practices which are deeply asymmetrical, but not quite total or exclusive enough to be properly termed sovereign.

Unsurprisingly, this ambiguous and contested political relationship has given rise to equally contested discourses of sovereignty. The history bears unequivocal marks of force and fraud, yet it can hardly be reduced to a conquest. The role of negotiation and cooperation are undeniable, yet the relationship is hardly consensual. Picking up on these strands of historical evidence, some discourses emphasize unilateral readings of the relationship and the sovereign conceptions of authority that go with them, while others emphasize the negotiated character of the relationship and the pluralist conceptions of authority these entail.

Authors like Flanagan, for example, look at the brute fact of Settler dominance and conclude that Settler society is inherently more developed, that First Nations do not have the necessary status to be considered sites of legitimate political authority, and that the relationship is therefore properly conceived of as a relationship between a Settler sovereign and its various subjects¹⁵⁸. Any treaties Settlers may have made with First Nations were thus not real treaties, in the international law sense of an arrangement between two sovereigns, but rather unilateral policy choices made by Settlers for the purposes of expediency or charity¹⁵⁹. In this vision, political power is unilateral and centralized in the Settler state.

Asch forwards an alternative position, focusing not on force and fraud but on the indispensable role of treaty and consent in the colonization process. According to Asch, treaty practices, especially as codified in the Royal Proclamation, show that Settlers did in fact see First Nations as legitimate sites of political authority and, indeed, understood their own authority on Turtle Island as dependent on and derivative of those treaties¹⁶⁰. This view has been called 'treaty federalism'. It portrays political authority as inherently multilateral and negotiated.

¹⁵⁸ Tom Flanagan, *First Nations? Second Thoughts* (Kingston: McGill-Queen's University Press, 2000). A useful summary of positions on page 6-7 and a subsequent list of consequences on pages 8-9 lay out Flanagan's views succinctly.

¹⁵⁹ Flanagan, *Second Thoughts* at 6-9. As evidence for this reading, Flanagan can point to endless examples of colonial bad faith – where force was used to compel treaty, where treaty terms were deliberately misrepresented, or where agreements were quickly broken. All of this might be taken as evidence that Settlers never really saw treaties as binding in any serious sense.

¹⁶⁰ Asch, *On Being Here to Stay* argues this view cogently in Chapter 6 and 7. To support this view, Asch argues that all the many instances of colonial force still do not amount to a conquest – there was no major Settler-First Nations war, no armistice ceding political authority, none of the hallmarks of a conquest under international law. There are, however, all the ingredients of an international treaty process, suggesting colonial officials saw negotiation as the basis of their authority. As American Chief Justice Marshall put it: "the words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." *Worcester v. Georgia*, [1832] 31 U.S. (6 Pet.) 515, [1832] 31 USR 63 at 519.

Certainly, this view receives considerable support from First Nations, who generally emphasize the ‘nation-to-nation’ character of the relationship¹⁶¹. Many First Nations have long and well-documented histories of pushing against a unilateral, subject-sovereign interpretation of their relationship to Settler authorities, working instead to re-assert negotiated co-decision through treaty. Oral histories, and indeed contemporary eye-witness accounts, both tend to confirm a treaty-federalist conception which understood political authority as shared¹⁶².

Following strands of both Flanagan and Asch’s logics, Chief Justice Marshall famously concluded that First Nations were “domestic dependent nations”. By accepting a treaty relationship, and through the sheer reality of power asymmetry, First Nations had sacrificed some, but not all, of their original sovereignty¹⁶³. Like vassal states of the European middle ages, they were under the protection of European states and had thereby lost the right to foreign affairs, foreign trade or military alliance, but retained internal decision-making power¹⁶⁴. On this reading, political power is multilateral but inherently asymmetrical. Various versions of this conclusion have been popular ever since, according as they do with aspects of both force and consent in the historical record¹⁶⁵.

¹⁶¹ See Canada, *Royal Commission* Vol. 1 generally, and especially at 13, 230.

¹⁶² See e.g. Michael Asch, “Confederation Treaties and Reconciliation: Stepping Back into the Future,” in *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows (Toronto: University of Toronto press, 2018) at 35-39. See also Neil Vallance, *Sharing the Land: the formation of the Vancouver Island (or ‘Douglas’) Treaties of 1850-1854 in Historical, Legal and Comparative Context* (Ph.D. Diss., University of Victoria, 2015); Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2013) generally and especially at 14-16.

¹⁶³ *Worcester* at 520

¹⁶⁴ *Worcester* at 521. This division of powers is, of course, asymmetrical in at least two ways: First Nations enjoy a partial sovereignty on a small land base, while Settlers enjoy unfettered sovereignty on their own vastly larger land base, as well as control over the external affairs of First Nations. In some ways, the influence of this position continues to inform modern treaty negotiations, where ultimate authority over so-called external matters are typically federal or provincial while authority of matters perceived as purely internal tend to rest more squarely with the band.

¹⁶⁵ See e.g. Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada,” *Osgoode Hall Law Journal* 34, no.1 (1996) especially at 109-111; *R. v. Van der Peet*, [1996] 2 SCR 507, [1996] 4 RNL 177; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, [1984] 13 DLR (4th) 321 at 377-78; Canada, Georges Erasmus, and

Certainly, this view is present in state's current discourse around recognition and reconciliation – First Nations authority is affirmed, and at the same time subordinated¹⁶⁶. This suggests a multilateral arrangement, but one that takes place between a sovereign Settler unit and a non-sovereign First Nations unit. In this context, the turn away from the state advocated by some scholars can be read as a sort of unilateralism designed to build inner strength, so that nations can engage with Settlers multilaterally on grounds of nation-to-nation equality¹⁶⁷.

The contemporary discursive field therefore maps many of the formative disjunctures of the political relationship – some accounts foreground force, hierarchy and unilateralism, while others foreground negotiation, equality and multilateralism. At stake in these discussions is not only the distribution of political authority among Settler and First Nations parties, but also the nature of political authority itself, as either unilateral and centralized, or diffuse and negotiated.

4. Case Study: The Kunst'aa Guu – Kunst'aayah Reconciliation Protocol

The Kunst'aa Guu – Kunst'aayah Reconciliation Protocol holds these tensions in a usefully illustrative manner. Like most First Nations in the province of British Columbia, the Haida have never signed any treaties with European Settlers. Indeed, the colonial government of B.C. largely saw treaties as unnecessary. In the 1970s, the colonial government was logging the Haida homeland particularly aggressively, sparking intense and prolonged resistance¹⁶⁸. The Haida moved to negotiate, but logging continued. A series of important court battles, blockades and direct actions ensued, leading to plans to make much of the islands a national park. The Haida

René Dussault. *Report of the Royal Commission on Aboriginal Peoples - Volume 5 - Renewal: A Twenty-Year Commitment* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 2.3.5.

¹⁶⁶ See Coulthard, *Red Skin* especially Chapter 1.

¹⁶⁷ See Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005) especially the Foreword.

¹⁶⁸ Borrows, *Freedom and Indigenous Constitutionalism* at 56-61.

relented their pressure, and negotiations stalled. Once again, the Haida erected blockades and initiated legal challenges. After important public relations and legal victories, the Haida signed an agreement establishing a park. Advocacy continued. Years later, B.C. and the Haida nation signed a Protocol Agreement establishing shared control of resource extraction on Haida Gwaii¹⁶⁹.

Under the agreement, the southern half of Haida Gwaii was set aside as a conservation area, while logging activities on the northern half were put under the control of a joint council with equal numbers of Settler and Haida representatives¹⁷⁰. Remarkably, the Agreement's preamble features the following passages, in parallel columns, which are worth reproducing in their entirety:

WHEREAS: A. The Parties hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii, as set out below.

The Haida Nation asserts that: Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective title of the Haida Nation who will manage Haida Gwaii in accordance with its

British Columbia asserts that: Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the

¹⁶⁹ Borrows, *Freedom and Indigenous Constitutionalism* at 55-58.

¹⁷⁰ Brian Egan, "Towards Shared Ownership: Property, Geography, And Treaty Making in British Columbia," *Geografiska Annaler* 95, no.1 (2013).

laws, policies, customs and traditions.

Legislature of the Province of British Columbia

Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement. ...Under this Protocol, the Parties will operate under their respective authorities.¹⁷¹

As these statements attest, the Haida and the Crown continue to hold conflicting views regarding sovereignty over Haida Gwaii and, as a consequence, regarding the nature of the agreement itself. It is, in this sense, an agreement to disagree about the relative status of their claims¹⁷². Nevertheless, each party accepts that some of its decision-making powers will now be exercised in concert with its partner through co-decision practices. These practices do not exhaust the agency of either partner.

The Haida continue to express political agency within and beyond Canadian institutions, asserting a more thorough multilateralism. Indeed, to the extent that the Haida have received recognition, it has come through concerted and prolonged political pressure campaigns designed to force settler authorities to the negotiating table¹⁷³. However, Settler authorities also continue

¹⁷¹ Haida Nation and Her Majesty the Queen in Right of the Province of British Columbia, “Kunst’aa Guu – Kunst’aayah Reconciliation Protocol,” accessed Nov 10, 2019 <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2010/462194/haida_reconciliation_protocol.pdf>. See also the preamble to Heiltsuk First Nation and the Government of B.C., “Strategic Land Use Planning Agreement,” accessed Nov 10, 2019 <http://archive.ilmb.gov.bc.ca/slrp/lrmp/nanaimo/central_north_coast/docs/Heiltsuk_FN_Signed_SLUPA.pdf>.

¹⁷² Webber, “Age of Encounter” especially at 53-54.

¹⁷³ This theme is omnipresent throughout Chapter 2 of Borrows, *Freedom and Indigenous Constitutionalism*.

to exercise unilateral authority according to their own legal norms. Because of the *de facto* power imbalance between Settlers and the Haida, their respective capacity for unilateralism is deeply asymmetrical. In this way, the power-sharing the Protocol represents takes place in a context of persistent and considerable inequality.

In all these ways the Haida agreement holds within it many of the central tensions of political relations between Settler and First Nations communities. Where Settler governments seek to exercise unilateral control or to incorporate First Nations as subordinate territorial entities within the Settler federation, First Nations resistance has forced a partial return to practices of mutual interpenetration and shared authority. This contest concerns not only how political power is distributed between parties, but also how it is conceptualized.

5. Conclusions

The political relationship between First Nations and Settler communities has therefore reflected a contested and shifting conceptual basis. Despite this complexity, certain broad trends emerge over time and space. In the early phases, Settler and First Nations were in a position of mutual need. As such, political authority was overlapping and interpenetrating in ways that facilitated coordinated action without exhausting the political agency of either party. Treaties provided an ongoing means to contest and manage a broad political relationship. As time went on, however, Settlers conceptions of authority became increasingly unilateral even as demographic and military shifts reduced Settler need for their former partners. As a result, Settlers began imposing increasingly exclusive and hierarchical forms of authority. Thus, the Royal Proclamation created discrete and asymmetrically conceived zones of Settler and First Nations governance, and treaties became a mechanism of incorporation into the Settler zones. Eventually, treaties fell into

relative disuse as Settlers relied more and more on unilateral legislation. First Nations, however, persisted in their own political structures, thereby re-asserting a degree of multilateralism. In response, Settler governments began offering limited forms of recognition and co-decision that position First Nations as autonomous but internal to the Settler polity. This allows Settlers to make practical concessions to First Nations political agency while at the same understanding these concessions as unilateral acts by a sovereign towards its subjects. The current political relationship is therefore deeply asymmetrical, but not quite sovereign.

These phases are not always temporally distinct, overlapping and playing out at different times in different places¹⁷⁴. Nor are they internally consistent. They do, however, mark broad shifts which can be usefully employed to map the changing relationship between First Nations and Settler political communities and the contested locus of sovereignty(ies) within it.

In particular, two concurrent trends help make sense of these phases. First, Settler conceptions of authority began to revolve more and more around conceptions of political authority as sovereign – that is to say, as total and exclusive. At the same time, Settlers used force, fraud, and migration to tilt the balance of power decidedly in their own favour, undercutting the mutual need that had underwritten earlier arrangements. As a result of these two trends, the political dimensions of the practice of sovereignty have come to revolve around two contrasting processes. First, Settler authorities increasingly rely on a logic of incorporation, working to integrate First Nations into the political structures of Settler society. In this way, Settler governments are trying to account for First Nations agency in a way that is compatible with a unilateral and exclusive understanding of political authority. In essence, multilateralism is reimagined as a sort of self-constrained unilateralism. Second, First Nations have both leveraged

¹⁷⁴ Miller, *Skyscrapers* at 116, 143.

the proffered position within Settler institutions and also contested the logic of subordination and incorporation, enacting their own independent political agency to reassert a more deeply multilateral understanding of political authority. To the extent that First Nations political advocacy has recreated conditions of mutual need, it has reproduced shared political structures. The contemporary relationship is therefore defined by ongoing and contested processes of incorporation and resistance, where all sides struggle to influence not only how political authority is distributed, but also how it is conceptualized.

[Chapter Two] Legal Practices

This chapter explores the legal dimensions of the relationship between First Nations and Settlers, exploring how legal practices have shifted over time, and how these shifting practices are challenging and being shaped by the logic of sovereignty. Once again, regional and spatial variations in the relationship are considerable, making the following overview necessarily schematic. Nevertheless, certain broad, recurring patterns are discernable.

In the earliest phases of encounter, the parties needed one another. As a result, each party seemed to recognize the other as an independent source of legality¹⁷⁵, and to expect negotiation and co-decision on shared concerns. Flexible, ad hoc legal procedures allowed both sides to contest and revise the relationship on an ongoing basis. As time went on, however, Settler legal thought began to conceive of legal authority in increasingly total and exclusive ways. At the same time, the balance of power within the relationship shifted, undercutting the mutual need between the parties. Bit by bit, Settlers began to reimagine First Nations legalities as autonomous components of a broader imperial legality. Gradually, this conception gave way to a view of First Nations law as internal to the local colonial legality, and finally, internal to the Settler constitution. With each phase, Settlers understood First Nations law as increasingly internal to their own legality, and thus perceived the relationship as more and more unilateral.

Webber's distinction between four types of legal sovereignty is useful in understanding these trends¹⁷⁶. For Webber, Sovereignty 1 describes total and exclusive authority. This is the

¹⁷⁵ In this chapter, I will use the terms “law” and “legality”. Law refers to a set of rules, while legality captures not only the rules themselves but also the institutions, stories, and worldviews from which they spring. To borrow from Aaron Mills, laws are the leaves of the tree, while institutions, stories, and worldviews constitute the branches, trunk and roots. “Legality” refers to the entire tree, while “law” refers only the leaves (positive rules). See Aaron Mills, “Rooted Constitutionalism,” in *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows (Toronto: University of Toronto press, 2018).

▪ ¹⁷⁶ Webber, “Age of Encounter” especially at 55-56.

sense in which sovereignty is used in this dissertation. However, there are at least three other senses of sovereignty. Sovereignty 2 means having the attributes of a state in international law, Sovereignty 4 consists of having the standardized, rationalized institutional package associated with the modern sovereign state, while Sovereignty 3 simply means that the sovereign actor constitutes an independent site of legal authority which is not derivative of any other source of authority.

In Webber's terms, Settlers gradually weaponized Sovereignty 2 and 4, using them to deny what had long been admitted – that First Nations possessed Sovereignty 3. Re-understood as lacking both international status and the necessary governing institutions, First Nations status as independent legal authorities was denied, and First Nations were subjected to the expansive claims of Sovereignty 1 – complete and unilateral Settler authority. Mills describes this process as “constitutional capture”¹⁷⁷. First Nations, however, have consistently worked to create distance from Settler legalities, and to insist on a negotiated relationship between legalities. We might think of this as “constitutional refusal”¹⁷⁸. The overall relationship, then, is one of contested absorption, as Settler legalities seek to justify unilateralism by denying the presence of multiple distinct legalities, and as First Nations work to reassert plurality and reclaim the multilateralism appropriate to it. Together, these trends have produced a contemporary jurisprudence which limits Settler sovereignty without recognizing First Nations sovereignty. Through aboriginal rights and title, in particular, Settler jurisprudence imposes a number of

¹⁷⁷ Aaron Mills, “Miinigowiziwin: All That Has Been Given for Living Well Together” *One Vision of Anishinaabe Constitutionalism* (PhD. Diss., University of Victoria, 2019) especially at 35-37.

¹⁷⁸ The term is inspired by Audra Simpson's concept of the 'politics of refusal'. In contrast to a politics of recognition, which seeks validation from a status-bestowing other, refusal constitutes an independent act of self-affirmation which rejects the implied hierarchy between recognition-giver and recognition-receiver. In so doing, a politics of refusal positions indigenous peoples as independent political, and in this case legal, jurisdictions, rather than cultural units within the settler state. Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) generally, but especially at 11-12, 19-23.

important limits and conditions on Settler discretion and protects limited space for First Nations agency. However, these limits are created, interpreted, and enforced by unilateral Settler institutions. This odd blend of unilateralism and pluralism allows Settlers to make practical concessions in the face of First Nations advocacy without compromising either their self-conception of sovereignty or their lived reality of physical dominance.

In making this argument, this chapter will unfold as follows. Section 1 proceeds chronologically, tracing the relationship between legalities through four rough phases. Section 2 attempts to draw out some of the central patterns and practices which have driven changes in the inter-legal relationship. Section 3 explores contemporary discourses on the topic. Finally, Section 4 explores the example of the Barriere Lake Algonquins as a case study to illustrate the argument, before I offer my conclusions in Section 5.

1. Four Phases of Legal Relation

1.1 The Early Period: Justice of the Peace (Contact - ~1800)

The earliest days of contact and colonization reflect an ad hoc state of affairs. Legal relationships between specific First Nations and Settler polities varied widely, as each community incorporated the other into its own legal norms in asymmetrical ways that reflected local balances of power and the distribution of need among the parties. Nor were the mechanics consistent – some relations involved territorial forms of jurisdiction while others were personal, or a mix of the two depending on subject matter or circumstances. By and large, however, whatever arrangements prevailed were established by and regulated through negotiation. Thus, we might say that each party considered the other to be, at the least, someone to be negotiated with.

Consider criminal jurisdiction, for example. In the French-occupied zone, it appears that First Nations and Settler authorities alike agreed that *inter se*¹⁷⁹ offenses would be dealt with by each community internally¹⁸⁰. Intercommunal offenses were sometimes resolved using First Nations diplomacy, when Settler authorities so consented, and sometimes using Settler courts, when First Nations so consented. When the Huron killed a Jesuit missionary in 1647, for example, the matter was settled through the giving of gifts with the full participation of the Jesuits, who determined, in the customary manner, how many gifts were needed to make amends¹⁸¹. When a particularly troublesome Mohawk was accused of murder in 1689, however, his band confirmed that he was violent and of bad character and asked the French to try him in their courts, expressing their gratitude after the execution occurred¹⁸². In this way, French and Mohawk legalities interpenetrated one another.

Ad hoc, shared institutions were also common. For example, many cases involved hybrids of various sorts – semi-trials where French court procedures were imperfectly followed; novel forms of execution like skull-crushing were adopted; culpability was waived entirely where liquor was concerned; First Nations councils sometimes acted as juries¹⁸³; and, notably, the sentencing phase was almost always absent, with redress left to local chiefs¹⁸⁴. These ad hoc forms of justice were often lopsided, following local power imbalances, economic and social structures, and national dispositions. Nevertheless, they show that both the French and their First

¹⁷⁹ *Inter se* means ‘between or among themselves’, such that an *inter se* offense involves either two settlers or two Indigenous persons. Offenses involving members of both communities would be intercommunal rather than *inter se*.

¹⁸⁰ Jan Grabowski, "French Criminal Justice and Indians in Montreal, 1670-1760," *Ethnohistory* 43, No.3 (1996) at 413.

¹⁸¹ Desmond Brown, "'They Punish Murderers, Thieves, Traitors and Sorcerers': Aboriginal Criminal Justice as Reported by Early French Observers," *Social History* 35, no.70 (2002) at 381.

¹⁸² Grabowski, "French Criminal Justice" at 414.

¹⁸³ See e.g. Katherine Hermes, "'Justice Will Be Done Us' Algonquian Demands for Reciprocity in the Courts of European Settlers," in, *Many Legalities of Early America*, eds. Christopher Tomlins and Bruce Mann (Chapel Hill: University of North Carolina Press, 2001) at 134.

¹⁸⁴ Grabowski, "French Criminal Justice" at 419.

Nations interlocutors recognized the other's legality and engaged in forms of co-decision which drew on both legal systems.

British practice was perhaps more structured, though no less variable. Broadly speaking, English colonies generally distinguished between First Nations who lived in English settlements, those who lived independently but in areas surrounded by English settlements, and those who lived beyond the pale of English settlements entirely¹⁸⁵. It seems that those who lived with the English were, almost from the outset, subjected to English law. Likewise, British subjects living in First Nations communities were typically subject to First Nations law, at least where the offense concerned the First Nations community¹⁸⁶. First Nations living as groups within the (mostly imaginary) borders of English colonies were perceived as self-governing but subordinate¹⁸⁷. Similarly, British forts in Indian country were typically self-governing, subject to the broader treaty relationship. Those nations beyond British settlement were totally independent *inter se*, and intercommunal matters were the subject of negotiation¹⁸⁸. The particular mix of jurisdiction prevailing in any particular place was "usually achieved through diplomatic negotiations of various kinds"¹⁸⁹.

Once again, the role of local power relations and mutual need is clear. Still, it appears both parties typically recognized the other as having an independent claim to legal authority. The

¹⁸⁵ Yasu Kawashima, "Jurisdiction of the Colonial Courts over the Indians in Massachusetts, 1689-1763" *The New England Quarterly* 42, no.4 (1969) at 540.

¹⁸⁶ The *Mutiny Act* (1765) confirms this variable territorial schema. It provided that disputes arising "within his Majesty's Dominions in *America*, which are not within the Limits or Jurisdiction of any Civil Government" were to be tried by the courts of the "next adjoining Province". However, the Act seems to have been applied only amongst Settlers *inter se*. *Inter se* offenses in First Nations communities were not prosecuted, and officials were instructed to resolve intercommunal offenses with First Nations according to "their own Customs and Ceremonies". Mark Walters, *The Continuity of Aboriginal Customs and Government Under British Imperial Constitutional Law as Applied in Colonial Canada, 1760-1860* (Ph.D. Diss., University of Oxford, 1995) at 147-148.

¹⁸⁷ Kawashima, "Jurisdiction of the Colonial Courts" at 54.

¹⁸⁸ Kawashima, "Jurisdiction of the Colonial Courts" at 532.

¹⁸⁹ Kawashima, "Jurisdiction of the Colonial Courts" 541.

borders of these claims were adjusted primarily through negotiation and treaty, though these always coexist with actual and implicit coercion in complex ways¹⁹⁰. In short, each party worked to incorporate the other into existing legal processes, creating interpenetrating institutions which facilitated negotiated decisions.

Read together, these arrangements suggest a time of inter-legality, with various actors engaging in a negotiated legal landscape that drew on First Nations and Settler law alike. This suggests an image of legal authority which roughly parallels Webber's concept of "sovereignty 3"¹⁹¹. Here, being sovereign means being recognized as an independent, non-derivative site of legal authority. It does not, however, carry the broader connotation of unilateralism. That is, Settler and First Nations legalities alike were recognized as independent legal authorities, but neither enjoyed nor expected unilateral control.

1.2 The Middle Period: Lazy Suzerainty (1800 - ~1840)

The first half of the 19th century was a time of transition for the relationship between Settler and First Nations legalities. With France vanquished and an end to the British war with America, First Nations lost much of their military importance. With the fur trade in decline and agricultural and industrial growth taking seed, First Nations were losing economic leverage. Perhaps most importantly, settlement, disease, war and dispossession drove shifting demographics, which tilted the balance of power decidedly in favour of the British. These trends are reflected in patterns of mutual incorporation. As balances of power became more lopsided

¹⁹⁰ For a series of discussions of the complex relationship between consent and coercion see Jeremy Webber, Colin Macleod eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver, University of British Columbia Press, 2010).

¹⁹¹ Webber, "Age of Encounter" especially at 56.

and consistent, the incorporation of First Nations into Settler legalities became more unidirectional and coercive.

Whereas negotiations between parties had once expressed a wide variety of relationships, Settler practice began to solidify around a view of First Nations as subordinate but autonomous components of the British Empire – a sort of intra-imperial status not unlike that enjoyed by protectorates, or by the colonies themselves. One indicator of the increasingly one-sided incorporation into Settler legal norms is the use of imperial commissions to resolve disputes between local colonies and First Nations¹⁹². In the place of the direct negotiations of the previous era, parties now increasingly turned to the Imperial government to arbitrate between them.

For example, *Keutrokwen's Case* was heard before the Secretary of the Indian Department (an imperial official at this time), the Departmental agent for the reserve, and four "Principal Chiefs" – suggesting the structure of an intra-imperial special inquiry, or in any case certainly not following the format of regular municipal court¹⁹³. With respect to jurisdiction, the chiefs concluded that "in conformity with the Custom of their Nation all Complaints relating to property in their Village should be settled amongst the Indians themselves". Indian Department officials apparently concurred that the Nation constituted an independent legality, at least for internal matters. However, *Chief Bernabé's Case* involved a charge that the Chief had been disloyal and ought to be removed. The Chief was not so removed, but it seems clear that the imperial authorities contemplated that they were empowered to remove chiefs because these chiefs constituted subordinate agents of the Empire¹⁹⁴. Thus, Settler authorities considered the

¹⁹² Walters, *Continuity of Aboriginal Customs* at 72.

¹⁹³ Walters, *Continuity of Aboriginal Customs* at 251.

¹⁹⁴ Walters, *Continuity of Aboriginal Customs* at 253. One additional case sheds light on the jurisprudence indirectly. In *Cameron (1835)*, imperial courts held that colonies were not sovereign *ex proper vigore*, but rather possessed only such powers as were delegated from the imperial sovereign. Legislation that affects First Nations could not therefore extinguish aboriginal rights unless that authority had been explicitly delegated, which it had not. This again suggests that First Nations were considered subject to imperial, but not local colonial, law. Bruce Clark,

Nations in question to have separate legalities autonomous from the colonial legal system, but subject to broader imperial authority. This represents a first step in the process of constitutional capture. While interpenetrating institutions and forms of co-decision persisted, they were increasingly reimagined as internal to the imperial legality.

Many First Nations also understood that the Settler legality was attempting to frame negotiations unilaterally and engaged in processes of “constitutional refusal”, working to maintain forms of relation that exceeded the constitutional parameters Settlers sought to impose. In 1727, for example, a spokesperson for the Wabanaki recounted such an interaction:

“he again said to me - but do you not recognize the king of England as king over all his states? To which I answered - yes I recognize him as king of all his lands; but I rejoined, do no hence infer that I acknowledge thy king as my king, and king of my lands. Herein lies my distinction - my Indian distinction. God hath willed that I have no King, and that I be master of my lands in common. He again asked me - do you not admit that I am at least master of the lands I have purchased? I answered him thereupon, that I admit nothing, and that I knew not what he had reference to”¹⁹⁵.

To use Webbers language, the Wabanaki were refusing Sovereignty 1 in favour of Sovereignty 3, thereby implying a continued need for co-decision. Likewise, the Mohawk have consistently asserted that they were allies, not subjects of the crown, appealing to direct diplomacy or international law even as they made use of intra-imperial fora¹⁹⁶.

Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada (Kingston: McGill-Queen's University Press, 1990) at 39.

¹⁹⁵ Asch, *On Being Here to Stay* at 40.

¹⁹⁶ When the British moved to interfere with Mohawk relations to the Mississauga, for example, the Mohawk protested that they were “a free people”, and the Indian department so affirmed – despite regular use of imperial tribunals and other mediated fora. Mark Walters, “According to the Old Customs of Our Nation: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847,” *Ottawa Law Review* 30, no.1 (1998) at 17.

Settlers responded to these assertions, affirming forms of First Nations autonomy and continuing forms of co-decision. For example, colonial and imperial law continued to recognize First Nations autonomy over *inter se* offenses on First Nations lands¹⁹⁷. Again, this suggests that Settlers saw First Nations legalities as autonomous. However, the assertion of Settler jurisdiction over intercommunal offenses, even when they occurred on First Nations lands, shows that First Nations legalities were seen as subordinate to a larger imperial legality¹⁹⁸.

The Middle Period therefore saw at least two important shifts. First, inter-communal matters shifted from direct negotiations between the parties to mediation by imperial officials. In this way, co-decision was gradually approaching unilateralism. Second, First Nations jurisdiction was more consistently circumscribed, both territorially and personally, while Settler jurisdiction became more expansive. In both these ways, the process of mutual incorporation was becoming more consistent and more lopsided. While Settlers continued to recognize First Nations legalities as having legal authority independent of the colonies, this authority was reimagined as internal to an overarching imperial legal order.

1.3 The Late Period: A Cold Reception (~1820- ~1970)

As the balance of power continued to shift in favour of the British and norms of sovereignty solidified in the Settler imagination, patterns of incorporation continued to grow more expansive,

¹⁹⁷ Administrator Peter Russell referred to Indian Lands as “extra-judicial” because they were beyond the pale of English justice – sentiments echoed by Chief Justice Robinson in *Regina v. McCormick* (1859). Mark Walters, “The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shawanakiskie Case (1822-26),” *University of Toronto Law Journal* 46, no.2 (1996) at 286.

¹⁹⁸ In 1803 the imperial parliament passed legislation extending criminal and limited civil jurisdiction to unceded Indian Lands. However, it appears that, in practice, First Nations were not subject to the legislation unless associated with European fur traders. For an influential discussion see Clark, *Native Liberty, Crown Sovereignty*. Foster argues that Clark’s thesis is mistaken, insofar as he presents the legislation as extending criminal but not civil jurisdiction. Foster argues that the statutes provide for elements of both. He agrees, however, that the legislation was not understood to apply to Indigenous people unless employed by the HBC, and potentially not even then. See Hamar Foster, “Forgotten Arguments: Aboriginal Title and Sovereignty in Canada *Jurisdiction Act Cases*,” *Manitoba Law Journal* 21, no.1 (1992).

more unidirectional, and more coercive. Rather than incorporating First Nations legalities into the imperial order as subordinate but autonomous polities roughly equal to the colonies, Settler authorities began incorporating First Nations into local colonial legalities as domestic subjects. As such, judges began bringing First Nations law into colonial courts as local customary law¹⁹⁹. Under this approach, judges assumed that First Nations law could be extinguished, continued, or modified unilaterally through colonial legislation or jurisprudence, rather than bilaterally through treaty or trilaterally through imperial commission.

Jackson v. Wilkes illustrates the tenor of the period well. The case turned on whether the Haldimand deed, granting land to the Huadenossaunee, had been made under the proper seal²⁰⁰. In the alternative, however, Chief Justice Robinson entertained the argument that the grant was also deficient for lack of grantee, given that the Six Nations were neither a corporation nor an individual, and hence did not enjoy legal personhood. In a sense, Robinson was arguing that the Huadenossaunee lacked the institutional characteristics necessary to be recognized as an entity at law.

Ultimately, Robinson concluded that the deed itself rendered the Nation a “constructive corporation”. In so doing, he recognized a sort of collective status for First Nations at law, but one deliberately designed to be devoid of the sovereignty inherent in the “domestic dependent nations” formula being used in America²⁰¹. A corporation is both a creature of and subject to

¹⁹⁹ See Walters, *Continuity of Aboriginal Customs* at 39.

²⁰⁰ Sidney Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 68.

²⁰¹ This construction, however, never gained the salience of its American counterpart, perhaps because even Robinson failed to apply it consistently. *Sheldon v. Ramsay* (1852) confirmed that the Haldimand deed was not binding, but reversed *Wilkes* in finding that the deed would have been deficient anyway, for lack of a grantee. In *R v. McCormick* (1859), Robinson equivocated further, finding that Indian groups have some collective capacity, but not that of a corporation and certainly not that of nation. Thus, a single judge reached three different positions, each of which denied First Nations legalities an independent existence for different reasons. Haring, *White Man's Law* at 76.

colonial law in ways that a nation may not be – indeed, in this case collective legal status was apparently called into being by a British deed! The case would prove characteristic of the era – to the extent that a distinct First Nations legality is recognized, it is presented as a creature of the common law.

With the independent status of First Nations legalities thus denied, judges began considering First Nations laws as forms of customary common law, without independent institutional foundations²⁰². This had important implications, because if First Nations law persisted only as a custom at common law then it was automatically extinguished if it was contrary to crown sovereignty or repugnant to Settler morality, or if it had been displaced by contrary legislation²⁰³. Thus, while First Nations law continued to be recognized, an autonomous source of First Nations legal authority was broadly denied. In fact, First Nations legal institutions were the object of criminalization, as potlatches, sundances, and other expressions of First Nations law outside of the Settler courts were outlawed²⁰⁴.

In the *Indian Annuities Case*, the court reasoned that because First Nations were British subjects the Robinson Treaties were a mere "promise and agreement, which was nothing more than a personal obligation by its governor", not a legal agreement between peoples²⁰⁵. Justice

²⁰² For the reception of custom at common law see Walters, *The Continuity of Aboriginal Customs* especially at 62-68.

²⁰³ As early as 1792, Ontario judges began trying *inter se* offenses. Of the four murder cases to arise in Detroit that year, three of them were *inter se* and the judge dispensed with them without seeming to make any distinction at all. Haring, *White Man's Law* at 65.

²⁰⁴ Convictions were, however, inconsistent and often ineffective. For discussion see Constance Blackhouse, *Colour-Coded: a Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) especially Chapter 3 "'Bedecked in Gaudy Feathers': The Legal Prohibition of Aboriginal Dance"; Bracken, *Potlatch Papers* at 60.

²⁰⁵ *A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.*, [1897] AC 199, [1896] CR 11 AC 308 at 213; See also *R. v. Commanda*, [1939] DLR 635, [1939] 72 CCC 246 (Ont. H.C.), where the court ruled that "it does not matter whether Indians have any rights flowing from [a] ... treaty or not. [They] ... may be taken away by the [provincial] ... [l]egislature without any compensation"; *R. v. Syliboy*, [1929] 1 DLR. 307, 50 CCC. 389 took this logic further, finding that First Nations had no capacity to make treaties and that existing treaties were void ab initio. The treaty of 1752, the court held, "[was] not a treaty at all... it [was] at best a mere agreement made by the Governor and council with a handful of Indians. In *Logan v. Styres*, [1959] 20 DLR. (2d) 416, 5 CNLC 261 (Ont. HC), the court returned

Robinson summarizes the overall tenor of the period well: “to talk of treaties with the Mohawk Indians...is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke St. or with the French emigrants who have settled in England”²⁰⁶.

International forums reflected a similar logic. In *Cayuga Indians*, an international tribunal held that “[a] tribe is not a legal unit of international law”, ruling that so far as an Indian Tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign within whose territory the tribe resides²⁰⁷. The implications of this were profound. Because First Nations legalities were seen as internal to the common law, colonial legislatures were free to define that status as they saw fit, unilaterally. In *Island of Palmas*, an international tribunal confirmed this logic, concluding that treaties between the Spanish and the Palmas Indians were “not, in the international law sense, treaties or conventions capable of creating rights and obligations”, such that whatever force they had was internal to the Spanish legal system²⁰⁸.

Using Webber’s frame, we might say that Settlers began denying that First Nations met the institutional criteria of an independent legality (Sovereignty 4). On this basis, they denied First Nations international status (Sovereignty 2). This allowed Settler jurisprudence to reimagine First Nations as also lacking what had long been recognized – Sovereignty 3, or an independent source of legal authority. Finally, this allowed Settlers to assert Sovereignty 1 – unfettered unilateral control. Thus, when the federation of Canada was founded, Settler leaders found it unnecessary to consult First Nations at all. Where negotiation and treaty had once been

to this logic, ruling that, by accepting a treaty, the Six Nations had become subjects of the Crown, and therefore subject to the Crown’s total sovereignty – including, it seems, its ability to ignore the very treaty by which sovereignty was gained.

²⁰⁶ Official letter to Robert Wilmot Horton, Under-Secretary of State for War and the Colonies, March 14, 1824. Cited in Bruce, *Native Liberty, Crown Sovereignty* at 23.

²⁰⁷ *Cayuga Indians (Can. v. U.S.)*, [1926] 173 R. Int'l Arb. Awards 309. For discussion see Russell Lawrence Barsh, “First Nations and Contemporary International Law,” *Oregon Law Review* 62, no.1 (1983) at 74.

²⁰⁸ *Island of Palmas (U.S. v. Neth.)*, [1928] 2 R. Int'l Arb. Awards 831, [1932] HCR (2nd) 83. For discussion Barsh, “First Nations” at 79.

the bedrock of political community on Turtle Island, they were now not even seen as properly legal. The solidification of sovereignty and the oppression of First Nations alike reached a high-water mark in this period.

Many First Nations worked to resist this shift towards unilateralism. In *Sero v. Gault*, for example, a Six Nations woman argued that the Indian department had no jurisdiction on reserve because the Six Nations were "an independent people" and "allies" of the Crown²⁰⁹. When Sero lost the case, she took her cause to the League of Nations. Indeed, recourse to international mechanisms was common when domestic courts failed to produce results²¹⁰. In other instances, First Nations simply enacted their own legal authority outside²¹¹, alongside²¹², through²¹³, and even in contravention of²¹⁴, Settler institutions. In all these ways, First Nations continued to assert independent, non-derivative legalities, and thus, continued to center the need for

²⁰⁹ For discussion see Bourgeois, "The Six Nations" at 296.

²¹⁰ To list just a few illustrative examples, in 1859, Nahnebahwequay, a Mississauga woman, traveled to London to petition the crown directly to protest treaty abuses by the colonial government. D.B. Smith, "Nahnebahwequay (1824-1865): 'Upright Woman,'" *Canadian Methodist Historical Society Papers* 13, no.1 (2001). In 1860, Cree leaders placed their concerns directly before Prince Albert on a royal visit. Likewise, in 1890 the Huadenossaunee wrote to the Governor-General requesting negotiations and insisted on the terms of the Covenant Chain treaty. Because the treaty was with the Crown, the Huadenossaunee would not negotiate with Canada. English courts rejected the claim, reasoning that the Crown was a divided entity. As recently as 1976, however, the Queen received several First Nations delegations at Buckingham Palace. Beverly Jacobs, *International Law/The Great Law of Peace* (M.A. Diss., University of Saskatchewan, 2000) at 46.

²¹¹ For example, when a First Nations man employed by a man named Youmans drowned on the job and Youmans refused to follow local laws requiring restitution to relatives, Youmans was put to death. When Settler police complained, they were told that Youmans knew the law of the territory and that his death had been in accordance with legal procedure. Ultimately, in an executive nod to the continued independence of First Nations law, the killer's sentence was commuted. Galois, "History of the Upper Skeena" at 134-136.

²¹² Indeed, where Settler law was deemed inappropriate, many First Nations communities chose to simply ignore it, rather than contesting it. Harring, *White Man's Law* at 99. For example, some Anishinaabe continued formal supervision of their fisheries long after Settler governments began doing the same. John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government," *Osgoode Hall Law Journal* 30, no.2 (1992) at 50.

²¹³ First Nations also continued to make creative use of Settler institutions to apply their own laws. In her analysis of the introduction of criminal law on the plains, for example, Gavigan finds that the number of cases involving First Nations was initially rather low, and that most cases involved First Nations Chiefs as complainants or informants, even in *inter se* offenses. It seems some plains Cree may have understood treaty as giving them a right to call on the North West Mounted Police and the courts to maintain order in their communities. Shelley Gavigan, "Prisoner Never Gave Me Anything for What He Done: Aboriginal Voices in the Criminal Court," *Socio-Legal Review* 3 (2007) especially at 79, 81, 85.

²¹⁴ See e.g. Gord Hill, *500 Years of Indigenous Resistance* (Oakland: PM Press, 2010). For a thoughtful discussion in Borrows, *Indigenous Constitutionalism* Chapter 3.

negotiated co-decision²¹⁵. Settler governments were often forced to respond, offering executive clemency²¹⁶, for example, or negotiating treaty adhesions long after treaties were deemed legally unnecessary²¹⁷.

1.4 The Modern Period: Rights and Wrongs (~1970-Present)

In the modern era, the internalization of First Nations legalities by Settler legalities has taken on new forms with the constitutionalization of aboriginal rights in 1982. On the basis of this shift, Settler courts developed an aboriginal rights jurisprudence which is in some ways a retreat from unfettered sovereignty, and which has to that degree improved the position of First Nations. However, the constitutionalization of aboriginal rights also continues the broader trend of positioning First Nations law as internal to Settler legality and subordinate to Settler institutions. In this way, the modern era continues to position Settler authorities as the final decision-makers of the system, even as those decisions are subjected to new constraints.

In *Calder*, the court found that aboriginal title can persist at common law²¹⁸. The court also accepted that title could be unilaterally extinguished, reaffirming a view of First Nations law as subject to the Settler legality. Since *Calder*, the Canadian constitution has been amended to “recognize and affirm” “existing aboriginal and treaty rights” such that these now have constitutional protection. This limitation of Settler unilateralism has created space for First

²¹⁵ Settlers responded by pairing their sweeping assertions of *de jure* jurisdiction coincided with considerable *de facto* accommodation. For example, in 1839, Powlis was tried and convicted of murder *inter se*, but pardoned on the grounds that his crime had been in accordance with First Nations custom. Harring, *White Man's Law* at 158. In 1861 a British Columbia court convicted Dick of killing a Squamish man, but asked the governor for a commutation on the grounds that the act was in keeping with Squamish law. Tina Loo, “Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia,” in Carolyn Strange ed., *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver: University of British Columbia Press, 1996) at 112.

²¹⁶ For extended discussion see Loo, “Savage Mercy”.

²¹⁷ Promislow, “Treaties” at 1123.

²¹⁸ *Calder et al. v. Attorney-General of British Columbia*, [1973] 1 SCR 313, [1973] 4 WWR 1.

Nations legal agency. It is noteworthy, however, that First Nations consent was not seen as necessary to amend the Constitution. In fact, the task of defining these rights has fallen to Settler courts, acting unilaterally. This process suggests that First Nations legalities are still understood as internal to the Settler frame. Indeed, as the courts fleshed out their aboriginal rights jurisprudence, they made it clear that First Nations legalities are not separate jurisdictions.

In *Pamajewon*, for example, the Shawanaga First Nation and the Eagle Lake First Nation claimed a broad right to self-government and economic self-determination²¹⁹. The Court, however, found this claim to be “at an excessive level of generality”, insisting that aboriginal rights be claimed as specific practices, rather than broad jurisdictions²²⁰. Moreover, each practice so claimed must have been integral to the distinctive culture before the assertion of European sovereignty²²¹, and cannot be incompatible with that sovereignty²²².

This reasoning bears some conceptual similarity to the recognition of local customary law. Like customary law, First Nations law must be sufficiently certain and continuous over time, and it cannot be incompatible with crown sovereignty. However, the modern era introduces the additional bar of cultural distinctiveness, flowing from s35. This shift makes the resulting doctrine novel in at least three ways. First, the recognition offered by *Pamajewon* requires a higher bar than is typical for customary law. Second, it also affords a different sort of recognition. Where customary laws are actually applied by courts to supplement common law rules of conduct, First Nations law is not applied to regulate conduct. Rather, it gives rise to constitutional rights, which act as checks on Settler conduct regulation²²³. In this sense, First

²¹⁹ *R. v. Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204.

²²⁰ *Pamajewon* at 27.

²²¹ *Van der Peet* at 45-46.

²²² *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911.

²²³ *R. v. Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513; *R. v. Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at 70.

Nations law is not only absorbed into the Settler legality, as in the Late Period, but also re-framed as a source of rights against Settler action, rather than a source of governance. Third, Aboriginal rights cannot be ignored or extinguished, as customary law could be. Aboriginal rights jurisprudence therefore draws off and departs from previous approaches, modifying their logic but continuing the broader trend of constitutional capture.

Similarly, the Supreme Court's most recent consideration of title in *Tsilhqot'in* understands aboriginal title as something closer to an ownership claim than it is to a jurisdictional claim²²⁴. The title-holding nation has a right to proactively use the land, but this right is akin to that held by any other property owner – except that it is subject to the additional limit that its use cannot be inconsistent with the Court's perception of the distinctive aboriginal relationship to their land²²⁵. Title also vests the nation with the ability to veto government use of title land, but the government can override this veto provided it justifies the action to its own courts²²⁶. The bar that the government must meet to infringe title is, in many ways, lower than that it faces when expropriating private land²²⁷. Thus, aboriginal title appears less as a third order of government, with its own protected jurisdictional space, and more as a constrained version of ownership.

The jurisprudence on criminal and tort matters confirms the approach taken to self-government in that First Nations law is not seen to constitute a jurisdiction, and thus cannot

²²⁴ Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in* Nation," *The Supreme Court Law Review* 71, no.1 (2015) at 83.

²²⁵ *Tsilhqot'in* at 67-76.

²²⁶ *Tsilhqot'in* at 13-18, 77-88.

²²⁷ McNeil notes that courts construe expropriation more narrowly than title infringements, that expropriation statutes contain procedural safeguards absent from title jurisprudence, and that the potential grounds for title infringement are broader than those of expropriation. McNeil concludes that "Aboriginal title might enjoy greater protection against federal infringement under current expropriation legislation than it does under the Canadian Constitution". Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right," in *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision*, eds. Owen Lippert, Melvin Smith, Tom Flanagan, Gordon Gibson (Vancouver: Fraser Institute, 2000) at 66.

provide a shield from Settler jurisdiction. Indeed, courts have been unequivocal that Canadian criminal law and other regulations apply to First Nations, whether on title land or not, in settlements or on reserves, on unceded land or on treaty land, on territory subject to the Royal Proclamation or not, and regardless of whether treaties were fraudulently obtained²²⁸.

First Nations have made use of the openings that the constitutionalization of aboriginal rights have created, and to that end have often phrased their claims in the Court's language. However, many First Nations have also consistently forwarded a view of their legalities as constituting independent jurisdictions, whose relation to Canadian jurisdiction must be negotiated. In *Delgamuukw*, for example, the plaintiffs claimed ownership and jurisdiction over their lands, a claim which was modified at trial into a claim for aboriginal title²²⁹. In *R. v. Fournier*, defendants appealed to the Royal Proclamation to insist that neither Settler courts nor legislatures had valid jurisdiction on Algonquin lands until a treaty was reached²³⁰. *R. v. Francis*, *R. v. Chief* and *R. v. Yellowhorn* all made similar claims²³¹. In a 1982 submission to the United Nations Commission on Human Rights, the Grand Council of the Mi'kmaq Nation characterized itself as an independent colony of Great Britain, analogous in jurisdiction to Canada or

²²⁸ In *R. v. Francis*, the defendant claimed that Canadian law did not apply to members of the Mohawk Nation on reserve because they are not Crown subjects and because no treaty established such jurisdiction. The court's reply was succinct "even if there existed some basis on which to challenge the acquisition of sovereign jurisdiction by Canada, the domestic or "municipal" courts of Canada lack competence to question it". *R. v. Francis*, ONSC 05/17, [2007] 85 OR (3d) 45 at 7. In *1536412 Ontario Ltd. v. Haudenosaunee Confederacy Chiefs Council*, ONSC 08/82, [2008] CanLII 28041, the court held that "the special rights enjoyed by the aboriginal communities under our constitution do not include sovereignty" at 22. In *R. v. Ignace*, [1998] 103 BCAC 273, [1998] 156 DLR (4th) 713 at 11, the appellants argued that Canadian jurisdiction did not apply on lands which had never been acquired by treaty. Citing *Delgamuukw*, the court found that any First Nations sovereignty, jurisdiction or legality failed to survive the application of common law. In *R. v. Day Chief*, 2007 ABCA 22, [2008] 412 AR 29, the defendants argued "that Alberta lacks jurisdiction to regulate their conduct - and indeed any conduct on the specific land where the offences are alleged to have occurred - because that land was acquired by fraud". Citing *Sparrow*, the court held that underlying sovereignty was always with the Crown, even on lands where no treaty had been signed.

²²⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] 153 DLR (4th) 193 at 7. For discussion see Borrows and Rotman, *Aboriginal Legal Issues* at 245.

²³⁰ *R. v. Fournier*, [2004] OTC 260, [2004] CanLII 66288 (ON SC) at 2.

²³¹ *Francis* at 4; *R. v. Yellowhorn*, 2006 ABQB 307, [2006] 399 AR 144 at 29.

Australia²³². Similarly, the Barriere Lake Algonquin and the Huadenossaunee have been to the United Nations repeatedly to assert the international status of their treaties and their equality with Quebec and Canada, as heirs to the English and French Crowns²³³. Thus, First Nations continue to make use of Settler law without necessarily acting within the Settler legality, using Settler institutions to trouble the narrative of constitutional capture. In so doing, they reassert Sovereignty 3 (existence as an independent legal authority) to contest the Crown's assertions of Sovereignty 1 and re-center the need for negotiation.

2. Practices of Note

As we have seen, the relationship between First Nations and Settler legalities has been hotly contested. The early period, characterized by mutual need between parties, involved a variety of shared institutions and conditional forms of authority. These practices recognized both parties as independent sources of legality and provided a means for both parties to contest their relationship iteratively. As time went on, however, Settler conceptions of legal authority became increasingly exclusive. Shifting balances of power undercut the mutual need between the parties, and Settlers gradually sought practices that more closely approximated a sovereign self-understanding. Thus, Settlers reimagined First Nations law as internal to the Settler legality, engaging in prolonged strategies of constitutional capture. First Nations continue to enact their

²³² Discussed in Barsh, "First Nations" at 94-97.

²³³ Kitchenuhmaykoosib Inninuwug First Nation and the Algonquins of Barriere Lake, "Joint Submission by the KI and the Algonquins of Barriere Lake, United Nations Economic and Social Council Permanent Forum on First Nations Issues, 7th Session, New York, April 21 - May 2, 2008," accessed Nov. 10, 2019 www.barrierelakesolidarity.org/2008/04/canada-quebec-condemned-before-un.html; Algonquins of Barriere Lake, "Submission by the Algonquins of Barriere Lake, United Nations Economic and Social Council Permanent Forum On First Nations Issues, 1st Session, New York, May 13-24, 2002," accessed Nov. 10, 2019 <http://www.turtleisland.org/news/news-algonquin3.htm>.

jurisdictional independence and center the need for negotiation, in reciprocal acts of constitutional refusal. Together, these trends have produced a contemporary jurisprudence which limits Settler sovereignty without recognizing First Nations sovereignty. This odd blend of unilateralism and pluralism allows Settlers to make practical concessions in the face of First Nations advocacy without compromising their own self-image as sovereign actors.

This contest has involved a number of shifting doctrines, practices and patterns. In the following section, I explore some of the most persistent and influential patterns, showing how current practice is both challenging, and challenged by, concepts of sovereignty.

2.1 Status, Hierarchy and Equality

In reviewing the literature and writing this chapter, the most prominent and consistent problem that emerged was this: Settlers (myself included!) want to sort First Nations into categories, either that of a foreign nation, or an imperial protectorate, or domestic citizens. For Settler authorities, categorizing First Nations is extremely important because status is tied to jurisdiction. Thus, determining whether First Nations are akin to a state or a province or a municipality determines what areas of autonomy First Nations can claim. This in turn determines the extent and scope of unilateral Settler authority. Categorizing First Nations according to a hierarchy of political units has therefore been an important practice of colonization, with each categorization working not only to affirm some level of First Nations autonomy, but also to carve out an inverse sphere of Settler unilateralism.

However, First Nations practice often does not map well onto any particular category. Indeed, many First Nations seem to traverse Settler political categories constantly and without linear directionality. Some First Nations (the Mohawk, for example) have consistently asserted

something close to international status. Others have been clear that they seek a place *within* Canada. However, since the beginning, and still today, many First Nations interact with multiple levels of Settler governance – from the UN and the Queen to the local courthouse – all at once and seemingly without contradiction. Thus, the Huadenossaunee could insist on their freedom to maintain independent diplomatic relations one day, and ask Settler courts to resolve an internal dispute the next²³⁴. A century later, the National Indian Brotherhood could appeal to London, and then negotiate with provincial Premiers²³⁵. If we ask what “status” these interactions imply, using Settler categories, the answer appears schizophrenic²³⁶. Indeed, it is tempting to attribute the oscillation to mere pragmatism. Perhaps this is sometimes the case. Yet if one sets aside Settler categories and turns towards First Nations political concepts, a more coherent explanation comes into view.

According to a recent court submission, the Anishinaabe, for example, organize themselves at the family, clan, village, national, and confederacy levels, and each of these levels engages with the other horizontally²³⁷. A continent away, Stó:lō self-descriptions are remarkably similar, describing different levels of government which are not hierarchically arranged, but rather negotiate as equals²³⁸. Where Settler authorities see different levels of social organization as nested within a hierarchy, this is not necessarily true in many First Nations communities. Thus,

²³⁴ Walters, “According to the Old Customs” at 17.

²³⁵ Peter Russell and Roger Jones, “Aboriginal Peoples and Constitutional Reform,” paper prepared for the *Royal Commission on Aboriginal Peoples*. (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at 9.

²³⁶ This makes the confused nature of Settler thought on the topic somewhat more understandable. Because many First Nations appeared to occupy multiple spots on the spectrum at once, Settler authorities were likely able to interpret First Nations as having whatever status Settlers were inclined to ascribe them. Whatever rung on the ladder Settler authorities chose, they could find at least partial support for their interpretation in First Nations practice and discourse.

²³⁷ *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, [2019] CNLR 1, (Plaintiffs’ Memorandum of Argument May 4, 2018).

²³⁸ Stó:lō Nation, “Integrated Cultural Assessment for the Proposed Transmountain Expansion Pipeline Project 2014,” in Kinder Morgan Canada, *NEB Application and Environmental Impact Assessment* (Calgary: National Energy Board, 2014) especially at sections 12, 14.

where Settler authorities seek to slot First Nations into a hierarchically arranged set of statuses, First Nations often seem to frustrate these attempts and transgress the boundaries of Settler categories, not because the Nations are inconsistent, but because their political agency is informed by their own political structures and worldviews. In this sense, the practice of engaging multiple levels of Settler authority as equals can be read as a practice of refusal, whereby First Nations insist on their own political and legal ontologies.

Both the ascribing and the refusal of differentiated hierarchical statuses have therefore been important practices through which the overall relationship is contested. Moreover, this pattern has implications for current practice and discourse. When we conceptualize treaty federalism, for example, Settler authorities may be intuitively tempted to assign First Nations a status – municipal, provincial, national – but we might also consider conceptualizing all these levels as engaged in consent-based equality.

2.2 Doctrinal Gaps

Another striking pattern that emerges from the attempted absorption of First Nations legalities by Settler legalities has been, ironically, a lack of clarity about that very process. From the beginning, at every stage since, and still today, Settler legal doctrine does not provide a coherent explanation of how exactly Settler jurisdiction was obtained, nor how First Nations jurisdiction was displaced.

For example, where did Crown sovereignty come from? Did it come into being the moment it was asserted? Did it follow along with de facto control over First Nations lands? Does it require conquest or treaty? In all cases, the answer seems to be “yes”. From the outset, opinions conflicted. According to Vattel, sovereignty came through effective occupation; yet

Marshal seemed to suggest that mere assertions of sovereignty were sufficient – a stance he later backed away from²³⁹. For Blackstone, sovereignty came through conquest or treaty²⁴⁰. In practice, Settler authorities employed all these arguments pragmatically, as suited the particular claims being validated. Somewhat incredibly, this confused and inconsistent state of affairs persists today.

According to the courts, Crown sovereignty over Acadia and New France apparently came from conquest of the French, although how France came to be in possession of sovereignty which it could subsequently lose has not been clearly explained, nor have the geographic areas so acquired been clearly defined²⁴¹. Elsewhere, the courts have gestured towards the Royal Proclamation, which provides for the acquisition of First Nations territory through treaty²⁴². Yet the courts also insist that Crown sovereignty is valid where no treaty exists, where treaty was fraudulently obtained, and where the Proclamation does not apply²⁴³. To the extent that treaty has been solidly relied on, it is not treaties with First Nations, but with other European and American states which act to crystalize sovereignty²⁴⁴. In the dominant line of contemporary jurisprudence, sovereignty seems to come into being the moment it is asserted, without further requirements²⁴⁵. Yet this stands in tension with accepted international law requirements which stipulate that occupation is needed to consummate sovereign claims²⁴⁶. Even today, the court loudly denounces *terra nullius*, but its tests for establishing aboriginal title and rights continue to

²³⁹ For discussion see Kent McNeil, “The Doctrine of Discovery Reconsidered: Reflecting on Discovering First Nations Lands: *The Doctrine of Discovery in the English Colonies* by Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg and *Reconciling Sovereignties: Aboriginal Nations and Canada* by Felix Hoehn,” *Osgoode Hall Law Journal* 53, no.2 (2016) at 708.

²⁴⁰ McNeil, “Doctrine of Discovery” at 708.

²⁴¹ Kent McNeil, “The Source, Nature, and Content of the Crown’s Underlying Title to Aboriginal Title Lands,” *The Canadian Bar Review* 96, no.2 (2018) at 289.

²⁴² *R. v. Côté*, [1996] 3 S.C.R. 139, [1996] 138 D.L.R. (4th) 385.

²⁴³ *Yellowhorn* at 45-48.

²⁴⁴ McNeil, “The Source, Nature, and Content” at 280.

²⁴⁵ *Delgamuukw* at 145; *Tsilhqot’in* at 69.

²⁴⁶ *Western Sahara Advisory Opinion*, ICJ GL No.61, [1975] ICJ Rep 12; McNeil, “Doctrine of Discovery” at 725.

presume Crown title and rights without requiring any conceptual or historic support for those claims²⁴⁷.

The courts themselves seem aware of this confused state of affairs, and have lately begun attaching modifiers like “assumed” or “*de facto*” onto their descriptions of Crown sovereignty, but again without clearly explaining what these are meant to signal²⁴⁸. As a result, Kent McNeil describes the jurisprudence as “confused and embarrassed”, with the courts providing little solid analysis of the source of crown title or sovereignty, leaving it an “unresolved constitutional conundrum”²⁴⁹. Likewise, Walters, Haring and Foster all contend that there was never a clear doctrinal foundation for extending Settler criminal jurisdiction over *inter se* offenses – judges simply began asserting it, without offering explanations²⁵⁰.

In many cases, courts have gone beyond mere inconsistency to outright ahistoricism. In *Ramsay*, Robinson claimed First Nations had “never” been exempt from criminal law – when of course they had – citing a report which stated that Indians had “always” been subject to British justice – when of course they hadn’t²⁵¹. In *Syliboy* the court claimed that treaties had “never” been recognized as binding, when of course they had²⁵². And even today, *Sparrow*, which has become a major authority on the subject, simply states that there was “never any doubt” that title and sovereignty vested in the Crown, when of course even a cursory glance at the historical record shows that there was nothing but doubt²⁵³. By claiming a false historical pedigree, courts

²⁴⁷ Kent McNeil, “The Onus of Proof of Aboriginal Title,” *Osgoode Hall Law Journal* 37, No.4 (1999).

²⁴⁸ Ryan Beaton, “De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada,” *Constitutional Forum* 27, no.1 (2018); McNeil, “Doctrine of Discovery” at 727.

²⁴⁹ Kent McNeil, “First Nations Sovereignty and the Legality of Crown Sovereignty: An Unresolved Constitutional Conundrum,” *Osgoode Digital Commons* 320 (2017) at 2, 1.

²⁵⁰ Haring, *White Man’s Law* at 123; Walters, *Continuity* at 52; Foster, *Forgotten Arguments* at 345.

²⁵¹ Cited in Clark, *Native Liberty* at 19.

²⁵² *Syliboy* at 313.

²⁵³ *Sparrow*, at 1103.

have been able to dodge the question of how things had come to be so – they had always been so, so there is nothing to explain.

This doctrinal flexibility has been an important practice of constitutional capture. However, the ambiguity it involved has also proven an important reservoir of resources for constitutional refusal. First Nations can contest Settler authority on unceded land, for example, precisely because Settler law has no coherent reply at the ready. First Nations can ask for imperial tribunals because it is not doctrinally clear why they should no longer be entitled to them, and Aboriginal title can be reasserted after centuries of dormancy because Settler law never developed a clear account of why it was being ignored. In all these ways, doctrinal confusion has been an important means of asserting unilateralism, and also a rich resource for re-asserting negotiation and co-decision.

2.2 Discretionary Exceptions

Another important practice which has persisted from the earliest days of contact until the present is the pragmatic pairing of universal rules and discretionary exceptions. For Settler authorities, the formal recognition of their unilateral decision-making power has always been more important than the particular decision reached. Conversely, First Nations often sought forms of power which centered on the ability to force relational, contextual negotiations²⁵⁴. As a result, Settler authorities often insisted on their unilateral authority while simultaneously using that unilateral discretion to offer informally negotiated accommodations. This allowed Settler authorities to maintain the self-image of sovereignty while also engaging in pragmatic negotiations. In this

²⁵⁴ Loo, “Savage Mercy”.

sense, discretionary exceptions work as a method of constitutional capture and a tool of constitutional refusal at the same time.

Consider the following episode between the French and their allies²⁵⁵. The French insisted that French criminal procedure apply to an intercommunal crime, but this was only made possible by assuring the defendant would be pardoned and released. Similarly, as Settler authorities attempted to shift intercommunal crimes definitively into municipal courts in the 1800s, they frequently gave First Nations offenders laughably short sentences – two years for murder in Nova Scotia, for example²⁵⁶. Two statutes from 1802 and 1821 are often cited to ground jurisdiction over unceded First Nations lands, but in practice cases were only brought against Settlers²⁵⁷. Rather, there was a well recognized but doctrinally ambiguous exception for First Nations. In B.C., judges developed a pattern of imposing regular sentences but requesting their commutation by the executive, often in response to petitions from First Nations leaders and with an eye to avoiding the repercussions of overplaying their hand²⁵⁸. Today, Gladue reports serve a similar role, allowing judges to reach verdicts in the normal way while providing a means to give lighter or more culturally appropriate sentences to First Nations offenders²⁵⁹. In all these ways, discretionary exceptions work to accommodate First Nations power and recognize the

²⁵⁵ White, *Middle Ground* at 79.

²⁵⁶ Haring, *White Man's Law* at 184.

²⁵⁷ Both statutes explicitly extended criminal, and some civil, jurisdiction over Indian Lands. The statutes were used to try Settlers for offences committed on Indian lands, but their provisions were not seen to apply to Indians or even Metis unless they were in the direct employment of the HBC. In this sense, the statutes extended jurisdiction over Indian lands, but not necessarily Indian subjects. See Haring, *White Man's Law* at 270. HBC testimony before an imperial committee confirms this interpretation, as does the case law, though both show that there was some confusion around the issue. For Discussion see Hamar Foster, "British Columbia: Legal Institutions in the Far West, from Contact to 1871," *Manitoba Law Journal* 23, no.1 (1995) especially at 65.

²⁵⁸ Tina Loo, "Savage Mercy".

²⁵⁹ A Gladue report is a type of pre-sentencing report that a Canadian court can request when sentencing an offender of Aboriginal background under Section 718.2(e) of the Criminal Code. Note that this occurs after culpability has been determined. See Native Women's Association of Canada, "What is Gladue?," accessed Nov 10th 2019, <https://www.nwac.ca/wp-content/uploads/2015/05/What-Is-Gladue.pdf>

continuation of a multilateral, negotiated inter-legal relationship without compromising the sovereign pretensions of Settler law²⁶⁰.

This practice has spatial and temporal dimensions. Because exceptions are often discretionary, rather than binding, their prevalence tends to fade away as the control of Settler authorities is solidified. In the early 1800s, First Nations were almost never tried for anything short of murder or rape, but over time this exception was gradually withdrawn²⁶¹. In the early days of colonization on the prairies, arrest numbers were low and the NWMP rarely acted without the explicit sanction of First Nations leaders²⁶². Fifty years later, when the demographic balance had shifted, arrests had skyrocketed and First Nations leaders themselves were frequently arrested²⁶³. The same logic animates spatial variations. For example, the NWMP were exercising a light hand on the prairies even as more settled areas in Ontario saw intrusive policing²⁶⁴. Fidler was pardoned for a crime that occurred in remote Saskatchewan at a time when members of First Nations in the cities enjoyed no such clemency²⁶⁵.

In these ways, discretion allows Settler authorities to assert sovereignty while at the same time engaging in forms of informal co-decision. The ability to force discretionary accommodations has therefore constituted an important means of constitutional refusal.

²⁶⁰ Conceptually, this mechanism also helps Settler authorities to transmute First Nations law from something truly legal to mere custom or tradition. Typically, discretion is offered at the arrest and sentencing stages, before or after the law has been spoken. Thus, the trial itself, where the law is considered, is insulated from any consideration of First Nations legalities. These factor in only as a means of explaining behaviour, not as a source of law *per se* Rachel Ariss and John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Blackpoint: Fernwood Publishing, 2012) at 43.

²⁶¹ Haring, *White Man's Law* at 158.

²⁶² Haring, *White Man's Law* at 243.

²⁶³ Sidney Haring, "'There Seemed to Be No Recognized Law': Canadian Law and the Prairie First Nations," in *Laws and societies in the Canadian prairie West 1670-1940* eds., Jonathan Swainger and Louis Knafla (Vancouver: University of British Columbia Press, 2005) at 96-101.

²⁶⁴ Haring, *White Man's Law* at 243.

²⁶⁵ Deborah Rose Peña, "The Power to Punish: Conflicts of Authority in the Case of Jack Fidler," *Hypocrite Reader* 2 (2011) at 3.

2.3 International Law Appeals and Exclusions

Another key contest has been over which legal forums First Nations have access to. Over time, Settlers have worked to foreclose international forums, forcing First Nations into the domestic Settler system as their only recourse. In this sense, the closure of international law has been crucial to the perceived internalization of First Nations legalities. Conversely, repeated appeals to international law, both Settler and inter-national Indigenous law, have been an important practice in troubling this internalization and re-centering the need for multilateral negotiation.

The first key practice for Settler authorities has been defining international agents in increasingly exclusive and territorial terms. The proposition that there can be only one international actor on a given territory has been an important tool. Since First Nations fall within the borders claimed by Settler polities, and since these Settler polities are recognized as international agents, First Nations can only be subjects of some kind. In *Mohegan*, for example, the tribunal found that because the Mohegan fell within the territorial limits of British claims, they were properly subject to the imperial rather than international legal system²⁶⁶. Likewise, an international commission in 1926 found that the Cayuga, who straddled the British-American border, fell within the boundaries of sovereigns and, as a result, their relations with Settler states were a matter for domestic, not international law²⁶⁷. As western international law took on a more developed institutional form, the League of Nations and its successor the United Nations both systematically excluded First Nations as participating units. In Webber's terms, Sovereignty 2 was relied upon to ground Sovereignty 1.

²⁶⁶ Mark Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal* 33, no.4 (1995) at 806.

²⁶⁷ Barsh, "First Nations" at 78.

Nevertheless, First Nations have fought to open this avenue up. Haudenosaunee presentations to the League of Nations sparked a crisis which took considerable diplomatic muscle to avoid, as did the Mi'kmaq appeal to the UNCHR²⁶⁸. In both cases, Settler authorities appealed to the indivisibility of sovereignty and to their own territorial claims to reposition the issue as a question of domestic law. For example, in response to the Mi'kmaq, Canada argued that self-determination “cannot affect the national unity and territorial integrity of Canada” and thus that treaties “are merely considered to be nothing more than contracts between a sovereign and a group of its subjects”²⁶⁹. The Mi'kmaq responded that only consent could make them subjects of another legal order – in effect, centering multilateralism and co-decision against Crown unilateralism²⁷⁰.

Indeed, First Nations continually work to trouble their exclusion from international forums, making pragmatic use of such openings as exist to make their presence felt, both at the intra-imperial and international levels. For example, in 1906 the Nisga'a sent a delegation to London²⁷¹. When First Nations were shut out of constitutional discussions in 1982, numerous delegations again appealed to London²⁷². When “Idle No More” protests broke out in 2013, movement figurehead Theresa Spence demanded negotiations with the Governor General, and not the Prime Minister²⁷³. In each case, the choice of imperial forums was in part a strategic reassertion of legal independence. Appeals to international forums are also common. For

²⁶⁸ Barsh, “First Nations” at 96-98; Grace Li Xiu Woo, “Canada’s Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations,” *Law, Social Justice and Global Development Journal* 1 (2003).

²⁶⁹ Barsh, “First Nations” at 97.

²⁷⁰ Discussed in Barsh, “First Nations” at 94-97.

²⁷¹ Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1908-1928,” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, eds. Hamar Foster, Heather Raven and Jeremy Webber (Vancouver: UBC Press, 2007) at 4.

²⁷² Douglas Sanders, “The Indian Lobby,” in *And No One Cheered: Federalism, Democracy, and the Constitution Act*, eds. Keith Banting and Richard Simeon (Toronto: Taylor & Francis, 1983) at 303.

²⁷³ CBC News, “Attawapiskat chief won't attend PM meeting in GG's absence”, accessed Nov. 10, 2019, <http://www.cbc.ca/news/politics/attawapiskat-chief-won-t-attend-pm-meeting-in-gg-s-absence-1.1369435>

example, Lovelace won an important victory at the UN— embarrassing, although not legally forcing, the government of Canada into action²⁷⁴. More recently, First Nations undertook the momentous task of drafting a declaration of their rights through the UN. Although the rights expressed therein are international they depend on the domestic state for voluntary self-enforcement, and indeed explicitly affirm the inviolable territorial integrity of Settler states, thereby perpetuating the domestic status of First Nations at international law²⁷⁵. Nevertheless, the very existence of the UN Declaration problematizes the exclusionary nature of international law, and thus works to resist the foreclosure of this avenue.

First Nations have also made use of their own inter-national forms of diplomacy to assert their independence. As the power of Settler authorities grew, powerful confederacies like the Wabanaki or Blackfoot began to form or solidify as a counterweight²⁷⁶. The Huadenossaunee continued to jealously guard their right to maintain independent relations with other First Nations groups into the 1800s²⁷⁷. And even today, more than 150 nations from across Turtle Island have signed a treaty alliance against the expansion of fossil fuel production from tar sands.²⁷⁸ These moves can also be understood, at least in part, as assertions of non-derivative international agency.

In sum, by working to define international law so as to exclude First Nations while also denying First Nations legalities, Settler authorities attempt to position their own courts as the default site of legal contestation, allowing them to domesticate, subordinate, and control the legal

²⁷⁴ *Lovelace v. Canada*, UNHRC Communication No.24/1977: Canada 30/07/81, [1977] UN Doc. CCPR/C/13/D/24/1977.

²⁷⁵ Michael Asch, “UNDRIP, Treaty Federalism, and Self-Determination,” *Review of Constitutional Studies* 24, no.1 (2019) at 3. For extended discussion see Barsh, “First Nations”.

²⁷⁶ Prins, *Storm Clouds* at 5.

²⁷⁷ Walters “Old Customs” at 17.

²⁷⁸ “Treaty Alliance Against Tar Sands Expansion” accessed Nov. 10, 2019 at www.treatyalliance.org/wp-content/uploads/2016/12/TreatyandAdditionalInformation-20161216-OL.pdf

relationship unilaterally. By troubling this exclusion and asserting independent international agency, First Nations problematize Settler sovereignty and the use of Settler-controlled forums to regulate intercommunal affairs and re-center the need for co-decision.

3. Discourses

As we have seen, the legal dimensions of the relationship between Settlers and First Nations has undergone important changes over time. The early period was characterized by mutual need between parties, and so involved shared institutions and conditional forms of authority which recognized both parties as independent sources of legal authority. Ad hoc, shared legal processes provided a means for both parties to contest and revise their relationship over time. As time went on, however, Settler conceptions of legal authority became more and more hierarchical and exclusive. As shifting balances of power made Settlers physically dominant, Settlers sought practices that more closely resembled sovereign unilateralism. In short, Settlers engaged in strategies of constitutional capture designed to re-present First Nations law as internal to the Settler legality. First Nations engaged in acts of constitutional refusal by continuing to enact their independent legalities, thereby centering the need for negotiation. Together, these trends have produced an uneasy mix of sovereignty and pluralism, as contemporary jurisprudence limits Settler sovereignty without recognizing First Nations sovereignty. Like historical practice, contemporary discourses around First Nations law can be understood in reference to these ongoing strategies of constitutional capture and refusal.

For example, one important discourse surrounding the relationship between First Nations and Settler legalities comes from the Settler courts. As we have seen, there are two primary mechanism through which Settler courts recognize First Nations law today—aboriginal rights,

and aboriginal title. In essence, the courts' position is that certain rights and titles, which pre-existed Settler sovereignty, were never legally extinguished²⁷⁹. As a result, the courts are prepared to recognize these rights and titles at common law. This recognition takes the form of an act of translation – the court identifies a pre-existing legal entitlement, and then attempts to find or fashion an equivalent right²⁸⁰ which can then be enforced, and infringed, by Settler courts²⁸¹.

Conceptually, then, the aboriginal rights paradigm works to recognize unextinguished First Nations law, but not unextinguished First Nations legalities. Rather, the courts' doctrines work to bring First Nations law into the Settler legality, re-expressing First Nations legal concepts through Settler institutions and worldviews²⁸². Materially, the aboriginal rights paradigm works to make Settler courts the arbiters of First Nations law. Settler judges decide if a right has been established, what the content of that right is, and when it can be infringed – and they do it all unilaterally, without dialogue or negotiation. In both senses, First Nations law is “captured” by the Settler constitution, in that it is made to work according to the logic of, and subject to the authorities designated by, the Settler legality²⁸³. In this way, the doctrines of aboriginal rights and title continue the trend of absorption which has animated Settler jurisprudence for hundreds of years.

²⁷⁹ *Calder* at 314-316.

²⁸⁰ “the court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right” *Marshall and Bernard* at 51.

²⁸¹ See e.g. *Sparrow* at 1114-1115; *R v. Gladstone*, [1996] 2 SCR 723, [1996] 137 DLR (4th) 648 at 62-65, and *Delgamuukw* at 160-169.

²⁸² “aboriginal interests and customary laws ... were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them” *Mitchell* at 10.

²⁸³ Mills, *Miinigowiziwin*, especially chapters 3, 7.

This discourse has strong resonance in state policy-making. Consider for example, ongoing debates about parallel aboriginal justice systems. Debates fixate on questions like whether the Canadian Charter will apply and whether appeal will lie with Canadian courts²⁸⁴. Thus far, the only innovations the state has recognized occur squarely within, and subordinate to, an overarching frame of Settler law²⁸⁵.

In contrast, First Nations discourses tend to portray First Nations legalities as independent and persisting sites of legal authority, requiring forms of interpenetration and co-decision. Visions like Borrows' and Henderson's, for example, can be understood as a rejection of Sovereignty 1 – unilateral decision-making power – in favour of a return to Sovereignty 3 – a recognition of both First Nations and Settler law as distinct sites of authority which must be taken into account. For Henderson, this takes the form of treaty federalism²⁸⁶. In this view, both Settler and First Nations legalities would enjoy robust self-government with exclusive jurisdictions, while also participating in shared jurisdictions and shared institutions²⁸⁷. The boundaries of these jurisdictions would be set multilaterally by treaty. Treaties therefore establish a relationship between two persisting, independent legalities, and act as something of

²⁸⁴ See e.g. Kerry Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government," *University of Toronto Law Journal* 49, no.1 (1999) at 53; Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms," *Osgoode Hall Law Journal* 34, no.1 (1996) at 61; Teresa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter," in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993) at 359; Bill Rafoss, "First Nations and the Charter of Rights" in John Whyte ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) chapter 11; David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012); Menno Boldt and Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms," *Ethnic and Racial Studies* 7, no.4 (1984); Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 6, no.3 (1989).

²⁸⁵ For examples and discussion see Val Napoleon and Hadley Friedland, "First Nations Legal Traditions: Roots to Renaissance," in *The Oxford Handbook on Criminal Law*, eds. Tatjana Hörnl and, Markus Dubber (Oxford: Oxford University Press, 2014).

²⁸⁶ James Youngblood Henderson, "Empowering Treaty Federalism," *Saskatchewan Law Review* 58, no.1 (1994).

²⁸⁷ Henderson, "Treaty Federalism" at 258, 310, 327.

an inter-legal constitution. Areas of shared jurisdiction would be governed by inter-societal norms, such that neither legality would enjoy unilateral powers nor expect the other to conform to its own internal norms²⁸⁸. Likewise, in Borrows' highly influential approach, both First Nations and Settler law persist as independent sites of legal authority, and both continue to regulate conduct in their respective zones and jurisdictions²⁸⁹. Any law that applies to both communities must therefore draw on a multiplicity of legal sources, using them together to render appropriate judgements²⁹⁰. The result is a sort of inter-societal law, drawing from both Settler and First Nations law without exhausting or erasing either.

Both Henderson and Borrows therefore seek shared institutions, but resist absorption into Settler law. Rather than First Nations law persisting at common law, we might say that both common law and First Nations law persist at intercommunal law. This account has strong resonance with the early periods of the colonial encounter, when First Nations and Settler legalities were indeed independent in their respective spheres and where shared concerns were the object of inter-societal norms and negotiations that exceeded the conceptual frames of both legalities. Conceptually, this logic is not compatible with Sovereignty 1, but rather is evocative of Sovereignty 3 – a recognition of both legalities as non-derivative authority sites, neither of which is entitled to unilateral control.

This trans-systemic approach is animating a resurgence of First Nations legal scholarship at the institutional level, informing to various extents the ground-breaking First Nations Law program at the University of Victoria and similar initiatives at the University of Alberta and McGill. It also animates international law jurisprudence like Josh Nichols' work on UNDRIP.

²⁸⁸ Henderson, "Treaty Federalism" at 310.

²⁸⁹ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) especially at 242.

²⁹⁰ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) especially at 123.

Together, these sites are helping reform how Settlers see the relationship between First Nations and Settler legalities.

Scholars like Mills posit a more radical form of non-absorption. For Mills, First Nations law is not only distinct from Settler law, it is ontologically different, such that the two legalities are essentially incommensurable precisely because Settler law revolves around individualist unilateralism, while indigenous law centers interdependence²⁹¹. Since it is not possible to hybridize the two systems, any inter-societal law must inevitably adopt either a Settler ontology or a First Nations ontology. In other words, there can be no truly inter-societal law – one framework must necessarily displace the other²⁹². If it is the Settler frame, relations will inevitably be unilateral. Only an indigenous frame makes space for multilateralism. Mills' therefore envisions the absorption of Settler legalities into a First Nations ontological framework, in an act we might call 'reverse constitutional capture' or perhaps 'treaty capture'. Unlike constitutional capture, however, Mills sees treaty capture as means of reclaiming multilateralism.

Legal discourse therefore continues to revolve around questions of absorption and resistance. In this way, contemporary discourses can be understood as extensions of longstanding historical strategies of constitutional capture and constitutional refusal.

4. Case Study: The Barriere Lake Algonquin and the Quest for a Tripartite Agreement

A series of jurisdictional conflicts between the Barriere Lake Algonquins (BLA) and the governments of Canada and Quebec provides a good illustration of the trends this chapter has canvassed.

²⁹¹ Mills, *Miinigowiziwin* especially at 200.

²⁹² Mills, *Miinigowiziwin* especially at 215.

In the 1760s, the BLA negotiated a treaty with the French and British crowns assuring Algonquin neutrality in colonial struggles and signifying mutual respect and non-interference²⁹³. By the 1990s, over-hunting and logging on their territories made the Algonquins think that their agreement needed to be revisited. They approached the governments of Canada and Quebec, as heirs to the English and French crowns, to negotiate a trilateral framework for resource extraction, including co-management and revenue sharing across the traditional territory.²⁹⁴

Settler governments, however, quickly began to favour the comprehensive land claims process instead²⁹⁵. Under this process, First Nations make ownership claims over their traditional territory, and then exchange the aboriginal rights flowing from those ownership claims for rights approximating fee simple title to a small percentage of their land. In the end, claimants are left with rights which are squarely internal to, and regulated unilaterally by, the Settler legal system. In this sense, the CLCP is another mechanism of absorbing First Nations legalities into the Settler frame – reducing multiplicity to nested unilateralism. The Barriere Lake Algonquins were emphatically uninterested in this process. Rather, they insisted on their status as an independent governing authority that must be negotiated with continually on a trilateral basis.

After prolonged conflict, Settler authorities sought to impose a new leadership on the Barriere Lake Algonquins that would not press the trilateral issue. A series of leadership battles and underhanded tactics ensued.²⁹⁶ Ultimately, the Federal government placed the BLA's finances under third party management, effectively seizing financial control of the community²⁹⁷.

²⁹³ The treaty is captured in the Three-Figure-Wampum, featuring figures representing each of three parties joining hands beside a Christian cross, signifying the sacred nature of the agreement. Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: Minnesota University Press, 2017) at 78.

²⁹⁴ Pasternak, *Grounded Authority* at 4.

²⁹⁵ Pasternak, *Grounded Authority* at 140-149.

²⁹⁶ Pasternak, *Grounded Authority* especially at 162 to 204.

²⁹⁷ Pasternak, *Grounded Authority* at 171.

In response, the BLA launched a series of direct actions, including blockades to prevent logging on their territory, road checkpoints to regulate traffic in the territory, occupations of government offices to demand a return to trilateral negotiations, and reclaiming Victoria Island – a stone’s throw from parliament hill²⁹⁸. Police responded with arrests, fines, property confiscation, and violence. In essence, Settler governments had refused a multilateral legal frame and insisted on a unilateral approach, forcing the Barriere Lake Algonquins to respond in kind with unilateral enactments of their own law in order to signal the continuing plurality of the legal landscape. The BLA also repeatedly took its case to the United Nations, especially the Permanent Forum on the Rights of Indigenous Peoples, where it insisted on the international nature of their relationship to Canada and Quebec and the binding international force of their original treaty²⁹⁹. Predictably, Canada relied on the exclusivity of territorial sovereignty to argue that any issues located within Canadian borders were necessarily a domestic concern³⁰⁰.

To this day, the BLA continue to insist that their relationship to Canada and Quebec is regulated by a treaty which is still in force, and that this treaty needs to be re-polished in the form of the trilateral framework. In contrast, Canada and Quebec continue to claim that the BLA’s rights and title are internal to Canadian law and subject to unilateral arbitration by Canadian courts, legislation by Canadian legislatures, and the discretionary acts of crown ministers.

The approach taken by Canada and Quebec is consistent with the larger pattern of attempted absorption. From the imposition of Indian Act band councils in place of traditional leadership structures, to the CLCP’s domesticating structure, to their non-engagement with

²⁹⁸ See a list of direct actions at <http://www.barrierelakesolidarity.org/>

²⁹⁹ See e.g. Kitchenuhmaykoosib Inninuwug First Nation and the Algonquins of Barriere Lake, “Joint Submission”; Algonquins of Barriere Lake, “Submission”.

³⁰⁰ See Shiri Pasternak, *On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy* (Ph.D. Diss., University of Toronto, 2014) especially at 1-31.

international fora, the Canadian strategy has been to deny legal pluralism and reposition the BLA and their lands as internal, and therefore subordinate, components of the Settler legal order.

Likewise, the BLA have engaged in a series of distance-maintaining manoeuvres, centering their original treaty, appealing to international law, and directly enacting their own legal order in a variety of ways in order to force multilateralism. In all these ways, the Barriere Lake Algonquins dispute illustrates the larger trends and strategies which animate the relationship between Settler and First Nations legalities.

5. Conclusions

As we have seen, the relationship between First Nations and Settler legalities is complex and contested. Nevertheless, certain broad patterns can be traced. Taken as a whole, these patterns suggest two broad arcs.

First, Settler conceptions of law became more exclusive and Settler populations became more physically dominant. Settler legalities responded by seeking to absorb and internalize First Nations legalities, bringing them gradually within their own conceptual and institutional frame in a prolonged project of constitutional capture, thereby subordinating First Nations law to a Settler legality and creating a system based on sovereign unilateralism. Thus, Settler authorities' perceptions of First Nations law slid gradually and inconsistently from an external view of First Nations legalities as foreign nations, to an intra-imperial view which saw First Nations as autonomous units of the empire, to a customary law approach which saw First Nations law as internal to domestic colonial law, to an aboriginal rights approach which sees First Nations law as a source of rights within the Settler constitution.

Second, First Nations have sought to maintain distance and exteriority from the Settler legality, engaging in varied strategies of constitutional refusal, thereby affirming the presence of their own independent legalities. By appealing to international law and imperial authorities, centering treaties, taking direct action to define and protect their laws, creatively using Settler legalities to open spaces of relative autonomy, and continuing their legalities independently, First Nations have sought to assert and reassert their legalities as external, persisting, and co-equal with their Settler counterparts, thus re-centering the need for multilateralism and forcing limited concessions from the Settler judiciary.

The contest between these arcs reveals some persistent patterns and practices. The Settler legality has depended on a series of hierarchically arranged statuses, a certain degree of doctrinal confusion, the strategic use and withdrawal of discretionary authority, and the foreclosure of international forums to transform the intercultural legal dialogue into a legal monologue. By contrast, First Nations have leveraged assertions of equality, historical consistency, relational deviations from the rules, and shows of international agency to reassert a negotiated, trans-systemic relationship between legalities.

Together, these patterned arcs have produced a number of limits on Settler discretion and preserved some space for First Nations legal agency, as in the modern treaty process or the jurisprudence of aboriginal title. To a significant extent, these remaining points of multilateralism are the result of tireless First Nations advocacy. However, these concessions are defined and enforced unilaterally by Settler institutions, allowing Settlers to understand them as internal to and consistent with Settler sovereignty. Contemporary jurisprudence therefore combines elements of constitutional capture and constitutional refusal in complex and challenging ways.

Overall then, we might describe the relationship as characterized by a troubled and contested, incoherent and ad hoc, partial and incomplete, often appropriated and resisted, and still ongoing attempt to transform plurality into monism on the one hand, and an oppressed but resilient, creative and opportunistic attempt to reassert plurality on the other. These processes have not resulted in the erasure of independent First Nations legalities, but they have succeeded in creating deeply asymmetrical relations between legal systems.

[Chapter Three] Economic Practices

This chapter explores the economic dimensions of the relationship between First Nations and Settler peoples, exploring how economic practices are challenging and being shaped by sovereignty. Broadly speaking, I contend that the economic relationship can be fruitfully understood through two interwoven processes – alienation, or the dispossession of actual resources, and diremption, or the reconceptualization of those resources³⁰¹. Tracing these two processes, I contend that conceptions of economic authority, like conceptions of political and legal authority, have gradually become more total and exclusive. At the same time, physical control over productive capacities has also been concentrated in a small Settler elite. In this sense, the processes of alienation and diremption have produced what we might think of as the sovereignization of the material sphere, as economic production produces private relations that increasingly resemble sovereign forms of authority³⁰². Alongside these processes of alienation and diremption, however, there are notable counter-practices of persistence and adaption, as First Nations use economic practices to creatively maintain a distinct economic structure that continues to involve overlapping claims and contingent forms of economic authority. The sovereignization of economic practice is therefore ongoing, partial, and contested.

In making this argument, I trace the economic relationship between Settler and First Nations through several loose phases. During the initial encounter, the economic relationship was characterized by mutual need and mutual, if asymmetrical, benefit. Each party was largely able to incorporate trade goods into their existing economic structures, and neither alienation nor

³⁰¹ “Dispossession combines two different processes normally thought distinct from one another: the transformation of non-proprietary relations into proprietary ones alongside systematic divestment” Nichols, *Theft is Property!* at 86.

³⁰² Indeed, Trosper refers to it as the “sovereign model of property ownership” Ronald Trosper, *Resilience, Reciprocity and Ecological Economics: Northwest Coast Sustainability* (New York: Routledge, 2011) at 78.

diremption were major features of the relationship. As colonial trade networks expanded and the Settler economy pivoted towards agriculture, however, Settler need for First Nations economic cooperation declined. Settlers began to displace First Nations on the land, and thus displace their modes of economic production. Alienation became a major feature of the relationship. At the same time, emerging capitalist systems popularized conceptions of ownership that were increasingly total and exclusive. In particular, ownership rights became more tightly bundled and concentrations of private wealth gave rise to new forms of purely private compulsion. Thus, property was both reallocated and reconceptualised in recursive processes. Agriculture helped spread bundled property claims across previously shared lands. Eventually, growing colonial trade networks facilitated an accumulation of capital, which in turn birthed an industrial and commercial revolution based on wage-labour. This helped spread private forms of sovereign authority through the worker-owner relationship.

As capitalism has solidified and transitioned into neo-liberalism, both alienation and diremption have become more sophisticated and pervasive, as the hypermobility of capital and the suppression of economic alternatives work to discipline Settler and First Nations governments alike. First Nations participated in these shifts in complex ways, embracing, resisting, withdrawing from and integrating new economic forms into their existing economic structures in adaptive ways that often combine coercion and consent, and trouble simple conceptions of agency³⁰³. Ultimately, this has produced an asymmetrical relationship between a Settler-dominated capitalist market and a multimodal³⁰⁴ First Nations economy which persists

³⁰³ Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2007) at 3.

³⁰⁴ Lutz terms the mixture of First Nations and western productive forms a “moditional” economy, to capture that it has both traditional and modern components which First Nations could draw on variably to suit changing needs and circumstances, see *Makuk* at 23. I am greatly indebted to this insight. However, I feel the words “traditional” and “modern” imply that only wage-labour is truly suitable to the present, while non-wage activity is a relic of the past. This is not the thrust of Lutz’s work, but it is, I believe, an unfortunate implication of his semantic choice. I prefer

alongside it and allows many First Nations people to at least partially escape private forms of compulsion and authority.

The following chapter maps each of these incomplete, ongoing transformations in more detail, showing how Settler authorities have worked to incorporate First Nations economies into Settler economies by both redistributing and reconceptualizing First Nations resources. Section 1 traces the colonial encounter through a series of rough phases. Section 2 examines some of the more important and enduring practices which have moved us through the phases just explored, showing how their continuity over time reveals an ongoing, but perpetually contested, process. Section 3 explores the discourses which legitimize and challenge these ongoing processes today, while Section 4 offers a case study examining the Hudson's Bay Company. Finally, I offer some concluding remarks (Section 5).

1. Four Phases of Economic Relations

1.1 Reciprocal Incorporation and Geopolitics: the Early Colonial Period (Contact- ~1725)

Early economic contact was largely a matter of rather limited interaction between economic systems that remained quite independent. On both sides of the encounter, property ownership and material production were highly decentralized affairs. Multiple overlapping ownership claims were typical³⁰⁵, authority over economic production was diffuse and often contingent³⁰⁶,

“multi-modal” economy because it conveys the idea that many First Nations people draw on multiple economic forms in flexible ways while steering clear of any allusion to modernist narratives.

³⁰⁵ For example, feudal families held inherited lands which were worked by serfs or feudal tenants who similarly inherited usufruct rights. Landholding families in turn owed allegiance to higher lords and ultimately the monarch, all of whom also had certain claims to their property. Greer, *Property and Dispossession* at 196 regarding the British, 75 regarding the French. See also Douglas Sanderson, "The Residue of Imperium: Property and Sovereignty on Indigenous Lands," *University of Toronto Law Journal* 68, no.3 (2018) at 326. For a First Nations comparator see Trospen, *Resilience* at 14 and for a comparison between the two models see Trospen, *Resilience* at 73.

³⁰⁶For example, land was not easily alienable. Both feudal tenants and other lords could block attempted transactions. Lords were not at liberty to dispose of their lands absolutely, and the rights now associated with an owner were widely distributed along the social hierarchy, with peasants, lords, nobles and monarchs all laying claim to certain rights. Large parts of a lord's lands were allotted to individuals, while other parts were held in common by

and productive processes involved negotiation between multiple quasi-independent actors³⁰⁷. Greer therefore describes Settler concepts of private authority as a system of “property as propriety”³⁰⁸, in that landowning required meeting multiple overlapping claims. Similarly, Trosper describes First Nations proprietary concepts on the Northwest coast as “contingent proprietorship”, in that retention of the proprietor role required meeting certain conditions and honouring the claims that kin and allied groups were entitled to make on the proprietor’s territory or resources³⁰⁹.

Settler-First Nations trade displayed similar characteristics. English Settlers, for example, commonly paid annual tribute for land they believed they owned, even making payments to multiple First Nations claimants³¹⁰. Even then, proprietary rights rarely entirely excluded the sellers from continued use³¹¹. Private authority was thus non-exclusive, a confluence of interpenetrating ownership claims drawn from both Settler and indigenous economic forms³¹².

Interpenetrating, contingent ownership claims allowed each party to partially subsume the other into its own economic cycles and ideologies of production³¹³. For Europeans, fish and later fur provided products for resale across Europe, tying First Nations economic production to commercial competition between European states. Trade shaped the distribution of power, both

entire villages, while others still were the common property of all humanity. Greer, *Property and Dispossession* at 157.

³⁰⁷ Kropotkin notes that cities, empires, guilds, noble families, and even peasant associations engaged in collective bargaining which structured overall economic processes. Petr Kropotkin, *The Essential Kropotkin*, eds. Emile Capouya and Keitha Tompkins (London: Palgrave Macmillan, 1975) at 188.

³⁰⁸ Greer, *Property and Dispossession* at 217.

³⁰⁹ Trosper, *Resilience* especially the summary at 14.

³¹⁰ Greer, *Property and Dispossession* at 91, 206.

³¹¹ Greer, *Property and Dispossession* at 90.

³¹² Allan Greer, "Land, Property and Colonization: Some Conceptual Issues," paper presented at the Workshop *Property in the Making of the Portuguese Empire*, University of Lisbon, 13 November 2013 at 11.

³¹³ Lutz, *Makuk*, especially the Introduction.

between European states and within them, as maritime trading nations prospered at the expense of others, and as a newly ascendant merchant class began to emerge³¹⁴.

In this sense, the fur and fish trades were incorporated into existing networks of mercantilist, proto-capitalist circulation. Ince, drawing on Marx, calls this process formal subsumption, in which “capital subsumes the labor process as it finds it; that is to say, it takes over an existing labor process, developed by different and more archaic modes of production” without actually pulling workers into a formally capitalist wage-labour relationship³¹⁵. Contrary to Ince’s progressivist narrative, however, processes of subsumption in this era were largely bi-directional. Even as First Nations labour was incorporated into growing Imperial economic systems, so too was European labour incorporated into existing First Nations economies and lifeways.

For First Nations, European trade goods made some tasks more efficient and changed some traditional economic activities; but many goods were used for ceremonial or diplomatic purposes as trade goods were incorporated into local gift-reciprocity economies, reinforcing existing worldviews and practices³¹⁶. As in Europe, trade was also increasing the relative domestic standing of trading chiefs within their communities, as well as shifting the geopolitical balance of power between those groups with access to the trade and those without³¹⁷.

³¹⁴ Thomas Wien, "Selling Beaver Skins in North America and Europe, 1720-1760: The Uses of Fur-Trade Imperialism," *Journal of the Canadian Historical Association* 1, no.1 (1990) at 307; P. J. Cain and A. G. Hopkins, "Gentlemanly Capitalism and British Expansion Overseas I. The Old Colonial System, 1688-1850," *The Economic History Review* 39, no.4 (1986) at 505.

³¹⁵ Onur Ulas Ince, "Primitive Accumulation, New Enclosures, and Global Land Grabs: A Theoretical Intervention," *Rural Sociology* 79, no.1 (2014) at 118.

³¹⁶ White, *Middle Ground* at 132.

³¹⁷ Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1992) at 18; W.A. Sloan, "The Native Response to the Extension of the European Traders into the Athabasca and Mackenzie Basin, 1770–1814," *The Canadian Historical Review* 60, no.3 (1979) at 286; Wien, "Selling Beaver" at 297.

The trade itself was typically an ad hoc mixture of gift-based exchange and proto-capitalist market exchange. Systems of advance payment, for example, were understood as loans by the French and as gift-exchanges by their partners, with actual practice showing elements of both³¹⁸. Likewise, pricing reflected both the kin-duties of local Algonquin systems of exchange and the profit-motive more familiar to European traders³¹⁹. Ultimately, these compromises were ambiguous enough that each party could understand the relationship largely as an extension of their existing economic institutions and ideologies³²⁰.

Thus, neither alienation nor diremption appear as a central feature of the early encounter. Rather, practices of contingent authority and interpenetrating ownership claims allowed Settlers and First Nations alike to subsume trade into existing economic practices and conceptualizations.

1.2 Serfs Up – Agricultural Expansion and Economic Competition (~1725- ~1840³²¹)

As time went on, a number of factors decreased the importance of the fur trade to the colonial and imperial economies. A combination of increased expenses, over-hunting and market saturation led to declining profits³²², and the eventual defeat of New France led to the spread of the more agricultural British economy at the expense of the trade-based economy of the French³²³. Of course, agriculture and fur hunting are largely incompatible land uses. Thus, the

³¹⁸ White, *Middle Ground* at 112.

³¹⁹ White, *Middle Ground* at 95, 119, 480.

³²⁰ White, *Middle Ground* at 119.

³²¹ This period begins around 1725 as the French fur trade began to collapse and the English agricultural model began to surge (see White, *Middle Ground* at 121-127), and extends until the canal and railroad building booms around 1840 began a new era of wage labour. See Allan Greer and Ian Radforth eds., *Colonial Leviathan: State Formation in Mid-nineteenth-century Canada* (Toronto: University of Toronto Press, 1992) at 6. Of course, all date ranges are approximate and subject to local variation; see discussion in Part 1.

³²² White, *Middle Ground* at 485.

³²³ Miller, *Skyscrapers* at 69, 70, 77.

shift from fur to agriculture would prove a major milestone in the economic relationship, putting Settler and First Nations economic systems into more pronounced competition and conflict³²⁴.

Settler farmers were typically independent, freehold producers³²⁵ who often took what land they needed of their own accord³²⁶. Government efforts to contain illegal squatting were sporadic and ineffective, often involving the government simply buying whatever land Settlers had already stolen. In this way, colonial agriculture became a major driver of local land conflict³²⁷.

Changes in agriculture in Europe would also prove significant for the colonies. Especially in Britain, previously common land and layered feudal holdings were increasingly being “enclosed” or transformed into large private parcels³²⁸. This created a class of dispossessed peasants, whose resistance to enclosure threatened domestic stability³²⁹. Colonial settlements provided an outlet for restless, dispossessed labour, mollifying domestic unrest with the promise of cheap or even free farmland overseas³³⁰. Thus, the changing nature of agriculture in Europe drove increased agricultural settlement in the colonies, further compounding local land pressures.

³²⁴ Indeed, a memorial address given to Prime Minister Laurier by Shuswap, Okanagan and Nlaka'pamux chiefs stressed the difference between fur-trade Settlers and agricultural Settlers, noting that the former were economically interdependent and therefore cooperative and neighbourly, while the later wanted only to displace Indigenous peoples. James Tully, “Two Ways of Being Colonial: Guest and Settler,” Paper presented to the *Workshop on Colonization and Decolonization*, University of British Columbia, April 12 2017.

³²⁵ Greer and Radforth, *Colonial Leviathan* at 6; Allan Greer, “Wage Labour and the Transition to Capitalism,” *Labour* 15 (1985) at 19, 21.

³²⁶ Taylor, *Divided Ground* at 8, 9, 41.

³²⁷ The Royal Proclamation was in part a response to this epidemic of Settler squatters. By forbidding the sale of First Nations’ land to anyone except the Crown, the Proclamation envisioned a more state-led process of dispossession. In essence, the state’s monopoly on land purchases from First Nations let it buy land cheaply, allowing the state to line its own coffers by re-selling the land to Settlers at a profit. In this way, property formation was feeding state formation, as the creation of private property from previously First Nations’ land reinforced the power of the colonial government. Taylor, *Divided Ground* at 10.

³²⁸ E. P. Thompson, *The Making of the English Working Class* (London: Penguin, 1991) at 217.

³²⁹ See e.g. Thompson, *Whigs and Hunters*.

³³⁰ Cain and Hopkins, “Gentlemanly Capitalism 1688-1850” at 515.

These two trends – the expansion of the Settler population and the pivot towards agriculture – put Settler economies into more direct competition with the economies of their erstwhile partners. Alienation therefore became a major feature of the economic relationship.

The enclosure movement also began to transform how land was conceptualized in Settler society, re-making land as a commodity in the western imagination³³¹. Since commodities are subject to more exclusive and absolutist ownership norms, the commodification of land gave rise to increasingly exclusive and unilateral conceptions of land ownership.

These increasingly exclusive concepts of land ownership find expression in the changing colonial relationship. The Royal Proclamation, for example, worked to conceptually divide the continent into mutually exclusive First Nations and Settler zones³³². Where pockets of First Nations people remained within Settler zones, reserves were created³³³. Indeed, three concurrent acts of demarcation – the establishment of private property through settler agriculture, the definition of international borders, and the creation of reserves – worked in a mutually reinforcing manner to support a logic of exclusive, bounded ownership³³⁴.

First Nations responses to these more concentrated forms of property ownership varied. Many communities moved away from the growing settlements and continued with their economic production and land-holding much as they always had, while others – particularly those increasingly encircled by settlement – leveraged the European economies strategically³³⁵. Many groups also contested the use of watertight territorial boundaries³³⁶. The same treaties that

³³¹ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001) at 70-81.

³³² However, the British appear to have asserted some overarching rights and radical title to even the First Nations zones. See Chapter 1 Section 1.3.

³³³ Greer, *Property and Dispossession* at 233.

³³⁴ Taylor, *Divided Ground* at 8. Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: University of British Columbia Press, 2003) at 266.

³³⁵ See Lutz, *Makuk* Chapters 4 and 5 comparing the Lekwungen and Tsilhqot'in responses, respectively.

³³⁶ See e.g. Bauerkemper and Stark, "Trans/National Terrain".

established reserves, for example, also frequently included guarantees that First Nations be able to hunt, harvest, and travel in Settler zones as they had previously³³⁷. Even inter-Settler treaties like Jay's Treaty, establishing the US-Canadian border, included provisions for the free movement of First Nations³³⁸.

Nevertheless, the dominant conceptualization of property ownership was becoming increasingly bounded and exclusive. Along with these conceptual shifts, the distribution of control over productive capacities was also shifting, as economic power became more centralized in the growing Settler population³³⁹. Thus, the shift from fur to agriculture in the Settler economy marked a major turning point, making processes of alienation and diremption a more pronounced feature of the relationship between First Nations and Settler economies. Little wonder, then, that many First Nations consistently center the shift from a fur trade to an agricultural economy as mapping a broader shift from mutual respect to coercion and assimilation³⁴⁰.

1.3 Work/Force – Wage-Labour and Disciplinary Hierarchy (~1840- ~1970³⁴¹)

Over time, the enclosure of agriculture in Britain facilitated a massive accumulation of capital in the Settler metropole, facilitating large investments in productive systems and fueling an industrial and commercial revolution³⁴². In the place of semi-feudal tenants or freehold farmers,

³³⁷ Allan Greer, "Commons and Enclosure in the Colonization of North America," *The American Historical Review* 117, no.2 (2012) at 377.

³³⁸ Taylor, *Divided Ground* at 73.

³³⁹ Significant as they are, these shifts should be exaggerated. Huge tracts of land had (and have to this day) virtually no Settler presence.

³⁴⁰ For discussion see Tully, "Two Ways of Being Colonial".

³⁴¹ This period begins around 1840 as canal and railroad building booms created a new labour market (See Greer and Radforth, *Colonial Leviathan* at 6) and continues until the rise of neo-liberalism around the economic crises of the 1970s. See Philip Cerny, "In the Shadow of Ordoliberalism: The Paradox of Neo-liberalism in the 21st Century," *European Review of International Studies* 3, no.1 (2016) at 81. Of course, all date ranges are approximate and subject to local variation, see discussion in Part 1.

³⁴² Cain and Hopkins, "Gentlemanly Capitalism 1688-1850" at 394.

wage-labour began to emerge as a major component of Settler production. Like land before it, labour was becoming commodified, and thus subject to the sort of absolute control exercised over other commodities³⁴³. The economic relationship between Settler and First Nations communities tracks these shifts, as resources were increasingly captured by industrial wage-based production, and as a new emphasis was placed on the disciplinary control of workers themselves.

As excess capital accumulated in Europe, the need for profitable investments led to a dramatic surge in canal and railroad projects across the colonies³⁴⁴. In contrast to the independent farms that had thus far been typical of the colonial economy, these projects required wage labourers³⁴⁵. Imperial policy shifted to meet these shifting economic needs. Whereas cheap or even free land grants in the colonies had once been an important means of building an agricultural base, Imperial administrators like Wakefield now pushed colonial governments to artificially raise the price of land as a means of disciplining the local population into a waged workforce³⁴⁶. Where land was dear, new Settlers would be forced to accept wage labour until they acquired enough capital for land of their own. This approach is part of a broader shift in state institutions, as everything from asylums and prisons to factories and armies were re-imagined with a new emphasis on disciplinary control of the individual, and the population as a whole, as productive forces³⁴⁷. Settlers were therefore subject to processes of dispossession and diremption as well.

³⁴³ Polanyi, *Great Transformation* at 70-81.

³⁴⁴ Greer and Radforth, *Colonial Leviathan* at 6, 7.

³⁴⁵ Greer, "Wage Labour" at 7, 19.

³⁴⁶ The state's monopoly on land purchases from First Nations also allowed the state to buy land cheaply, while its policy of selling dear to Settlers lined state coffers even as it created a labouring class and an investing class. Dean Neu and Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Blackpoint: Fernwood Publishing, 2003) at 41.

³⁴⁷ See e.g. Michel Foucault, *Discipline & Punish: The Birth of the Prison* (New York: Pantheon, 1977).

However, efforts to discipline and dispossess First Nations were particularly aggressive. On reserve, welfare provision became tied to school enlistment, forcing recipients to adopt a sedentary lifestyle which rendered many First Nations economic activities unviable, thereby pushing parents into the labour force even as children were prepared for the same fate through industrial schooling³⁴⁸. Social programs worked to lessen reliance on kin ties and encourage dependence on the state and employer³⁴⁹. Staple resources, like cod, beaver, bison and salmon also saw rapid industrialization, as Settler factories displaced First Nations harvesting and monopolized access in massive, society-changing acts of resource alienation³⁵⁰. First Nations workers were often brought into these factories, which became a major site of diremption as well. Labour was thus increasingly alienated into the Settler economy even as it was reconceptualised as an object of hierarchical control³⁵¹. For Ince, this stage marks the point at which processes of formal subsumption, which accumulate capital through engagement with non-capitalist economies without transforming their modes of production, gave way to real subsumption, where the focus is squarely on conversion to wage labour³⁵². With this shift, the economic relationship moved further away from the forms of conditional ownership and interpenetrating claims that had characterized the early encounter, revolving increasingly around exclusive, absolute concepts of private authority.

First Nations reactions to these shifts varied widely, depending on local preferences, strategic considerations, and the viability of the local First Nations economy. Some groups (like

³⁴⁸ Neu and Therrien, *Accounting for Genocide* at 109, 125.

³⁴⁹ Neu and Therrien, *Accounting for Genocide* at 129; Bruce Curtis, "Representation and State Formation in the Canadas, 1790–1850," *Studies in Political Economy* 28, no.1 (1989) at 62.

³⁵⁰ For examples see Donna Feir, Rob Gillezeau and Maggie Jones, "The Slaughter of the Bison and Reversal of Fortunes on the Great Plains," *Center for Indian Country Development Working Paper* 2019-01 (2019); Lutz, *Makuk* at 186-200.

³⁵¹ First Nations commodities were also increasingly captured by industrial processes, as traditional staples like the salmon, cod, eel and bison were all aggressively monopolized and overexploited by wage-based productive forms.

³⁵² Ince, "New Enclosures" at 118.

the Tsilhqot'in) withdrew from populated centers or took steps to push out Settler populations, while others (like the Lekwungen) relocated to be near industrial centers in order to take advantage of wage-labour opportunities³⁵³. Even these groups, however, typically incorporated the new wage-relation into their own economic systems. Labour was often undertaken seasonally, forming a new part of existing resource rounds³⁵⁴. Often, companies dealt with bands at the community level, contracting with chiefs to supply labour at negotiated rates³⁵⁵. On an individual level too, First Nations people often used wages as inputs into their own prestige economies³⁵⁶. To some extent, wage labour replaced declining traditional activities, especially where ecological collapse had made First Nations economies less viable. Generally, however, wages, like the trans-Atlantic trade before it, were layered on top of existing economic activities, creating a flexible, multimodal economy which remained distinctively First Nations³⁵⁷. Thus, First Nations continued to incorporate Settler economic practices into their existing economic structures and concepts even as they were incorporated into Settler labour markets.

First Nations were also active in some early labour movements, joining Settlers who were also contesting the new wage-labour paradigm³⁵⁸. In the decades surrounding the turn of the

³⁵³ See Lutz, *Makuk* Chapters 5 and 4 respectively.

³⁵⁴ Lutz *Makuk* at 201.

³⁵⁵ Lutz *Makuk* at 200.

³⁵⁶ Steven High, "Native Wage Labour and Independent Production during the 'Era of Irrelevance,'" *Labour* 37 (1996) at 244.

³⁵⁷ Of course, there are significant spatial variations. In some places, like the prairies, it is probably true that First Nations labour had limited economic importance. In others, as in the northwest coast canneries or the resource extraction zones of northern and western Ontario, First Nations labour was central to capitalist development. Variation was also temporal. When labour was in short supply, especially in times of war, First Nations participation in wage labour was high; but when the troops returned home, so did First Nations marginality. Thus, First Nations continued to act as something of a reserve labour force, meaningfully independent of the market but involved opportunistically. Rolf Knight, *Indians at Work: An Informal History of Native Labour in British Columbia, 1858-1930* (Vancouver: New Star, 1996), especially at 201, 203, 204, 208.

³⁵⁸ Lutz, *Makuk* at 217. See also High, "Native Wage Labour"; Stuart Jamieson, "Native Indians and the Trade Union Movement in British Columbia," *Human Organization* 20, no.4 (1962). Jamieson's work is based on the West Coast, but he argues that "the general picture that emerges is, perhaps, fairly typical of Indians in several areas of this continent that have been undergoing rapid industrial expansion and union growth" at 219.

century, First Nations participated actively in many unions, created indigenous-only chapters of settler unions, and even created ‘race conscious’ indigenous-only unions of their own³⁵⁹.

Together with Settler labourers, these institutions created a degree of mutual need between capitalist and worker, facilitating an era of active, if asymmetrical, collective bargaining that meaningfully compromised the absolute control of capitalist over their assets.

In all these ways, the growth of the wage-economy signalled another series of important shifts in the economic relationship between Settler and First Nations. As capital accumulation birthed a wage-labour market in Settler societies, conceptions and allocations of private authority became more exclusive and absolute.

1.4 Invisible Hands and Inconvenient Indians³⁶⁰ – Discipline, Neo-liberalism and Neo-Colonialism (~1970- Present)

As the colonization process, and the capitalist economy, progressed and solidified, both the processes of alienation and diremption took on new intensity, and new forms. Indeed, the massive accumulation of capital resulting from the industrial revolution and the transition to wage-labour made possible the commodification of money itself³⁶¹, and the rise of finance and investment as the major drivers of the global economy. With this shift, capital became hypermobile and less tied to particular places, political regimes, and industries. As a result, labour’s position became more precarious, and workers’ ability to organize was drastically undercut by the threat that capital would simply relocate to more pliable areas. Thus, real wages

³⁵⁹ Jamieson, “Trade Union Movement” at 220.

³⁶⁰ This is an homage to Thomas King’s prescient exploration of the interplay between the lived experience of modern indigeneity and colonial ideology surrounding the figure of the “Indian”. Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (New York: Doubleday, 2012).

³⁶¹ See Polanyi, *Great Transformation* at 70-81.

began to fall while profits soared, and the physical distribution of control over productive processes and private property became increasingly concentrated in a transnational investor class³⁶².

The mobility of financial capital made workers vulnerable to new forms of diremption, as economic insecurity encouraged workers to internalize and self-discipline themselves to the norms that capital encouraged³⁶³. This impacted First Nations workers in particular, as increased competition largely marginalized First Nations in labour unions, leaving First Nations workers even more vulnerable than their Settler counterparts³⁶⁴. First Nations were also major targets of disciplinary strategies by Settler governments, who began linking schooling, welfare payments³⁶⁵, funding for First Nations governments³⁶⁶, loans, and even the ability to raise one's own children to displaying a properly entrepreneurial mentality³⁶⁷.

³⁶² The Canadian component of this class is, of course, predominantly Settler. Ownership of Canadian production, however, continues to be largely foreign and the productive model continues to be based on resource extraction for foreign profit. Panitch characterizes Canada as a "rich dependency", likening foreign control to that exercised over former colonies in the third world. See Leo Panitch, "Class and Power in Canada," *Monthly Review* 36, no.11 (1985). Within this dependency, Coulthard argues that processes of 'primitive accumulation' are ongoing, as Settler authorities commoditize indigenous lands and resources. Coulthard, *Red Skin* especially the Introduction and Chapter 2. We might therefore say that the modern Canadian economy expresses a dual core-periphery relation – Canada is peripheral to the centers of global finance, and First Nations economies are peripheral to that Settler-dominated periphery.

³⁶³ For discussion see Maurizio Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition* (Los Angeles: Semiotext(e), 2012) especially chapter 3.

³⁶⁴ High, "Native Wage Labour" at 252; Jamieson, "Trade Union Movement" at 222.

³⁶⁵ Indeed, governments increased welfare payments to First Nations communities dramatically during this period, making state support a significant part of First Nations economies. In 1900, less than 1% of First Nations income was from government welfare, but by 1972 this had risen to 47%. Like wages, these payments were largely incorporated into First Nations economies, adding another element to a multi-modal economy which already integrated both capitalist and subsistence practices. Once integral to the multi-modal economy, however, welfare payments were manipulated in three ways – first, reliance on welfare disincentivized the traditional economic rounds that might otherwise provide an alternative to wage labour; second, payments were made conditional upon a set of behaviours deemed appropriate to the modern economy, serving as a means of disciplining individuals into wage labour; and finally, the inadequate size of welfare payments ensured a continued need for wage-labour. Lutz, *Makuk* at 270.

³⁶⁶ Neu and Therrien, *Accounting for Genocide* at 125, 133, and 140.

³⁶⁷ Robert Paine ed., *The White Arctic. Anthropological Essays on Tutelage and Ethnicity* (St John's: Memorial University, 1977) at 7–28. See also Kenneth Coates and William Morrison, "In Whose Best Interest? The Federal Government and the Native People of Yukon, 1964–1991," in *Rebirth: Political, Economic, and Social Development in First Nations*, ed. Anne-Marie Mawhiney (Toronto: Dundurn Press, 1993) at 19–33.

The modern treaty process has been a major site of this shift. If treaties were all but ignored in the Late Period, the Modern Period saw treaties re-emerge as a technology of rule. Increasingly, modern treaties aim to create forms of autonomy which leave First Nations dependent on the capitalist market, and which therefore force them to compete for market resources³⁶⁸. In effect, this market reliance disciplines First Nations governments, forcing them to seek forms of self-rule which are compatible with extractive capital. Indeed, these shifts track larger transformations characteristic of the neoliberal era. According to Tully, the relationship between former colonies and former colonizers has become similarly “indirect”, with imperial powers “able to govern the conduct of the former colonies by a host of informal means, from economic aid, trade manipulation, and debt dependency to military dependency, intervention, and restructuring... They exercise various forms of inducement, constraint, channelling, and response, and employ various means, from economic dependency to military intervention, to try to control or govern the way the former colonies or ‘developing countries’ exercise their powers of self-government”.³⁶⁹ Like the relationship between colonies and the metropole, the forms of control that Settlers exercised over First Nations were becoming subtler, more indirect, and more reliant on internalized self-discipline and capitalist-market compulsion.

Settler governments too, are increasingly disciplined by the need to attract mobile capital in order to produce tax revenues, similarly internalizing the appropriate norms and behaviours³⁷⁰. In fact, this is giving rise to new patterns of alienation. A global phenomenon known as “the third enclosure” is underway, as global corporations discipline governments into privatizing

³⁶⁸ For an extensive discussion see Andrew Woolford and R. S. Ratner, “A Measured Sovereignty: The Politics of Nation-Making in British Columbia,” *Canadian Journal of Native Studies* 24, no.2 (2004).

³⁶⁹ Tully, “Lineages” at 4.

³⁷⁰ See e.g. Stephen Gill and Claire Cutler, *New Constitutionalism and World Order* (Cambridge, Cambridge University Press, 2015); James Chen, “Race to the Bottom” accessed November 11, 2019 <https://www.investopedia.com/terms/r/race-bottom.asp>

previously public resources³⁷¹. Reservations and other First Nations lands are a major target of this third enclosure.

The process of incorporating First Nations economies into Settler structures has therefore continued and intensified. New forms of alienation and diremption work recursively to bring First Nations economic activity within the conceptual and material bounds of the capitalist-market economy, even as they offer forms of agency and power within those bounds. In particular, mobile capital is increasingly able to discipline workers, governments and First Nations alike.

These new strategies, like the approaches that preceded them, have been only partially successful. Welfare payments, like wage-labour before them, have been integrated into First Nations economic systems to constitute part of a flexible, dynamic multimodal economy which remains in many ways distinct from the Settler economy³⁷². Many eligible groups have rejected the modern treaty process³⁷³, and many groups who have embraced modern treaties use them to act otherwise within the system.³⁷⁴ Others reject the system outright. Disenchanted with the state and its corporate partners, many First Nations political organizations and grassroots activists have embraced a new nationalism, based on the resurgence of First Nations economic practices old and new³⁷⁵.

³⁷¹ This trend is continuous with earlier enclosures – first, common property is transformed into state property; then it is transformed into private property. Stuart Banner, “The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850,” *American Journal of Legal History* 41, no.1 (1997) especially at 64.

³⁷² See e.g. Lutz on the “modifional” economy. Lutz, *Makuk* at 23.

³⁷³ This is particularly true of the B.C. Treaty Process. Despite a recent upsurge, just 38% of B.C.’s 200 Indian Act bands are in any stage of negotiation, and only three have fully completed treaties (the Maa-nulth, Tla’amin and Tsawwassen First Nations). BC Treaty Commission, “Negotiations Update.” accessed November 10, 2019 <http://www.bctreaty.ca/negotiation-update>

³⁷⁴ The idea of acting otherwise within a set of rules as a form of resistance comes from Tully, *Public Philosophy* especially at 23-24.

³⁷⁵ Jeff Cornthassel, “Re-envisioning Resurgence: First Nations Pathways to Decolonization and Sustainable Self-Determination,” *Decolonization: Indigeneity, Education & Society* 1, no.1 (2012).

2. Practices of Note

The economic relationship between First Nations and European Settlers can therefore be understood through a number of loose phases, each of which occurred in different ways and at different times in different geographic areas.

In the earliest periods, trade created conditions of mutual need and mutual, if asymmetrical, benefit between the parties. The structure of the trade was an ad hoc, negotiated affair that both sides were able to contest and influence. As the fur trade declined and the Settler economy pivoted towards agriculture, however, the shared needs of the earlier periods gave way to conflicting needs and land uses. Settler farmers began displacing Indigenous peoples and productive processes, capturing their lands and reconceptualising them as the object of exclusive ownership rights. As time went on, the industrial revolution brought wage-labour to the fore of the Settler economy. Wage-labour processes monopolized many First Nations resources, alienating them into Settler hands even as they were reconceptualised as the objects of exclusive control. As the capitalist economy matured into its current phase, indirect forms of economic compulsion have become more prominent, as private authorities use their wealth to influence behaviour in complex ways.

Broadly speaking, these phases track two ongoing processes: the alienation of First Nations resources into the hands of a small Settler elite, and the re-imagining of First Nations resources, lands and labour as capitalist commodities which are no longer subject to multiple, contingent ownership claims but instead are the object of unilateral authority. Together, these processes have worked to reduce mutual need between the parties, and thus to reduce the scope of inter-societal contestation. Ultimately, these shifts have produced absolutist conceptions of

economic authority which closely mirror the concepts and allocations of authority associated with the sovereign state. In this sense, the shifts surveyed above represent the sovereignization of the economic sphere. First Nations continue to contest this sovereignization by enacting economic practices which exceed the capitalist framework. In limited ways, they have succeeded in maintaining forms of layered ownership and contingent authority.

A vast and sometimes contradictory array of practices have worked to facilitate this transformation³⁷⁶. Four such practices – treaties and reservations, legislative double-movements, ecological destruction, and aboriginal title – have proven especially potent and durable, and each continues to be central to ongoing processes of alienation and diremption today. The following section explores each of these practices, showing their continuity and influence over time.

2.1 Treaties and Reserves

The evolution of treaty practices maps interestingly onto shifts in the overall focus of economic production over time. Originally, the economic objective for both First Nations and Settlers alike was control of trade against rivals. Hence, treaties focused on trade and military alliances, with little interference in the internal affairs of either people. As land became the predominant site of economic concern, so treaties shifted from documents of peace and friendship to something more closely resembling deeds of land cession. As agricultural production, trade, and later industry came to depend on wage-labour, treaties began to promote the conversion to agriculture and industry by providing agricultural implements and European-style education and training, and encouraging sedentary lifestyles³⁷⁷. Finally, as capitalism matured and Canada solidified as a

³⁷⁶ Nichols notes that consensual and coercive attempts coexisted and that each took a variety of competing sub-forms. Nichols, *Theft Is Property!* at 96.

³⁷⁷ Asch, *On Being Here to Stay* at 139.

resource economy, the modern treaty process arose as a means of creating legal certainty for resource extractors by converting broad swaths of title land, potentially subject to ill-defined, overlapping claims, into more mutually-exclusive government and First Nations lots³⁷⁸. In this sense, treaties have been, and continue to be, instruments of property centralization, both conceptually and materially. Seen in this light, treaties were and are not only a means of state building, but a means of capitalist-market building as well.

This present phase of treaty making continues many aspects of earlier treaties, converting the layered ownership claims invoked by aboriginal title into estates which more closely resemble exclusive, fee-simple lots, while at the same time reallocating the vast majority of the claimed land to Settler governments. However, Modern Treaties also often contain provisions for co-managed land, or land where government ownership is subject to certain continuing First Nations rights.

Indigenous advocacy has been central in maintaining this limited space for conditional ownership and overlapping claims. On Haida Gwaii, for example, Haida advocacy has produced co-management structures³⁷⁹. Likewise, during their treaty negotiations, the Tsleil-Waututh First Nation proposed a more flexible system of jurisdiction involving varying levels of control over different parts of their traditional territory³⁸⁰. Settler negotiators, however, were insistent on the bounded, exclusive nature of land tenure; the Tsleil-Waututh would have complete ownership of some lands, and no significant interest in the rest. “The Tsleil-Waututh proposal to transform property relations in British Columbia to allow the First Nation to remain connected with its broader traditional territory... on their own terms was rejected outright... because it failed to

³⁷⁸For an excellent discussion focusing on the B.C. Treaty Process see Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: University of British Columbia Press, 2006).

³⁷⁹ Borrows, *Freedom and Indigenous Constitutionalism* at 56-61.

³⁸⁰ Woolford, “Transition and Transposition” at 70.

address itself to dominant Canadian property relations”³⁸¹. In this way, the Modern Treaty processes illustrates the contested, incomplete and partial nature of alienation and diremption processes.

Reserves have also been a longstanding feature of the treaty process. In early periods, reserves were often offered to keep First Nations trading partners and military allies close. As the importance of military alliances waned and the focus of production shifted from trade to land, reserves became increasingly remote – so as not to threaten the consolidation of Settler populations³⁸². With the turn to industry, official practice shifted once more, placing reserves close to settlement so as to facilitate their assimilation into Settler cultures, economies and work forces³⁸³. Many previously remote communities also found themselves encircled by growing settler populations. The resulting encirclement of the reserve by bounded property converted the reserve itself into a form of bounded property, although ownership rights remained unbundled, with Settler governments, band councils, individuals, and traditional leaders all maintaining various cross-cutting claims. This has become a major target in recent decades, with calls for privatization a mainstay of public discourse in the neo-liberal era³⁸⁴.

In other ways, however, reserves continue to constitute challenges to the absolutist property form. First Nations have struggled to defend their reserves and to preserve them as islands of communally managed land in a sea of fee simple ownership, rejecting repeated allotment efforts³⁸⁵. While reserve land is technically Crown land held in trust for the band, First

³⁸¹ Woolford, “Transition and Transposition at 72.

³⁸² Christopher Alcantara, “Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession,” *The Canadian Journal of Native Studies* 23, no.2 (2003) especially at 398.

³⁸³ Alcantara, “Individual Property” at 399.

³⁸⁴ For a critical discussion of this push see Shiri Pasternak, “How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada,” *Antipode* 47, no.1 (2015).

³⁸⁵ Tonina Simeone, *Federal-Provincial Jurisdiction and Aboriginal Peoples* (Ottawa: Parliamentary Information and Research Service, 2001).

Nations legal advocacy has pushed Courts to declare that the Crown must act as a fiduciary in land management decisions³⁸⁶. Provincial laws apply, but only via federal mechanisms of incorporation³⁸⁷. In all these ways, property ownership and authority on reserve remains layered, unbundled and conditional.

Thus, treaties and the connected practice of reservations have been used to pursue a shifting battery of ends, working to secure increasingly bounded, absolutist conceptions of property with considerable, but limited, success. Now, reserve lands function as zones of partial exception, perpetual disruptions whose very status as such reveals the fee-simple norm against which they are constituted.

2.2 Legislative Double-Movements

Legislation has also played a major role in facilitating the contested conversion of both First Nations and Settler economies into absolutist forms of property and labour. In the case of First Nations, however, legislation represents a sort of “double-movement”³⁸⁸, as government policy often pulls in two directions at once. On the face of it, the overarching goal of government policy has been assimilation and incorporation into the workforce. At the same time, however, many government actions worked to limit the success of First Nations in the capitalist-market economy. Sometimes, these acts came as a response to public pressure from Settler competitors. At other points, governments pursued their own interests, looking to channel resources towards tax-paying Settlers as a means of lining state coffers. At other times it is doubtful that

³⁸⁶ *Guerin* at 336.

³⁸⁷ For discussion see Kerry Wilkins, "Still Crazy after All These Years: Section 88 of the Indian Act at Fifty," *Alberta Law Review* 38, no.2 (2000).

³⁸⁸ Polanyi, *The Great Transformation* especially Chapter 11.

governments understood the effects of their policies at all. Nevertheless, legislation worked to simultaneously integrate and exclude First Nations land, labour and production.

For example, as industrial agriculture took off on the prairies, for example, Settler negotiators used treaties to encourage agricultural settlement, channelling annuity payments into farm implements and instructors³⁸⁹. At the same time, governments, under pressure from local populations, refused to provide adequate machinery, delivered aid at inadequate levels, manipulated prices, and enacted legislation to disadvantage First Nations farmers³⁹⁰. Similarly, a myriad of federal and provincial laws limited the other types of occupations Indians could participate in, curtailed grazing and water rights, prevented the pre-emption of land, and excluded First Nations from acquiring fishing, timber, or trapping licences³⁹¹.

The government monopoly on land purchases too, was ostensibly designed to protect First Nations from economic exploitation and ensure their economic viability. Instead, governments used their monopoly to suppress land prices. From 1860, they also took over management of the funds generated by land sales and, by and large, used them to finance broader government expenditures³⁹². Reservations were often put on land of little economic value, and the communal nature of reserve property prevents First Nations from accessing credit.

Today, this tradition continues as aboriginal rights are specifically held to protect only a modest, subsistence lifestyle³⁹³. Modern Treaties also take up this limitation. Schouls, writing of

³⁸⁹ Asch, *On Being Here to Stay* at 139; Neu and Therrien, *Accounting for Genocide* at 62.

³⁹⁰ Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Kingston: McGill-Queens University Press, 1993), see e.g. 164, 219, 253; James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013) at 149.

³⁹¹ High, "Native Wage Labour" at 258.

³⁹² Neu and Therrien, *Accounting for Genocide* at 82.

³⁹³ "treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth". *Marshall* at 7; *Gladstone* recognized a commercial right to fish, but limited it to providing "the basics of food, clothing and housing, supplemented by a few amenities" at 41.

the BCTP, notes that “all resource harvesting rights are to be restricted to domestic uses only, cannot be sold to anyone other than Aboriginal persons, and are to be subject to federal and/or provincial measures necessary for conservation, public health, or public safety. There is to be no commercial Aboriginal right with respect to the harvesting of fish, wildlife, or migratory birds. ...And, while the First Nations will possess treaty rights to harvest fish, wildlife, and migratory birds for domestic purposes, the annual total allowable catch per First Nation will be determined by the federal minister”³⁹⁴. Thus, a process otherwise geared towards capitalist-market participation also includes significant barriers to that goal.

This sort of double-movement is confusing, but widely characteristic of colonialism. Politically, Veracini explains that Settler polities work to absorb First Nations in order to fully realize their status as a state equal to the mother country, while simultaneously depending on First Nations difference as a mark of distinction and therefore independence from the mother country³⁹⁵. In this sense, the ongoing erasure of indigeneity and its perpetual persistence are both crucial to the Settler identity. In many ways, the Settler self is defined in contrast to both its First Nations other and its imperial parent, likening itself to each in order to distance itself from the other, and thereby maintaining a separate identity for itself in the middle³⁹⁶. In much the same way, we might say that Settlers work to absorb First Nations economies in order to complete their market-making processes and claim their place among the advanced economies of the world, even as they rely on First Nations economies as an other against which to define

³⁹⁴ Tim Schouls, “Between Colonialism and Independence: Analyzing British Columbia Treaty Politics from a Pluralist Perspective,” Paper presented to the *Canadian Political Science Association Annual Meeting*, London: June 3rd, 2005 at 14.

³⁹⁵ Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (London: Palgrave Macmillan, 2010) especially at 17, 29, 30, 32-39. In a similar vein, Bracken argues that Settler society defines itself through a dream of First Nations erasure which it must never complete. Bracken, *Potlatch Papers* at 190.

³⁹⁶ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no.4 (2006) at 369.

themselves. Thus, the industrious Settler is constructed in opposition to the lazy Indian³⁹⁷. The modernity of private property is built in juxtaposition to the communalism of the subsistence round. The prosperity of the wage-labourer is defined by the real or imagined poverty of the subsistence economy. If incorporation were too successful, capital and labour alike would lose an important cautionary tale and its disciplinary implications. If incorporation was too unsuccessful, however, gift-reciprocity might take hold in the public mind as a viable alternative. The ideal outcome is therefore that First Nations remain marginal to the wage-economy, unable to rely on traditional alternatives but permanently impoverished by their marginality. Thus constructed, indigeneity becomes as important to market-building and market-preserving processes as it is to state-building and state-preserving processes, working to define and legitimize the absolutist conception of property and labour through its own ongoing, partial incorporation.

2.3 Ecological Destruction

Another historically prominent and enduring practice of incorporation has been ecological collapse and the subsequent undermining of non-capitalist economic forms. In a fascinating study, Greer shows how roving farm animals acted as a major force of dispossession³⁹⁸. In the east during the Early Period, for example, private farm holdings were typically paired with common grazing lands at their peripheries. Grazing animals dramatically changed the ecosystem of these areas, causing their First Nations habitants to relocate in pursuit of game and other sustenance. In this sense, ecological change acted as the forerunner of colonial expansion, continually pushing the frontier one step past the actual settlements and facilitating their march

³⁹⁷ Lutz, *Makuk*, chapter 3.

³⁹⁸ Greer, "Commons and Enclosure" at 376.

west. As ecosystems changed and traditional First Nations economies became less viable, First Nations were forced to either retreat to more remote areas, participate in the growing agricultural and wage industries, or some combination of both.

Of course, the overhunting of fur-bearing animals was also a major contributor to the decline of the fur trade, marginalizing First Nations labour and feeding the subsequent redevelopment of the economy along agricultural and industrial lines. Indeed, by the early 19th century the Hudson's Bay Company was maintaining its profits by diversifying away from the fur trade, employing First Nations labour in agriculture and handicraft production³⁹⁹. Most dramatically, the commercial over-exploitation of staples – especially cod, bison, and salmon – for domestic Settler consumption or export undercut the mainstay of First Nations production on the coasts and prairies, quickly putting formerly prosperous peoples in a desperate economic position⁴⁰⁰. Agricultural and later wage labour came to fill the gaps, being integrated in and in some cases becoming dominant parts of existing economic structures. In some cases, particularly on the prairies, Settlers and governments deliberately decimated the buffalo not only to trade their skins, but to weaken the resistance of First Nations rivals and forcibly open up their lands and labour supplies⁴⁰¹.

In the contemporary era of resource capitalism, this trend continues. Resource extraction tends to scare off game. It also produces incredible amounts of pollution and disrupts local habitats. As a result, the penetration of the resource industry tends to undermine existing subsistence activities, tilting the balance in these mixed economies increasingly in favour of

³⁹⁹ High, "Native Wage Labour" at 256.

⁴⁰⁰ Indeed, the effects of staple collapse have been dramatic and enduring: formerly bison-dependent societies had between 20-40% less income per capita in 2000 than the average Native American nation, and this effect is strongest among the least historically diverse economies. Feir, Gillezeau and Jones, "Slaughter of the Bison".

⁴⁰¹ Tovias, "Navigating the Cultural Encounter" at 271.

wage labour or government dependency⁴⁰². In fact, even conservation efforts can often reinforce absolutist property forms through certain forms of state management, while at the same time undermining First Nations economies by preventing traditional harvesting activities⁴⁰³.

In sum, ecological destruction works to undermine First Nations economies and thus to reinforce emerging absolutist property forms, both materially and conceptually. The resulting conservation efforts sometimes model interesting forms of co-management, but often they embrace state ownership and management in ways that fail to challenge the logic of bounded, absolute title. Thus, ecological change works on multiple levels to solidify the capitalist productive mode.

2.4 Aboriginal Title

Another important practice is aboriginal title. Courts have ruled that the *Royal Proclamation* and the common law both recognize some form of pre-existing, inherent proprietary interest⁴⁰⁴.

However, the Crown was also held to have radical, underlying title on all lands, whether purchased or not⁴⁰⁵. In this sense, aboriginal title is a burden on the Crown's underlying title, which does not amount to a full proprietary interest until aboriginal title is extinguished. Title land is therefore subject to two overlapping ownership claims, each of which works to limit the other.

⁴⁰² The construction of the Coastal Gas Link Pipeline, for example, recently caused the destruction of active traplines in Unist'ot'en Yintah. Unist'ot'en Camp, "Coastal Gas Link Bulldozes Unist'ot'en Trapline," accessed Nov. 10, 2019 <https://unistoten.camp/cgl-bulldozes-trapline/>

⁴⁰³ James Davey concludes that "colonialism occurs both through forest harvesting and park designation". James Davey, *A Bridge to Nowhere: British Columbia's Capitalist Nature and the Carmanah Walbran War in the Woods (1988-1994)* (M.A. Diss., University of Victoria, 2019) especially Chapter 2: *The Carmanah War in the Woods: Falldown and Sitka Spruce Wilderness (1967-1990)*. However, some conservation efforts have embraced co-management mechanisms, which are in some ways reminiscent of the layered property claims of earlier eras. For an example and discussion, see Saul Brown, "Indigenous Marine Response Centre Breathing Life into Reconciliation," *National Observer*, April 6th, 2018.

⁴⁰⁴ *Delgamuukw* at 114.

⁴⁰⁵ *Roberts v. Canada*, [1989] 1 SCR 322, (1990) 57 DLR (4th) 197 at 131.

The recognition afforded to each of these claims has been, however, deeply asymmetrical and closely tied to processes of alienation and diremption. First, both titles have their source⁴⁰⁶ in the assertion of Crown sovereignty⁴⁰⁷. This assertion gave the Crown its underlying title and also triggered the reception of the common law, at which point First Nations' proprietary interests were received into common law as aboriginal title⁴⁰⁸. Thus, while both party's proprietary interests are recognized, Crown sovereignty is assumed while First Nations' sovereignty is not similarly recognized. In this sense, the claims recognized are inherently unequal. Second, Crown title can be 'perfected' by purchasing the aboriginal proprietary interest; but First Nations' title can never be similarly perfected by purchasing the Crown interest. Nor can new title interests be purchased. Title therefore creates a unidirectional flow of land from First Nations to Settlers⁴⁰⁹.

Nevertheless, where title land remains, it constitutes an important recognition of the layered ownership claims typical of earlier periods, with each claimant limiting the unfettered discretion of the other. First Nations rights to title land include a right to exclusive use and occupation. However, this right is subject to inherent limits⁴¹⁰, and may be infringed for private or public benefit under a justificatory scheme in many ways looser than that involved in fee simple expropriation⁴¹¹. Before it was constitutionalized in 1982, title could also be extinguished

⁴⁰⁶ This is not to say that First Nations did not have proprietary interests under their own legal and economic systems prior to the assertion of sovereignty, but it is doubtful that these bore strong resemblance to what the courts now recognize as Aboriginal title. Aboriginal title is a common law concept, and it stems from, and is only comprehensible in reference to, the assertion of Crown sovereignty.

⁴⁰⁷ McNeil, "Source, Nature, and Content" at 280

⁴⁰⁸ McNeil, "Source, Nature, and Content" at 278. See also Sanderson, "Imperium" at 327-332.

⁴⁰⁹ Indeed, the fact that title land can only be sold to the Crown has historically allowed the government to buy land at well below market rates and fund its own expansion by redistributing the land to Settlers at a profit. When title was re-affirmed at law in *Calder* after decades of disuse, Settler governments immediately initiated a Comprehensive Land Claims Process and later a modern Treaty Process, both of which were largely designed to facilitate state purchase of any lands where title might be asserted. Andrew Woolford, "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process," *Canadian Journal of Sociology* 29, no.1 (2004).

⁴¹⁰ *Delgamuukw* at 111.

⁴¹¹ McNeil, "Aboriginal Title" at 66.

through legislative fiat⁴¹². Aboriginal title is also personal, in the sense of being inalienable except to the Crown⁴¹³. Thus, the range of permissible uses is narrower and potential infringements broader than those associated with fee simple ownership, as Crown claims work to limit First Nations claims. Settler governments, for their part, can alienate title lands or infringe on title rights, but only subject to a justificatory test⁴¹⁴. The government also owes First Nations a fiduciary duty in managing title lands, obligating them to consult regarding land use decisions and further limiting their absolute discretion⁴¹⁵. Even where title is unproven, certain limits apply to government discretion.⁴¹⁶ Ownership of title lands is therefore layered, and discretion over them is not absolute. Each claim limits the others in evolving and asymmetrical ways. Title therefore works not only to recognize competing claims, but also to arrange them hierarchically.

3. Discourses

Treaties and reservations, legislative double-movements, ecological destruction, and aboriginal title have therefore proven to be important practices, continuing long-standing trends in the economic relationship between Settlers and First Nations. In particular, these practices facilitate two ongoing processes: the alienation of First Nations resources into the hands of a small, predominantly Settler upper-class, and the re-imagination of First Nations resources, lands and labour as capitalist commodities which are no longer subject to multiple, contingent ownership claims but instead are the object of more unilateral authority. Together, these processes have worked to reduce mutual need between the parties, and thus to reduce the scope of inter-societal

⁴¹² *Delgamuukw* at 165. See also per La Forest J. at 202.

⁴¹³ *Delgamuukw*, at 113.

⁴¹⁴ While the test was detailed in *Sparrow*, its application to aboriginal title as well as aboriginal rights was made clear in *Gladstone* at 73.

⁴¹⁵ *Delgamuukw*, at 168.

⁴¹⁶ *Haida Nation v. British Columbia*, 2004 SCC 73, [2004] 3 SCR 511 at 27.

contestation. Nevertheless, First Nations continue to enact economic practices which exceed the capitalist framework. In limited ways, they have succeeded in maintaining forms of layered ownership and contingent authority. As important as it is to understand these practices of transformation, the underlying discourses that legitimize and challenge them are equally important parts of the processes of economic colonization. In essence, the sovereignization of economic production and the associated absorption of First Nations economies is narrativized in one of two broad ways.

The first story comes to us from thinkers like Demsetz. This story argues that property regimes evolve towards efficiency over time, in a spontaneous but inevitable manner⁴¹⁷. Levmore calls this the “transaction-costs” explanation of economic change⁴¹⁸. Basically, Demsetz argues that European Settlers moved from decentralized, unbundled concepts of property and economic production towards increasingly spatialized, increasingly absolutist conceptions of property because the latter system had lower transaction costs, and outcompeted the former. Once the new, more efficient model was introduced in the colonies, it outcompeted local decentralized economies as well. Demsetz uses the Montagnais as an example. When colonial settlement gave rise to the commercial fur trade, the value of furs rose sharply, which increased the externalities associated with open-access hunting. The Montagnais, Demsetz argues, accordingly began marking off their hunting grounds and allocating exclusive rights to hunt in certain places⁴¹⁹. In short, they moved towards a private property regime voluntarily, for reasons of efficiency. Stories like this posit both that the absorption of First Nations economies

⁴¹⁷ Harold Demsetz, “Toward a Theory of Property Rights,” *American Economic Review* 57, no.1 (1967).

⁴¹⁸ Saul Levmore, “Two Stories about the Evolution of Property Rights,” *Journal of Legal Studies* 31, no.2 (2002).

⁴¹⁹ Stuart Banner, “Transitions between Property Regimes,” *Journal of Legal Studies* 31, no.2 (2002) at 359.

(and of the decentralized incarnations of Settler economies) has occurred, and that it was largely voluntary, inevitable and irreversible⁴²⁰.

Banner provides a second narrative, arguing that the costs associated with changing property regimes is so high that such transformations do not occur automatically, even when there are efficiency gains to be had. Rather, “societies [only] reallocate property rights when some exogenous political realignment enables... benefits to be channelled disproportionately towards powerful and costs towards weak actors”⁴²¹. This set of political circumstances motivates the powerful to pursue changes in property relations that would otherwise not occur, often acting through the existing governing institutions which they control. Levmore calls this the “interest group theory” of property transition, revolving as it does around the ability of a particular elite to push for, and monopolize the benefits of, reorganization⁴²².

This story relies on evidence that suggests common-farming and other decentralized techniques are often quite efficient for their users⁴²³. Enclosing land as private property, however, allows the benefits of the land to be disproportionately captured by the wealthy title holders. Indeed, Banner notes that in Europe, in the colonies, and in First Nations communities, the distributional effects of the transition were typically highly skewed towards an emerging merchant elite⁴²⁴. In Settler communities, private landholding also facilitated taxation, giving the state an incentive to support the merchant class in order to fund its own expansion and defense,

⁴²⁰ Of course, every one of these assumptions is questionable. Many First Nations clearly have not adopted western ownership norms, or have combined these creatively with indigenous norms. Where conversion has occurred, it was not spontaneous or in the absence of coercion and state interference. It is therefore highly debatable whether the shifts Demsetz describes actually occurred as he describes them.

⁴²¹ Banner, “Transitions” at 368.

⁴²² Levmore, “Two Stories” at 424.

⁴²³ Levmore notes that transitions between common and private ownership continue to occur in both directions, to suit different needs and circumstances. Levmore, “Two Stories” at 429.

⁴²⁴ Banner, “Transitions” at 369.

as capitalist-market formation and state formation fed one another⁴²⁵. Similarly, some First Nations political systems may also have been captured by pro-enclosure elites whose wealth allowed them to monopolize existing political channels for private gain⁴²⁶. In this story, the changing economic relationship is not driven by diffuse efficiency gains for society at large, but rather by concentrated relative gains for the specific elites who pursue them.

There are three especially important differences between these accounts. First, if economic transitions are driven by efficiency gains, then they are both desirable and largely inevitable. If, conversely, economic transitions are driven by the interests of powerful elites, then they are contingent, resistible, and reversible. Second, the transaction-costs account suggests that First Nations poverty is the result of a stubborn refusal to fully modernize, and will be relieved by overall efficiency gains once First Nations communities become fully capitalist. The interest-group narrative, on the other hand, suggests that First Nations poverty is the result of a political order which channels the benefits of economic production disproportionately towards powerful Settlers and, to a lesser degree, to a small elite of First Nations collaborators. It will be relieved only through structural reform to the colonial relationship. Third, the transaction-costs narrative suggests that First Nations economies are simply unviable in the contemporary era, that ‘there is no alternative’ to the liberal-capitalist paradigm. Conversely, the interest-group narrative suggests that First Nations economic forms are still viable, and perhaps even superior in their distributional consequences⁴²⁷. If so, then resisting the transition towards absolutist forms of

⁴²⁵ Levmore, “Two Stories” at 430; P.J. Cain & A.G. Hopkins, “Gentlemanly Capitalism and British Expansion Overseas II: New imperialism 1850–1945,” *South African Journal of Economic History* 7, no.1 (1992) at 515.

⁴²⁶ For example, Maquinna, a Nuu-chah-nulth chief, rose to a prominence formerly unknown in his society through his centrality in the trade. Similarly, the Tsimshian, under a series of newly ascendant trading chiefs named Legaic, moved to monopolize trade routes for geopolitical and domestic advantage. Others, like the Cree and Assiniboine, imposed themselves as tithing middle-men instead. Fisher, *Contact and Conflict* at 18, 32; Susan Marsden and Robert Galois, “The Tsimshian, The Hudson's Bay Company, And The Geopolitics Of The Northwest Coast Fur Trade, 1787–1840,” *Canadian Geographer* 39, no.2 (1995); Wien, “Selling Beaver” at 297.

⁴²⁷ Trosper, *Resilience and Reciprocity* at 14.

production constitutes an important means of resisting the twin processes of alienation and diremption and thus, the colonization process itself. This narrative underlies a self-conscious contemporary resurgence of First Nations economic practices⁴²⁸.

Levmore concludes that it will usually be impossible to know which mechanism – transaction costs or interests groups – has driven a particular shift in property regime⁴²⁹. Indeed, we might add that most cases probably involve at least some of both mechanisms. Nevertheless, it is clear from the present chapter that the interest group theory plays a considerable role in the shifting relationship between Settler and First Nations economies. Certainly, the costs and benefits of the transition have been heavily lopsided in a way that is difficult to account for through efficiency. Likewise, the ongoing use of First Nations economies suggests that their users do not find these economic forms less efficient. In fact, communities whose First Nations economies were less disrupted tend to do better today⁴³⁰, and many staple industries which have made the transition to capitalism have since collapsed, suggesting significant long-term transaction costs⁴³¹. Last, it is noteworthy that the conceptual shifts involved in the changing economic relationship closely mirror those involved in the changing political and legal relationship, with all three spheres moving towards increasingly bounded, unitary and hierarchical conceptions of authority of time. This suggests a broader ideological and political transition which is not reducible to economic transaction costs.

The narrativization of the economic relationship between Settler and First Nations is therefore contested. Both narratives agree that First Nations economies have been forcibly, and

⁴²⁸ See e.g. Corntassel, "Re-envisioning Resurgence".

⁴²⁹ Levmore, "Two Stories" at 450.

⁴³⁰ For discussion see Feir, Gillezeau and Jones, "Slaughter of the Bison".

⁴³¹ Ann Carlos and Frank Lewis, "Property Rights, Competition, and Depletion in the Eighteenth-Century Canadian Fur Trade: The Role of the European Market," *Canadian Journal of Economics* 32, no.3 (1999).

partially, absorbed by Settler economies over time. There is no agreement, however, on why this occurred, whether it is justifiable, and whether it can be undone.

4. Case Study: the Hudson's Bay Company

The remarkable existence of the Hudson's Bay Company (HBC), which spans nearly the entire history of intensive Settler-First Nations contact on Turtle Island⁴³², illustrates many of the recurring patterns that animate the economic relationship between Settlers and First Nations.

In the early era of the fur trade, the Company was granted a trading monopoly to lands larger than all of Europe. Like many Chartered companies of the era, the HBC was a profit-driven corporation but also had obligations to aid in colonization, as a condition of its monopoly⁴³³. Private and public roles were not neatly separated. Indeed, the Company maintained independent diplomatic and military relations, administered its own system of justice, and maintained its own system of governance for Settler populations⁴³⁴. The HBC was thus a “company-state”, a sort of hybrid structure whose independent authority claims coexisted with imperial claims in complex and non-exclusive ways⁴³⁵. The Company also treated with local nations to secure lands for forts and settlements⁴³⁶. The authority of the HBC was thus non-exclusive of First Nations claims as well. The result was a highly layered environment where no party enjoyed unilateral control.

⁴³² Excluding earlier Viking visits and possible fishing voyages which, although forms of contact, did not involve lasting settlement.

⁴³³ Edward Cavanagh, “A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company, 1670–1763,” *Canadian Journal of Law and Society* 26, no.1 (2011) at 32; Chris Magoc and David Bernstein eds., *Imperialism and Expansionism in American History: A Social, Political, and Cultural Encyclopedia and Document Collection* (Santa Barbara: ABC-CLIO, 2015) at 31.

⁴³⁴ Cavanagh, “Company with Sovereignty” especially 28-47.

⁴³⁵ See e.g. Philip Stern, “‘A Politie of Civill & Military Power’: Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State,” *Journal of British Studies* 47 (2008) at 253–83, 257. See also Philip Stern, “Politics and Ideology in the Early East India Company-State: The Case of St Helena, 1673–1709,” *Journal of Imperial and Commonwealth History* 35, no.1 (2007) at 1-23.

⁴³⁶ Promislow, “Treaties” AT 1117-1120.

For the most part, early trade was mutually beneficial and land competition between Settlers and First Nations was low⁴³⁷. The trade was a heavily “administered” mixture of barter and market exchange which could be easily incorporated into both European markets and local gift-economies⁴³⁸. In particular, the Company began offering loans and supporting non-hunting members of the community, in an early use of welfare as a means of encouraging trapping and creating early relationships of dependency⁴³⁹.

In 1869–1870, the HBC, under pressure from the Imperial government, sold its Charter rights to Canada, retaining only its trading posts, the areas around them, and a “fertile belt” of farmland stretching across the Prairies⁴⁴⁰. The public and private functions of the Company were being separated, with the nascent nation of Canada assuming governmental functions and the HBC transitioning to a private fur-trading and agricultural land-speculating corporation⁴⁴¹. Through strategic land sales in the fertile belt, the Company participated in a wider shift towards agricultural development which was now displacing First Nations’ economies.

The end of the HBC’s monopoly also signalled important shifts within the fur trade, as company paternalism declined, competitive markets emerged, and employment came to more closely resemble the wage-relation⁴⁴². Increasingly, government transfer payments and treaty

⁴³⁷ In fact, the presence of HBC forts was often advantageous for local nations geopolitically, and many proactively sought the establishment of forts in their territories. See e.g. Marsden and Galois, “Geopolitics of The Northwest Coast Fur Trade”.

⁴³⁸ “The use of the Made Beaver (MB) to value trade goods and Native produce (furs, hides and provisions) permitted an application of exchange value to a barter system... In effect, the HBC had monetarized a barter system of trade; the Made Beaver standard could be converted easily into English pound sterling currency” such that “a European mercantile company adapted to a barter situation, [and] Indians adjusted to the market system”. Frank Tough, “Indian Economic Behaviour, Exchange and Profits in Northern Manitoba During the Decline of Monopoly, 1870–1930,” *Journal of Historical Geography* 16, no.4 (1990) at 388-389.

⁴³⁹ Tough, “Indian Economic Behaviour” at 399.

⁴⁴⁰ John Galbraith, “Land Policies of the Hudson’s Bay Company, 1870–1913,” *The Canadian Historical Review* 32, No.1 (1951) at 1.

⁴⁴¹ Galbraith, “Land Policies of the Hudson’s Bay Company” at 2.

⁴⁴² Tough, “Indian Economic Behaviour” at 396.

annuities took the place of Company welfare⁴⁴³, maintaining relations of market dependence but now in a way that was not tied to a particular employer. First Nations traders responded to this newly competitive market, leveraging competition strategically in ways that showed both an understanding of the new price mechanism and also an ability to maintain distinct economic forms and logics⁴⁴⁴.

Over the course of the Late Period, the Company used well timed land sales to supplement the fur trade and build up capital⁴⁴⁵. As the Settler population in the West grew and the railroad and canal booms created a local wage-labouring consumer base, the Company invested its real estate profits into a massive expansion of its stores – now remodelled as department stores catering to the urban Settler middle-class, instead of traders and trappers⁴⁴⁶. Like the broader economic relationship, the activities of the Company were becoming increasingly defined by wage-labour and consumption. Government policy also took on a new character, with the expansion of the welfare state as a means of producing a well-disciplined labour force⁴⁴⁷. Once again, First Nations incorporated these services and payments into existing multimodal economies, maintaining distinct economic forms even as they participated in wage-labour and welfare programs⁴⁴⁸.

At the dawn of the modern era, control of the company – like the Canadian constitution – was finally transferred from London to a board of Canadian governors⁴⁴⁹. In practice, however,

⁴⁴³ Tough, “Indian Economic Behaviour” at 396.

⁴⁴⁴ Tough, “Indian Economic Behaviour” at 392-397.

⁴⁴⁵ Galbraith, “Land Policies of the Hudson’s Bay Company” generally.

⁴⁴⁶ David Monteyne, “Constructing Buildings and Histories: Hudson’s Bay Company Department Stores, 1910-1930,” *Bulletin: The Journal of the Society for the Study of Architecture in Canada* 20, no.4 (1995) at 97.

⁴⁴⁷ Cavanagh, “Company with Sovereignty” at 43.

⁴⁴⁸ Tough, “Indian Economic Behaviour” at 397.

⁴⁴⁹ Galbraith, “Land Policies of the Hudson’s Bay Company” at 20.

powerful interests in London continued to exercise considerable indirect control⁴⁵⁰ in ways that invoke the neo-colonial tactics characteristic of the era. The welfare programs the company had pioneered also became an important tool of indirect Settler rule in the North – one Paine has called “welfare colonialism”⁴⁵¹. In recent years, Indigenous peoples have also shaped these payment systems, as a series of land claims and treaties have created room to negotiate.

The story of the HBC is thus in many ways an illustration of larger historical processes. Initially, First Nations economies were incorporated into emergent mercantile capitalism even as Settler economies were incorporated into local economic, political and ceremonial systems. Ownership was layered, multilateral, and contingent. Over time, a transition to agricultural land-speculation created increased resource competition and alienation. The profits that land-sales produced generated the necessary capital, and the land-sales themselves generated the necessary consumer base, for a transition towards wage-labour and consumerism in the form of urban department stores. Over time, the corporate structure of the Company shifted to involve more indirect forms of imperial control, even as Company welfare policies were used to exert indirect influence over many First Nations. The history of the HBC therefore illustrates recurring patterns of mutual incorporation, displacement, discipline, and neo-colonialism that have characterized the broader economic relationship between Settlers and First Nations, showing accelerating processes of alienation and diremption, on the one hand, and creative acts of adaptation, cooption, and persistence on the other⁴⁵².

⁴⁵⁰ John Selwood, "An Early Example of Globalisation: the Hudson's Bay Company's Interlocking Directorships," *Prairie Perspectives* 3 (2000) at 9; Galbraith, "Land Policies of the Hudson's Bay Company" at 20.

⁴⁵¹ Robert Paine, "The path to Welfare Colonialism," in Robert Paine ed., *The White Arctic: Anthropological Essays on Tutelage and Ethnicity* (St. John's: Memorial University, 1997).

⁴⁵² Greer, *Property and Dispossession* at 426.

5. Conclusions

In sum, the economic relationship between First Nations and Settler peoples has historically been one of mutual, asymmetrical, and recursive transformation. Through this process, both the conceptualization of property and its allocation in society would become far more centralized, exclusive, and absolute.

Indeed, when the encounter began, both social groupings organized production through unbundled, non-exclusive and contingent forms of property which recognized interpenetrating ownership claims⁴⁵³. Early contact did little to change any of this. The fur trade created conditions of mutual need and mutual, if asymmetrical, benefit between the parties. The structure of the trade was an ad hoc, negotiated affair that both sides were able to contest and influence. With the defeat of the French, however, the colonial economy became more agricultural. This new emphasis placed First Nations and Settler economic forms in competition. This triggered largescale alienation, as Settler farmers displaced First Nations and their economic modes. At the same time, an emerging capitalist ideology was producing more total and exclusive conceptions of land ownership. Land was therefore being reconceptualised, as well as reallocated. Over time, the accumulation of capital from cheap colonial resources and overseas monopolies fueled an industrial and commercial revolution in Europe, and eventually in the colonies themselves. Labour, too, became commodified and subject to new forms of disciplinary control. Industrial processes continued to displace First Nations economic practices, drawing Indigenous peoples into the wage relation in complex and uneven ways. Like land before it, labour was being reconceptualised even as control over it was redistributed. As neo-liberalism developed, the

⁴⁵³ Greer, *Property and Dispossession* at 202, 218.

wage-labour relation became more precarious, and the forms of alienation and diremption it facilitates became more intense and indirect.

Thus, First Nations and Settlers alike saw disaggregated bundles of economic control centralize over time, gradually and unevenly giving way to a form of economic organization in which ownership is more exclusive and absolute. At the same time, actual ownership also concentrated in a small cast (e) of Settler elites, whose newly exclusive claims gave them disproportionate control over the economic process. Control did not, however, flow to Settlers in an undifferentiated manner. This was no simple transfer of power from one society to another (though it was also that). Rather, huge portions of Settler society were also seeing their lands and independence eroded and their ideologies reworked in favor of the same elites.

These transformations were never coherent in any one location and they played out very differently for different groups at different times. Moreover, the transformations remain partial, ongoing and perpetually contested. First Nations have struggled against dispossession and diremption alike, as indeed have Settlers. To a significant extent, First Nations' participation in the capitalist-market constitutes an act of adaptability and resiliency aimed at supporting First Nations economic practices, rather than an act of assimilation or capitulation⁴⁵⁴. These acts of resilience and resistance have created or preserved limited forms of conditional authority or co-decision.

Nevertheless, there is a clear correlation between the conceptualization and allocation of private property and the broader relationship between First Nations and Settler peoples. As economic relations became more centralized, absolutist, and asymmetrical, both conceptually and materially, so too did the political and legal relationships between communities. In this

⁴⁵⁴ High, "Native Wage Labour" at 263.

sense, “European statehood did not emerge alone but as a political form specific to capitalist social relations that presumed a constitutive distinction between public power, exercised through claims of sovereign jurisdiction (*imperium*), and private power, exercised by private law ownership (property, *dominium*)”⁴⁵⁵. The solidification of each fed the other in recursive ways. Thus, Greer argues that “owning and ruling, though analytically distinct, were intimately connected aspects of early modern empire building”⁴⁵⁶, pointing to market-building and state-building processes as mutual dependent, mutually reinforcing conceptual and material projects.

⁴⁵⁵ Onur Ulas Ince, "Between Equal Rights: Primitive Accumulation and Capital's Violence," *Political Theory* 46, no.6 (2018) at 17.

⁴⁵⁶ Greer, "Land, Property" at 11.

[Chapter Four] Conclusions: Pluralism and Sovereignty on Turtle Island

The preceding chapters have explored the political, legal, and economic dimensions of the relationship between Settlers and First Nations in order to see what these practices can teach us about sovereignty and pluralism. The following chapter explores the connections between these fields of practice, mapping their similarities and disjunctures and offering a preliminary analysis of how far and in what ways they either exceed or confirm the sovereign framework.

If, drawing on Dicey, we consider the assemblage of sovereignty to be defined by total and exclusive authority, we might say that the history of First Nations-Settler relations has been one of contested sovereignization.

Initially, Settler and First Nations communities found themselves in a position of mutual need, both militarily and commercially. The practices they developed suggest that each party accepted the other as independent sources of authority and sought interpenetrating, shared institutions or conditional forms of autonomy that allowed them to coordinate their respective claims and meet their respective needs. Authority was neither total nor exclusive, all sides were able to meaningfully contest the relationship, and a precarious multilateralism White calls the “middle ground” prevailed.

As the relationship progressed, however, two important shifts occurred. First, the defeat of New France and the concurrent shift to an agricultural economy tilted the balance of military, commercial and demographic power dramatically to favour Settlers, undercutting the mutual need that had underwritten the multilateralism of the early relationship. Second, concepts of sovereignty became more prominent in Settler thought and practice, leading Settlers to seek more unilateral, less contestable structures, practices, and institutions.

As these two trends reinforced one another, the practices that define the relationship between Settler and First Nations peoples became less multilateral. First Nations have contested this change, forcing concessions that continue to fetter Settler sovereignty. The end result is certainly not multilateral, but nor would be quite right to describe Settlers as sovereign. Settlers have been forced to make a series of concessions, but they have done so in ways that seek to maintain both the self-image of sovereignty and the lived reality of power asymmetry. These concessions therefore take the form of self-imposed constitutional limits and voluntary treaty settlements. Such practices seek to re-imagine the trans-systemic relationship as internal to Settler polity, such that power-sharing can occur without undermining the conceptual integrity or physical dominance of that polity.

Pluralism on Turtle Island is therefore hard-fought, shallow, and hierarchical, yet sovereignty is incomplete, fragile and contested. Actual practice lies somewhere between the two – shaped by both but achieving neither.

This account shows how actual practice exceeds the sovereign framework. Indeed, it points to at least two promising sites where we might find ways to reimagine political order in ways that do not depend on total, exclusive authority. The first is in the earliest periods of the relationship, before Settlers imposed hierarchical sovereignty and when practices of co-decision and conditional authority were common. The second is in the spaces of resistance and resurgence where First Nations have preserved or created spaces of co-decision and conditional authority alongside and against sovereign structures.

The following chapter will place political, legal, and economic practices in conversation (Section 1), offer some preliminary analysis (Section 2) and briefly highlight some particularly promising practices that might be explored moving forward (Section 3).

1. Connecting Political, Legal and Economic Practices on Turtle Island

The relationship between First Nations and Settler communities has reflected a contested and ambiguous conceptual basis. Both communities are internally diverse, both changed internally over time, each was shaped by its interaction with the other, all in the face of shifting power relations and political needs. While the relationship can be understood through rough temporal phases, these are far from discreet. As a result of all of this, it is difficult to describe the relationship, or its evolution over time, according to any single coherent logic or narrative. Nevertheless, some salient processes are a clear.

Initially, First Nations-Settler relations were treaty-based in ways that challenge conceptions of sovereignty as final authority (Sovereignty 1). Instead, political authority was typically shared to varying degrees, legal practices were largely hybrid and negotiated, and material production was decentralized and multilateral. Neither party enjoyed unilateral authority, and neither party was able to determine decision-making structures according to their own norms. Instead, contexts of mutual need gave rise to interpenetrating authority structures which both First Nations and Settler communities could understand as legitimate relative to their own theories, institutions and norms. In this sense, both Settler and First Nations authority were conditional upon their ability to satisfy multiple accounts of social legitimacy. Indeed, early treaties can be understood as not only establishing shared treaty councils, but also setting out mutual conditions which regulated the autonomous authority of both communities. Together, practices like these allowed all parties to contest the relationship, adjusting it over time to meet their respective needs. During this period, then, authority was multilateral and negotiated.

Over time, however, Settler authorities used force, fraud and immigration to make themselves physically dominant. The end of great-power military competition on the continent and the shift towards an agricultural and later industrial economy also dramatically undercut Settler need for the erstwhile partners. At the same time, Settler societies transitioned from polyarchic empires to nation-states, and their conceptions of political order became increasingly centered around sovereign, bounded, centralized authority. As a consequence of these concurrent trends, Settlers were more able to impose their vision on the relationship, and their vision was more oriented towards exclusive and total authority. Practice shifted accordingly. Treaties were re-cast as non-binding promises by a unilateral sovereign, Settler courts no longer engaged with First Nations legalities, and material relations took the form of hierarchical owner/worker relations. In all these ways, the actual exercise of authority became more unilateral.

As Settlers re-imagined their own forms of authority in increasingly sovereign terms, they began to re-imagine First Nations as less and less sovereign. In the legal, political, and economic spheres, conceptions of First Nations slid from something resembling a foreign nation, to something resembling a domestic political unit. This reflects a logic of incorporation that integrates First Nations into, and subordinates them to, the broader authority structures of Settler society. In short, by arranging overlapping Settler and First Nations authorities as nested in a single hierarchy, Settlers are able to conceive of their authority as exclusive and total while still making practical concessions in response to ongoing First Nations contestation.

This situation has resulted in a troubled, incomplete form of sovereignty in at least two ways. First, as the *de facto* authority and control of the Settler state solidified, Settlers moved towards unilateral accounts of authority which did not speak to First Nations norms or institutions. First Nations are obviously not inclined to accept accounts of authority which do not

speak to their own understandings, and so continue to contest Settler sovereignty and work towards a renewed multilateralism. Second, because the actual historical basis of Settler authority was in fact multilateral, Settler authorities have struggled to provide an account of unilateral authority which is internally coherent, even according to Settler norms. This tension is evident in recent jurisprudence. Old doctrines of racial superiority are no longer acceptable, the doctrine of terra nullius has been rejected⁴⁵⁷, conquest never took place, treaty making has been inconsistent, wrapped in force and fraud, and subsequently abused or ignored. Even where credible agreements were reached, Settlers now live far beyond their terms. As a result, the considerable *de facto* power of Settler governments coexists with an obvious legitimacy crisis, both vis a vis First Nations and within their own ideology.

Settler authorities continue to experiment with doctrinal and institutional arrangements designed to legitimize their authority. Aboriginal rights and title, the modern treaty process, co-management agreements, and a host of other accommodations can all be understood in this light, as attempts to re-describe First Nations authority as a component part of Settler authority structures, thereby offering practical concessions in a manner consistent with both a self-understanding of sovereignty, and a lived reality of physical dominance.

In short, a commitment to unilateral authority prevents Settler institutions from providing a compelling account of their own legitimacy, leaving Settler sovereignty critically incomplete and perpetually contested, while at the same time frustrating the pluralist practices that characterized earlier phases of the relationship. Turtle Island, then, is stuck somewhere between sovereignty and pluralism, shaped by both but achieving neither.

⁴⁵⁷ “The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada” Tsilhqot’in at 69.

2. Understanding Pluralism on Turtle Island through Symbiogenesis

The total and exclusive forms of authority inherent in sovereignty are not therefore a terribly useful frame for describing actual practices of pluralism on Turtle Island. This suggests that we need new ways of thinking, new concepts that center around interdependence and plurality without losing sight of asymmetry and domination.

Haraway's use of the concept of symbiogenesis is helpful for thinking this paradoxical coexistence and intermingling of pluralism and sovereignty⁴⁵⁸. Symbiogenesis is the evolutionary process by which one cell or organism absorbs another, incorporating the other into itself and being transformed internally in the process⁴⁵⁹. As Haraway explains, processes of digestion are not always successful, sometimes the organism which was "eaten" or absorbed refuses to be digested, surviving as an independent entity within the host system. Over time, the host adjusts to its presence, even coming to rely on the other to perform key biological tasks⁴⁶⁰. Similarly, the absorbed entity adapts to its new situation, coming to rely on features of the host environment for its own survival. The result is a co-constituted being, comprised of two distinguishable beings, neither of which could survive in its present form without the other⁴⁶¹. Over time, the two co-evolve as a unit in relation to other units even as each continues its own independent evolution and maintains external relationships independent of its partner.

Furthermore, because the assemblage is not coherent or unitary, because it contains the

⁴⁵⁸ Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham, Duke University Press, 2016) especially chapter 3.

⁴⁵⁹ Ricardo Guerrero, Lynn Margulis, and Mercedes Berlanga, "Symbiogenesis: the Holobiont as a Unit of Evolution," *International Microbiology* 16, no.3 (2013).

⁴⁶⁰ See Scott Gilbert, Jan Sapp and Alfred Tauber, "A Symbiotic View of Life: We Have Never Been Individuals," *Quarterly Review of Biology* 87, no.4 (2012); Donna Haraway, "Staying with the Trouble Anthropocene, Capitalocene, Chthulucene" in Jason Moore ed., *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (Cambridge: MIT Press, 2016) especially note 16.

⁴⁶¹ Lynn Margulis, "Symbiogenesis and Symbiogenesis" In *Symbiosis as a Source of Evolutionary Innovation: Speciation and Morphogenesis*, ed. Lynn Margulis (Cambridge: MIT press, 1991). See also S.R. Bordenstein and K.R. Theis, "Host Biology in Light of the Microbiome: Ten Principles of Holobionts and Hologenomes," *PLOS Biology* 13, no.8 (2015).

possibility of manifold different relations both internal and external, the resulting pair is susceptible to surprising change.

However, symbiogenetic coevolution is constitutively asymmetrical. The host never absorbs its other entirely, yet it feeds on it perpetually. These beings co-evolve, as it were, shaping each other, depending on one another, even as one cannibalizes the other. Relations between the two units are both cooperative, in that they rely on each other to survive, and competitive, in that it is possible for one to gain at the other's expense⁴⁶². There is an asymmetrical interdependence, an ongoing relation of domination that is never total, often fragile, but always pronounced.

Similarly, we might say that the Settler polity has attempted to absorb First Nations into itself. First Nations, however, have refused to be digested. Instead, they cause continual indigestion, disrupting the host system even as they are drawn deeper into it. This indigestion in turn shapes Settler society. Indeed the Settler state, its parent empires, and international law itself were all deeply shaped by their encounter with, and eventual exclusion of First Nations diplomacy⁴⁶³. Likewise, contemporary First Nations are also deeply shaped by the encounter⁴⁶⁴. Like a host organism, Settler society has come to rely on First Nations to perform a shifting battery of tasks essential to its own identity⁴⁶⁵. First Nations communities too, have, as a result of

⁴⁶² Haraway, *Trouble* at 60, 62. See also Thom van Dooren and Viciane Despret, "Evolution: Lessons from Some Cooperative Ravens," in *The Edinburgh Companion to Animal Studies*, eds. Lynn Turner, Ron Broglio and Undine Sellbach (Edinburgh: University of Edinburgh Press, 2017).

⁴⁶³ Hamilton, "Sovereignty" at 73; John Breuilly, "Modern Empires and Nation-States," *Thesis Eleven* 139, no.1 (2017) at 11-29.

⁴⁶⁴ Johnny Mac, "Hoquotist: Reorienting Through Storied Practice" in *Storied Communities: Narratives of Contact and Arrival in the Constitution of Political Community*, eds. Hester Lessard, Rebecca Johnson, Jeremy Webber (Vancouver: UBC Press, 2010).

⁴⁶⁵ Lutz argues that Settler society needs its First Nations counterpart to occupy a subordinate position in order to constitute its own privileged position, just as the capitalist depends on the existence of the worker for his existence as such. Lutz, *Makuk* Chapter 3: Making the Lazy Indian. Similarly, Veracini argues that Settler polities try to erase or absorb Indigenous peoples in order to overcome their frontier status and achieve recognition as state equal to the mother country. At the same time, Settler polities use their encounter with First Nations as a means to differentiate themselves from the mother country, thereby asserting their independence. Settler identity is therefore constituted by

their ongoing dispossession and oppression, become in some ways dependent on the supports of the Settler state. Yet each retains a separate identity with distinct, even contradictory needs.

Rather than a body-politic, we have been left with a holobiont-politic: an interdependent community of asymmetrically related units who intra-act to constitute one another and their shared community in ways that are both antagonistic and mutualistic⁴⁶⁶. Just as each unit of a holobiont maintains its own network of cooperative and competitive models beyond their relation to one another, both the Settler state and First Nations leverage transnational networks and processes to further their own objectives – their respective fates in some ways tied, in other ways oppositional⁴⁶⁷.

Situations of symbiogenesis also involve what Frank has termed mutual policing – each party invests energy into forms of social control which limit the actions of the other. Sometimes this policing is indeed mutual, and results in a sort of distributed control over the internal sociality of the overarching unit. Where pronounced resource discrepancies exist between component parts, however, the dominant party tends to take on social policing unilaterally, investing its surplus energy in social control while the under-resourced partner decreases its

both the persistence and the marginality of Indigenous others. Lorenzo Veracini, *Settler Colonialism* especially at 17, 29, 30, 32 39. In a similar vein, Bracken argues that Settler society defines itself through a dream of First Nations erasure which it must never complete. Bracken, *Potlatch Papers* at 190.

⁴⁶⁶ Or, as Haraway puts it: “symbiotic assemblages, at whatever scale of space or time, which are more like knots of diverse intra-active relatings in dynamic complex systems, than like the entities of a biology made up of preexisting bounded units (genes, cells, organisms, etc.) in interactions that can only be conceived as competitive or cooperative. ... Holobionts require models tuned to an expandable number of quasi-collective/ quasi-individual partners in constitutive relatings; these relationalities are the objects of study. Haraway, *Trouble* at 63.

⁴⁶⁷ An ecological community of organisms that encompasses a broad range of interactions (parasitic to mutualistic), patterns of transmission (horizontal to vertical), and levels of fidelity among partners... Both mutualistic and antagonistic (fitness conflict) evolution can occur among constituent members of the community, not just adaptations at the “hologenome” level, and there is abundant empirical evidence for such divergence of selective interests among members of host-microbiome communities... all members of the community are evolutionary entities that experience different selection pressures, potentially live in a different range of habitats, and vary in their fidelity to the association. Angela Douglas and John Werren, “Holes in the Hologenome: Why Host-Microbe Symbioses Are Not Holobionts,” *mBio* 7, no.2 (2016).

involvement or ceases to engage in policing altogether. In such situations, the terms of mutualism become decidedly unilateral.

The parallels here are obvious. Initially, we might say that the relationship was mutually policed. As the Settler state came to monopolize physical and social resources its interactions with First Nations parties became increasingly unilateral. Where local resource conditions favoured First Nations they were able to partake in defining the relationship more strongly. Frank is quick to point out that levels of policing, although frequently asymmetrical, are not uniform or static – rather they respond to fluctuating resource conditions. Indeed, even small shifts in relative resource abundance can lead to pronounced shifts in mutual policing. This suggests a certain degree of reversibility – if the monopolization of resources were to give way to more even distributions, social control may follow suit as both partners adjust their ability to police the other.

Thus, while symbiogenesis is generally considered irreversible, in that the two units are no longer neatly separable (we are all here to stay, as then Chief Justice Antonio Lamer put it⁴⁶⁸), asymmetry is actually not an inherent or fixed feature of the relation. It is contingent, a direct result of resource asymmetry. As we have seen, the mutual policing through which the relation is regulated can and has shifted over time. It can and will continue to shift.

Symbiogenesis therefore provides a concept capable of holding the contradictions of this political relationship in tension. Moving beyond an interdependence/impunity spectrum, symbiogenesis allows us to think interdependence and impunity together, to see how each is a contingent, interactive and intra-active function of the other⁴⁶⁹. It allows us to capture a co-

⁴⁶⁸ *Delgamuukw* at 186.

⁴⁶⁹ Haraway notes that symbiogenesis allows us to think relationships which transcend the dichotomy between competition and cooperation, showing how actors involve in both dynamics at once. Haraway, *Trouble* at 60.

constitution which is at once deeply multilateral and also profoundly, progressively and maliciously asymmetrical. The term captures a relation which is at once deeply structured and inherently contingent, flexible and iterative. It avoids facile dichotomies and essentialisms without dissolving important power relations into a simple hybridity. In this way, the concept of symbiogenesis makes room for the persistence of difference alongside a depth of mutual influence in ways that sovereignty cannot contemplate.

3. Developing Pluralism on Turtle Island: Some Concluding Remarks

To summarize the relationship between sovereignty and pluralism on Turtle Island, we might say that as Settler power increased and concepts of sovereignty gained salience in Settler society, Settlers sought increasingly unilateral control of the relationship. First Nations resisted, and continue to resist, this shift, seeking forms of multilateralism. As a result, current practice shows a blend of practical concessions and profound asymmetry.

This account suggests two places pluralists might look for conceptual and material resources. The first is in early-contact practices, when the balance of power was such that Settler authority required a convincing account of its own legitimacy vis a vis First Nations. The second is spaces where First Nations resistance has been especially pronounced or efficacious. Here too, Settler authorities have been forced to re-embrace sources of authority that exceed the sovereign framework.

In the early-contact periods, shared interests and a rough balance of power put the parties in a position of mutual need. As a result, First Nations and Settler decision-making structures tended not to be totally discreet. Instead, authority structures interpenetrated, partaking in forms of co-decision through treaty, hybrid trials, and mixed trade structures. The resulting exercises of

authority were therefore able to draw on multiple distinct sources of legitimacy, securing social order without a final decider. Similarly, even unilateral decisions were often subject to forms of conditionality which allowed each party to shape and constrain the behaviour of the other.

Likewise, where First Nations resistance to Settler authority is most pronounced and most efficacious, Settler authorities have been forced into a position of mutual need. As in the past, this has often given rise to interpenetrating authority structures. Blockades on Haida Gwaii, for example, gave rise to innovative co-management procedures. Conditionality also re-emerges in this space, for example in modern consultation procedures.

By looking to these contexts of inter-dependence and mutual need, and to the practices of inter-penetration and conditionality that they produce, we can find forms of authority and legitimacy that are suited to a pluralist environment.

Part 2: Practices of Pluralism in Europe

As we have seen, the interaction of different social orders poses difficult questions, forcing social actors to navigate multiple rule sets without clear guidelines for how, or indeed if, those rules should interact. In response, western society has developed the institution of sovereignty; by dividing competing authority claims into mutually exclusive compartments, we assure a single set of rules prevails in any given place, thereby avoiding the uncertainty and conflict of inter-systemic relations altogether⁴⁷⁰. This principle has since become the conceptual foundation of the domestic and international order⁴⁷¹.

Despite this foundational role, the practice and theory of sovereignty are currently in crises⁴⁷². More and more, transnational flows of people, capital, information, and corporate and civic actors are putting so-called sovereigns in conversation with multiple distinct sources of authority and legitimacy. Scholars are struggling to modify or transcend the language of sovereignty in order to describe these arrangements.

One important site where these transformations are playing out is through the increasingly complex relationship between states and international organizations. Europe is paradigmatic of these challenges⁴⁷³. As the European Union grows and evolves, its relationship to national systems, and indeed to other forms of international law, is creating a rich environment of overlapping legitimacy claims, jurisdictions, and functions. Complex relationships are being

⁴⁷⁰ Havercroft, *Captives of Sovereignty* especially at 12-14.

⁴⁷¹ Walker, *Sovereignty in Transition* at 80.

⁴⁷² See e.g. Walker, *Sovereignty in Transition*; for further discussion see Richard Bellamy, "A European Republic of Sovereign States: Sovereignty, Republicanism and the European Union," *European Journal of Political Theory* 16, no.2 (2017) especially at 200-202.

⁴⁷³ Walker positions Europe as paradigmatic of these challenges. Walker, *Sovereignty in Transition* at vii.

negotiated in response. Questions of sovereignty have long been central to these discussions, and they remain hotly contested today.

The following chapter is an attempt to take stock of how practices of interaction between the European Union and its member-states are challenging, and being shaped by, concepts of sovereignty. My analysis explores the legal, political, and economic dimensions of these practices, tracing how each helps to co-create the overall relationship.

To briefly summarize the argument, I contend that Europe was built out of sovereign states, but has gradually undertaken a prolonged and uneven process of fostering mutual need between members. Over time, this has led to a set of shared or interpenetrating institutions, and also to practices of conditional authority. The exact nature of these authority structures has been the subject of intense and unresolved contestation.

The political sphere, for example, is characterized by hybrid institutional structures. Each treaty revision brings elements of federalism, elements of inter-governmentalism, and elements of populism and technocracy. The end result is a multivalent polity that pursues multiple vectors of legitimacy at once. Similarly, in the legal sphere, courts have developed a practice of recognizing one another's authority subject to certain conditions. This allows each court to understand the Union in its own way, while giving each court an incentive to accommodate the understandings of other courts. The overall legal system is therefore characterized by an irresolvable tension between national and supranational law – the law does not resolve these tensions; rather, the law is a product of them. In the economic sphere, however, the development of the Union has worked to insulate fundamental economic structures from popular contestation. The economic dimensions of the relationship thereby reveal another contest, not simple about who has power, but about how that power is structured and limited.

Overall then, we might say that the EU is defined by ongoing contestation. Rather than resolving these contests, the EU cultivates a certain ambiguity, embracing elements of each theory and blending them together in pragmatic ways that enable action-coordination amidst persistent plurality. However, the entrenchment of basic economic structures has placed important economic decisions beyond the scope of contestation. In this sense, European pluralism is functionally limited – a political and legal pluralism resting on a shared (and coercively enforced) economic foundation.

In making this argument, I begin in the political realm, exploring how various practices of sovereignty and pluralism have been expressed in the ongoing negotiation and evolution of the EU treaties (Chapter 5). Next, I explore the influence of courts as they have interpreted and shaped these treaties and the contested theories they express (Chapter 6). Third, I explore the interplay between these political and legal negotiations and the economic evolution of the union, asking how material production has shaped and been shaped by struggles for sovereignty and pluralism (Chapter 7). Finally, I conclude by reflecting on how these conversations connect, what practices they co-create, and how they can help us think critically and productively about social order in pluralist contexts more generally (Chapter 8).

[Chapter Five] Political Practices

At the end of World War Two, Europeans had experienced the extreme forms of international and civil violence that a world of sovereign states can produce. Desperate for a way to secure peace, ensure human rights, and rebuild material prosperity, Europe's leaders were ready to countenance forms of multilateralism that challenge the sovereign frame. Thus, discussion of a European community began – a set of multilateral institutions designed to prevent war, stifle totalitarianism, and promote commerce between European states⁴⁷⁴.

From the beginning, there were fierce debates about what such a union would look like, how expansive its powers would be, and how it would relate to the sovereign state. Some favoured a powerful Union positioned hierarchically above the state, while others envisioned a voluntary organization subordinate to the state.

In the face of persistent disagreement, the Union began with a modest set of institutions regulating the production of coal and steel in order to prevent any one nation from amassing the materials of war. Over time, these institutions grew and expanded, as diverse actors wrestled with divergent aspirations and shared needs. Those who favoured a strong Union and those who favoured strong states compromised recursively.

For example, the integration process featured four central institutions – a supranational Commission and Parliament, and an inter-governmental Council and Council of Ministers. Subsequent developments saw supranational advances in economic areas, but inter-governmental actors prevented similar progress in social and security policy. As the Council moved away from

⁴⁷⁴ Emmanuel Brunet-Jailly, Achim Hurrelmann and Amy Verdun, eds. *European Union Governance and Policy Making: A Canadian Perspective* (Toronto: University of Toronto Press, 2017) especially the Introduction.

unanimity, making it easier for individual states to be out-voted, the Union also developed a system of opt-outs for national governments. As the Union progressed, monetary policy moved to the supranational sphere but fiscal policy remained vested in the member nations. The Maastricht treaty divided community competences into three pillars, creating a more supranational decision-making process for the economic pillar, but also set up a more inter-governmental process for the social and security pillars. The pillar structure is no longer in use, but even today the Union uses multiple different decision-making processes, some more supranational and some more inter-governmental, depending on the issue at hand. In all these ways, the structure of the Union is the product of compromise between conflicting visions of political community.

Alongside this contest between supranationalist and inter-governmentalist understandings of the Union, another axis of contestation has also shaped the EU's development. This contest pits a preference for technocratic decision-making against a preference for participatory decision-making. Here too, the political structure of the Union reflects elements of each. Unelected actors play prominent – even leading – roles, but are also making limited efforts to foster broader deliberative participation to complement institutional decision-making.

Together, these two cross-cutting axes of contestation have shaped the Union's development. I contend that this process has given rise to an ambiguous political entity that is neither sovereign over, nor subordinate to, its members. Instead, national and supranational actors have forged interpenetrating institutions where shared decisions can be reached and legitimized with neither a shared understanding of what sort of political community the Union represents, nor where power does, or ought to, lie within it.

A number of important practices have facilitated this ability to build community in the face of persisting and fundamental differences. For example, European actors have shown a pattern of seeking cooperation where agreement can be found, while leaving contentious issues that might otherwise stall progress aside. The Union has also developed practices that allow each country to integrate in slightly different ways, letting each nation forge a relationship in reference to local understandings and interests. Finally, a focus on the results of integration, rather than the processes that drive it, has provided a common basis of support for actors with diverse understandings of the Union itself. Together, these practices allow the EU to function without ever resolving fundamental questions regarding what the relationship between the Union and its member-states is, or what it should be. To this day, the most fundamental questions of the trans-systemic relationship remain unresolved. Nevertheless, the forms of multilateralism this ongoing compromise has produced have succeeded entirely in preventing war between participants, securing a reliable degree of human-rights protection, and building economic links between nations.

This chapter explores the political dimensions of the contests that have shaped the European Union, mapping how successive compromises have allowed the Union to expand and deepen without ever resolving fundamental questions about exactly where political authority lies. I begin with a brief overview of the integration process (Section 1), and a discussion of the major practices that have animated it (Section 2). Section 3 explores the discourses used to understand this process. Section 4 illustrates my argument through the example of the failed Constitutional Treaty. Finally, Section 5 offers some conclusions.

1. An Overview of the Political Relationship (~1950-Present)

1.1 Describing an Elephant: Two Positions on the Nature of European Integration

Since the inception of the European Steel and Coal Community in 1955 – and, indeed, even before⁴⁷⁵ – attempts at European integration have been marked by two conflicting positions, one seeking a federal or quasi-federal ‘United States of Europe’ and the other envisaging an international community of independent states more akin to the League of Nations or the UN⁴⁷⁶.

The supranationalists, as I will call proponents of the first position, come in many stripes. Some were ardent federalists, advocating the immediate establishment of a popular, European-level government complete with all (or most) of the hallmarks of a traditional state⁴⁷⁷. Others suggested the gradual extension of functional agreements overseen by apolitical technocrats, with minimal public input, as a means of slowly binding nations together⁴⁷⁸. Seeing an outright transition to a sovereign European government as impractical, these functionalists suggested that mutually advantageous deals on specific issues would, over time, create spill-over effects, leading supranational structures to accumulate more and more power and legitimacy until a continental government had been achieved.

While the former saw political legitimacy as essential to building the solidarity necessary to overcome parochial nationalism and forge a European demos, the later favoured depoliticizing integration as much as possible precisely in order to avoid needing to meet such a challenge head on. Nevertheless, both functionalists and more straightforward federalists ultimately advocated

⁴⁷⁵ Bellamy, “European Republic” at 198.

⁴⁷⁶ Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials. 5th Edition* (Oxford: Oxford University Press, 2011) at 4-5.

⁴⁷⁷ For discussion see Antje Wiener and Thomas Diez, *European Integration Theory* (Oxford: Oxford University Press, 2009) at 25-66.

⁴⁷⁸ Wiener and Diez, *Integration Theory* at 9. The locus classicus of the functionalist argument is of course Ernst Haas, *Beyond the Nation State* (Stanford: Stanford University Press, 1964).

an integration process which would create a distinct, sovereign political entity above and beyond, and independent of, the nation states over whom it would be built.

On the other side of the debate, the Inter-governmentalists – defenders of the national state – fought for forms of integration that privileged and preserved state sovereignty⁴⁷⁹. They saw integration as a form of coordination between state parties, who would retain ultimate authority rather than transferring it, all at once or gradually, to a supranational structure. They argued that absent a European demos, only the state could provide a forum for democracy and human rights, and that any continental union must necessarily consist of a union between fully sovereign states⁴⁸⁰.

Thus began a long debate over the shape and nature of the European project – would states feature as minor actors within a new continental sovereign, or would states remain the central actors, using the union as a mere tool to achieve their autonomous ends? This debate is clearly reflected in the integration process itself.

1.2 From World War to Tug of War: A Brief History of European Integration

In many ways, the evolution of the EU treaties can be read as a tug of war between supranationalist and inter-governmentalist positions over time. As the respective academic and political potency of these two visions of integration waxed and waned, different periods were marked more strongly by one or the other⁴⁸¹. Yet at no point has either position ever been totally dominant; even the most inter-governmentalist periods of the EU's development also helped to

⁴⁷⁹ For discussion see Wiener and Diez, *Integration Theory* at 67-87.

⁴⁸⁰ See e.g. Andrew Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmental Approach," *Journal of Common Market Studies* 31, no.4 (1993); Andrew Moravcsik, *The Choice for Europe* (Berkeley: University of California Press, 1999).

⁴⁸¹ Craig and de Burca, *EU Law* at 7.

create and strengthen independent European institutions, and even the most supranationalist steps made concessions to the continuing sovereignty of member-states.

As a result, the EU has come to reflect a complex and sometimes contradictory compromise between these divergent positions. To this day, there is enough of both positions in the treaties that debates about how best to understand the nature of the EU as a political community continue unabated, with each side making descriptive as well as normative claims. In the end, the prevailing wisdom is that the EU is politically and legally *sui generis*, what Delors famously described as an “*objet politique non-identifié*”, lying somewhere between a traditional federation and a typical international organization⁴⁸².

The early European Coal and Steel Community, for example, featured a supranational Commission empowered to make binding decisions which state parties were obligated to obey and a supranational court to settle disputes⁴⁸³. Yet the arrangement also created a strong Council comprised of state governments to steer the process, and another to wield legislative power. This mixed institutional arrangement and the ideological tension it expresses have been central to the European community ever since.

Indeed, subsequent moves towards a European Economic Community moved the continent closer to a supranationalist vision by dramatically expanding community competences, but did so only by taking the issues its member states found most sensitive – for example, defense – off the agenda⁴⁸⁴. The EEC also fulfilled federalist ambitions by creating a nascent

⁴⁸² Jacques Delors, "Speech by Jacques Delors (9 September 1985)," in *Bulletin of the European Union no.9*. (Luxembourg: Office for Official Publications of the European Communities, 1985).

⁴⁸³ Craig and de Burca, *EU Law* at 7.

⁴⁸⁴ Craig and de Burca, *EU Law* at 6.

European Parliament, yet at the same time strengthened the role of the Council in community decision making⁴⁸⁵.

Compromises in the treaties themselves were also born out in practice. In 1965, inter-governmentalists led by French President De Gaulle pushed for consensus decision making in the Council, while supranationalists preferred qualified majorities⁴⁸⁶ which could push integration forward over the objection of reluctant states. The result was the famous “Luxemburg compromise” – Council decisions would formally require only a qualified majority, but in practice no decisions would be taken unless full consensus could be achieved⁴⁸⁷. This de-facto veto swung the balance of power within the community firmly in favour of national governments. Yet this period also saw the EEC gain control of its own budget (1970) and led to the first direct elections of the European Parliament (1979).

The Maastricht Treaty is widely seen as swinging the balance towards supranationalist ambitions once more⁴⁸⁸. In a move to help build a European demos, it created European-level citizenship and coined the name European Union, rather than European Community. It also created co-decision mechanisms between the Parliament and Council, empowered the Parliament to block appointments to the Commission, and enabled it to request the initiation of new legislation⁴⁸⁹. Furthermore, Maastricht created new institutions like the European Central Bank (ECB) and European System of Central Banks (ESCB), set in motion the creation of the Euro, and expanded Union competences into new areas. At the same time, however, it enshrined the

⁴⁸⁵ Craig and de Burca, *EU Law* at 9.

⁴⁸⁶ A Qualified Majority consists of 55% of member-states (at least 16) containing a super-majority of population (65%). Certain policy areas, including membership of the Union, the finances of the Union, harmonisation in the field of social policy; most aspects of the common security and defence policy, citizenship, and most institutional changes require unanimous approval by Council. See European Council, “European Council - Voting System” accessed Nov. 10, 2019 www.consilium.europa.eu/en/council-eu/voting-system/

⁴⁸⁷ Craig and de Burca, *EU Law* at 7.

⁴⁸⁸ Craig and de Burca, *EU Law* at 13.

⁴⁸⁹ Craig and de Burca, *EU Law* at 13.

much-celebrated principle of subsidiarity, whereby EU programs are always implemented by the smallest level capable of doing so⁴⁹⁰. According to this principle, member-states are obliged to implement the majority of Union policy themselves, according to domestic institutions and policy priorities. The Union only acts directly when member-states would be unable to act effectively in isolation. This strategy gives member-states a continuing role even in areas that are technically Union competencies, making EU supranationalism less top-down and less threatening while at the same time enabling muscular central action when the situation demands it. This important principle was paired with the principle of conferral, stating that the Union only had such competences as the member-states conferred on it⁴⁹¹. Together, these doctrines worked to protect national sovereignty, ensuring that supranational bodies could only act where states had empowered them, and even there only to the degree that supranational solutions were truly necessary.

Even more tellingly, Maastricht established a “pillar” structure for the community, separating competencies into three areas, each governed by different rules⁴⁹². The Economic Pillar would be more strongly supranationalist, driven primarily by the Commission and controlled by qualified majorities in the Council. The Social and Security pillars, however, would be driven by the Council and require consensus. This structure allowed states to cede more power in areas perceived of as peripheral to their own sovereignty while retaining a greater degree of inter-governmentalism in the areas that concerned them most. In fact, even the more heavily supranationalist developments were balanced by a number of opt-outs and exceptions,

⁴⁹⁰ Craig and de Burca, *EU Law* at 94-100.

⁴⁹¹ Craig and de Burca, *EU Law* at 74.

⁴⁹² Craig and de Burca, *EU Law* 14.

allowing states to position themselves within the Union in a decidedly inter-governmentalist fashion.

Maastricht also complicated the supranational/inter-governmental binary somewhat, by introducing the Committee of the Regions (CoR) – an advisory body representing regions, counties, provinces, municipalities and cities in their own right. The CoR must be consulted on EU legislation that affects sub-national governments, and may be asked for input or offer input on other issues⁴⁹³. Many see the CoR as an attempt by the Commission to circumvent national governments, opening avenues to pursue a supranational agenda more aggressively⁴⁹⁴. However, its members, despite being elected representatives from local governments, are appointed to the CoR by their national governments. Later treaties also gave the Committee the ability to enforce the principle of subsidiarity before the European Court of Justice, thus positioning it as a check on supranational authority⁴⁹⁵. In this sense, the CoR plays a balancing role not unlike the principle of subsidiarity itself, enabling supranational action but also embedding it firmly within domestic authority structures⁴⁹⁶. In practice, however, the advisory nature of the CoR has made this body relatively weak, at least at this point in its continuing evolution.

⁴⁹³ European Commission, “The Committee of the Regions” accessed Nov. 10, 2019, https://europa.eu/european-union/about-eu/institutions-bodies/european-committee-regions_en

⁴⁹⁴ Ingeborg Tömmel, “Transformation of Governance: The European Commission's Strategy for Creating a ‘Europe of the Regions’,” *Regional & Federal Studies* 8, no.2 (1998) at 53.

⁴⁹⁵ “Committee of the Regions”.

⁴⁹⁶ The status of sub-national actors is, of course, more than simply another pawn in the political manoeuvres of the supranationalists and inter-governmentalists. Sub-national actors can also be considered a third order of government, and can in that sense be seen as forwarding sovereignty claims of their own. In some cases, sub-national governments are actively seeking secession from their states. In many others they are renegotiating their relationship with central governments. In some cases, like Italy’s Lega Nord, sub-national actors are euroskeptic. In other cases, like Scotland or Catalonia, eventual EU membership is a key feature of secession discourse. These claims add an additional layer of complexity to the multi-level structure of European governance. However, the scope of this dissertation is already sprawling. Given that the European case was selected in order to explore challenges to the state “from above”, rather than “from below”, I have reluctantly excluded sub-national European actors as a major focus. See *supra* note 24.

The subsequent Constitutional Treaty failed when French and Dutch voters rejected it in referenda, but its content was largely carried forward into the Treaty of Lisbon. Lisbon further consolidated the Union, but it was deeply shaped by the failed Constitutional Treaty, and consciously shunned more ambitious federalist language and content⁴⁹⁷. Provisions regarding the primacy of European law over national law were made deliberately ambiguous, and Article 347 established a sort of reserve sovereignty for member-states, safeguarding their supremacy in areas that had not been delegated up to the EU. Lisbon also consecrated the emerging Open Method of Coordination approach, a system of non-binding benchmarks and monitoring processes which allowed the Union to suggest wide-ranging policy goals but fell short of actually empowering it to enforce them. Instead, these goals would take the form of suggestions, to be implemented or ignored at the pleasure of the member-states. While Lisbon dissolved the pillar structure established in Maastricht, it retains separate decision-making processes for security and foreign policy⁴⁹⁸. In the end, critics attacked Lisbon from both sides, with some claiming it was too supranationalist and others decrying the resurgence of inter-governmentalism⁴⁹⁹.

In retrospect, then, the development of the EU treaties reflects a long ideological struggle between inter-governmentalist and supranationalist positions. During the initial period, supranational trends seemed ascendant, while the period between the EEC and the Single European Act (SEA) seemed to signal the victory of inter-governmentalism before Maastricht saw the pendulum swing back the other way. The defeat of the constitution, and the more recent euro and migration crises, suggest that the tide may be turning yet again. Yet even within each period, the dominant theory coexisted uneasily with, and made serious concessions to, its

⁴⁹⁷ Craig and de Burca, *EU Law* at 24-28.

⁴⁹⁸ Craig and de Burca, *EU Law* at 27.

⁴⁹⁹ Craig and de Burca, *EU Law* at 28.

competitor. In this sense, the European integration process has been a process of compromise, one which has allowed fundamental questions about the very nature of the process itself to go unresolved.

Consider the current legislative balance. Only the Commission may introduce legislation. Once proposed, legislation follows a variety of decision procedures based on the subject matter at hand. In the Ordinary Procedure⁵⁰⁰, also known as the Co-decision Procedure or Community Method, Parliament considers the Commission's proposal and offers amendments before sending the bill to the Council. The Council may then either pass the law or send it back to Parliament with amendments of its own. Parliament can accept these amendments or make further changes. The Commission then expresses its opinion on those changes. If it objects, the Council can only pass the law through unanimous consent. If the Commission assents, ordinary qualified majorities will suffice. Thus, the Commission acts as an agenda setter and gatekeeper, while Parliament and the Council fill the legislative role jointly. National parliaments also play a role through their position in EU committees and through subsidiarity, leading some to describe them as a virtual third chamber⁵⁰¹.

This Ordinary Procedure is, however, also subject to a wide spectrum of variations. Certain issues require only a Consent Procedure, meaning Parliament must agree but cannot offer amendments⁵⁰². In other areas, Parliament must be consulted but its opinion is non-binding⁵⁰³. In

⁵⁰⁰ European Parliament, "About the European Parliament – Legislative Powers" accessed Nov. 10, 2019 <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers>

⁵⁰¹ See e.g. Ian Cooper, "Comment: Will National Parliaments Use their New Powers?," *EU Observer*, 16 October 2009, accessed Nov. 11, 2019 <https://euobserver.com/opinion/28839>.

⁵⁰² These areas include internal market exemptions and competition law. See "Legislative Powers".

⁵⁰³ These areas include the admission of members, methods of withdrawal, and combating discrimination. See "Legislative Powers".

certain rare areas, the Council and Commission can legislate without any parliamentary involvement at all⁵⁰⁴.

Member-states also appoint judges to the European Court of Justice without parliamentary involvement⁵⁰⁵. However, Parliament appoints the president of the Commission and approves the rest of the Commission, appoints the president and executive board of the European Central Bank, and selects the European Ombudsman⁵⁰⁶.

Overall, this system can be characterized as a hybrid authority structure supported by a system of dual legitimacy, blending inter-governmental and supranational institutions and theories of legitimacy in a dynamic, shifting and asymmetrical manner that allows the fundamental tension between them to persist unresolved⁵⁰⁷.

1.3 If I May Interrupt: Non-State Actors and European Integration

While state and EU actors are playing out an important contest between supranationalist and inter-governmentalist visions in Europe, citizens, NGOs and social movements and are also actively contesting and influencing how and where authority operates. These struggles often transcend supranationalist and inter-governmentalist stances, economic positions, geographic divisions, and even traditional political cleavages, revolving instead around the contested meaning of democracy itself. Thus, populists of all stripes are challenging the democratic

⁵⁰⁴ These areas include the Common External Tariff Policy and the Common Commercial Policy. European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, accessed No.10, 2019 http://data.europa.eu/eli/treaty/tfeu_2012/oj especially Article 31 and Article 207.

⁵⁰⁵ European Union, *Treaty on the Functioning of the European Union* Article 253.

⁵⁰⁶ European Parliament, "Rules of Procedure of the European Parliament," accessed Nov. 10, 2019 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20070101+RULE-101+DOC+XML+V0//EN&language=EN&navigationBar=YES>

⁵⁰⁷ Ulrike Liebert, "Postnational Constitutionalisation in the Enlarged Europe" *Democracy beyond the State: Assessing European Constitutionalisation*, in eds. U. Liebert, J. Falke and A. Maurer (Baden-Baden: Nomos, 2005) at 12.

credentials of the status quo and experimenting with their own alternatives, even as governing institutions struggle to adapt and respond. Together, these contests suggest another important axis of contestation in Europe, one which problematizes the connection between sovereign institutions at all levels and the people themselves in their role as the constituent power of their communities.

From the beginning, the development of the EU was marked by a profound mistrust of democratic politics⁵⁰⁸. In the wake of popular fascist dictators and communist revolutions, many felt that democratic publics were simply too ill-informed, too emotional, and too-easily captured by rent-seeking special interests or populist demagogues⁵⁰⁹. As a result, the Union was deliberately designed to favour decision-making by national elites and technical experts. The leading role of the Commission, for example, reflects not only supranational motivations, but also technocratic ones, as unelected experts hold an exclusive right of legislative initiative. Likewise, the early Parliament was purely advisory; decisions were reached in Council. Parliament's power has since grown, but it remains in a relatively weaker position⁵¹⁰. This is both a means of ensuring inter-governmentalist influence, and also a means of insulating the

⁵⁰⁸ Varoufakis says technocracy is in the EU's genes, see Yanis Varoufakis, *And the Weak Suffer What They Must?* (New York: Nation Books, 2016) at 111, 237; McGiffen calls the democratic deficit "structural" Steve McGiffen, "Bloodless Coup d'Etat: The European Union's Response to the Eurozone Crisis," *Socialism and Democracy* 25, no.2 (2011) at 26; Isikel argues that "the EU's so-called democratic deficit—the purported dearth of democratic mechanisms of control, accountability, and responsiveness commensurate to its powers—is a systemic feature, not a bug" going on to call technocratic management "the guiding objective of the European Union" and "the broader philosophy of European integration", Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford: Oxford University Press, 2016) especially Chapter 2; while Streeck calls the issue "structural", Wolfgang Streeck, "Peoples and Markets: Democratic Capitalism and European Integration," *New Left Review* 73, no.1 (2012) at 26.

⁵⁰⁹ Thomas Biebricher, "Europe and the Political Philosophy of Neo-liberalism," *Contemporary Political Theory* 1, no.38 (2013) at 5; Wolf Sauter, "The Economic Constitution of the European Union," *Columbia Journal of European Law* 4, no.27 (1998) at 48.

⁵¹⁰ Lord and Magnette argue that a sort of hierarchy exists between different claims to legitimacy in the EU, with indirect vectors featuring more prominently than directly democratic vectors. Christopher Lord and Paul Magnette, "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU," *Journal of Common Market Studies* 42, no.1 (2004) at 191.

integration process from direct democratic pressures. As this technocratic supranationalism displaces state competences or binds the hands of state governments, national governance also becomes increasingly technocratic.

Social movement and NGO actors seem especially attuned to this trend. While civic actors rarely seem to map neatly onto inter-governmentalist or supranationalist positions, they have taken issue with the technocratic aspects of EU governance. According to Della Porta, most strike a decidedly instrumental posture, focusing on particular policy changes without expressing clear preferences regarding which level of government ought to decide them⁵¹¹. Likewise, the decision of which level of government to focus on tends to be more strategic than principled⁵¹². Many organizations will push the EU to influence their national government while simultaneously pushing their national government in hopes of shaping the EU⁵¹³. Others will hop from one forum to the other, opportunistically⁵¹⁴. Ultimately, Della Porta and Caiani claim that most NGOs are neither Eurosceptic nor Europhile, but rather “sceptical Europeanists” – they take issue with the direction and nature of integration, but are more or less agnostic as to integration itself⁵¹⁵. Similarly, public opinion is highly ambiguous on the question of integration. Richard Haesly introduces the helpful term “euro-instrumentalists” – those who support

⁵¹¹ John Fitzgibbon, “Citizens against Europe? Civil Society and Eurosceptic Protest in Ireland, the United Kingdom and Denmark,” *Journal of Common Market Studies* 51, no.1 (2013) at 107.

⁵¹² See Donatella Della Porta and Manuela Caiani, *Social Movements and Europeanization* (Oxford: Oxford University Press, 2009) at 14-15.

⁵¹³ Della Porta and Caiani, *Social Movements* especially chapters 2 and 3.

⁵¹⁴ For forum-shopping by state actors see e.g. Virginie Guiraudon, “European Integration and Migration Policy: Vertical Policy-making as Venue Shopping,” *Journal of Common Market Studies* 32, no.2 (2000); for non-state actors see e.g. Hannah Murphy, and Aynsley Kellow, “Forum Shopping in Global Governance: Understanding States, Business and NGOs in Multiple Arenas,” *Global Policy* 4, no.2 (2013).

⁵¹⁵ See Della Porta and Caiani, *Social Movements* generally, especially the Conclusions.

integration when it serves their interests or suits their personal policy preferences, and defend national sovereignty when it does not⁵¹⁶.

The relationship between EU and state institutions does not therefore appear to be a major issue of concern for European civil society actors. The relationship between those institutions and the people, however, is highly salient. Indeed, this concern is at the heart of the contemporary “populist zeitgeist” currently sweeping European politics. Cas Mudde defines populism broadly as those ideologies which distinguish between a corrupt but powerful elite and a virtuous but disenfranchised people⁵¹⁷. Mouffe calls this the “populist moment”, stressing a similar line between the people and the elites⁵¹⁸. This line can be drawn in a variety of ways, from nationalistic and xenophobic populism on the right to progressive, egalitarian and radically participatory populism on the left⁵¹⁹. One of the particular features of this discourse is that it makes no necessary distinction between elites at the national level and those at the European level. Some populists focus their ire on one or the other according to local political currents; but both are subject to the populist critique. What all of these clusters of populism share is a pronounced distrust of traditional politics as overly elite-driven and technocratic - a feeling that ordinary people have been marginalized and disenfranchised in favour of a shadowy elite, and a strong sense that current political structures prevent a genuinely democratic decision-making process⁵²⁰.

⁵¹⁶ See Richard Haesly, "Euroskeptics, Europhiles and Instrumental Europeans: European Attachment in Scotland and Wales," *European Union Politics* 2, no.1 (2001).

⁵¹⁷ Cas Mudde, "The populist Zeitgeist," *Government & Opposition* 39, no.3 (2004).

⁵¹⁸ Chantal Mouffe, *For a Left Populism* (London: Verso, 2018) Chapter 1.

⁵¹⁹ Mouffe, *Left Populism* at 4. For a discussion of the distinction in the context of European political parties and movements see Gilles Ivaldi, Maria Elisabetta and Lanzone Woods, "Varieties of Populism across a Left-Right Spectrum: The Case of the Front National, the Northern League, Podemos and Five Star Movement," *Swiss Political Science Review* 23, no.4 (2017).

⁵²⁰ Mary Kaldora and Sabine Selchow, "The 'Bubbling Up' of Subterranean Politics in Europe," *Journal of Civil Society* 9, no.1 (2013) at 84.

Institutional actors seem tuned into populist sentiment, and have taken a series of steps to address the much-discussed democratic deficit which lies at its heart. Indeed, it was in the 1990s, just as contemporary populism was gathering steam across the political spectrum, that the Commission undertook its large-scale effort to incorporate civil society actors into EU decision-making practices.

The Commission's reaction was inspired by discourses of deliberative democracy⁵²¹. In brief, deliberative democrats argue that majoritarian decisions are only ever imperfectly representative – they represent the winners, not the population writ large⁵²². The true legitimacy of democratic decision-making, therefore, flows not from effective representation but from processes of dialogue and fair debate to which all participants are committed⁵²³. However, prospects for truly open dialogue are narrow in majoritarian institutional settings, as political and strategic considerations gain weight⁵²⁴. As a result, deliberation needs to be broadened, taking place in an open and free public sphere, unmarred by the constraints of the political process. In this sense, policy-making is split into two conceptual phases; an open, participatory public debate followed by an institutionalized, majoritarian decision-making procedure⁵²⁵. Civil society groups act as mediators between governments and citizens, rooting government policies in the deliberative processes that give them legitimacy⁵²⁶.

⁵²¹ Sabine Saurugger, "The Social Construction of the Participatory Turn: The Emergence of a Norm in the European Union," *European Journal of Political Research* 49, no.4 (2009) at 165; Barbara Finke, "Civil Society Participation in EU Governance," *Living Review of European Governance* 2, no.2 (2007) at 15.

⁵²² Erik Eirksen, "Deliberative Supranationalism in the EU," in *Democracy in the European Union: Integration Through Deliberation?*, eds. Erik Eirksen and John Fossum (New York: Routledge, 2000) at 47.

⁵²³ Eirksen, "Deliberative Supranationalism" at 44.

⁵²⁴ See e.g. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996) especially at 171.

⁵²⁵ "publics do not act, as they possess no decision making agency. In public spheres it is only possible to deliberate" See Eirksen "Deliberative Supranationalism" at 53-55.

⁵²⁶ See e.g. John Erik Fossum and Hans-Jorg Trezn, "The EU's Fledgling Society: From Deafening Silence to Critical Voice in European Constitution-Making," *Journal of Civil Society* 2, no.1 (2006) at 58.

The Commission's White Paper on European Governance clearly reflects this logic, problematizing a "gap" between institutions and citizens and positing civil society as a mediating force to connect the two⁵²⁷. It stresses access to information and regularized consultation as a means of fostering dialogue, arguing that "democracy depends on people being able to take part in public debate"⁵²⁸. Yet it also maintains a certain separation between this deliberation and the actual act of governing, stating unequivocally that "better consultation complements, and does not replace, decision making by the Institutions"⁵²⁹.

In keeping with this vision, the Commission proceeded to make consultation with civil actors widespread, inviting their participation in committees, aggressively funding European-level groups, and disseminating information widely⁵³⁰. The Constitutional Convention embodied a similar ethic and was explicitly mandated to bring Europe closer to its citizens⁵³¹, with the drafting process making a point to include non-governmental organizations and foster pan-European debates. The text of the Constitutional Treaty, and the later Lisbon Treaty, also provided for a European Citizen's Initiative (ECI), through which citizens could ask the Commission to legislate on any issue within its competencies⁵³². Oddly, this package of democratic reforms is largely in keeping with the technocratic vision of the Union – civil society experts are brought into the policy process, decisions continue to rest largely with national elites,

⁵²⁷ See e.g. Commission of the European Communities, *European Governance White Paper COM 428* (Brussels: CEC, 2001) at 3, 4, 7, 8, 11, 16.

⁵²⁸ Commission, *European Governance* at 11.

⁵²⁹ Commission, *European Governance* at 16.

⁵³⁰ Della Porta and Caiani, *Social Movements* at 90.

⁵³¹ European Council, "Laeken Declaration on the future of the European Union (15 December 2001)," in *Bulletin of the European Union no.12*. (Luxembourg: Office for Official Publications of the European Communities, 2001). For discussion Emanuela Lombardo, "The Participation of Civil Society in the European Constitution-Making Process," Paper presented to the CIDEL Workshop *Constitution Making and Democratic Legitimacy in the EU*, London, November 10, 2004. Lombardo notes that "Giscard D'Estaing, opened the first substantive debate of the Convention claiming that 'the citizens of Europe felt that their voice was not being heard on the future of Europe and that the first phase of the Convention should therefore be a listening phase' at 8.

⁵³² This provision was eventually realized in the Lisbon Treaty. Organizers must gather at least 1 million signatures, meeting a threshold of 750 signatures per member of the European Parliament in at least 7 member-states.

and the people themselves continue to be (at least) one step removed from the decision-making processes.

These attempts to involve civic actors in European governance, collectively termed the “participatory turn”⁵³³ in European politics, have therefore met significant criticism. The Commission’s funding and consultation practices, for example, are widely seen as biased towards specific policy input by formally representative groups in a manner that precludes genuinely critical, alternative or cause-based organizations⁵³⁴. Reliance on Commission funds, which constitute 80-90% percent of funding for many major European-level groups⁵³⁵, also tends to make these groups more beholden to institutional pressures than to their own grassroots – leading some to describe the Commission’s partners as “astroturf” organizations; artificial grassroots⁵³⁶. Similarly, the Constitutional Convention largely marginalized critical voices, and many civil society groups that did participate felt their input was meaningless, an exercise in hearing but not listening⁵³⁷.

The ECI, too, is a rather weak form of democratic participation. Even if a Citizen’s Initiative is successful in gathering enough signatures to suggest legislation, the Commission is under no obligation to actually propose the suggested legislation; and even if it did, the Parliament and Council are under no obligation to pass that legislation. Thus, Citizens cannot legislate directly without the approval of all three central institutions. Sovereignty, in this sense, remains firmly vested in political and bureaucratic leaders. As a result, the participatory turn fails

⁵³³ For discussion see Saurugger, “Participatory Turn”.

⁵³⁴ See e.g. Della Porta and Caiani, *Social Movements* especially at 236; Gary Marks and Doug McAdam “Social Movements and the Changing Structure of Political Opportunity in the European Union,” *West European Politics* 19, no.2 (1996) at 7; Justin Greenwood, “Organized Civil Society and Democratic Legitimacy in the European Union,” *British Journal of Political Science* 37, no.2 (2007) at 342.

⁵³⁵ Greenwood “Organized Civil Society” at 343.

⁵³⁶ Beate Kohler-Koch, “Civil Society and EU Democracy: ‘Astroturf’ Representation?” *Journal of European Public Policy* 17, no.1 (2010).

⁵³⁷ Fitzgibbon, “Citizens against Europe” especially at 110-111; Della Porta and Caiani, *Social Movements* at 95.

to really speak to the vision of democracy that civic actors are voicing⁵³⁸. Unsurprisingly, these reforms have done little to counter the resurgence of populism across the continent⁵³⁹.

Contests between technocratic and participatory visions of integration, therefore, represent a major axis of contestation, one that has shaped the Union in ongoing ways. This contest sits alongside the supranationalist v. inter-governmentalist contest, the two crosscutting in complex ways. As with supranationalist v. inter-governmentalist debates, the contest between technocratic and participatory or populist understandings of the Union has never been resolving definitively, given rise instead to mixed institutions and hybrid approaches.

2. Practices of Note

Political institutions in Europe therefore reflect at least two cross-cutting contests, one between supranationalism and inter-governmentalism, and one between populism and technocracy.

Partisans of each position have proven able to shape the integration process. Over time, these contests have produced a series of mixed authority structures which struggle to give voice to multiple actors and to satisfy multiple legitimacy claims. As a result, the question of who has sovereignty within the Union – if anyone – remains hotly contested, with all sides able to influence institutional structures in a way that prevents a single vision from predominating. A number of important practices have facilitated this ad hoc development, allowing the Union to deepen and expand even in the face of persisting and fundamental disagreement.

2.1 Functional Bracketing: The Elephant in the Room

⁵³⁸ Della Porta argues that the participatory turn is better understood as “a rhetorical device to gain legitimacy rather than a genuine move towards a more pluralistic EU democracy”. Della Porta and Caiani, *Social Movements* at 95.

⁵³⁹ Giandomenico Majone, “The Common Sense of European Integration,” *Journal of European Public* 13, no.5 (2006) at 616.

The somewhat remarkable accomplishment of constructing the most integrated region in the world without a clear consensus on exactly what was being built – where sovereignty does, would and should lie within the Union – has certainly required creative compromises on some thorny issues. However, this process has also relied in part on an explicit strategy of setting the most contentious issues aside.

The founders of the ECSC, many of them committed functionalists, had faith that integration could begin in the least controversial areas and gradually spill over into more difficult issues as citizens' interactions with, and loyalty to, the international level increased⁵⁴⁰. This approach was reaffirmed with the Spaak Report of 1956, in which the Inter-governmental Committee decided explicitly to focus negotiations on less contentious issues like trade barriers while leaving more controversial political issues aside⁵⁴¹.

This theme has been a hallmark of European integration. In general, policy integration has far outpaced political integration. Even in the policy domain, issues perceived as tangential to state sovereignty have seen more integration than areas like foreign affairs, defense, and criminal law, languages and education, etc. Perhaps the most notable discrepancy in this regard is the robust trade and economic integration, in contrast to weak social policy and service provisions. While there have long been calls – both official and unofficial – for a “Social Europe”, social policy remains largely the purview of individual member-states⁵⁴². These areas, which both require and reinforce bonds of solidarity and identity within political communities, lie closer to the core of state competencies. They are also deeply controversial, both within the

⁵⁴⁰ Wiener and Diez, *Integration Theory* at 37.

⁵⁴¹ European Council, *Intergovernmental Committee on European Integration, The Brussels Report on the General Common Market* (Luxemburg: Information Service, High Authority of the European Coal and Steel Community, 1956).

⁵⁴² For discussion of this asymmetry see Stephan Leibfried and Paul Pierson, "Prospects for Social Europe," *Politics and Society* 20, no.3 (1992).

member-states and especially at the European level, where issues of redistribution and burden-sharing tend to arouse strong passions on all sides. As a result, these areas have seen relatively little integration, with social policy continually deferred to future negotiations.

Even economic integration has been primarily focused on trade barriers and monetary policy, with the more sensitive issue of budgetary control remaining almost entirely untouched until the recent Euro-crisis forced leaders to take action. Indeed, the Eurozone had long been, and still is, criticized for being lopsided – characterized by monetary union and budgetary nationalism⁵⁴³. Once again, we see that more difficult, more controversial issues are often set aside in order to facilitate progress in other areas.

The current refugee crisis gripping the continent illustrates this trend well. Thus far, the EU has given enormous amounts of aid to Syria's neighbours, in exchange for their help settling refugees before they reach Europe's shores⁵⁴⁴. They have signed elaborate agreements with Turkey, providing money and policy incentives to the Turkish government in exchange for their help re-settling refugees already in Europe⁵⁴⁵. They have strengthened external borders and stepped up naval patrols⁵⁴⁶. All of these are relatively uncontroversial steps for an affluent continent faced with a politically volatile situation.

As of yet, however, European leaders have not been able to agree on the most critical issues – how many refugees to settle, where in the Union to settle them, and how to manage the

⁵⁴³ See e.g. Emmanuel Murlon-Druol, "The Making of a Lopsided Union: Debates about Economic Adjustment in Europe before the Euro," *West European Politics* 37, no.6 (2014).

⁵⁴⁴ European Commission, *Humanitarian Aid and Civil Protection: Syria Crisis Factsheet* (Brussels: ECHO, 2016); European Commission, *Managing the Refugee Crisis: EU Support to Lebanon and Jordan Since the Onset of Syria Crisis* (Brussels: ECHO, 2016).

⁵⁴⁵ "Migrant crisis: EU-Turkey Deal comes into Effect," *BBC News*, March 20th, 2016. Accessed Nov. 10, 2019 <https://www.bbc.com/news/world-europe-35854413>.

⁵⁴⁶ Vasudevan Sridharan, "EU to triple funding for 'Operation Triton' to tackle Mediterranean Migrant Crisis," *International Business Times*, April 24th, 2015, accessed Nov 10, 2019 <https://www.ibtimes.co.uk/eu-triple-funding-operation-triton-tackle-mediterranean-migrant-crisis-1498100>.

process⁵⁴⁷. In a context where the migration decisions of one country effect outcomes in others – Greece can open its borders and Germany will see increased migration – a common policy on the right of refugees to enter, travel around, and settle in member countries seems like an obvious candidate for supranational resolution. Yet public passions run high, and are not uniform throughout the Union. As a result, responses remain fractured, with policy developments occurring almost exclusively at the national level.

In light of the EU’s history, this is hardly surprising. Bracketing controversial issues and setting them aside for later has long been an important strategy in the integration process. At times, it has facilitated progress when disagreements threatened to undermine the integration process itself. However, as the refugee crisis, and perhaps the near dearth of social policy, illustrate, it can also limit the integration process in troubling ways.

Seen in this light, the fact that inter-governmentalist, supranationalist and populist positions remain viable interpretations, and potent shapers, of the integration process seems less flabbergasting. In many ways, the EU is a Union that survives, prospers and grows precisely by harnessing its own ambiguity.

2.2 Variable Geometry: A Reply to Archimedes

Another key practice which has allowed the integration process to proceed without settling fundamental questions regarding the locus and distribution of sovereignty is what has been referred to as the EU’s “variable geometry” or “multi-speed integration”⁵⁴⁸. In essence,

⁵⁴⁷ Nick Gutteridge, "EU migrant relocation plan 'DEAD' as Poland REFUSES to take in Thousands of Asylum Seekers," *Sunday Express*, April 15, 2016, accessed Nov. 10, 2019 <https://www.express.co.uk/news/politics/661166/EU-migrant-relocation-plan-dead-Poland-refuse-take-in-asylum-seekers>.

⁵⁴⁸ For a historical discussion see Françoise de La Serre and Helen Wallace, “Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?” *Notre Europe: Research and Policy Papers* 2 (1997); for an

integration is not uniform – some countries are integrated more or less depending on local preferences.

One benefit of a functional, issue-by-issue approach to supranational governance is that different groupings of countries can agree on different issues. Thus, the borders of the EU, the Eurozone, the EEC, the Common Defense Policy (CDP), and the Schengen Area, to take just a few examples, are not totally coterminous. To illustrate, the UK was, until recently, an EU country outside of the Schengen Area⁵⁴⁹ which did not use the Euro⁵⁵⁰; Monaco, despite not being a member of the EU or Schengen, does use the Euro⁵⁵¹; while Switzerland, a non-EU state that does not use the Euro is within the Schengen⁵⁵². In this way, European integration is not a one-size-fits-all arrangement. Different countries are able to integrate differently, and to different degrees.

To this end, opt-outs have long been an important feature of the integration process. The Danish, for example, received opt-outs concerning defense policy, among other things⁵⁵³. In exchange, Denmark agreed to recuse itself from decisions on these matters. British objections to Union social policy similarly led the other member-states to conclude an agreement on that matter between themselves⁵⁵⁴. Each round of enlargement also saw transitional measures designed to allow certain portions of community law to be delayed or accepted gradually⁵⁵⁵.

Eventually, the Maastricht and Amsterdam treaties formalized this strategy, establishing a series

updated discussion see Carlo Maria Cantore, “We’re One, but we’re Not the Same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU,” *Perspectives on Federalism* 3, no.3 (2011).

⁵⁴⁹ Bulgaria, Croatia, Cyprus, Ireland, and Romania are also EU states outside of the Schengen Area.

⁵⁵⁰ In fact, nine countries (Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Poland, Romania, Sweden, and the United Kingdom) are EU members but do not use the euro.

⁵⁵¹ This is also the case in San Marino, Vatican City and Andorra. Kosovo and Montenegro also use the euro as a *de facto* domestic currency. European Commission, “Euro Area,” accessed Nov. 10, 2019 http://ec.europa.eu/economy_finance/euro/world/outside_euro_area/index_en.htm.

⁵⁵² Iceland, Norway, and Liechtenstein are also non-EU states within the Schengen Area.

⁵⁵³ La Serre and Wallace, “Enhanced Cooperation” at 6.

⁵⁵⁴ La Serre and Wallace, “Enhanced Cooperation” at 9.

⁵⁵⁵ La Serre and Wallace, “Enhanced Cooperation” at 8.

of opt-outs and enhanced cooperation procedures that allowed states to conclude agreements which, although part of EU law, would not apply uniformly throughout the territory⁵⁵⁶.

These provisions, designed to keep a handful of reluctant states from paralyzing the integration process, have long been seen as a backdoor for European federalism – a means for a vanguard of committed countries to lead the way towards an ever deeper Union⁵⁵⁷. For others, opt-outs and enhanced cooperation procedures are a means of ensuring member-state sovereignty over the pace and extent of the integration process – a way to keep the states in the driver's seat. The procedures themselves reflect this ambiguity. While nation-states can use them to shape the Union, the Commission and Parliament also play a decisive role, in deciding whether or not to proceed and governing when countries can join or leave such arrangements⁵⁵⁸.

The Open Method of Coordination (OMC) is another key feature of this variable geometry. In essence, the OMC is a voluntary mechanism whereby the Council sets policy goals and monitors their implementation by the members, without enforcing them directly or prescribing specific ways in which those goals should be pursued⁵⁵⁹. It is therefore up to the members to choose whether or not, and in what way, to pursue those goals.

In fact, even more traditional, hard law mechanisms which apply throughout the entire Union are subject to considerable variation by virtue of the principle of subsidiarity. Directives and regulations, although passed at the supranational level, are implemented at the national or even sub-national level. As a result, these acts are incorporated into domestic law in

⁵⁵⁶ Examples include agreements on divorce law and unitary European patents. For discussion see Cantore, "We're One, but we're Not the Same" at 10-14.

⁵⁵⁷ La Serre and Wallace, "Flexibility and Enhanced Cooperation" at 6.

⁵⁵⁸ Cantore, "We're One, but we're Not the Same" at 9.

⁵⁵⁹ For a discussion of national variations in social policy, for example, see Egidijus Barcevičius, Timo Weishaupt and Jonathan Zeitlin eds., *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (London: Palgrave Macmillan, 2014) especially Chapter 9, Timo Weishaupt, "The Social OMC's at work: Identifying and Explaining Variations in National Use and Influence".

different ways in different countries, according to national legal traditions and policy preferences⁵⁶⁰. The presence of sub-national actors only complicates matters further, as the authority and status of these regions vary wildly⁵⁶¹.

Ultimately, the result of these side agreements, opt-outs, enhanced cooperation procedures, transitional agreements, OMC's, subsidiarity variations, and treaty concessions is a highly variable, non-uniform sort of integration which effectively allows states to position themselves along a spectrum of sovereignty. Some states embrace integration more strongly than others, and some embrace it in different ways than others. This allows each state to view its relationship with the Union, and the distribution of sovereignty between them, slightly differently. Such arrangements make *a priori* agreement on the fundamental nature of the integration process less important – in a very real sense there is no one, single integration process or, for that matter, one single distribution of sovereignty within it.

The current drama surrounding the UK's membership in the Union provides an example. British voters, notoriously concerned with national sovereignty, expressed discontent with the extent and specific contours of the integration process. Increasingly potent political factions began advocating that the UK withdraw from the EU entirely. Yet the Union's variable geometry gave British Prime Minister Cameron another option: He set out to re-negotiate the terms of the UK's membership, seeking particular opt-outs, changes, and concessions which, in his view, would allow the UK to re-assert key aspects of its own sovereignty while nevertheless participating in the integration process. In essence, he sought to adjust the UK's position on a sliding scale between national sovereignty and supranational participation. That he was unable to

⁵⁶⁰ For a discussion of how subsidiarity has facilitated a highly variable approach to energy policy, for an example, see Roberto Serralles "Electric Energy Restructuring in the European Union: Integration, Subsidiarity and the Challenge of Harmonization," *Energy Policy* 34 (2006) at 2546-2550.

⁵⁶¹ For discussion see Udo Bullmann, "The Politics of the Third Level," *Regional & Federal Studies* 6, no.2 (1996).

sell these concessions to the British public should not distract from the fact that the Union was both willing and able to offer such flexibility. Even the decision to leave the Union has not exhausted the multi-speed dynamic, but rather triggered a series of negotiations designed to decide how far, and in what ways, the UK would remove itself from the Union.

Like the strategy of bracketing off broadly contentious areas, the strategy of allowing some states to integrate more than, or differently from, others allows the integration process to proceed without ever settling the question of whether the EU is a mere agreement between states, or something closer to a super-state.

2.3 Functional Legitimacy: *The Prince's New Clothes*

Scholars have long claimed that EU depends more on “output legitimacy” rather than “input legitimacy”⁵⁶². In other words, it is not the merits of the decision-making process which generates support for integration, but rather the results. The results – open borders, shared currency, free trade and increased competitiveness, are thus taken to garner approval that transcends the supranational/inter-governmental divide, allowing both camps to overlook the ambiguous and sometimes opaque integration process that achieves them⁵⁶³.

Consider, for example, the principle of subsidiarity. Member-states implement Union policy according to local institutions, traditions and priorities wherever possible, and the Union only acts directly when member-states would otherwise be ineffective. In other words, the division of authority is functional, designed to meet policy goals as well as to balance political

⁵⁶² See Fritz Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford: Oxford University Press, 1999) especially Chapter 1; Fritz Scharpf, “Problem Solving Effectiveness and Democratic Accountability in the EU,” *IHS Political Science Series* no.107 (2006).

⁵⁶³ For discussion see Leon Lindberg and Stuart Scheingold, *Europe's Would-be Polity: Patterns of Change in the European Community* (Englewood: Prentice-Hall, 1970).

principles. In essence, authority lies wherever it needs to, fluctuating issue by issue, with its particular configuration at any moment justified relative to the desired output.

Indeed, Isikel has argued that the integration process has become dominated by a logic of functional legitimacy, where discourse focuses on the tasks performed and goals accomplished by the Union rather than the nature of the Union itself or any principled arguments therefor⁵⁶⁴. Rather than rallying citizens, or governments for that matter, around a theory of political legitimacy, elites have been rallying around particular policy goals.

For example, a 2016 pamphlet produced by the UK government to advocate for EU membership makes not a single mention of either democracy, peace, individual rights (except the right to study and work abroad), or political community, but instead dedicates lengthy sections to the instrumental value of EU membership to the UK economy and its impact on the cost of living, opportunities to study and work abroad, and security cooperation⁵⁶⁵. Similarly, counterpoints place heavy emphasis on the uncertain economic results of leaving the Union. There is scarcely a principled argument to be found.

In this way, the overall ambiguity as to the precise nature of the EU and the exact grounds of its legitimacy have been compensated for by a reliance on output legitimacy and functional achievement. This results-oriented approach can be seen as another key factor in the integration process's ability to proceed without resolving fundamental questions surrounding its basic nature.

⁵⁶⁴ See Turkuler Isikel, *Functional Constitution* generally and especially Chapter 1.

⁵⁶⁵ Government of the U.K., *Why the Government Believes that Voting to Remain in the European Union is the best Decision for the UK* (London: Cabinet Office Publishing Service, 2016) accessed Nov 10., 2019 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515068/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk.pdf.

3. Discourses of Sovereignty: “Pooled” or “Shared” Sovereignty

The political development of the Union has therefore reflected several cross-cutting cleavages, as different actors hold different understandings of what the EU is and where it is going.

Supranationalist, inter-governmentalist, technocratic and populist understandings of the EU have all shaped its development over time. Rather than resolving this fundamental ambiguity, the EU has developed a series of practices that allow it to leave controversial questions unanswered. In this sense, the EU can be understood not as an expression of any single coherent ideology, but rather as the result of ongoing and variable contestation between multiple competing visions. Scholars are struggling to develop language to describe this situation. Some favour terms like “divided sovereignty” or “disaggregated sovereignty”, reminiscent of federal theories where each level of government remains sovereign in its own policy domains⁵⁶⁶. As Burca points out, however, this conception is increasingly tenuous. As Union competencies expand, there are virtually no policy fields which do not require joint action in some sense⁵⁶⁷. Other scholars are thus embracing various concepts of “shared sovereignty” instead.⁵⁶⁸

Discourses of “multi-level governance” (MLG)⁵⁶⁹ take up this logic, suggesting that, in an increasingly globalized world, effective governance requires municipalities, regions, member-states, EU institutions, and private actors of all sorts to exercise their authority collectively, in a

⁵⁶⁶ See e.g. Anne-Marie Slaughter, “Security, Solidarity and Sovereignty: The Grand Themes of UN Reform,” *American Journal of International Law* 99, no.3 (2005); Bruno De Witte, “Sovereignty and European Integration: the Weight of Legal Tradition,” in *The European Courts and National Courts: Doctrine and Jurisprudence*, eds. Anne-Marie Slaughter, Alec Stone Sweet and J.H.H Weiler (Portland: Hart publishing, 1998).

⁵⁶⁷ Gráinne De Burca, “Sovereignty and the Supremacy Doctrine of the European Court of Justice” in *Sovereignty in Transition* Neil Walker (Portland: Hart Publishing, 2003) at 459.

⁵⁶⁸ See e.g. Michael Keating, “Sovereignty and Plurinational Democracy: Problems in Political Science”; Miriam Aziz, “Sovereignty Über Alles: (Re)Configuring the German Legal Order”; Anneli Albi, “Postmodern Versus Retrospective Sovereignty? Two Different Discourses in the EU and the Candidate Countries?” all in Walker, *Sovereignty in Transition*.

⁵⁶⁹ Seminal statements include Markus Jachtenfuchs, “Theoretical Perspectives on European Governance,” *European Law Journal* 1, no.2 (1995); Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration* (Lanham: Rowman & Littlefield, 2001); Scharpf, *Governing in Europe*.

sort of extended, networked federalism⁵⁷⁰. In such a system, power is now highly diffuse and its exercise requires the cooperation of many actors in fluid, issue-specific networks, each of which may be characterized by different combinations of actors and norms of interaction⁵⁷¹. Ultimately, this pooling of sovereignty incentivizes deliberation and cooperation, generating joint authority and interdependent legitimacy⁵⁷².

Liebert characterizes this hybrid system as “multi-layered, semi-parliamentary governance [that] blends national and supranational, participatory and representative sources of democratic legitimacy”⁵⁷³. Lord and Magnette expand, arguing that the EU balances multiple legitimacy claims and authority structures in a variety of distinct ways, such that it can only be considered a blend of them all⁵⁷⁴. The EU employs a number of practices to facilitate this blending. Influence varies functionally, as certain theories are more influential in some fields and less in others. It also varies temporally, with different bodies involved in different stages of the decision-making process. Lastly, influence blends together through mixed bodies⁵⁷⁵. Ultimately, however, these various legitimacy claims all work to support an authority claim on behalf of the mixed institutions they produce⁵⁷⁶.

Despite interrupting the traditional debate between inter-governmentalists and supranationalists, populist movements and discourses also show a similar appreciation for the mixed nature of authority in Europe. Consider Spain’s 15M movement and its electoral counterpart Podemos, for example. Through a series of ongoing institutional experiments, 15M

⁵⁷⁰ For a brief discussion see Hans Lindahl, “Sovereignty and Representation in the European Union” in *Sovereignty in Transition*, ed. Neil Walker (Portland: Hart Publishing, 2003) at 90.

⁵⁷¹ Mark Pollack, “Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?” *Annual Review of Political Science* 8, no.1 (2005) at 383.

⁵⁷² Pollack, “Theorizing the European Union” at 380.

⁵⁷³ Liebert, “Democracy beyond the State” at 15.

⁵⁷⁴ See e.g. Lord and Magnette, “E Pluribus Unum?”

⁵⁷⁵ Lord and Magnette, “E Pluribus Unum” at 190-193.

⁵⁷⁶ Lord and Magnette, “E Pluribus Unum” at 199.

members have developed complex, horizontal networks of participatory public assemblies⁵⁷⁷. Typically, these assemblies employ variations of consensus decision making⁵⁷⁸, and reject the need to work within established laws or institutions⁵⁷⁹. They claim a constituent power, free to set aside or remake rules as they go⁵⁸⁰. Nevertheless, 15M has developed an electoral component, Podemos, which runs both national and European candidates in what Pablo Ouziel describes as a “one foot in, one foot out” strategy – working both within institutions and parallel to them, as needed⁵⁸¹. Thus, 15M also enacts a vision where multiple conflicting sites and theories of authority are relevant, and where prudent actors engage with power at multiple levels in complex, even contradictory ways.

Each of these discourses, in its own way, points to a diffusion and decentralization of sovereignty in a way that rejects the inter-governmentalist/supranationalist dichotomy. Indeed, MLG positions itself precisely at the intersection of International Relations and Comparative Politics literatures⁵⁸². This type of discourse suggests that it is not a matter of figuring out which level sovereignty rests with, so much as a matter of recognizing that sovereignty cannot meaningfully inhere in either level. In this view, effective governance requires ways of exercising authority and generating legitimacy collectively.

4. Case Study: Unity in Diversity – Sovereign Ambiguity in the Constitutional Treaty

The saga surrounding Europe’s failed constitution provides an excellent example of the ambiguous nature of political authority in the EU and the ongoing compromises this ambiguity

⁵⁷⁷ Pablo Ouziel, *Vamos Lentos Porque Vamos Lejos’: Towards a Dialogical Understanding of Spain’s 15Ms* (PhD Diss. University of Victoria, 2015) especially at 203-210.

⁵⁷⁸ Ouziel, *Vamos Lentos* at 205.

⁵⁷⁹ Ouziel, *Vamos Lentos* at 209.

⁵⁸⁰ Ouziel, *Vamos Lentos* at 206.

⁵⁸¹ Ouziel, *Vamos Lentos* at 220.

⁵⁸² Ouziel, *Vamos Lentos* at 379.

has produced. The drafting process included both a Constitutional Convention engaging a variety of interest groups, NGOs, regional representatives and ordinary citizens at the European level, and an Inter-governmental Conference between the member-states. While the convention was designed to be, and touted as, participatory and deliberative, participants debated under the shadow of the coming governmental negotiations.⁵⁸³ Even within the Convention itself, inter-governmentalist and supranationalist camps were readily identifiable, leading Convention President Valéry Giscard d'Estaing to “call on the conventioners to seek to keep the best of both approaches”⁵⁸⁴.

The content of the Treaty was also highly ambiguous, with both sides making gains⁵⁸⁵. For example, it would have affirmed, for the first time, the supremacy⁵⁸⁶ of Union law, while at the same time stressing that the EU was a Union of states and could act only in areas voluntarily conferred on it by those states⁵⁸⁷. Similarly, the competencies of the Union would have been expanded, but reserve powers would have been allocated to the member-states⁵⁸⁸. While the powers of the European Parliament were expanded in a number of ways and the document introduced provisions for ballot initiatives at the European level, the Constitution also provided for legislative scrutiny by national parliaments⁵⁸⁹ and created, for the first time, a formal exit mechanism for national governments⁵⁹⁰ as well as a series of procedural safeguards, vetoes and

⁵⁸³ Craig and de Burca *EU Law* at 33.

⁵⁸⁴ Kalypso Nicolaïdis, “The New Constitution as European ‘Democracy’?” *Critical Review of International Social and Political Philosophy* 7, no.1 (2004) at 80.

⁵⁸⁵ Clive Church and David Phinnemore, *Understanding the European Constitution* (London: Routledge, 2005) at 129-136.

⁵⁸⁶ Despite its absence from previous treaties, EU Supremacy had already been established, and contested, in case law. See discussion in Chapter 6 of this dissertation.

⁵⁸⁷ Craig and de Burca, *EU Law* at 21.

⁵⁸⁸ Gerald Baier, “The EU's Constitutional Treaty: Federalism and intergovernmental relations – lessons from Canada,” *Regional & Federal Studies* 15, no.2 (2005) at 212.

⁵⁸⁹ Baier, “The EU's Constitutional Treaty” at 211.

⁵⁹⁰ European Union, “Treaty Establishing A Constitution For Europe,” *Official Journal of the European Union* C 310 (2004).

opt-outs for member-states⁵⁹¹. The text also recognized the role of sub-national governments and would have given them standing before the ECJ.

The ratification process, too, included parliamentary procedures typical of international treaties in some countries, while others held referenda more reminiscent of supranational constitution-making. Semantically, the document claims that it reflects the will⁵⁹², and serves the interests⁵⁹³, of both the people and states of Europe. Academic reactions mirrored this ambiguity, and, in the end, the treaty was criticized for being both too federalist and not federalist enough⁵⁹⁴. Even the slogan associated with the constitution, “Unity in Diversity”, is wonderfully ambiguous. Indeed, this statement captures the dynamic of political contestation around issues of sovereignty nicely; in the end, the Union would be neither supranationalist nor inter-governmentalist, and both at the same time⁵⁹⁵. Nicolaïdis, for example, presents the constitutional text not as a contradiction but as a third way, between inter-governmental and supranational visions; a Hegelian synthesis of a Cartesian dichotomy⁵⁹⁶. She argues that the constitution is best seen as a demoi-cracy; “a vision of the EU grounded in a double legitimacy of states and citizens, a community of nations”⁵⁹⁷. As in discourses of “pooled” or “shared” sovereignty, the authority of the Union would come precisely from its mixed structure. Rather than creating a hierarchy or defining watertight compartments, then, the Constitution is best seen as a framework for the joint exercise of sovereignty⁵⁹⁸.

⁵⁹¹ Church and Phinnemore, *European Constitution* at 134-136.

⁵⁹² “Treaty Establishing A Constitution For Europe”, Article 1-1.

⁵⁹³ “Treaty Establishing A Constitution For Europe”, Title IV.

⁵⁹⁴ Craig and de Burca, *EU Law* at 35.

⁵⁹⁵ Church and Phinnemore, *European Constitution* especially at 136.

⁵⁹⁶ Nicolaïdis, “Demoi-cracy?” at 77.

⁵⁹⁷ Nicolaïdis, “Demoi-cracy?” at 80. Church and Phinnemore also discuss “dual legitimacy” Church and Phinnemore, *European Constitution* at 131.

⁵⁹⁸ Church and Phinnemore, *European Constitution* at 130.

When the Constitution was put to a vote, however, both French and Dutch publics rejected it, despite the support of all major parties, unions, and business associations and, tellingly, despite the fact that the EU was otherwise popular in both countries⁵⁹⁹. A substantial share of the “no” vote was essentially a protest vote, motivated by disapproval of the elite-driven integration process, rather than an objection to integration itself⁶⁰⁰. The Commission’s attempt to generate popular legitimacy through dialogue had failed, in part because civic actors were not seeking dialogue. They were seeking actual decision-making power—power which remained deliberately elusive. Rather, civic actors were contesting what the state and the Union share – a representative model of low-intensity democracy where power remains perennially removed from public participation⁶⁰¹.

After the defeat of the Constitution, state and EU actors re-packaged its content into the Lisbon treaty – a text which is substantively nearly identical to its constitutional predecessor⁶⁰². Only the sweeping constitutional language and the grand attempt to involve citizens and civil actors were gone, allowing elites to keep a lower profile and push through the same content without engaging in the same risky public process. In essence, state and EU actors moved to narrow the range of sites of authority and theories of legitimacy which had to be managed. By cutting out civil society, state and EU leaders – who share the same vision of democracy – were better able to forge compromise. Once again, however, they had to reckon with civil society, as

⁵⁹⁹ Mark Franklin, Michael Marsh and Lauren McLaren, “Uncorking the Bottle: Popular Opposition To European Unification in The Wake of Maastricht,” *Journal of Common Market Studies* 32, no.4 (1994) at 468.

⁶⁰⁰ Protest votes against national governments accounted for 18% of the “no” vote in France and 14% in the Netherlands. Taggart, “Questions of Europe” at 16-19. In both cases, reasons for opposing the Constitution were highly heterogeneous, with opposition from the left and the right for an enormous variety of reasons. In this sense “the constitutional treaty appears to have become the vehicle for popular venting of any number of discreet grievances, most unconnected with the actual contents of the treaty”. Robin Niblett, “Shock Therapy,” *Euro-Focus* 11, no.2 (2005) at 1.

⁶⁰¹ Donatella Della Porta and Alice Mattoni, “Cultures of Participation in Social Movements,” in *The Participatory Cultures Handbook*, eds. Aaron Delwiche and Jennifer Jacobs Henderson (London: Routledge, 2012) at 171.

⁶⁰² Craig and de Burca, *EU Law* at 20.

Irish groups defeated the treaty over the strong support of all major political parties⁶⁰³.

Recognizing that civic actors could not be cut out so easily, EU and Irish authorities invested huge sums into civil society groups of their own, held a second referendum, and secured passage of the treaty.

The saga of the Constitutional treaty, therefore, highlights the multiple axes along which political power is contested in Europe. It also speaks to the messy, even self-contradictory, and often unsuccessful ways in which various actors seek to manage conflicting sites of authority in Europe.

5. Conclusions

Since the beginning, there have been conflicting positions on the exact nature of the European integration process. Some favour a strong Union and subordinate states, others the reverse. Some favour a technocratic Union accountable to the people's representatives, while others envision a more direct role for public participation. Each of these axis of contestation crosscut one another in complex ways. The very nature and distribution of political authority is at stake in these questions. Yet rather than resolving them one way or the other, the story of European integration is one of ambiguity and compromise, contradiction and synthesis.

Indeed, the basic institutional structure of the Union features four core institutions - a supranational Commission and Parliament, and an inter-governmental Council and Council of Ministers. As the Council moved away from unanimity, making it easier for individual states to be out-voted, the Union also developed a system of opt-outs for national governments. At

⁶⁰³ For an extended discussion see John FitzGibbon, "The Failure of Political Parties and the Triumph of Civil Society: Ireland's two Lisbon Votes in Wider Perspective," Paper presented at the *European Consortium for Political Research General Conference*, Porto, Portugal, June 24, 2010.

various points and still to this day, the Union has employed different decision-making processes for different issues, some more supranational and some more inter-governmental, depending on the subject matter. At the same time, civic actors have contested the technocratic, non-participatory nature of both supranational and inter-governmental institutions, pushing for more participatory conceptions of democracy. EU institutions have responded with a series of consultative measures which attempt to address populist concerns from within a technocratic frame. In all these ways, the structure of the Union is the product of compromise between conflicting visions of political community. Rather than reflecting a single, coherent ideology, the EU is a product of multiple cross-cutting contests, drawing on different understandings at different times, in a pragmatic but ad hoc mixture.

This situation challenges traditional notions of sovereignty in fundamental ways. The EU has no body which wields total, exclusive authority—no “power to keep them all in awe”. Nor does it revolve around a single theory of who *ought* to have political authority. Interestingly, however, the resulting competition between sites of authority has not given rise to war or oppression. Rather, it has birthed practices of compromise and bracketing, variable geometry and functional legitimacy claims – a battery of flexible, dynamic practices which have allowed a shared political community to survive, indeed flourish and grow, without any agreement on the very nature of the community itself. Instead, political actors have endorsed mixed institutional structures which rely on multiple legitimacy claims to support collective action in a way that transcends their component parts without truly resolving the tension between them.

The resulting structure can be unstable. Its future is perpetually uncertain. Contestation and crisis are a near-permanent state of affairs, and predictions of the Union’s imminent demise are frequent. Forms of power asymmetry and coercion persist. Nevertheless, the forms of

contestation that have developed have made war between participants all but unthinkable.

Hierarchy and deep democratic deficits remain, yet overt totalitarianism has been held at bay.

At this point, the success or failure of the European project remains an open question. Regardless of this, the practices and discourses of political contestation in Europe suggest ways of thinking about political authority that stretch traditional concepts of sovereignty so far that the very analytical utility of the term is frequently thrown into question.

[Chapter Six] Legal Practices

This chapter explores the relationship between national and supranational courts in Europe, asking how their practices of interrelation challenge, and are shaped by, concepts of state sovereignty. The topic is vexed. The early treaties provide little guidance on how European and national law should relate. In this context, the European Court of Justice boldly proclaimed the supremacy of European law over national law. National courts, however, forwarded a series of counter claims asserting national sovereignty. Both national and supranational courts have therefore made conflicting claims to sovereignty, drawing from conflicting visions of Union and the various theories of legitimacy that correspond to them.

The presence of multiple competing claims has not, however, jeopardized the legal dimensions of the integration project. In fact, just the opposite, the resulting practices of compromise and cooperation have made law into a major driver of the integration process. In essence, European courts have iteratively developed a practice of mutual conditionality. Rather than seeking joint institutions through which to reach shared decisions, as in the political sphere, legal actors have developed practices of conditional cooperation, where each court accommodates the others subject to certain locally imposed conditions. As a result, each actor's authority is autonomous, but contingent upon their meeting certain minimal standards imposed by the others.

This system allows each court to maintain its own distinct understanding of the trans-systemic relationship, setting parameters derived from their own local contexts and traditions. As a result, there is no uniform relationship between central and national courts, but rather a broad variety of specific relationships that can and do vary substantially from one another. Each of

these specific relationships also varies over time, as participants adjust their claims and counter-claims in ongoing practices of dialogue. This system of mutual conditionality allows the integration process to proceed without ever needing to reach agreement on fundamental trans-systemic questions.

The following chapter explores the legal contests that have given rise to mutual conditionality. I begin with a brief overview of the legal environment (Section 1), first from the point of view of the European Court of Justice (ECJ), then from the point of view of various national courts, and finally from the perspective of the European Court of Human Rights (ECtHR). In brief, I show that the ECJ made several major judgements over the 1960s and 70s which declared the supremacy of Union law over national law. This effectively constitutionalised the treaties, and represented a major step towards a supranational vision of the Union. National courts responded to this assertion with various kind of counter-claims that were more inter-governmentalist in nature. Some suggested the EU supremacy was a matter of national law, and could therefore be revoked. Others rejected the Union's supremacy outright. German courts came up with an innovative solution. They began placing conditions on EU supremacy, such as that EU law will prevail over national law so long as it meets nationally imposed conditions. This approach quickly spread to other national courts. Recently, the ECJ and ECtHR have adopted a similar posture towards one another. The end result is that the European legal environment is characterized by conditional forms of authority where each court acts autonomously, but also takes into account competing claims and actors. Section 2 discusses some major practices which have animated this system of conditional authority, exploring how the mutual nature of conditions, the development of trans-systemic precedents, and the ability to

tolerate a wide range of legal positions from different courts have allowed the system to develop over time.

Section 3 explores the discourses used to understand this process, exploring how concepts of constitutional pluralism emphasize the role of both productive contestation and shared norms and practices, in facilitating trans-judicial negotiation over time. Section 4 illustrates my argument through the example of the European human rights regime, showing how EU human rights law is a result of dialog between the ECJ and national courts. Finally, Section 5 offers some preliminary conclusions on how legal practice is challenging, as well as being shaped by, concepts of sovereignty.

1. An Overview of the Legal Relationship (1952-Present)

1.1 The View from the Mountaintop: Sovereignty in the European Court of Justice

The original EEC treaties contained no provision dealing with the relative status of national and European law⁶⁰⁴. Nevertheless, the European Court of Justice (ECJ) has assertively filled this lacuna. According to the ECJ, the treaties establish a new political community, sovereign in its own domains, independent of its member-states, and bearing a direct relationship to the people of Europe. Member-states, the ECJ claims, have forgone a portion of their original sovereignty in order to create the Union, and can therefore be compelled and overruled by it. In this sense, community law reigns supreme⁶⁰⁵.

⁶⁰⁴ The Constitutional Treaty would later include such a provision, but it was never successfully ratified. The following Lisbon Treaty finally recognized the primacy of EU law, but did so in an ambiguous way that actually leaves the question of ultimate authority unclear. See Craig and de Burca, *EU Law* at 266.

⁶⁰⁵ It is interesting to note that the ECJ developed this aggressive supranationalist position in the 1960s – precisely when the inter-governmentalism of the Luxemburg Compromise had paralyzed political actors and all but halted the integration process. Indeed, the Court’s response has been credited with quietly reinvigorating the European project. See e.g. Eric Stein, “Lawyers, Judges and the Making of a Transnational Constitution,” *American Journal of International Law* 75, no.1 (1981).

The first major step towards this position came in the landmark decision, *Van Gend en Loos*⁶⁰⁶. Here, a Dutch corporation claimed that tariffs applied to its imports violated the EEC treaty. A Dutch Court subsequently referred the matter to the ECJ, asking whether the treaty was directly enforceable in national courts. Among other things, the Dutch, Belgian, and German governments protested that only member-states and the Commission could bring suits based on the treaty, and only the ECJ could consider them⁶⁰⁷. Furthermore, the question of whether Community law would be directly applied in Dutch courts was really a question regarding the incorporation of Community law into domestic law, and was thus an issue for domestic courts. This position suggests that the treaty is a mere compact between states, and that its effect is a matter for states to decide. The ECJ rejected this logic, proclaiming that the treaties had created a new political community, the subjects of which were both states and citizens, and that the EU therefore had a direct relationship to the people of Europe, unmediated by their governments⁶⁰⁸. Accordingly, citizens gained direct rights under the treaties, rights which could in fact be asserted by individuals and heard by national courts. This principle of “direct effect” positioned the Union as a sort of quasi-federation, existing independently of its member-states.

Shortly after, the Court followed this ruling with its decision in *Costa*⁶⁰⁹. In this case, Italy had nationalized its energy sector and a shareholder complained that this action violated the Treaty of Rome. Under Italian law, the most recent expression of parliament’s will implicitly repeals any older, conflicting laws. Thus, Italian courts held that the nationalization was valid and repealed any conflicting portions of the Treaties as they applied to Italy. This stance positions the Union as a mere contract between states, to be complied with or set aside at their

⁶⁰⁶ *Van Gend en Loos v. Netherlands*, ECJ Case 26/62, [1963] ECR 1.

⁶⁰⁷ *Van Gend en Loos* at 23.

⁶⁰⁸ *Van Gend en Loos* at 12.

⁶⁰⁹ *Costa v. ENEL*, ECJ Case 6/64, [1964] ECR 585.

pleasure. In this sense, it constituted a strong claim to sovereignty of behalf of Italian courts. The ECJ once again rejected this logic, arguing that nation states had ceded a portion of their sovereignty by signing the treaties and were no longer at liberty to act outside of them⁶¹⁰. As a result, it proclaimed that Union law was supreme over national law, regardless of which had come first, and that national courts were therefore under an obligation to set aside any national laws which conflicted with the Treaties⁶¹¹. With this new doctrine of “supremacy”, the court solidified its aggressively supranationalist position, portraying the Union as not only an independent political entity, but one positioned hierarchically above the member-states.

The years that followed saw the ECJ gradually expand and solidify both Supremacy and Direct Effect. In *Internationale Handelsgesellschaft*, it extended its claim of supremacy over national legislation to cover national constitutions as well, finding that constitutions had to be interpreted in accordance with the treaties and, when they could not be, were of no force and effect to the extent of the violation⁶¹². In *Simmenthal*, it ruled that lower courts, not ordinarily empowered to set aside national law, could and indeed must, do so on the basis of the supremacy doctrine⁶¹³. In *Foto-Frost*, the ECJ ruled that national courts could not review Union law for

⁶¹⁰ *Costa* at 593-594. The Court argues “the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail”.

⁶¹¹ Note that national laws which conflict with EU laws are not struck down or rendered non-existent, but rather disapplied to the extent of the conflict. In that sense, the national law remains good law, applicable in all cases that do not raise conflicts with EU law. See *Krzysztof Filipiak Case*, ECJ Case 314/08, [2009] ECR I-11049.

⁶¹² *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECJ Case 11/70, [1970] ECR 1125. The Court ruled that “a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure”. See also *Commission v. Luxemburg*, ECJ Case C-573/93, [1996] ECR I-3207. In *Ciola*, the Court clarified that supremacy applied not only to grand constitutional norms and legislation but to the most minute administrative decisions as well, *Ciola v. Land Vorarlberg*, ECJ Case C-224/97, [1999] ECR I-2517.

⁶¹³ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECJ Case 106/77, [1978] ECR 629.

constitutionality, or even for compliance with the Treaties themselves⁶¹⁴. Only the ECJ could rule on the validity of Union law, which national courts were obligated to apply.

Likewise, in *Van Duyn*, the court expanded its doctrine of Direct Effect. Under *Van Gend en Loos*, only treaty provisions and EU regulations were directly effective. Directives, which ask a member-state to achieve a particular result without prescribing a mechanism, and are generally seen as a less intrusive legal instrument, were not directly effective. In *Van Duyn*, however, the court held that Directives could also be directly effective, and indeed are directly effective even before the deadline to transpose them into national law.⁶¹⁵ Thus, the Direct Effect doctrine came to encompass all expressions of EU law, even those deliberately designed to afford states more discretion. In *Defrenne*, the Court further found that Direct Effect operates not only vertically, in that courts are obliged to enforce EU laws against their own governments, but also horizontally in disputes between private citizens.⁶¹⁶

Decisions like these have produced claims that the ECJ effectively federalized and constitutionalized the Union, becoming one of the major drivers of the integration process and indeed pushing it far beyond what political actors had envisioned or agreed to⁶¹⁷. There is no doubt that the Court's aggressive sovereignty claims go well beyond what the treaties suggest. There is, however, more than one side to every story.

1.2 Voluntary Servitude: Sovereignty in National Courts

⁶¹⁴ *Foto-Frost v. Hauptzollamt Lübeck-Ost*, ECJ Case 314/85, [1987] ECR 4199.

⁶¹⁵ *Van Duyn v. Home Office*, ECJ Case 41/74, [1974] ERC 01337.

⁶¹⁶ *Defrenne v. Sabena*, ECJ Case 43/75, [1976] ECR 455.

⁶¹⁷ See e.g. Stein, "Transnational Constitution"; J.H.H. Weiler "A Quiet Revolution: The European Court of Justice and Its Interlocutors," *Comparative Political Studies* 26, no.4 (1994). Indeed, the functional, teleological nature of the Court's judgements in *Costa* and *Van Gend en Loos* strongly supports suspicions that the court was pursuing an integrationist agenda. See Craig and de Burca, *EU Law* at 258.

National courts throughout the Union have, in different ways and to different extents, contested the ECJ's claims of supremacy and the supranationalist vision they imply⁶¹⁸. These counter-claims take a variety of forms, each rooted in their own national legal traditions and cultures, and can themselves be internally complex. A few examples will serve to illustrate this point.

Of all the member-states, Belgium perhaps comes closest to affirming the ECJ's claims. In *Le Ski*⁶¹⁹, its Cour de Cassation accepted EU supremacy based on the very nature of international law. Belgium has a monist legal culture where international law generally has direct effect, without any need for a positive act of incorporation by the national legislature. Accordingly, Belgian courts have ruled that international law, as law between states, was inherently higher than national law, and thus that EU law was indeed supreme – mirroring the logic of the ECJ itself. However, even here matters are not quite so clear. In *Orfinger*, the Conseil d'État found supremacy to be rooted in Article 34 of the constitution, which allows for the transfer of sovereign powers to international institutions⁶²⁰. Although clearly friendly towards the ECJ and accommodating of its claims to supremacy, this argument suggests that, should Article 34 ever be amended, EU law may longer be supreme. In effect, it says “you are supreme...because we say so”. In this perspective, *kompetenz-kompetenz*, or the authority to decide where authority rests⁶²¹, is located in national law. This interpretation draws some support from the fact that the Court of Arbitration is empowered to review treaties *post facto* for constitutionality, suggesting that treaties are not inherently supreme but rather acquire that status

⁶¹⁸ For discussion see Paul Craig, “The ECJ, National Courts and the Supremacy of Community Law,” in *The European Constitution in the Making*, eds. Ingolf Pernice and Roberto Miccu (Bade-Baden: Nomos, 2004); Miguel Maduro, “Contrapuntal Law” in *Sovereignty in Transition*, ed. Neil Walker (Portland: Hart Publishing, 2003).

⁶¹⁹ *Fromagerie Franco-Suisse Le Ski v. État Belge*, BCC Case 4750, [1972] CMLR 330. (Belgian Cour de Cassation).

⁶²⁰ *Orfinger v. Belgian State*, BCE Case 62/922, [1997] 116 JLT 256. (Belgian Conseil d'Etat).

⁶²¹ To put the point another way, the decision of whether Belgium is a monist or a dualist legal system rests with national actors, such that even a monist stance is ultimately grounded in national rather than supranational authority claims.

as a result of national law⁶²². While this logic is community-friendly, it also suggests that whatever supremacy the Union may have was freely delegated, and could presumably be withdrawn by the member-states. Thus, even within the national judiciary that most closely approximates the ECJ's logic surrounding supremacy, latent challenges exist.

Poland sits on the opposite end of the spectrum. While EU law is supreme over statutes under Article 90(1) and by virtue of a successful accession referendum, the constitution remains the supreme law of the land⁶²³. The constitution is to be interpreted as far as possible in accordance with EU law, but in the event of an unresolvable conflict between EU law and the Polish constitution, the latter takes precedence. Thus, the court proclaims: “the principle of interpreting domestic law in a manner sympathetic to European law...has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the constitution”⁶²⁴. In the event of such a conflict, Poland must either amend its constitution or leave the Union⁶²⁵. Furthermore, the Court has held that certain key competencies and rights are so central to the identity of Poland that they cannot be delegated to international organizations⁶²⁶. These positions imply a strong counter-claim against the ECJ – for the Poles, sovereignty rests with the member-state and EU decisions are dependent upon their ongoing consent. Even here, however, it is

⁶²² Bruno De Witte, “Do Not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands,” in Neil Walker ed., *Sovereignty in Transition* (Portland: Hart Publishing, 2003) at 357-358.

⁶²³ *Constitutionality of the Accession Treaty*, PCT Case K 8/04, [2005] 86 PLG 744. (Polish Constitutional Tribunal); Craig and de Burca, *EU Law* at 293.

⁶²⁴ *Accession Treaty* at 14.

⁶²⁵ This issue came to a head when the Court found the European Arrest Warrant unconstitutional. See *European Arrest Warrant*, PCT Case P1/05, [2005] CMLR 1181. (Polish Constitutional Tribunal). Ultimately, the constitution was amended to remove the conflict.

⁶²⁶ *Constitutionality of the Lisbon Treaty*, PCT Case K32/09, [2010] 9 OTK-A 108 (Polish Constitutional Tribunal) at 22, 40.

worth noting that members cannot simply set aside EU law at will. Rather, leaving the Union entirely is their ultimate recourse.

The United Kingdom, until recently, took a unique position all their own. Because of the UK's strong tradition of parliamentary supremacy and lack of a written constitution, the UK has no tradition of judicial review. Rather, Parliament remains sovereign at all times, and, in theory, is empowered to do anything at all. As such, more recent acts of parliament are taken to implicitly repeal any older statutes with which they conflict⁶²⁷. These traditions have made EU supremacy difficult to justify in reference to the domestic legal system. Unlike most continental countries, the UK cannot found this power in the domestic constitution, as there is no written constitution. Instead, EU law has been incorporated into UK law through legislation, in the form of *The European Communities Act*. In *Factortame*, the court reasoned that Parliament, having given its consent to the EU treaties and passed enabling legislation with full knowledge of the doctrine of supremacy, must intend to give those treaties priority over all subsequent law⁶²⁸. Thus, while Parliament remains sovereign, its will is interpreted as reversing the doctrine of implied repeal and giving force to the treaties, rather than to more recent laws which could potentially contravene them. In *Thoburn*, the court refers to the *European Communities Act* as a special class of "constitutional statute" to which the doctrine of implied repeal does not apply⁶²⁹. Such legislation, the court ruled, can only be repealed explicitly. In this way, UK courts were able to accept EU supremacy in day-to-day cases. Nevertheless, both lines of argument make it clear that, should Parliament clearly indicate its intention to pass laws which contravene the

⁶²⁷ Craig 'The ECJ, National Courts' at 40.

⁶²⁸ *R. v. Secretary of State for Transport, ex p. Factortame Ltd.*, 1989 UKHL 1, [1990] 3 CMLR 867. (U.K. House of Lords).

⁶²⁹ *Thoburn v. Sunderland City Council*, 2002 EWHC 195, [2003] UKQB 151 (U.K. Queen's Bench).

treaties, these laws would be valid and the Treaties set aside⁶³⁰. Parliament therefore remains sovereign at all times, and EU supremacy is dependent upon their not explicitly stating a desire to the contrary. In this sense, even ordinary legislation is potentially supreme over EU law. Such a position clearly rejects the ECJ's assertion that member-states have sacrificed a portion of their sovereignty and are no longer free to reject EU laws.

German courts have accepted EU supremacy over legislation based on Article 23-1 of the Basic Law⁶³¹, but have also placed limits on that supremacy. Thus, while accepting supremacy in its day-to-day operations, the German Constitutional Court has really positioned itself as the ultimate authority and the locus of *kompetenz*. In a now famous pair of cases, the *Solange* decisions, the Constitutional Court first ruled that, because the EU did not provide human rights protections, it was incumbent upon German courts to review EU laws for compatibility with the Basic Law⁶³². In this way, EU supremacy was subjected to certain limits – Union measures which violated basic rights would not be applied. Years later, in *Solange 2*, the Constitutional Court found that the EU had since developed an impressive human rights jurisprudence that provided internal protections essentially equivalent to those in the Basic Law⁶³³. As a result, German courts would no longer review EU laws, unless evidence could be presented that the system as a whole no longer provided equivalent human rights protection. These decisions have been euphemistically referred to as the “So-long-as” decisions – so long as the EU does not systematically violate the German constitution, it will be considered supreme⁶³⁴.

⁶³⁰ *Macarthy v. Smith*, 1980 EWCA Civ 7, [1981] QB 180. (U.K. England and Wales Court of Appeal).

⁶³¹ *Honeywell*, BVerfGE Case 2661/06, [2010] NJW 3422. (German Constitutional Court).

⁶³² *Solange I*, BVerfGE Case 37/271, [1974] 14 CMLR 540. (German Constitutional Court).

⁶³³ *Solange II*, BVerfGE Case 73/339, [1987] 3 CMLR 225. (German Constitutional Court).

⁶³⁴ Mehrdad Payandeh, “The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture,” *European Law Review*, 13, no.1 (2017) at 416.

The Constitutional Court has since added additional conditions. In *Maastricht*, it held that EU law was only supreme insofar as German courts found it to be *intra vires*, directly refuting the ECJ's position in *Foto-Frost*⁶³⁵. In *Lisbon*, it ruled that EU law could not affect the core identity of the German federation, including by intruding into such policy areas as the use of force, core fiscal decisions, social programs, or issues of cultural importance like education and family law⁶³⁶. These “locks”, as they are commonly known, represent a clear counter-claim – while the ECJ believes that member-states are no longer at liberty to set aside EU law, the German Court clearly believes otherwise. It locates sovereignty and ultimate authority firmly within the German constitution, and considers itself to be in a position to accept or reject the ECJ's supremacy claims.

This issue came to a head in the Outright Monetary Transactions (OMT) case⁶³⁷. Here, the German court made a reference questioning the legality of the European Central Bank's bond-buying program. In the reference, the German court indicated that it found the legality of OMT dubious, and suggested that if the ECJ did not find it to be contrary to community law the German court may find it to be contrary to one of its “locks”. The ECJ responded that OMT was legal, provided it met certain criteria. Ultimately, the German court accepted these criteria and declined to follow through on their threat to declare the program unconstitutional. In this way, Germany was able to leverage its locks to encourage the ECJ to introduce certain limits on the OMT program, in exchange for which it continued to support ECJ supremacy in practice. This

⁶³⁵ *Maastricht Treaty*, BVerfGE Case 89/155, [1993] 33 ILM 388. (German Constitutional Court) at 388, 422. In *Banana*, however, the Court clarified it would conduct ultra vires review only if the ECJ had already ruled on the question and the measure at issue was “highly significant”. *Banana 2*, BVerfGE Case 1/97, [2000] 21 HRLJ 251 (German Constitutional Court) at 60-61.

⁶³⁶ *Lisbon Treaty*, BVerfGE Case 2/08, [2010] 2 CMLR 712. (German Constitutional Court).

⁶³⁷ *Gauweiler and ors v. German Bundestag*, BVerfGE Case 134/366, [2014] 2 BvR 2728/13. (German Constitutional Court).

conditional approach to supremacy claims has since spread around the continent⁶³⁸. Italian courts adopted a similar logic in *Granital*⁶³⁹, and French, Spanish, Cypriot, Czech and even UK courts have since followed suit, adopting conditional postures of assorted varieties towards the ECJ⁶⁴⁰.

As these examples show, the principle of supremacy has been contested, resisted, and limited in dialogue with national courts. The same can be said of Direct Effect. After the ECJ broadened direct effect to include horizontal interactions and deepened it by applying the principle to Directives, as well as Regulations, national courts began making reference questions which suggested they might challenge the doctrine. In response, the ECJ accepted some limits on Direct Effect. In *Marshall*, the court ruled that Directives were only directly effective against the state to whom they are directed. Thirty years later, the ECJ attempted to revisit this boundary. In *Ajos*, Danish courts denied the direct applicability of a Directive against age discrimination. The ECJ however, ruled that the Directive merely gave form to a more general principle of community law. The Directive was not applicable, but the general principle was. The Danish court responded that the Danish Accession Act did not empower national courts to disapply national laws based on ‘general principles’, and refused to follow the ECJ’s opinion. In essence, the Danish court was exercising a form of *ultra vires* review to resist the ECJ’s attempt to circumvent the limits established by *Marshall*. This lesson was not lost on the ECJ when the issue arose again in *Taricco*⁶⁴¹. Initially, the ECJ held that Italian statutes of limitation were allowing individuals to get away with tax fraud, and that the statutes thereby prevented Article 325 TFEU

⁶³⁸ Giuseppe Martinico, “Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts,” *European Journal of International Law* 23, no.2 (2012) at 420-422.

⁶³⁹ *Granital S.p.A. v. Amministrazione finanziaria*, n.170/66, [1984] 1 Foro Italiano 2062. (Italian Constitutional Court).

⁶⁴⁰ Martinico, “European Convention” at 419.

⁶⁴¹ *Taricco and Others*, ECJ 42/17, [2017] ECLI:EU:C:2017:936.

from being directly effective. In the wake of *Ajos*, Italian courts had signalled that they too might disapply the ECJ's ruling because striking down statutes of limitations compromised the certainty and predictability of Italian law, in violation of core principles of the Italian constitution. In essence, they were threatening to undertake a form of identity review. Quickly, the ECJ reversed its position, ruling that Direct Effect is limited by the need for legal certainty. Thus, Direct Effect has also been subject to negotiation between national and supranational courts. Here too, the result has been a conditional acceptance – national courts embrace direct effect, but also police its limits. The ECJ accepts this policing in exchange for national cooperation with the broader principle. The system depends on mutual accommodation between the two.

In fact, in *Celmer*, the ECJ made this system of conditional acceptance and mutual policing horizontal, as well as vertical⁶⁴². The ECJ ruled that Ireland does not have to honour extradition requests made by another member-state if that state's justice system is systemically deficient. Thus, the acceptance of extradition requests between states is conditional – it turns on the extraditing party's assessment of the requesting party's legal system. This creates a system of peer-review between national courts, with each monitoring the others and cooperating only on a conditional basis. In essence, each court has to accommodate the concerns of the others in order to have its own concerns accommodated in turn.

As a result of this evolving system of mutual accommodation, the European legal environment is able to function despite the fact that its participants hold wildly contrasting, even contradictory, understandings of their shared relationship. The fact that German, Polish, Irish and European courts all have different vision of where authority does and should rest does not prevent them from developing shared norms and tackling complex problems. Rather, it occasions

⁶⁴² *Minister for Justice and Equality v LM.*, ECJ Case 216/18, [2018] ECR 0000.

a constant dialogue by which courts collectively find solutions that are mutually acceptable from each perspective, without the need to resolve their underlying differences. Instead, each court enjoys a sort of conditional authority, wielding autonomous powers subject to the minimal conditions of their peers.

1.3 Three's Company: Sovereignty and the European Court of Human Rights

As a separate international legal order to which all EU states are parties, the presence of the European Court of Human Rights (ECtHR) in this environment adds yet another level of complexity, as the ECtHR makes and elicits its own sovereignty claims vis-à-vis national and European courts. Interestingly, the ECtHR and the ECJ have developed practices of conditional authority similar to the “So-long-as” approach.

Much like the ECJ, the ECtHR holds that violations of the European Convention on Human Rights (ECHR) are to be rectified, regardless of whether their source is domestic legislation, international treaties, or national constitutions⁶⁴³. In this way, the national constitution is not a shield from obligations under the ECHR, which is in a certain sense “supreme” over national law. However, the ECHR is not directly effective and does not require direct, hierarchical incorporation of the ECHR into domestic legal orders. In fact, it does not specify any particular method of realization, requiring only that the rights in question be protected in some way⁶⁴⁴. Thus, the ECtHR is supreme, but not directly effective. When the ECtHR declares a state to be in breach, the state itself is left to rectify the problem under the supervision of the inter-governmental Council of Europe – a system which has been called

⁶⁴³ Andrea Caligiuri and Nicola Napolitano, “The Application of the Echr in the Domestic Systems,” *The Italian Yearbook of International Law* 20, no.1 (2010) at 126.

⁶⁴⁴ Caligiuri and Napolitano, “Application of the Echr” at 128.

“weak judicial review”⁶⁴⁵. The ECtHR has also introduced a “margin of appreciation” doctrine, ruling that national courts and legislatures enjoy a degree of discretion or latitude in the manner in which they discharge their obligations under the ECHR⁶⁴⁶. Where there is widespread disagreement amongst the member-states as to the importance or meaning of a given right, the margin will be wider; where there is widespread consensus, the court will act more aggressively. In this sense, the strength of the Court’s supremacy claims hinges, in part, on the practices of the member-states themselves⁶⁴⁷. In all these ways, it is a very different supremacy claim from that made by the ECJ.

For their part, member-states have generally given Convention rights effect in national legal systems through enabling legislation, constitutional provisions, judicial activism or simple constitutional monism⁶⁴⁸. Positions regarding the supremacy of the ECHR vary according to the method of incorporation⁶⁴⁹. In the Netherlands and Moldova, the Convention outranks even domestic constitutions. These courts essentially accept the ECtHR’s claims that international law has an inherently superior status. In other countries, the ECtHR’s role is defined in reference to domestic legal norms and methods of reception⁶⁵⁰. In Austria, the Convention has constitutional status. In other states, including Spain, Portugal and France, the Convention ranks above ordinary legislation but below the national constitution. Germany and Italy accord the Convention normal legislative status, although both judiciaries have given it a special

⁶⁴⁵ Caligiuri and Napolitano, “Application of the Echr” at 146.

⁶⁴⁶ *Sanoma Uitgevers BV v. the Netherlands*, ECtHR Application no.38224/03, [2010] ECHR 1284 at 59; *Petrovic v. Austria*, ECtHR Application no.20458/92, [1998] ECHR 21 at 38.

⁶⁴⁷ Charles Sabel and Oliver Gerstenberg, “Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order,” *European Law Journal* 16, no.5 (2010) at 524.

⁶⁴⁸ Martinico, “European Convention” Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts,” *European Journal of International Law* 23, no. 2 (2012) at 413-414.

⁶⁴⁹ For recaps of the following see Martinico, “European Convention” especially at 404-422; Caligiuri and Napolitano “Application of the Echr” especially at 126-131. For an extended discussion see Hellen Keller and Alec Stone Sweet eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2009).

⁶⁵⁰ Martinico, “European Convention” at 404.

interpretative significance that effectively raises its profile to a supra-legislative level. In the UK, the Convention is embodied in the Human Rights Act (HRA), which technically has only ordinary legislative status⁶⁵¹. Once again, we see a legal relationship that is highly variable and contested, with a number of actors each asserting their own supremacy on a variety of grounds.

The relationship between the ECJ and ECtHR is also complex. The EU is not a member of the ECHR, and vice versa. In this sense they are parallel legal orders, each with no claim to direct supremacy vis-à-vis the other. However, given that all EU members are bound by both sets of laws, supremacy questions arise indirectly regarding which set of rules a member would have to follow in the case of a conflict. For its part, the ECtHR has conducted indirect review of EU laws by holding member-states accountable even in areas where their competences have been delegated to an international organization⁶⁵². In this sense, the ECtHR can be seen to consider its rulings supreme over other international commitments, including those made to the EU. However, it has also held that it will not review specific acts so long as the organization in question provides an equivalent degree of rights protection to that provided in the Convention. Since the EU has been found to provide such protection, the ECtHR does not review EU acts directly⁶⁵³. So it seems that, like Germany's Constitutional Court, the ECtHR considers itself technically supreme, but has decided to waive that supremacy subject to certain conditions, allowing *de facto* ECJ supremacy in its own sphere⁶⁵⁴.

The ECJ has struck a similar posture. Under *Kadi*, it will review the acts of EU institutions or member-states for compliance with EU law even if those acts give effect to

⁶⁵¹ Martinico, "European Convention" at 417.

⁶⁵² *Matthews v. U.K.*, ECtHR Application no.24833/94, [1999] ECHR 12. In *Kokkelvisserij*, the ECtHR also found member states could be held liable for the rulings of the ECJ if their own courts had requested the reference. *Kokkelvisserij v. Netherlands*, ECtHR Application no.13645/05, [2009] ECHR 286.

⁶⁵³ *Bosphorus v. Ireland*, ECtHR Application no.45036/98, [2005] ECHR 440.

⁶⁵⁴ Sabel and Gerstenberg, "Coordinate Constitutional Order" at 519.

international treaties or laws⁶⁵⁵. It also indicated that it might waive that right if the relevant treaty itself provided comparable protections⁶⁵⁶. Still, the ECJ holds that it, and not the ECtHR, is responsible for interpreting these rights as they relate to the EU. In fact, the ECJ has recently rejected EU accession to the ECHR precisely on the grounds of its own autonomy⁶⁵⁷.

Overall then, the relationship between the ECtHR and member-states is variable, with each country and the ECtHR itself forwarding different visions of the arrangement, which stand in perpetual tension. The relationship between the ECtHR and the ECJ is characterized by competing claims coupled with close coordination and mutual deference. The result is that here, too, all sides make contradictory supremacy claims, and all take steps to harmonize their jurisprudence and avoid conflicts which would require their competing claims to be resolved.

2. Practices of Note

The development of EU law has therefore been marked by contrasting positions regarding where supremacy lies. The ECJ claims broad supremacy for EU law, but national courts have signalled that this supremacy claim is contingent upon meeting certain standards derived from their national legal systems. The ECJ has accepted these limits in practice, creating a system where neither court enjoys total or exclusive powers. Instead, the efficacy of EU law is a matter of perpetual compromise in conditions of persistent plurality. Over time, these evolving compromises have produced certain identifiable practices or tools which consistently reoccur and

⁶⁵⁵ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECJ Joined Cases C-402/05 P and C-415/05 P, [2008] ECR I-06351.

⁶⁵⁶ Piet Eeckhout, "Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC" *European Journal of International Law Blog*, Feb 2, 2009, accessed Nov. 10, 2019 <https://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/#>.

⁶⁵⁷ *Opinion Pursuant to Article 218(11) TFEU*, ECJ Case 2/13, [2014] EUR-Lex CELEX 62013CV0002; Daniel Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13," *German Law Journal* 16, no.1 (2016).

help the system to function. Three particularly unusual practices warrant explicit attention: multilateral conditionality, variability, and doctrinal interpenetration.

2.1 Multilateral Conditionality

The most important practice that allows EU and national law to coexist without resolving their respective authority claims is clearly the use of multilateral conditionality.

As we have seen, various national courts employ a variety of “locks” in order to place constraints and conditions on the ECJ’s claims. Other courts choose not to assert locks, or to treat the entirety of the domestic constitution as a lock. Regardless, courts are able to use the concept of locks to shape, contest or support the ECJ’s authority claims to the extent that they so desire. Likewise, by selectively asserting its supremacy, the ECJ is able to set boundaries on national authority – national law is valid only to the extent that it conforms to EU law, provided that EU law meets nationally imposed conditions. As we have seen, the ECJ and ECtHR place conditions on each other’s authority as well. Thus, each court enjoys only a conditional level of authority, but each court also enjoys the ability to place conditions on the authority of others.

The ECtHR’s “margin of appreciation” doctrine reflects a similar but distinct logic, relying on auto-limitation rather than mutual limitation. In essence, the ECtHR uses the constitutional traditions of the member-states to limit its own supremacy claims, while member-states self-limit their own authority by ratifying the ECHR according to their chosen domestic methods of incorporation. Rather than making their acceptance of supremacy claims conditional, conditionality is built into the supremacy claim itself. Regardless, the net effect is that neither member-states nor the ECtHR enjoy unfettered supremacy as it is traditionally conceived in a sovereign order. Lastly, the peer-review facilitated by *Celmer* allows courts to place conditions

on inter-national legal cooperation, making the international authority of each court subject to the conditions of its peers.

Together, these doctrines force each actor to consider the stance of each other actor in making its decisions. As a result, it hardly matters who is supreme in the final instance, because every decision of every actor is, in some sense, pre-negotiated. Interestingly, this system allows each actor to consider itself supreme in the final instance. Because the self-perception of sovereignty remains, courts are able to act in decidedly non-sovereign ways without rethinking their own conceptual foundations or meeting the perhaps fatally demanding task of articulating a politically palpable relationship between actors. Because this process of conditional supremacy allows multiple supremacy claims to coexist without definitive resolution, it has become one of the primary practices of legal pluralism in Europe.

2.2 Variability

Another striking feature of the European legal environment is how evidently non-uniform it is. As we have seen, each national court understands its relationship to the ECJ and ECtHR differently, and the ECJ and ECtHR understand this as well. As a result, the practices of dialogue that prevail between each national court and its central interlocutors differ substantially from one another.

Rather than establishing a single, hegemonic relation between central and national courts, the European system embraces a rather more open-ended form of intra-court negotiation. This variability allows each national court to think through its challenges to centralized sovereignty in a way that is true to national ideologies, histories, political contexts, and balances of power.

In Ireland, for example, EU membership is often seen as a potential alternative to English colonialism. In Poland, conversely, EU law can be reminiscent of Soviet impositions. These two historical-political contexts demand distinct responses, and the European legal environment is flexible enough to accommodate that.

Variability also makes the system dynamic – because there is no established way that national and EU courts must relate, each is able to make adjustments in response to changing circumstances. Variability also facilitates experimentation, allowing courts to test out their positions and revisit them over time. Courts can even observe their peers and borrow approaches that seem to work.

Perhaps most importantly, however, variability allows all courts in the European legal environment to avoid definitively answering the fundamental question: “what is the relationship between national courts and the ECJ/ECtHR?” Rather than needing to build consensus around one particular vision, actors are able to co-experiment with a range of provisional answers that are neither final nor binding on their peers. Much like the strategy of variable geometry, this technique allows integration to proceed and, indeed, provides opportunities for ambitious courts to lead the way while preventing hesitant courts from stalling overall progress.

For all these reasons, the fact that the relationship between national courts and central courts (like the ECJ and ECtHR) is not uniform has been an important means of facilitating legal integration.

2.3 Interpenetration

Another interesting feature of the relationship between European and state legal systems is that it can be difficult to tell exactly where one ends and the other begins.

The human rights jurisprudence of both the ECJ and ECtHR, for example, are rooted in the common constitutional traditions of the member-states⁶⁵⁸. Likewise, human rights law in those states is shaped in part by commitments made to the ECJ and ECtHR⁶⁵⁹. Thus, when the ECJ upheld regulations on laser-tag games in Germany, it was able to claim that it was not acting on the basis of a German law regarding the dignity of human life, but European law – because the latter was conceptually based in national traditions, such that the German principle has essentially been incorporated into EU law⁶⁶⁰. In this way, the German principle was upheld without compromising the ECJ's wider authority claim.

Similarly, the ECJ treats the ECHR as a 'minimal standard' in its own human rights discourse⁶⁶¹, gives ECtHR judgements "special significance" and authority in its own jurisprudence⁶⁶², and in general adopts adjudicative strategies which parallel the ECtHR and thus prevent conflict with it⁶⁶³. In this sense, the ECHR is a part of EU law. Just as EU law is based in the constitutional traditions of the member-states, so too it is based in the ECHR, such that the three systems are not totally discrete.

Doctrines like the "margin of appreciation" continue this trend. The judgements of supranational courts are affected by the contemporary positions of national courts; however, where there is strong international consensus, supranational courts are more willing to punish transgressors.

⁶⁵⁸ Craig and De Burca, *EU Law* at 366-372.

⁶⁵⁹ Tommaso Pavone, "The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis," *SSRN* no.2042867 (2012) at 15.

⁶⁶⁰ Craig and De Burca, *EU Law* at 414.

⁶⁶¹ European Union, *Treaty on the Functioning of the European Union* Article 6(2).

⁶⁶² *Nold v. Commission*, ECJ Case 4/73, [1974] ECR 491.

⁶⁶³ Pavone, "Past and Future Relationship" at 14.

The spread of the *Solange* approach also shows that national courts are listening to one another, borrowing ideas and lines of reasoning⁶⁶⁴. Indeed, Slaughter contends that European judges increasingly constitute a single community, drawing on and wrestling with a common body of trans-systemic precedent and doctrine⁶⁶⁵. The Italian relationship with the ECJ, for example, can hardly be understood in isolation from the Italian courts' relationship to German courts, whose judgements provided obvious inspiration and political cover for the Italian approach.

In all these ways, various European legal orders interpenetrate one another. The lines that separate them are fuzzy and overlapping. This interpenetration is one tool actors use to prevent conflicts. This is true in at least two ways. First, interpenetration creates a degree of harmonization. For example, since the ECHR is a minimal standard in EU law, it is hard to imagine how the ECJ could ever find that a member-state had violated EU law by following ECtHR rulings. Second, interpenetration allows each court to take the others into account without compromising its own conceptual autonomy. As we have seen in *Tarrico* and *Solange*, for example, the ECJ sometimes reacts to claims of national supremacy by declaring that the impugned national norm is in fact a part of EU law, because EU law is based in national traditions. This allows the ECJ to uphold the results sought by national courts, but to do so on the basis of EU rather than national law, thus preserving its broader supremacy claim. In essence, each court can draw on its peers without venturing outside of its own body of legal precedent, because the systems are not conceptually discrete. In both these ways, the non-discrete, interpenetrating nature of European legal systems is an important practice through which they avoid conflict while still maintaining competing supremacy claims.

⁶⁶⁴ Martinico, "European Convention" at 420-422.

⁶⁶⁵ Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44, no.1 (2003).

3. Discourses of Constitutional Pluralism

The practices of the ECJ, national courts, and the ECtHR are therefore characterized by conflicting claims to and accounts of authority. These conflicting claims show a dynamic, flexible character centered around competition, non-resolution and mutual accommodation. Discursively, authors tend to portray various claims to authority as creating an enduring tension that cannot – and, indeed, should not – be resolved⁶⁶⁶. Instead, these tensions are presented as the central dynamic of a new form of “constitutional pluralism”; a system whose vibrancy and durability stems from each actor’s willingness to adjust their position while maintaining their autonomy. Rather than coming to joint decisions, like political actors, courts tend to take individual decisions, but do so in a way that takes competing claims into account. Of course, accounts of this dynamic vary.

Some accounts are decidedly agonistic, placing emphasis on the creative, generative role of conflict in the European legal environment. For example, Maduro suggests that the legal environment invites a concept of competitive sovereignty⁶⁶⁷. According to Maduro, the legitimacy and efficacy of the ECJ’s legal claims have historically depended on the support of powerful and diverse national courts⁶⁶⁸. The ECJ has therefore conducted itself in a manner conducive to receiving that support, negotiating and adapting its positions in response to its interlocutors as a means to pursue its own power. Similarly, national courts have accepted the supremacy of EU law in part because it strengthens their hands against national governments – in essence, EU law provides a new tool which national courts can use to challenge their

⁶⁶⁶ Miguel Maduro, “Three Claims of Constitutional Pluralism,” in *Constitutional Pluralism in the European Union and Beyond*, eds. Matej Avbelj and Jan Komárek (Portland: Hart Publishing, 2012) at 80.

⁶⁶⁷ Maduro “Contrapuntal Law” at 505, 521.

⁶⁶⁸ Maduro “Contrapuntal Law” especially at 520-522.

governments⁶⁶⁹. This is especially true for lower courts, which are often not empowered to conduct constitutional review, but who are empowered to apply EU law to disallow legislation. Thus, the system of mutual accommodation can be explained as a function of self-interest – each actor tries to maximize its own power, and it is this dynamic which produces the overall system of mutual accommodation or constitutional pluralism. Because this competitive dynamic incentivizes each actor to take the concerns of the others into account in its own reasoning, the contest actually works to make constitutionalism more inclusive and more legitimate⁶⁷⁰. The key, Maduro insists, is the ability of each actor to impose serious costs on the others. This capacity for autonomous reaction is what accounts for pro-active accommodation⁶⁷¹.

Taking a more liberal line, Weiler praises Europe's constitutional "sonderweg", or special way of doing things, as defined precisely by its capacity to foster cooperation without erasing difference⁶⁷². A world of totally separate communities, he suggests, is exclusionary and divisive. Moreover, in a globalized world, closed decision-making structures ensure that many affected by decisions have no say in them. On the other hand, a single, unified community would be homogenizing and oppressive⁶⁷³. A wider range of actors is involved in the decision-making process, but only at the cost of the distinctive sovereignty claims that lie at the core of their identities as actors. Certain groups could even become permanent minorities, rendering their inclusion simply a more pronounced form of marginalization. In contrast, the practice of accommodating competing sovereignty claims encourages communities to include one another, without collapsing the differences between them or robbing each other of the capacity for

⁶⁶⁹ For discussion see Karen Alter, "The European Court's Political Power," *West European Politics* 19, no.3 (1996).

⁶⁷⁰ Maduro, "Three Claims of Constitutional Pluralism" at 83.

⁶⁷¹ Maduro "Contrapuntal Law" at 524-525.

⁶⁷² J.H.H. Weiler, "In Defense of the Status Quo: Europe's Constitutional Sonderweg" in *European Constitutionalism beyond the State*, eds. J.H.H. Weiler and Marlene Wind (Cambridge: Cambridge University Press, 2003).

⁶⁷³ Weiler, "Sonderweg" at 19

autonomous action. For Weiler, the key to managing this tension between inclusion and autonomy lies in certain principles of “constitutional toleration” immanent in the practices of European courts⁶⁷⁴.

Slaughter offers a different interpretation of the European legal environment. Rather than emphasizing the generative role of autonomy and conflict, she emphasizes the shared foundations that serve to keep conflict within a narrow band where cooperation is possible. In essence, Slaughter argues that practices of judicial communication are creating a “community of courts” in which judges – from national and international courts alike – develop shared ways of reasoning, shared norms, shared authorities, and shared expectations⁶⁷⁵. This common foundation allows courts to engage in dialogue about particulars, because they are secure that fundamental issues are already the subject of agreement. Sabel and Gerstenberg offer a complementary account which focuses on commonalities when they speak of “coordinate constitutionalism”⁶⁷⁶. Over time, they argue, the conditional acceptance of ECJ supremacy creates a constitutional “overlapping consensus” – a set of shared norms which different actors can embrace from different ideological positions⁶⁷⁷. Thus, disagreement on some issues is facilitated precisely by the presence of consensus on core topics. In essence, the overlapping consensus keeps conflict within acceptable bounds; because each court is secure that its own foundations are not under threat, they are able to tolerate each other’s claims⁶⁷⁸.

These discourses share some striking characteristics. They emphasize dynamic, flexible compromise in a context of persistent differences on important questions of legitimacy and

⁶⁷⁴ Weiler, “Sonderweg” at 24.

⁶⁷⁵ Slaughter, “Community of Courts”.

⁶⁷⁶ Sabel and Gerstenberg, “Coordinate Constitutional Order”.

⁶⁷⁷ Sabel and Gerstenberg, “Coordinate Constitutional Order” at 513, 543-550.

⁶⁷⁸ Sabel and Gerstenberg, “Coordinate Constitutional Order” especially at 545, 550.

authority. Some accounts emphasize the role of conflict in generating shared norms, while others emphasize the role of shared norms in structuring conflict. Wiener and Liste provide an interesting way to bring these accounts together. For them, certain meta-level norms are widely shared, but these norms only take on meaning relative to particular legal and cultural contexts at local levels⁶⁷⁹. Thus, all actors might agree on the importance of “human rights” while holding wildly contradictory ideas of what this means, and what it entails in any given situation. In this way, fundamental principles are both shared and contested at the same time – they are shared at the meta level, and contested at the meso level⁶⁸⁰. Because all participants are committed to similar meta-norms, they are able to contest the meso-level meaning and application of those norms without feeling that their foundations are being questioned⁶⁸¹. Thus, both conflict and consensus play a generative role, working together to produce a shared framework of contestation⁶⁸².

Together, these discourses provide ways to think about the contested relationship between European courts as generative, giving rise to new forms of judicial dialogue which challenge traditional notions of total and exclusive authority.

4. Case Study: Constitutional Dialogue in Europe

⁶⁷⁹ Antje Wiener and Philip Liste, "Lost Without Translation?: Cross-Referencing and a New Global Community of Courts," *Indiana Journal of Global Legal Studies* 21, no.1 (2014).

⁶⁸⁰ “[Meso norms are]at the centre of the agenda of norms research. This central position is owed to the observation of a gap between generally agreed and well justified norms on the one hand, and relatively specific and often highly disputed rules and regulations, on the other. As Steven Bernstein rightly notes, “one way to think about contestation is ‘the gap between general rules and specific situations’”. Antje Wiener, *A Theory of Contestation* (New York: Springer, 2014) at 4. See also, 3, 9, 36, 66, 75, 104, etc.

⁶⁸¹ Wiener, *Theory of Contestation* at 10, 37, 45, 81.

⁶⁸² For a critical discussion of the lacuna around fundamental norms in constructivist research and its role in limiting the scope of contestation see Jonas Wolff and Lisbeth Zimmermann, "Between Banyans and battle scenes: Liberal Norms, Contestation, and the Limits of Critique," *Review of International Studies* 42, no.3 (2014).

The complex spectrum of positions described in this section have not been reached in isolation, but through dialogue. The development of Europe's human rights discourse illustrates these interactions well.

Originally, the ECJ's position was that fundamental rights were part of national and ECHR—but not Community—law⁶⁸³. Initially, this division suited national courts and the ECtHR well⁶⁸⁴. As the doctrine of supremacy evolved, however, the ECJ declared EU law, with no human rights protections whatsoever, to be supreme over national law, even national constitutions. This left the system devoid of rights-based limitations, potentially exposing citizens to grave abuses⁶⁸⁵. German courts raised this concern in the *Solange I* decision.

In response, the ECJ proposed a new arrangement; it declared that although constitutions themselves were subordinate to EU law, respect for the constitutional principles of the member-states was an integral part of EU law, which therefore provided human rights protections of its own⁶⁸⁶. It proceeded to analyze whether there was an infringement of these rights and replied in the negative.

The German Constitutional Court, however, was not convinced by this newfound and as-yet untested commitment to a somewhat vaguely defined body of principles emerging from the varied constitutional orders of the member-states. *Solange I* made this clear; the Court would review EU law on constitutional grounds *so long as* the EU itself lacked comparable and proven rights protection⁶⁸⁷. In this sense, it can be read as an invitation for the ECJ to prove its

⁶⁸³ Alec Stone Sweet, "Constitutional Dialogues in the European Community," in Ann-Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler eds. *The European Court and National Courts: Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998) at 319.

⁶⁸⁴ For a discussion of the functional division between community, convention and national courts see Pavone "Past and Future Relationship".

⁶⁸⁵ Pavone "Past and Future Relationship" at 17.

⁶⁸⁶ *Internationale Handelsgesellschaft*.

⁶⁸⁷ *Solange I*.

credibility. Here too, the Constitutional Court found that no violation had, in fact, occurred in this case.

The ECJ responded with its decision in *Nold*⁶⁸⁸. It knew it had to give its rights jurisprudence greater credibility and specificity in order to satisfy the Germans. It also knew that doing so created a possible conflict with the ECtHR, then a much more established entity, which could undermine its legitimacy even further⁶⁸⁹. The ECJ saved two birds with one hand, declaring that treaties signed by the member-states, including the ECHR, were a part of EU law. In so doing, it was able to piggy-back on the credibility of the ECtHR, already accepted by the Germans, while also preventing conflicts with it⁶⁹⁰. The ECJ proceeded to demonstrate its commitment by drawing on the ECHR in a number of subsequent cases, although it never struck down a member-state measure on these grounds⁶⁹¹.

The German Constitutional Court was convinced – for the most part. It responded by softening its position, agreeing not to review EU acts so long as EU rights jurisprudence remained, on the whole, comparable to Germany's⁶⁹². The ECJ, seemingly satisfied as well, borrowed a page from the ECtHR's playbook, taking steps to accommodate national counter-claims by allowing national courts a margin of discretion in *Schmidberger* and *Omega*⁶⁹³. The ECtHR, too, had to adjust to this changing legal environment. Reacting to the ECJ and drawing inspiration from the Germans, its *Bosphorus* judgement effectively endorsed the *Solange* approach⁶⁹⁴.

⁶⁸⁸ *Nold*.

⁶⁸⁹ Pavone "Past and Future Relationship" at 12.

⁶⁹⁰ Pavone "Past and Future Relationship" at 14.

⁶⁹¹ Pavone "Past and Future Relationship" at 15.

⁶⁹² *Solange II*.

⁶⁹³ Sabel and Gerstenberg, "Coordinate Constitutional Order" at 529.

⁶⁹⁴ *Bosphorus*.

With this acceptance, the system seemed to reach a momentary equilibrium around the *Solange* principles, and they proliferated quickly as a number of courts adopted variants of this “counter-limits” strategy vis a vis both the ECJ and ECtHR⁶⁹⁵.

In this way, the community transitioned from a functional model, based on a division of labour between the ECJ, the ECtHR and domestic courts, towards a model of overlapping competencies and mutual coordination, as the result of an ongoing process of claim and counter-claim. This transformation illustrates how constitutional pluralism works; one court suggests a given arrangement, others object and react or forward counter-suggestions of their own, and the issue ping-pongs back and forth, each court adjusting its position vis-à-vis the others until a mutually acceptable solution is found.

Over the course of these interactions, a set of (more or less) shared human rights standards emerged as a common foundation uniting the national courts, the ECJ and the ECtHR. Mutual respect for these shared fundamentals underwrites the willingness of each court to tolerate the claims of the others. In that sense, the development of European human rights law has been an interactive, multilateral process of constructing shared norms, building a de-territorialized body of precedent which both contains and facilitates debate⁶⁹⁶.

Importantly, no laws were actually struck down in the course of this saga. Indeed, each court seemed careful to make its interventions in a manner accommodating of the claims and authority of its interlocutors. Note also that no consensus has actually been reached on the fundamental question of sovereignty. Rather, these practices allow each court to consider itself supreme in the final instance, while at the same time providing practices of negotiation which prevent supremacy claims from coming into conflict. As a result, various actors are able to

⁶⁹⁵ Martinico, “European Convention” at 420-422.

⁶⁹⁶ Sabel and Gerstenberg, “Coordinate Constitutional Order” at 513.

coordinate action on complex topics without any actor enjoying total or exclusive authority over the others.

5. Conclusions

The legal dimensions of the relationship between the EU and its member-states has been characterized by competing authority claims and, indeed, competing understandings of the European legal system. These competing claims are coordinated over time through a system of conditional authority. In essence, each actor's authority claim is good, insofar as it meets the basic conditions laid out by other actors. This system allows different visions of the legal order to coexist without resolution, while nevertheless facilitating coordination over time.

As we have seen, this system developed gradually and in an *ad hoc* manner. In the 1960s and 70s, the ECJ made several major judgements which declared the supremacy of Union law over national law, thereby forwarding an assertively supranational understanding of the Union. National courts responded to the ECJ's supremacy with a variety of counter-claims which reflect more inter-governmentalist understandings of the Union. Ultimately, German courts began placing conditions on EU supremacy. This approach quickly spread to other national courts, and to the ECJ and ECtHR – which have adopted a similar strategy in relation to one another.

A number of important practices facilitated these developments. In particular, the mutuality of conditions, the development of interpenetrating doctrines and precedents, and the ability to tolerate a wide range of legal positions from different courts have allowed the system to develop without ever needing to definitively answer the question of whose law is really supreme. Scholars describe the resulting arrangement as “constitutional pluralism”, emphasizing both the

productive role of judicial contestation and the role of shared norms in facilitating productive contestation over time.

Clearly, the complex, dynamic and highly variable system of supremacy claims and counter-claims, conditions and accommodations made by various courts within the European legal environment challenge traditional conceptions of legal order as based upon a single, final authority. Indeed, each court seems to forward its own unique theory of why EU law is legitimate, and there seems to be little interest in developing a compromise theory accepted by all. At times, this has proven highly advantageous; the clear-cut supremacy of EU law, particularly in the 1960s when the EU lacked a developed rights jurisprudence, could have undercut the salience of human rights on the continent, and, in so doing, undermined the very legitimacy of the integration process. Conversely, a clear subordination of EU law may have entirely frustrated the goals of integration. Instead, the interplay of competing claims has allowed the integration process to continue without undermining core national legal principles.

As in the political arena, the legal relationship is not one-size-fits-all, but rather highly variable. Nevertheless, EU and ECHR law have proven extremely effective and influential tools of integration. This opens up space to think about forms of social coordination that centre around the ongoing negotiation of persisting differences between multiple power centers, none of which is capable of definitively subordinating the others.

However, the logic emerging from legal actors is more than an extension of the ethos of political contestation. Compromise-treaties have produced interpenetrating institutional structures at the political level, bringing various actors together in shared exercises of power. Conversely, legal practice and discourse displays a more consociational logic. Each court retains its separate institutional structure, coordinating with other actors rather than making shared

decisions through shared institutions. It would be a stretch, for example, to say that the ECJ “shares” in German sovereignty. Under the discourse of the courts, German sovereignty rests with Germany alone; Germany has simply chosen to express it in an accommodating manner. In this way, the system of mutual-conditionality that has emerged between courts is distinct, allowing separate bodies to coordinate their actions over time without resolving the fundamental differences between them.

[Chapter Seven] Economic Practices

This Chapter explores the economic dimensions of the relationship between the European Union and its member-states, asking how private forms of authority are structured and distributed, and how this challenges, and is shaped by, concepts of state sovereignty.

Of course, the distribution of control over the economic structure has important implications for the distribution of sovereignty between the Union and its member-states, participating in the ongoing contest between supranationalist, inter-governmentalist, and populist ideologies. What is most striking about the contest for economic power is not, however, a transfer of sovereignty from the state to the Union, but rather the way multiple actors coordinate in an effort to insulate economic decisions from political contestation. Both Union and state actors participate cooperatively in this delimiting, collectively shielding the economic structure from popular intervention. In response, populist forces have worked to contest market norms and experiment with alternative forms of economic production that exist largely outside of official institutions.

As a result, European economic practices depart from the trends that animate political and legal practices. Political and legal actors entertain wildly different interpretations of their relationship, yet have found practices which allow them to cooperate without resolving their fundamental differences. Economic practices are not subject to this sort of open-ended non-resolution. Instead, institutional actors work together to limit contestation. Because there is little institutional space to contest the current economic model, contestation tends to spill into streets, and periodically into the ballot box, in destabilizing bouts of crisis and conflict.

The following chapter explores the practices and contests that have led EU and state actors to cooperatively shield the economic sphere from popular contestation. I begin with a brief economic history of the Union (Section 1). From the beginning, the EU was shaped by an ordoliberal ideology that favoured technocratic decision-making and entrenched economic rules. Though the basic economic structure reflects a blend of social democratic, Keynesian, corporatist and ordoliberal ideologies, the latter predominates early integration in important ways. As neo-liberal ideologies began to gain salience in the 1970s, privatization and deregulation became major features of the embedded economy. Finally, the 2008 financial crisis produced a significant intensification of technocratic control over budgetary decisions. Over time then, the economic structure has become embedded in the political and legal structure of the Union-State relationship. Section 2 discusses the major practices that have facilitated this entrenchment over time, exploring how a structural asymmetry between negative and positive integration, an entrenched supranational monetary structure, and an extensive system of economic surveillance work together to insulate the economy from popular contestation. It also briefly looks at how contestation of the economic structure has been forced to manifest outside of formal institutions. Section 3 explores the discourses used to understand this process, discussing conceptions of economic constitutionalism, disciplinary neo-liberalism, and economic disembedding. Section 4 illustrates my argument through the example of the Greek sovereign debt crisis, showing how repeated attempts by the Greek government and electorate to influence economic choices were stifled by technocratic supervision and entrenched economic rules. Through monetary policy, budgetary supervision and loan conditions, the embedded economic structure of the Union was effectively insulated from popular contestation. Finally, Section 5 offers some preliminary

conclusions on how these economic practices challenge, and are shaped by, conceptions of sovereignty.

1. An Overview of the Economic Relationship

1.1 Post-War Reconstruction and the “Economic Constitution” (~1950- ~1970)

At the end of World War Two, Europe’s governments were swollen from war-time growth, but its major economies needed to be totally rebuilt. This unique political situation proved fertile ground for a form of liberal economic theory called ordoliberalism, particularly in Germany⁶⁹⁷. Like classical and neo-liberals, ordoliberals see a competitive market as the key to economic growth. However, while classical and neo-liberalism focus on restraining state interference with “natural” market dynamics, ordoliberals focus on the positive role of states in constructing competitive markets artificially⁶⁹⁸. Ordoliberals therefore envision a strong state capable of intervening decisively to ensure a stable and, above all, competitive market.

However, the wars had also left many European officials deeply suspicious of democratic politics, as both intellectually unsophisticated and prone to capture by demagogues and rent-seeking special interests⁶⁹⁹. The state must build the market, but democratic governments cannot be trusted to do this without corruption, incompetence, and volatility. Ordoliberals therefore promoted an “economic constitution” – a set of economic ground rules which would be deliberately insulated from popular political control⁷⁰⁰. To safeguard these rules, society would require a number of unelected, arms-length bodies to make key economic decisions in a rational,

⁶⁹⁷ Sauter, “Economic Constitution” at 1.

⁶⁹⁸ Biebricher, “Neo-liberalism” at 2-5; Thomas Biebricher, “The Return of Ordoliberalism in Europe – Notes on a Research Agenda,” *i-lex* 21, no.1 (2014) at 3-5.

⁶⁹⁹ Biebricher, “Neo-liberalism” at 5; Sauter, “Economic Constitution” at 48.

⁷⁰⁰ Sauter, “Economic Constitution”; Mark Blyth, *Austerity - The History of a Dangerous Idea* (Oxford: Oxford University Press, 2013) at 156-190.

apolitical manner. Particularly in Germany, but also in Italy and the Benelux countries, ordoliberalism became a defining feature of the reconstruction period⁷⁰¹. Unelected, independent public bodies began to proliferate, and entrenched rules were the order of the day⁷⁰².

In this context, many saw the integration process as a means to construct an ordoliberal order that would be beyond the reach of any national government⁷⁰³. In this way, the growth of the Union as a supranational entity and the entrenchment of the economic order have always gone hand in hand. For example, consider the leading role played by the unelected Commission and Court in the ECSC, compared with the constrained consensus requirements that paralyzed the Council and the merely advisory power of the Parliament. The institutional structure of the Union, especially in its early form, was in many way designed to give unelected bodies a leading role which could only be loosely shaped by political actors. Likewise, the Coal and Steel Community, the Atomic Energy Community and the Economic Community that followed were all acts of state-led market building – proactive attempts to (re)establish the conditions of competitive enterprise. By entrenching a supranational market in these goods, the nascent Union effectively prevented any one government from intervening to shape them.

The EEC, in particular, enshrines four fundamental freedoms: the freedom of goods, people, capital, and services. By prohibiting interference in these areas, the EEC denied states many of the traditional tools with which they intervened in their economies⁷⁰⁴. Without tariffs or capital controls, states could no longer nurture domestic industries or use trade as a geopolitical

⁷⁰¹ Sauter, “Economic Constitution” at 49. For a discussion of Italian ordoliberalism in particular see Blyth, *Austerity* at 189-190.

⁷⁰² David Parker, *Privatization in the European Union: Theory and Policy Perspectives* (London: Routledge, 1998) at 10; Frank Vibert, *The Rise of the Unelected Democracy and the New Separation of Powers* (Cambridge: Cambridge University Press, 2007) at 136.

⁷⁰³ Varoufakis, *the Weak Suffer* at 111; Isiksel, *Functional Constitution* at 13-14.

⁷⁰⁴ Sauter, “Economic Constitution” at 51; Josef Hein, “The Ordoliberalism that Never Was,” *Contemporary Political Theory* 12, no.4 (2013) at 252-254.

tool against rivals. Without hard borders, states could no longer control local labour markets. In these ways, the early institutions of the EU reflect a clear attempt to entrench economic ground rules and insulate them from popular control by member governments.

Ordoliberalism's 'apolitical' economic vision was, however, pursued in a political context. At the European level and at the German level, ordoliberals found themselves compromising with Keynesians, social democrats and corporatists⁷⁰⁵. To a certain degree the resulting compromises were congruous – ordoliberals prized a competitive market, but many could see how a certain level of welfare provision, social services and regulations could work to safeguard consumption and worker competitiveness overall⁷⁰⁶. The (in)famous Common Agricultural Policy (CAP), for example, can be read as a concession to existing social and corporate structures at the national level⁷⁰⁷. The early era of the EU's post-war economy was therefore defined by a blend of social market interventions and ordoliberal economic constitutionalism.

1.2 The Crisis of the 1970s and the Neo-Liberal Turn (~1970 - ~2008)

As post-war reconstruction progressed, simply rebuilding could no longer provide an adequate basis for economic growth⁷⁰⁸. The European economy began to stagnate⁷⁰⁹. In response, the Keynesian and social democratic elements of the European economic structure fell into relative disfavour, and the neo-liberal ideas that were more fashionable in the Anglosphere began to gain

⁷⁰⁵ Hein, "Ordoliberalism that Never Was" especially at 252-254.

⁷⁰⁶ Cerny, "Shadow of Ordoliberalism" at 6.

⁷⁰⁷ Henrik Zobbe, "The Economic and Historical Foundation of the Common Agricultural Policy in Europe," Paper presented at the *Fourth European Historical Economics Society Conference*, University of Oxford, September 2001.

⁷⁰⁸ Barry Eichengreen, *The European Economy since 1945 - Coordinated Capitalism and Beyond* (Princeton: Princeton University Press, 2008) at 6; Parker, *Privatization* at 42.

⁷⁰⁹ Cerny, "Shadow of Ordoliberalism" at 4.

currency.⁷¹⁰ Alongside ordoliberal market building, which often requiring de-commodifying interventions, the EU began to display a more marked propensity for commodifying interventions – interventions which privatized public goods and services as a path to competitiveness. The nature of the economic constitution remained mixed, but the ideological mix was shifting. All the while, the insulation of economic choices from public control was continuing.

First, consider the continued entrenchment of the original ordoliberal vision. In 1985 the Schengen Agreement established the free movement of people, while in 1986 the Single European Act set in place a plan to complete the internal market and to move incrementally through a system of pegged exchange rates towards a common currency. The creation of the Euro which flowed from this is perhaps the most important ordoliberal feature of the EU. Crucially, the European Central Bank took on much of the authority formerly held by national central banks, but with an explicit mandate not to use this power to manage national economies, as national central banks had long done⁷¹¹. Rather, the ECB would maintain price stability and nothing more.

Moreover, in order to be eligible for the shared currency, countries had to agree to stringent debt and deficit limits⁷¹². These requirements undercut governments' ability to use deficit spending to stimulate depressed economies or manage macro-economic cycles. The EU, however, has a budget of only about 1% percent of European GDP and has not replaced the state

⁷¹⁰ In Cerny's words, the downturn "not only led to the delegitimation of what has been called 'embedded liberalism'—i.e., the coexistence and interdependence of free trade and international capital flows alongside domestic Keynesian economic policies, an overarching 'international regime' that had dominated the international political economy from the late 1940s to the early 1970s, but also the growing dominance of neo-liberalism". "Shadow of Ordoliberalism" at 4.

⁷¹¹ Michael Wilkinson, "Austerity, Grexit and the Battle for the Euro" *LSE Law & Policy Briefing Series* 10 (2014) at 2

⁷¹² Sauter, "Economic Constitution" at 67; Hein, "Ordoliberalism that Never Was" at 356.

as a major deficit-spender⁷¹³. Without the ability to run large deficits at either level, governments become dependent on attracting an influx of private capital to stimulate depressed economies – rather than spending public funds, governments must deregulate or lower taxes in order to attract private investment⁷¹⁴. This, in turn, shrinks states’ revenue and regulatory reach, further reducing national governments’ capacity for economic intervention. In this way, the monetary union and its associated budgetary criteria constitute a major entrenchment of the economic constitution, further tying the hands of elected governments.

Alongside these ordoliberal policies, commodifying neo-liberal policies were also gaining salience. Beginning in the 1970s and gaining momentum through the 90s, European economies undertook largescale privatization of government assets and services⁷¹⁵. In large part, these reforms were driven by the Maastricht debt criteria, along with the pressures of free capital and the persistent, detailed and sector-specific efforts of the Commission⁷¹⁶. These commodifying shifts in the European economy reflect a novel neo-liberal ideology, yet they also participate in the broader shift in power towards actors who are not directly subject to popular control⁷¹⁷. At the same time, the Commission took steps to bring private actors more prominently into the policy process⁷¹⁸.

⁷¹³ European Union, “Integrated Financial Reporting Package Overview, Financial year 2017” accessed Nov. 10, 2019 <https://europa.eu/!hK34QQ>

⁷¹⁴ Cerny, “Embedding Neo-liberalism” at 30.

⁷¹⁵ Parker, *Privatization* at 12-18.

⁷¹⁶ Parker, *Privatization* at 19, 23, 39. Clifton, Comín & Fuentes test the influence of the EU on privatization against a range of other possible explanations and conclude “Pragmatic concerns connected to European integration requirements, particularly in sectors such as telecommunications, transport and utilities, were of the utmost importance in motivating governments to privatize from the 1990s. Europe is thus a powerful explanatory factor when considering ongoing EU privatization.” Judith Clifton, Francisco Comín and Daniel Díaz Fuentes, “Privatizing Public Enterprises in the European Union 1960–2002: Ideological, Pragmatic, Inevitable?” *Journal of European Public Policy* 13, no.5 (2006).

⁷¹⁷ Parker, *Privatization* at 41.

⁷¹⁸ David Cohen and Jeremy Richardson, *Lobbying the European Union: Institutions, Actors and Issues* (Oxford: Oxford University Press, 2009) at 6. Indeed, Mahoney notes that business remains the dominant force in the Commission’s consultations, making up approximately 72% of the groups holding a committee position. Christine

Once again, more corporatist and social democratic influences are also discernible in this period. The Single European Act expanded community competences into social policy, economic and social cohesion, research and technological development, and the environment, reflecting a more pro-regulatory approach. More importantly, it included a range of social cohesion funds, structural funds, agricultural funds, regional funds, and other forms of industrial policy measures reminiscent of the rent-seeking behaviours which ordoliberalists despise⁷¹⁹. The economic structure of the EU therefore remained mixed— a product of various political manoeuvres and compromises over time. Increasingly, though, the overall character of the economic relationship between the EU and national governments was being defined by entrenched, EU level rules and unelected actors setting economic parameters which could no longer be easily contested.

1.3 The 2008 Financial Crisis and Post-Ordoliberalism (~2008- Present)

The financial crisis of 2008 marked another major turning point in Europe's economic system, intensifying the entrenchment of the economic constitution considerably. In essence, bad debts threatened Europe's banks, and their combined debt load was more than some governments could backstop⁷²⁰. In this way, it was not only a banking crisis but a sovereign debt crisis as well. Both in its goals and in its chosen methods, Europe's response was deeply shaped by ordoliberalism⁷²¹.

Mahoney, "The Power of Institutions: State and Interest Group Activity in the European Union," *European Union Politics* 5, no.4 (2004) at 455.

⁷¹⁹ Sauter, "Economic Constitution" at 51-57.

⁷²⁰ Blyth, *Austerity* at 19, see also Chapter 4.

⁷²¹ Biebricher, "Neo-liberalism" at 2.

Biebricher argues that the overarching goals of the various measures taken was to restore competitiveness via pro-market reforms and fiscal policy⁷²². He also points out that the chosen methods are deeply technocratic. For example, indebted countries were offered conditional loans that forced national governments to adopt economic reforms dictated by unelected experts in the Commission, the IMF, and the ECB⁷²³. Second, the system of fiscal constraints introduced earlier was dramatically expanded with new regulations giving the Commission expansive supervisory powers over all national budgets⁷²⁴. Third, technocratic governments were installed in several countries, to implement the economic reforms that their democratic governments had refused⁷²⁵.

Even this period, however, is not unidimensionally ordoliberal, and certain elements of the EU's crisis response suggest a Keynesian influence. For example, the ECB began printing money to cover bad debts. Nevertheless, the overall goal of economic reforms was to make indebted countries more competitive, thereby enabling growth. The chosen mechanisms are, by and large, insulated from democratic control. Cerny calls the resulting mixture of neo-liberal, ordoliberal, and Keynesian policies "post-ordoliberal" to signify a complex blend of partially overlapping policy prescriptions which, while not theoretically coherent, are in practice designed to safeguard and entrench the economic constitution⁷²⁶.

⁷²² Biebricher, "Neo-liberalism" generally; Biebricher, "Return of Ordoliberalism" especially at 7-9.

⁷²³ See Varoufakis, *the Weak Suffer* generally and especially at 151, 169-170.

⁷²⁴ Biebricher, "Neo-liberalism" at 1; Hein, "Ordoliberalism that Never Was" especially at 356; Magnus Ryner, "Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and its Management," *Journal of European Public Policy* 22, no.2 (2015) especially at 282.

⁷²⁵ Pastorella lists the following examples: Bajnai (Hungary 2009), Fischer (Czech Republic 2009), Monti (Italy 2011), Papademos (Greece 2011), Pikrammenos (Greece 2012), Raykov (Bulgaria 2013), Rusnok (Czech Republic 2013) and Bliznashki (Bulgaria 2014). Guilia Pastorella, "Technocratic Governments in Europe: Getting the Critique Right," *Political Studies* 64 no.4 (2016) at Note 1. The case of Monti is probably the most widely accepted example.

⁷²⁶ Cerny, "Shadow of Ordoliberalism" at 8. In another article, Cerny describes the mixture as "regulatory", "managed" or "social" neo-liberalism. See Philip Cerny, "Embedding Neo-liberalism: The Evolution of a Hegemonic Paradigm," *The Journal of International Trade and Diplomacy* 2, no.1 (2008) at 39.

1.4 Economic Constitutionalism and the Fourth Branch

Overall, then, we might say that the economic structure of the EU has a strong and persistent ordoliberal foundation, coexisting in a range of semi-comfortable compromises with social-democratic, corporatist, Keynesian, and neo-liberal economic visions over time⁷²⁷. Given the relatively strong social state in most European countries, the net effect has been liberalizing⁷²⁸. The most significant dimension of the economic relationship between the EU and its member-states is, however, the pronounced commitment to economic constitutionalism – that is to say, a commitment to using supranational institutions and rules to insulate economic policy from popular control.

A range of debt and deficit criteria constrain national governments, and an array of unelected public and private actors have come to play roles in economic decision making. Vibert refers to this as “the rise of the unelected”, arguing that such bodies are now so heavily implicated in economic governance that they effectively constitute a fourth branch of government⁷²⁹. Vibert also notes, however, that this new branch is not distinct from the others, as in a system of checks and balances. Rather, unelected bodies have become part of the broader networks of co-decision that define European governance⁷³⁰. In this way, sovereignty is being redistributed, with unelected bodies wielding increasing but typically non-exclusive authority.

⁷²⁷ At a formal level, the substantive content of the entrenched economic constitution is therefore reasonably compatible with a range of economic choices. The complex set of market pressures, monetary and fiscal constraints, and structural impediments, however, mean that it is significantly easier for governments to adopt ordoliberal policies than interventionist ones. See Sauter, “Economic Constitution” at 67-68.

⁷²⁸ Fritz Scharpf, “The Asymmetry of European Integration or why the EU cannot be a ‘Social Market Economy’,” *Kolleg-Forschergruppe Working Paper No.6* (2009) at 211.

⁷²⁹ Vibert, *Rise of the Unelected* generally but especially at 2, 5, 15. Note that while I embrace much of Vibert’s diagnosis, I do not share his conclusions. Vibert argues that the fourth branch actually enhances democracy by creating a more informed and engaged citizenship. This conclusion seems based on a “new division of powers” separating out the fact-gathering phase of politics from the judgement phase. I find this distinction both implausible in principle and counterfactual in reality.

⁷³⁰ Vibert, *Rise of the Unelected* at 142.

However, authority is not merely being shuffled around in this process, it is also being confined within a set of capitalist-market-based rules designed to prevent popular contestation. As a result, the expression of popular sovereignty through member-states and EU institutions alike is circumscribed, confined within limits that were deliberately placed beyond popular control⁷³¹. The populist and nationalist resurgence across Europe is, in part, a reaction to this narrowing of public control⁷³². In all these ways, the economic relationship between the EU and its member-states participates in larger contests over how power should be distributed between actors, but it also reveals another line of contestation regarding how power should be limited and structured.

2. Practices of Note

The economic structure of the Union has always shown the influence of an ordoliberal preference for both entrenched economic rules and technocratic decision-making, gradually building an economic system which cannot be easily contested. The following Section explores a number of diverse practices that have facilitated these two processes.

2.1 The Law of the Market: Structural Asymmetry in the Integration Process

One major practice which shields the economic structure from effective institutional contestation is embedded in the structure of the integration process itself. Indeed, integration is marked by what Scharpf has called two “asymmetries”⁷³³.

⁷³¹ Isiksel, *Functional Constitution* especially at 99.

⁷³² Blyth, *Austerity* at 29.

⁷³³ Scharpf, "Asymmetry".

First, the barriers to action are much higher for political actors than for legal actors. Court decisions require only a majority of a panel of judges, while European-level legislation requires a qualified majority of member governments plus a majority of Parliament and the support of the Commission. Moreover, once a judicial decision has been made it can only be reversed through treaty changes, which once again requires a high degree of political consensus. The system therefore structurally favours legal, over political, forms of integration⁷³⁴.

Second, legal action necessarily favours negative integration⁷³⁵. There are several reasons: EU law is mostly about free trade, the ECJ's caseload comes largely from a corporate litigative elite who pursue a coordinated continental attempt to push the law in a more liberal direction, and – most importantly – courts are empowered to strike down existing laws but not to create new, European-level regulatory regimes⁷³⁶.

The net effect of these two asymmetries is that it is far easier to de-regulate Europe through case law than it is to re-regulate it through legislation. As a result, legal integration has worked to clear away regulation at the national level, but such regulation cannot be re-created at the European level because the demands of collective decision making between diverse economies are so high, and because countries whose economies are already liberal have an incentive to act as veto players.

Strange as it may seem, this imbalance actually meshes well with the functionalist tendencies that have always animated the integration process. In theory, negative economic integration should, over time, “spill-over” and create the necessary incentives for positive political integration. To a certain extent this has occurred. However, the need to garner support

⁷³⁴ Scharpf, "Asymmetry" at 217.

⁷³⁵ Scharpf, "Asymmetry" at 214.

⁷³⁶ Scharpf, "Asymmetry" at 222.

from liberal economies within the EU has ensured the European-level re-regulation often fails to exceed the lowest common national denominator⁷³⁷. Thus, even positive integration tends to have a liberalizing effect overall, and has certainly not proven an effective avenue for public control of the economy.

Because of the dual asymmetries Scharpf describes, supranationalism has come to be a deeply judicial and deeply neo-liberal phenomenon – each time the Court pushes forward a more supranational vision of the Union, it deepens the imbalance between negative and positive integration and so works to insulate the capitalist-market from political influence.

The Court's landmark supranationalist stances in *Van Gend en Loos* and *Costa*, for example, also meant exposing market-intervening legislation to challenge by private actors and reducing tariffs designed to protect local industries in *Van Gend*, and forcibly transforming the Italian electricity market from a public service to a profit-driven sector in *Costa*. Both decisions subordinated the social priorities of national governments not only to Community law, but also to the free market. In this way, the court's determination to deepen what began as a trade deal and transform it into a true supranational entity is also effectively a commitment to insulate the economic structure from popular intervention.

Subsequent rulings like *Dassonville* and *Cassis* similarly expanded the scope of Community law substantially, but primarily as a negative instrument which could be used to challenge social policies and regulations. In *Dassonville*⁷³⁸, the ECJ interpreted a treaty ban on import quotas as prohibiting any national legislation that had any effect on the movement of goods, even if this effect was unintended and, indeed, even if it was only a potential and not an

⁷³⁷ Scharpf, "Asymmetry" at 238.

⁷³⁸ *Procureur du Roi v Benoît and Gustave Dassonville*, ECJ Case 8/74, [1974] ECR 837.

actual effect⁷³⁹. Thus, the court dramatically expanded its own authority from the power to strike down tariffs to a much broader power to review essentially all national legislation. At the same time, however, it undermined the regulatory ability of the national states without recreating that ability at the European level.

Likewise, in *Cassis*⁷⁴⁰, the ECJ ruled that member-states could not require foreign products to meet domestic regulations; rather, they must accept the regulations of the source country at face value, unless refusing to do so meets certain specified public-policy purposes. In short, if something is legally for sale in Denmark, it must be legally for sale in Germany too. This case has important supranationalist implications because it makes free movement a default presumption which must be rebutted in defense of particular regulations⁷⁴¹. As Menéndez puts it, this move transforms “the power of review of the validity of national laws...from a mouse, restricted to the national norms through which the economic border is established and reproduced, to an elephant, extending to the whole national legal order”⁷⁴². Again, however, this supranationalist gain also gives more regulated economies an incentive to lower their standards, lest their products be out-competed by those from less regulated economies. The ruling therefore incentivizes a liberalizing race, as countries compete to make their products competitive through deregulation. The ECJ went on to apply this framework to challenge everything from national

⁷³⁹ Scharpf, “Asymmetry” at 217-219.

⁷⁴⁰ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECJ Case 120/78, [1979] ECR 649.

⁷⁴¹ “The *Dassonville* and *Cassis* doctrines were subsequently extended from free trade to free service delivery, free establishment, free capital movement and the free mobility of workers (Oliver and Roth, 2004). In a similar process, moreover, European competition law has been extended to promote the access of private providers to the public-service and infrastructure functions that member states had previously excluded from the market or protected against unfettered competition (Smith, 2001; Biondi et al., 2004; Grossman, 2006; Ross, 2007; Damjanovic and de Witte, 2008). In principle, therefore, no area of national law, institutions and practices remained immune.” Scharpf, “Asymmetry” at 211.

⁷⁴² Agustín José Menéndez, “The European Crises and the Undoing of the Social and Democratic Rechtsstaat,” in *The European Union in Crises or the European Union as Crises?*, eds. John Fossum and Agustín Menendez (Oslo: ARENA Reports, 2014) at 420.

tax and pension systems to labour and protest rights, extending its own reach and insulating the capitalist market from state intervention at the same time⁷⁴³.

Overall then, the various decision-making structures of the EU have worked to structurally ensure that the ability of democratic actors to contest the economic structure is significantly lessened at the national level, without being comparably re-created at the supranational level.

2.2 It's all About the Benjamins: Sovereignty, Currency and Monetary Union

The Euro is perhaps the most visible, evocative achievement of the supranationalist vision of the European Union. However, this landmark in the contest over the distribution of sovereignty between the state and the Union also works to circumscribe the sovereignty of popular actors in important ways.

In many ways, the struggle to establish the Euro was not about supranationalism or inter-governmentalism at all⁷⁴⁴. Rather, the Euro has its foundation in the way capital flows in Europe. In essence, surplus countries, notably Germany, export far more to the rest of Europe than they import, leaving them with a sizable trade surplus relative to deficit countries, like France or Greece. Before the Euro, this created two diametrically opposed economic interests. It was in the interest of deficit states to intervene in the continental economy, using low interest rates and deficit spending to stimulate domestic production and close their trade imbalance. Yet these very policies deprived surplus nations of their foreign markets. Europe was therefore locked into a mercantilist monetary competition. Deficit states worked to stimulate their domestic economies

⁷⁴³ Menéndez, "The European Crises" at.421.

⁷⁴⁴In fact, the first proposals of monetary union came from De Gaulle's famously nationalist government, and were rejected by the supranationalist Chancellor Erhard in accordance with their respective economic interests. Varoufakis, *the Weak Suffer* at 29.

through deficit spending, and Surplus states worked to prevent this by periodically raising their own interest rates, thus raising the cost of borrowing, and forcing deficit states to abandon their now too-expensive economic interventions⁷⁴⁵.

After several rounds of this cycle, the French concluded that the sort of economic interventions France needed were impossible at the national level. Accordingly, they decided to change their focus to the supranational level⁷⁴⁶. As a result, successive generations of French authorities developed an ambitious plan: they would pursue monetary union, creating a new European Central Bank which, they hoped, would be willing to use monetary policy to support deficit economies⁷⁴⁷.

The Surplus nations, however, were wise to the plan and used their considerable economic clout to hijack the project. Under threat of yet another engineered recession, they made sure that the new ECB would be the most independent central bank in the world⁷⁴⁸, and that its mandate would be to pursue currency stability, not prop up deficit regions through market intervention⁷⁴⁹. The currency would contain no mechanism for helping out struggling deficit nations – in fact, it would explicitly forbid bailouts⁷⁵⁰. The creation of the Euro therefore transformed monetary policy from a political instrument to an entrenched economic structure.

⁷⁴⁵ Varoufakis, *the Weak Suffer* especially at 113-130.

⁷⁴⁶ Menéndez, “The European Crises” at 418; Varoufakis, *the Weak Suffer* at 123.

⁷⁴⁷ Varoufakis, *the Weak Suffer* at 124.

⁷⁴⁸ See Wilkinson, “Battle for the Euro” at 2. Although as Lazzarato notes: “The “independence” of the Central Bank with regard to Treasury is, in reality, a mask for its dependence on the markets” Lazzarato, *Indebted Man* at 97.

⁷⁴⁹ Varoufakis, *the Weak Suffer* at 142.

⁷⁵⁰ After the 2008 financial crisis, the ECB did lower interest rates and engage in massive quantitative easing, in an effort to control the value of the Euro and stimulate the failing economy. However, the Bank’s decision to act in this way sparked enormous controversy, including an ECJ reference case and a German Constitutional Court case considering whether the bank had illegally exceeded its mandate. See *Gauweiler*. Furthermore, because of structural limits on public deficits, low interest rates did not translate to deficit spending by member governments. Instead, the extra Euros the ECB printed went largely to recapitalize failing private banks and the lower interest rates were designed to stimulate private lending. Indeed, quantitative easing went hand in hand with a new round of privatization, deregulation, and austerity. See Varoufakis, *the Weak Suffer* at 191. Thus, even the ECB’s rare interventions in European monetary policy are such that they impede, rather than facilitate, public control of the economy.

In this way, the development of a supranational monetary policy reflects a contest between divergent economic interests and ideologies, but it also shows how both sides were committed to using supranationalism as a means of entrenching their own economic preferences, deliberately insulating them from popular contestation.

2.3 Big Brother is Watching: Economic Surveillance and Disciplinary Neo-Liberalism

The economic constitution also finds expression through fiscal policy. In fact, one of the most important practice through which sovereignty is delimited in Europe comes through the Fiscal Compact and the corresponding European Semester⁷⁵¹.

Eurozone states have long been subject to the European Stability and Growth Pact (SGP), which obliges member-states to maintain budget deficits of less than 3% of GDP and overall national debt levels under 60% of GDP⁷⁵². If countries violate these criteria they risk substantial fines and sanctions. In order to ensure compliance, member-states submit annual fiscal reports to the Commission, detailing their plans to meet the SGP criteria. In essence, these criteria represent a form of structural negative integration in the fiscal sphere – they work to prevent government spending, but not to enable EU spending. Indeed, because the EU’s budget comes from the member-states, the SGP represents an indirect limit on Union budgets as well.

After the Euro crisis, the European Fiscal Compact (EFC) tightened these macroeconomic monitoring and enforcement mechanisms, requiring GDP targets to be incorporated into domestic law and supervised by an independent domestic monitor; providing

⁷⁵¹The European Semester is a cycle of six month periods during which the Commission sets structural and fiscal objectives, and member states work to integrate these into their economic policies under the SGP and the six-pack and two-pack regulations. See European Council, "European Semester" accessed Nov. 11th, 2019, consilium.europa.eu/en/policies/european-semester/

⁷⁵² European Commission, "The Stability and Growth Pact" accessed Nov 11, 2019 http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm.

for earlier and more consistent corrective action; and requiring every state to submit their national budgets to the Commission in advance⁷⁵³.

In practice, however, the Commission's 'advice' is not limited to maintaining proper debt and deficit levels. Rather, it extends to every corner of economic policy, even areas in which the Union does not have authority – including, for example, tax policy⁷⁵⁴. In this way, all national budgets are pre-screened to ensure that they match the vision of the economic constitution.

Interestingly, the ability of the Union to compel policy changes is directly linked to the state of a member's economy - the more indebted a country is, the more stringent the surveillance and the more punitive the sanctions. In this sense, fiscal sovereignty exists as a sort of gradient – to the extent that states voluntarily limit their fiscal policies, they remain sovereign; to the extent that they exceed fiscal limits, sovereignty is curtailed⁷⁵⁵. This distribution of sovereignty serves less to empower one level or the other, and more to prevent contestation.

The resulting system is one that Gill calls “disciplinary neo-liberalism” – a series of legal and fiscal punishments designed to keep elected officials playing by pre-determined “rules of the game”⁷⁵⁶ which they are no longer able to effectively contest⁷⁵⁷.

⁷⁵³ European Commission, “Six-pack? Two-pack? Fiscal compact? A short guide to the new EU fiscal governance,” accessed Nov 11, 2019 http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm. Streeck describes these developments as a “quantum leap of economic surveillance” Streeck, “Peoples and Markets” at 36.

⁷⁵⁴ Ton van den Brink and Jan van Rossem, “Sovereignty, Stability and Solidarity: Conflicting and Converging Principles and the Shaping of Economic Governance in the European Union,” *UCD Working Papers in Law, Criminology & Socio-Legal Studies* Research Paper no.04 (2014) at 20-23.

⁷⁵⁵ Menéndez, “The European Crises” at 456; John Fossum and Agustín José Menéndez, “Which crises? Whose crises?” in *The European Union in Crises or the European Union as Crises?*, eds. John Fossum and Agustín Menendez (Oslo: ARENA Reports, 2014) at 17, 26.

⁷⁵⁶ Stephen Gill, “Globalisation, Market Civilisation, and Disciplinary Neo-liberalism,” *Millennium Journal of International Studies* 24, no.3 (1995) at 401.

⁷⁵⁷ McGiffin describes “a considered and programmatic series of measures designed finally to remove any influence which parliamentary democracy may have afforded the peoples of the member states over their own economic governance”. McGiffin, “Bloodless Coup” at 37. Similarly, Hollis claims “European citizens in the affected Member States are no longer able to influence microeconomic management through democratic input”. Grant Hollis, “The 'Sovereignty' Debt Crisis?” *North East Law Review* 10, no.2 (2014) at 18.

2.4 Commons Wealth: Contestation, Occupation, and Alternative Economies

In the face of structural, monetary and fiscal constraints which limit the ability of accepted institutions to shape the economic sphere, economic contestation has come to involve an array of populist, direct-action tactics. Sometimes, these tactics have enacted, or aspired to, alternative economic practices. Because alternatives are so rare at the institutional level, these grassroots innovations constitute an important site of pluralism, and an important practice of economic contestation, in Europe.

The Italian Commons Movement provides an excellent example. The movement began in response to mass privatization, particularly of water utilities⁷⁵⁸. Activists began in local political fora with a series of citizen's initiatives, but regional and national governments alike refused to even debate their proposals⁷⁵⁹. Under public pressure, the Italian government formed a commission which recommended that certain resources be seen as "common" – that is to say, neither state-owned nor privately-owned, but rather owned directly by the community of resource users and managed according to their needs and the needs of future generations⁷⁶⁰. The government, with the EU's support, ignored this recommendation and proceeded with privatization. Citizens organized a referendum to declare water a 'common' resource. All major parties opposed the referendum, and the government also challenged the campaign in court⁷⁶¹. Nevertheless, the referendum passed with a record 95% and an unprecedented absolute majority

⁷⁵⁸ Ugo Mattei, "Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neo-liberal Governance," *South Atlantic Quarterly* 112, no.2 (2013) at 367.

⁷⁵⁹ For more on the bill, see Tommaso Fattori, "Commonification of the Public Realm," *South Atlantic Quarterly* 112, no.2 (2013).

⁷⁶⁰ Mattei, "Protecting the Commons" at 368.

⁷⁶¹ Saki Bailey and Ugo Mattei, "Social Movements as Constituent Power: The Italian Struggle for the Commons," *Indiana Journal of Global Legal Studies* 20, no.2 (2013) at 991.

of Italian citizens⁷⁶². Parliament worked to ignore and limit the referendum results, prompting courts to intervene⁷⁶³.

Activists also organized the first successful European Citizens Initiative, far exceeding the requirements with 1.9 million signatures in 13 member-states⁷⁶⁴. Like the Italian government, the Commission's response was lacklustre, refusing to make access to water a human right and citing a need to remain "neutral" on questions of privatization⁷⁶⁵. Water services were omitted from a later directive on service liberalization, but privatization continued. Having exhausted traditional institutional channels at both the State and EU level, commons activists began focusing on local experiments with commons-inspired forms of public management⁷⁶⁶. For example, the city of Naples has established a participatory system of public governance for the local water corporation, taking control away from the city council and handing it directly to a community of resource users⁷⁶⁷. Theatres in Rome, Venice, Catania, Palermo, and Milan have also been illegally or semi-legally occupied as "cultural commons" and administered through participatory structures⁷⁶⁸. These economic alternatives are participatory, decentralized, and non-profit. In contrast to the exclusive rights of the traditional property owner, the Commons enacts an economic vision where vital resources are subject to multiple ownership claims from all those who depend on them, and is in this sense an important site of economic pluralism. In contrast to the closure of economic debate at the institutional level, the Commons embraces an open-ended

⁷⁶² Mattei, "Protecting the Commons" at 367.

⁷⁶³ Mattei, "Protecting the Commons" at 372.

⁷⁶⁴ Bailey and Mattei, "Social Movements as Constituent Power" at 1000.

⁷⁶⁵ Andreas Bieler, "Mobilising for Change: The First Successful European Citizens' Initiative 'Water is a Human Right'" Paper presented at the *ETUI Monthly Forum*, Brussels, January 22, 2015 at 26-27.

⁷⁶⁶ Mattei, "Protecting the Commons" at 374.

⁷⁶⁷ Mattei, "Protecting the Commons" at 374.

⁷⁶⁸ Bailey and Mattei, "Social Movements as Constituent Power" at 987.

dialogue where communities of resource users are able to experiment in flexible, dynamic ways to suit their respective needs.

Similarly, much of Europe has a rich history of politicized squatting⁷⁶⁹. Frustrated with the perceived capitulation of unions and traditional political parties, dispossessed groups in Copenhagen, Berlin, London, Spain, and across the continent have occupied abandoned buildings and converted them into self-organized community hubs, housing people and hosting cooperative economic enterprises including bookshops, cafés, printing presses, recording studios, and soup kitchens⁷⁷⁰. When the 2008 financial crisis hit, millions saw their homes foreclosed as political institutions supported the absolute right of banks to control their assets. In response, activists in Spain began directly re-occupying repossessed homes, supporting families illegally staying in their erstwhile residences through dense networks of community aid⁷⁷¹. Here, too, many occupied residences became directly-democratic community hubs, complete with public assemblies of their own and a rich relationship with the broader anti-austerity movement⁷⁷². Like the Commons, politicized squatting enacts an economic vision where ownership is shared by all who depend on a given resource, and where economic production is a site of direct participatory democracy and open-ended contestation.

Other movements aspire to, but have not (yet) directly experimented with, economic alternatives. For example, activists in the UK have been contesting the economic system based on its unsustainable relationship to the living earth. Frustrated by the major political parties'

⁷⁶⁹ See e.g. Alexander Vasudevan, *The Autonomous City: A History of Urban Squatting* (Brooklyn: Verso, 2017); Squatting Europe Collective eds., *Squatting in Europe: Radical Spaces, Urban Struggles* (New York: Minor Compositions, 2012).

⁷⁷⁰ Vasudevan, *The Autonomous City* at 3.

⁷⁷¹ Miguel A. Martínez López and Ángela García Bernardos, "The Occupation of Squares and the Squatting of Buildings: Lessons From the Convergence of Two Social Movements," *ACME: An International E-Journal for Critical Geographies* 14, no.1 (2015).

⁷⁷² López and Bernardos, "The Occupation of Squares" at 159.

shared lack of action to tackle climate change, Extinction Rebellion has organized months of direct action across the country, throughout the continent, and around the world⁷⁷³. In essence, this movement protests the right of the property owner to seek profit without taking into account the parallel claims of other humans, plants and animals, and future generations to a clean, livable planet. In response, Extinction Rebellion advocates a citizen's assembly to open up space for contestation, redesigning the economic system from the bottom up⁷⁷⁴.

Likewise, French activists, frustrated with decades of neo-liberal policies, turned to a perceived 'political outsider', Emmanuel Macron, and his newly founded party for economic reform. When even Macron's government failed to offer significant change, protestors took to the streets in months of protest in what came to be called "the yellow-vest movement". Demands varied widely, but included calls for directly-democratic reforms including citizen initiatives, citizens' assemblies, and legislatures filled by lottery from the general population⁷⁷⁵. Macron responded by launching a national debate, which included 21 regional citizens' assemblies where the president engaged with ordinary people. In this sense, the yellow-vest movement is also designed to re-open the economic sphere to contestation.

These experiments are significant in at least two ways. First, they eschew traditional representative models in favour of directly democratic alternatives, thus locating sovereignty in the people themselves rather than the state or the Union⁷⁷⁶. In this way, the economic contest between protestors and governments partakes in a larger struggle over how sovereignty is distributed. Second, each of these sites contests the delimitation of sovereignty, positioning the

⁷⁷³ Extinction Rebellion, "Act Now," accessed Nov.11, 2019 <https://rebellion.earth/act-now/>

⁷⁷⁴ Extinction Rebellion, "Resources," accessed Nov.11, 2019 <https://rebellion.earth/act-now/resources/citizens-assembly/>

⁷⁷⁵ Rachel Mar, "France's Yellow Vests Are Rebels Without a Cause, French President Emmanuel Macron is Trying to Figure out What They Want," *The Atlantic*, March 18, 2019, accessed Nov.11th, 2019 <https://www.theatlantic.com/international/archive/2019/03/france-yellow-vest-protesters-want/585160/>.

⁷⁷⁶ Mattei, "Protecting the Commons" especially at 975-987.

people as a constituent power that is not bound by the existing economic structure⁷⁷⁷. In important ways, these protest movements are not just about who has political agency, but also about the ways the capitalist-market has been placed beyond the reach of popular actors.

3. Discourses: “New Constitutionalism”, Sovereignty and Material Contestation

The economic structure of the EU is therefore shaped by an ordoliberal preference for technocratic decision-making and entrenched economic rules designed to insulate the economy from popular contestation. Because of these preferences, supranationalism has been closely tied to the entrenchment of an economic constitution. Structural, monetary, and fiscal constraints all fetter the authority of elected actors, entrenching economic policy into the legal and political structures of the state-Union relationship. In these ways, economic practices are redistributing power towards supranational and technocratic actors, and also subjecting the authority of elected actors to limits that cannot be easily contested.

Discursively, the link between sovereignty and the de-politicization of the economy is pronounced. It has led some to herald an era of new, corporate and financial, sovereigns – powerful transnational elites, crosscutting every conceivable level of power, whose own interests shape the exercise of authority more profoundly than any political process⁷⁷⁸. Others speak of the installation of technocratic governments in Italy or the imposition of loan conditions on Greece as “coups”⁷⁷⁹, and it is not uncommon to hear the dominance of German monetary policy spoken

⁷⁷⁷ Mattei, “Protecting the Commons” at 997.

⁷⁷⁸ For example, Streeck argues “it is now quite clear that the democratic states of the capitalist world have not one sovereign, but two: their people, below, and the international ‘markets’ above” Streeck, “Peoples and Markets” at 64.

⁷⁷⁹ McGiffen, “Bloodless Coup” at 41; Tanguay calls it “regime change”, Liane Tanguay, “Governmentality in Crisis: Debt and the Illusion of Liberalism,” *Symploke* 23, no.1 (2015) at 460; while Wilkinson refers to it as a “silent revolution” Wilkinson, “Austerity, Grexit” at 3.

of as the “Fourth Reich”⁷⁸⁰. Even the moniker of the latest economic crisis – the “*sovereign debt crisis*”⁷⁸¹ – suggests evocative links.

Stephen Gill articulates these links in the language of constitutionalism, arguing that neo-liberal economic orthodoxy increasingly has the status of entrenched rules which political actors are constrained to act within⁷⁸². As the basic economic rules are embedded in transnational legal and political structures, the costs of defying them grow ever more intense. Actors who resist market dogma now face international condemnation – ranging from being shut out of credit markets to sanctions, tariffs, fines, asset seizures, conditional loans and strings-attached rescue packages. The ‘free’ markets this infrastructure supports also enable highly mobile investors and employers to punish and reward economic policies by making or withdrawing investments⁷⁸³. At the same time, the presence of transnational agreements and norms shields these economic choices from domestic public pressure⁷⁸⁴. The end result is that state decision making becomes less responsive to citizens and more responsive to market forces, essentially allowing capital to discipline governments while at the same time becoming increasingly free from discipline by those governments⁷⁸⁵. Increasingly, these rules are becoming entrenched at every level, from the municipal to the transnational⁷⁸⁶, rendering contests over the distribution of sovereignty between

⁷⁸⁰ Indeed, a google search for “fourth Reich European Union” will produce an alarming number of results, but a few examples include Simon Heffer, “Rise of the Fourth Reich, How Germany is Using the Financial Crisis to Conquer Europe,” *Daily Mail*, August 17, 2011 <https://www.dailymail.co.uk/news/article-2026840/European-debt-summit-Germany-using-financial-crisis-conquer-Europe.html>; Nikolaus Blome, Sven Böll, Katrin Kuntz, Dirk Kurbjuweit, Walter Mayr, Mathieu von Rohr, Christoph Scheuermann and Christoph Schult, “The Fourth Reich: What Some Europeans See When They Look at Germany,” *Der Spiegel* March 23, 2015, accessed Nov. 11, 2019 <https://www.spiegel.de/international/germany/german-power-in-the-age-of-the-euro-crisis-a-1024714.html>.

⁷⁸¹ See Hollis, “The ‘Sovereignty’ Debt Crisis” at 10.

⁷⁸² See e.g. Gill and Cutler, *New Constitutionalism*.

⁷⁸³ Stephen Gill, “European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neo-liberalism in Europe,” *New Political Economy* 3, no.1 (1998).

⁷⁸⁴ Stephen Gill, “Market Civilization, New Constitutionalism and World Order,” in *New Constitutionalism and World Order*, eds. Stephen Gill and Claire Cutler (Cambridge: Cambridge University Press, 2015) at 39.

⁷⁸⁵ Gill, “European Governance and New Constitutionalism” at 8.

⁷⁸⁶ Gill and Cutler, *New Constitutionalism* at 5.

governments far less salient. Indeed, because the parameters of political power are pre-set, even changes in government often have very little effect on the actual policies delivered⁷⁸⁷. In this sense, capitalist-market forces now set the rules of the game, acting as the true constitution of modern society.

Expanding on this analysis, Cutler argues that the tension between what she calls the international and transnational – roughly what I have been calling inter-governmental and supranational – is in fact part of a single process, a dialectic of global capitalism which divides power between the two in such a way as to entrench neo-liberal policies⁷⁸⁸. Consider, for example, Scharpf's claim that negative integration, driven by the supranational court, is structurally designed to outpace positive integration, driven largely by more cumbersome inter-governmental legislative processes, thus suppressing public intervention in the market and ensuring a deregulatory bias⁷⁸⁹. The variety of legislative decision-making processes also involves a substantive bias, enabling deregulatory action but making active interference in the market easy to block⁷⁹⁰. In this way, the distribution of political and legal authority makes certain outcomes structurally more likely than others. While maintaining that the economic constitution is formally neutral, Sauter concedes that the overall structure of the system is biased towards liberalizing outcomes⁷⁹¹. New Constitutionalism is therefore characterized by multiple,

⁷⁸⁷ Gill, "European Governance and New Constitutionalism" at 19; Sitrin and Azzellini make the same point drawing on interview work: "Since all governments respond increasingly to the dictates of economic actors, most parties in most countries agree on all fundamentals. Tariq Ali fittingly named this the "extreme center." Anestis, from Athens, tells us that the center-right and center-left parties of Greece, along with the fascists, are called the "united party of the markets." Amador Fernandez Savater, a 15-M activist from Madrid, describes the common perception of party politics in Spain as..."market dictatorship" "Azzellini and Sitrin, *They Can't Represent Us!* at 49.

⁷⁸⁸ Claire Cutler, "Legal Pluralism as the 'Common Sense' of Transnational Capitalism," *Oñati Socio-legal Series* 3, no.4 (2013) at 724.

⁷⁸⁹ Scharpf, "Asymmetry". See also Friedrich Hayek, "The Economic Conditions of Interstate Federalism," in *Individualism and Economic Order*, ed. Friedrich Hayek (Chicago: University of Chicago Press, 1939).

⁷⁹⁰ Menéndez, "The European Crises" at 424.

⁷⁹¹ Sauter, "Economic Constitution" at 64-66.

fragmented, and often contradictory legal and political regimes which are nevertheless united in their material effects⁷⁹². Together, the various political and legal regimes and their patterns of interaction work to delimit popular sovereignty, placing certain decisions beyond the reach of effective contestation⁷⁹³.

Taking a different tact, Polanyi argues that liberal and neo-liberal⁷⁹⁴ economic theory also involve an attempt to dis-embed the economy⁷⁹⁵. Indeed, modern economic theory is based on the complete abstraction of the individual from their ecological and social surroundings⁷⁹⁶.

Workers and consumers are treated as atomistic, their behaviour determined by capitalist-market structures alone and totally unaffected by their social and natural relationships. Natural resources are treated as commodities, abstracted from the ecosystems and social relationships that produce and reproduce them. Both become monetized and treated as abstract reservoirs of value, thereby disconnecting the economy from the real. Together, these fictitious commodities encourage us to conceive of the economy in abstraction from the social and ecological relationships on which it depends, treating these deeply co-dependent systems as analytically distinct externalities. As a result, liberal economics dis-embeds economic decision-making from its social and natural limits, treating it instead as an autonomous sphere⁷⁹⁷. In this sense, this dis-embedding of the capitalist-market is another way that market norms have been shielded from popular contestation

⁷⁹² Cutler, "Common Sense" at 722.

⁷⁹³ Cutler, "Common Sense" at 728, 733.

⁷⁹⁴ Polanyi's analysis stops short of the historical period normally associated with neo-liberalism and focuses primarily on the domestic national context, yet many authors connect current economic trends to a revitalization of classical liberal economics and present globalization as a third Great Transformation, similarly working to dis-embed the market. See e.g. Eric Hake and Walter Neale, "Karl Polanyi's Great Transformation and the Current Transformations in Central Europe," in *Economic Transition in Historical Perspective: Lessons From the History of Economies*, eds. Charles Andres Clark and Janina Rosicka (London: Ashgate, 2001) at 27.

⁷⁹⁵ Polanyi, *Great Transformation* at xxiv-xxviii.

⁷⁹⁶ Polanyi, *The Great Transformation*, especially at 71-80.

⁷⁹⁷ It is important to clarify that the economy can never actually be dis-embedded from the social or ecological. Rather, we can be convinced to act as though it has been dis-embedded. See Fred Block, "Understanding the Diverging Trajectories of the United States and Western Europe: A Neo-Polanyian Analysis," *Politics and Society* 35, no.1 (2007) at 5-6.

– protected not only from government policy, but from social and ecological limitations as well⁷⁹⁸. Like Cutler, Polanyi suggests that this process is not totally even and coherent. Rather, it is characterized by counter-movements and sometimes by double-movements, as society moves in two directions at once⁷⁹⁹.

Each of these accounts stresses how economic rules are increasingly insulated from public control and subject to entrenched limits which cross-cut institutional divisions and levels of government. These rules are complemented by a range of unelected public and private actors, who are now influential at every level of the policy process. Considered in the context of the preceding chapters, this appears to be something of a counter-trend. While the political and legal domains are increasingly characterized by revisable, contestable rules which are never quite settled, the economic sphere is increasingly organized around rules that are insulated from contestation. This suggests that the diversity achieved by European pluralism is functionally limited to certain spheres of practice; a reasonably wide margin of difference can be tolerated in political and legal practices, but the room for divergence in economic practices is considerably more constrained.

Such limits raise serious questions about whether European integration actually does proceed without a common theory of legitimacy, or whether the grounds of this legitimacy have simply shifted from political principles to economic ones. Indeed, Isiksel argues that functional,

⁷⁹⁸ Capra and Mattei, *Ecology of Law* especially at 17-19, 70.

⁷⁹⁹ Polanyi, *The Great Transformation* at 119. Caporaso and Tarrow argue that Europe is currently experiencing precisely such contradictions, pointing to the weak but persistent emergence of EU social policies as evidence of a counter-movement which nonetheless participates in dis-embedding the economy. See James Caporaso and Sidney Tarrow, "Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets," *International Organization* 63, no.4 (2009). Similarly, the EU itself works both to construct an internal market free of barriers and to construct a corresponding "outside" where barriers are more permissible, thus expressing something of a double movement itself. Even the limiting aspects of this arrangement are, however, periodically put in the service of capital as the Union expands. See Paul Copeland, "IPE and European Integration: Applying Karl Polanyi's *The Great Transformation*," *IPEG Working Papers in Global Political Economy* no.40 (2009) at 18-19. The emergence and cooptation of anti-austerity protest movements represents another interesting example of the logic of double-movements. See Ouziel, *Vamos Lentos Porque Vamos Lejos* especially chapter 5, 227-264.

output legitimacy has long been more fundamental than traditional political legitimacy at the EU level⁸⁰⁰.

4. Case Study: Sovereign Debts and Democratic Deficits – The Greek Crisis

All of this can be illustrated in reference to the Greek financial crisis of 2009. As we have seen, patterns of economic exchange within Europe are dominated by a flow of goods from the Germanic center to the Eastern and Mediterranean peripheries, and an inverse flow of capital from the peripheries into Germanic and French banks⁸⁰¹. This creates a surplus of cash in the Surplus nations and a scarcity of it in Deficit nations, making lending highly profitable in the periphery compared to the center⁸⁰². As a result, banks in the center use their surplus cash to make lucrative loans in the periphery. The resulting loans finance the continued purchase of goods from the Surplus countries, while locking the deficit countries into ever deeper debt.

Such was Greece's position in 2008. This, in combination with some serious internal problems in Greek tax collection and public spending, lead to an accumulation of unsustainable debt, causing lenders to suddenly shut Greece out of the credit market. This meant that the Greek government could no longer cover its own expenses. Normally, countries respond to such crises by printing more money, allowing them to pay their debts while simultaneously devaluing the currency and encouraging investment. Because it was bound to the Euro, however, this option was not available to the Greek government. The ECB controlled the Euro, and it was specifically forbidden from recycling German surpluses to help weaker members. This triggered fears that Greece may have to leave the Euro. With several other countries experiencing similar crises or

⁸⁰⁰ Isiksel, *Functional Constitution* at 20.

⁸⁰¹ Varoufakis, *the Weak Suffer* at 166.

⁸⁰² Streeck, "Peoples and Markets" at 65.

debt levels, this possibility raised the spectre that the Eurozone could collapse entirely⁸⁰³. In light of the functional legitimacy claims on which the Union was built, such a crisis had the potential to throw the entire integration process into question⁸⁰⁴.

In an effort to safeguard the integration process, the European Commission, European Central Bank and the International Monetary Fund – collectively nicknamed the Troika – offered a loan to help Greece meet its obligations. In exchange for the bailout, they demanded an aggressive package of reforms aimed at cutting government spending, privatizing state assets, and deregulating the market in order to encourage investment. In other words, loans were used to entrench an economic vision, locking Greece into a series of economic choices which no subsequent government could challenge.

After weeks of public protests and occupations, a snap election was held and Greek voters overwhelmingly rejected the terms of the bailout packages. A left-wing party formed government on a promise to use government spending to stimulate the economy. In essence, the Greek government preferred a social-democratic economic policy to an ordo- or neo-liberal one. For months, the Greek government and the Troika argued over the proper response. The Troika refused to offer a loan without the attached conditions. For additional leverage, the Greek government put the Troika's offer to a referendum. Greek voters rejected it by substantial margins. However, the Troika refused to countenance a social-democratic response, and used its leverage as Greece's last remaining source of credit to force the Greek government to accept its conditions⁸⁰⁵. Under considerable duress, the Greek government accepted the terms of an

⁸⁰³ Varoufakis, *the Weak Suffer* at 173.

⁸⁰⁴ Isiksel, *Functional Constitution* at 32.

⁸⁰⁵ Varoufakis, *the Weak Suffer* at 151. At 169-169 Varoufakis compares the Troika's tactics to waterboarding: "What does the term "waterboarding" imply? You take a subject, you engulf his head with water until he suffocates but, at some point before death comes, you stop. You allow the subject to take a few agonizing breaths and then you continue to engulf his head in water again. You repeat until he confesses. Fiscal waterboarding is obviously not physical, it's fiscal. But the idea is the same and it is exactly what happened to successive Greek governments from

agreement that was arguably even harsher than the one their voters had rejected. Critics claim the result is a veritable coup, with the Troika – rather than Greece or the EU – exercising sovereignty, and with loan conditions acting as a *de facto* Greek constitution⁸⁰⁶.

In a very real sense, the ability of the Greek voter and even the Greek government to effectively contest the structure of the economy has been delimited, constrained by an economic constitution which is backed by a host of disciplinary measures enforced by unelected, arm's length institutions.

5. Conclusions

As the creation of the Euro and the case-law of the ECJ indicate, the contest between supranational and inter-governmental visions of the EU have important material dimensions. More profoundly, the economic aspects of integration illuminate new axes of contestation which concerns not only how sovereignty is distributed, but how it is shaped and limited.

Indeed, the history of the EU's development has also been a history of economic entrenchment. From the start, the EU was shaped by an ordoliberal ideology that favoured technocratic decision-making and entrenched economic rules that popular actors could not easily contest. While the overall economic system reflected a blend of social democratic, Keynesian, corporatist and ordoliberal ideologies, the ordoliberal preference for economic entrenchment was a major feature of early supranationalism in Europe. In the 1970s, social democratic and

2010 onward. Instead of air, Greek governments nursing unsustainable debts were starved of liquidity while at once, they were banned from defaulting to creditors. Facing payments to their creditors that they were forced to make, they were denied liquidity until the very last moment, just before formal bankruptcy. Instead of confessions, they were then forced to sign new loan agreements... At that moment, the troika would provide just enough liquidity in order to repay the members of the Troika (ECB, IMF): Exactly like waterboarding, the liquidity provided was calculated to be barely enough to keep the subject going without defaulting formally, but never more than that. And so the torture continued with the effect that the government was kept completely under the Troika's control."

⁸⁰⁶ See Varoufakis, *the Weak Suffer*, at 254; McGiffen, "Bloodless Coup" at 41; Wilkinson, "Austerity, Grexit" at 3.

Keynesian ideologies fell out of favour, and neo-liberal ideologies became more prominent. Privatization and deregulation became significant features EU economic policy, again implemented through technocratic actors and entrenched economic rules. The 2008 financial crisis deepened this trend, as European actors responded to the monetary crisis by intensifying the budgetary constraints placed on member-states. These historical trends show an enduring pattern whereby supranationalism is operationalized in such a way as to insulate the economic structure from popular contestation.

A host of practices have facilitated the insulation of the economy from popular contestation. These include a variety of limitations on public actors, like the SGP and the EFC, as well as a battery of less obvious mechanisms, including judicial decisions, central-bank mandates, and the very structure of the Union. Together, these practices force elected actors at all levels to accept certain “rules of the game” which they cannot easily contest. Legal repercussions, financial sanctions, capital flight, and a variety of other practices further work to punish any actor that tries to exceed the economic rules. The result is that the economic structure has become entrenched into the political and legal systems, acting as a sort of new constitutionalism that structures public power. With the development of entrenched economic rules, a range of unelected actors, both private and public, have also become involved in the governance process. At times these actors take over previously political tasks; at other times they are inserted into the policy process alongside traditional political actors. In both cases, they work to dampen public influence over the economy.

Because institutional channels of contestation are largely closed, economic contestation often takes on a populist and eurosceptical character, and dissatisfied actors frequently engage in forms of contestation that exceed formal institutional channels. These grassroots economic

practices are important sites of economic pluralism, contesting the insulation of the economy from popular control and connecting it to populist visions of the Union more generally.

In this way, economic practices in Europe both mirror and depart from the patterns of practice than animate legal and political spheres. Like the political and legal spheres, power is being shared by multiple actors with distinct interests and legitimacy claims. In response, economic institutions at the national and supranational level have developed interpenetrating institutions, like the European semester, and forms of conditional authority, like the SGP and EFC. They have also brought private and technocratic actors into existing policy processes. None of these actors controls the economic sphere unilaterally. However, these interpenetrating institutions and forms of conditionality work together, not to facilitate contestation – as in the political and legal spheres – but rather to prevent it. Instead of facilitating an open-ended dialogue between non-final authority sources, economic constitutionalism has resulted in a shared silence, as non-final authorities work cooperatively to limit access to contestation.

[Chapter Eight] Conclusions: Pluralism and Sovereignty in Europe

Together, the contested practices surveyed in this chapter, and many others, are working to transform and reconfigure the exercise of authority in Europe, co-creating new assemblages of power. The following section explores the ways in which these emerging practices challenge the assemblage of sovereignty, and how they are shaped by it in turn.

If sovereignty is defined by total, exclusive authority and designed to provide order in a chaotic world, the novelty of the European multilogue is immediately clear. Instead of vesting power in a total, exclusive authority capable of maintaining order, European actors have embarked on a gradual process of cultivating mutual need between actors. By reaching functional agreements iteratively over time, European actors have given one another a stake in continued cooperation. This has, in turn, motivated a series of practices - setting aside contentious topics, accommodating conflicting beliefs, and maintaining a certain level of conceptual ambiguity – which allow actors to contest and adjust their relationship over time. The ongoing revision of the relationship allows actors to coordinate without the presence of a sovereign or, indeed, any agreement on the nature of the political community.

Over time, these contests have generated practices which now structure the European environment. In particular, European actors have developed interpenetrating institutions and forms of conditional authority. These practices allow a variety of actors to coordinate their actions without ever reaching agreement on where authority does, or ought to, lie. Order in Europe is therefore a function of contestation, rather than an alternative to it.

Yet, at the same time, many of the institutions which participate in this decentralized system are organized internally around a more traditional sovereign model. Likewise, the structure of economic practice works to limit contestation in ways that undercut the flexible multilogue characteristic of political and legal practices. Europe therefore represents a limited but nevertheless significant challenge to the logic of sovereignty, one that can be thoughtfully nurtured moving forward.

Interestingly, those sites which have moved most decisively away from sovereignty have not witnessed a surge of destabilizing competition, oppression or violence. Just the opposite – legal and political institutions have made war between European countries, and overt totalitarianism within them, almost unthinkable. Rather, it is those sites which most resemble sovereignty – the economic sphere and the internal organization of hierarchical institutions – which have seen the most destabilizing conflicts.

This chapter will begin by putting political, legal and economic practices into conversation, to reveal some of their constitutive similarities and differences (Section 1). Section 2 will offer some preliminary analysis, providing tentative concepts that can help us think about the practices we have observed and the forms of relation they suggest. Finally, Section 3 offers some thoughts about how European pluralism might be nurtured moving forward.

1. Connecting Political, Legal and Economic Practices in Europe

Perhaps the most obvious observation regarding the transformation of European governance is that authority is being diffused to more and more sites, and to more and more different kinds of sites (national, supranational, corporate, legal, civic and civil). This is itself a departure from the

sovereign framework. However, several additional features make the pluralization of authority in Europe particularly significant.

First, these sites of authority relate to one another in flexible, dynamic ways rather than through stable, pre-determined hierarchies. This is not to say that relations between various institutions are not asymmetrical – some actors are certainly more powerful than others. In fact, Europe's various actors can be thought of as engaged in complex forms of competition and cooperation where each seeks, at least to some degree, advantage over the others. The lack of formal hierarchy does not therefore denote a presence of equality. Nevertheless, asymmetry is dynamic and fluid. This makes the relationship between institutions (unevenly) contestable – actors are able to call the relationship into question, to contest its terms and pull them into the space of problematization, because they are not predetermined.

Second and relatedly, the various sites of authority at work in Europe ground their authority claims in different sources of legitimacy, such that each site of authority perceives its own powers as non-derivative; that is to say, independent of its peers. In this way, each site of authority also represents a vision of authority, such that the contest between authority sites is also a contest between theories or understandings of the overall relationship between actors.

Third, the various sites of authority are not discrete, nor are their bases of legitimacy. European governance is not a matter of watertight units, each governing its own jurisdiction unilaterally according to its own logic. Rather, European institutions tend to interpenetrate, sharing power rather than dividing it, and drawing on multiple sources of legitimacy instead of elevating just one.

Together, these three features create a context of mutual need between European actors – each actor holds only a portion of the authority and legitimacy needed for collective action, such that

the ability of any one actor to pursue its ends depends critically on the cooperation of others. In fact, the entire integration process has long been conceptualized as a gradual attempt to stitch previously discrete structures together by fostering mutual endeavours and mutual need. As a result of this cultivated co-dependence, Lord and Magette argue that legitimacy in the EU has come to reflect the confluence of four ‘vectors’: indirect, parliamentary, technocratic and procedural. These vectors of legitimacy are combined in different ways in different decision-making processes⁸⁰⁷. Sometimes they operate according to a division of labour; at other times they form a chain; at still others they blend together⁸⁰⁸. “These, in turn, support political systems that are not configured for the articulation of any one view of legitimacy but for the mediation of relationships between several”⁸⁰⁹. The European system, in other words, is based on mutual need between multiple, qualitatively different sites of authority and legitimacy, engaged in complex forms of asymmetrical competition and cooperation. The Union draws on all of these in uneven and sometimes contradictory ways.

A number of cross-cutting practices facilitate this. First, the use of mixed authority structures has emerged as a prevalent means of reconstituting sovereignty. The hybrid structure of the EU’s institutions, the dual-strategy of the constitutional convention as an inter-governmental conference and a constituent act, and the various decision-making procedures of the Union all represent notable attempts by two or more authoritative actors to regularize processes of co-decision.

Where authority sites have remained distinct, rather than developing shared institutions, they have often turned to strategies of conditionality instead. The *Solange* approach,

⁸⁰⁷ Lord and Magette, “E Pluribus Unum” especially at 184-188.

⁸⁰⁸ Lord and Magette, “E Pluribus Unum” especially at 190-192.

⁸⁰⁹ Lord and Magette, “E Pluribus Unum” at 184.

characterized by the conditional acceptance of EU supremacy, is surely the paradigm case. Yet this logic is pervasive. The ECtHR's margin of appreciation works, in its own way, to reinforce that trend, making power contingent upon meeting certain standards. The Fiscal Compact draws on a similar logic, acting as a conditional, revocable recognition of budgetary autonomy. Even the principle of subsidiarity can be seen in this way, as imposing a condition on the Union's political authority. All of these arrangements function to create mutual flows of influence – one party accepts the influence of the other, but only on the condition that it be able to exert influence in return.

Together, these practices help enable action-coordination that does not require questions of authority to be settled definitively. Rather, the European project represents an attempt to govern from a place of persisting legal and political difference.

It is notable, however, that both co-decision and conditionality seem all but absent from economic conflicts, where the rules of the game are entrenched and insulated from contestation. Where the contestation typical of European governance is most constrained, the institutions and norms characteristic of European governance are also underdeveloped. This suggests that contestation is generative, giving rise to forms of order that may not arise where contestation is absent. On the other hand, the strict enforcement of a shared economic vision works to help facilitate, and indeed necessitate, collective action in the political and legal spheres. In this sense, this shared-sovereignty model of the political and legal spheres and the unitary model expressed in the economic sphere may actually work together, co-creating a particular type of constrained compromise which has been central to the integration project.

2. Understanding Pluralism in Europe through Sympoiesis

As discussed, governance in Europe takes place through competition and cooperation between multiple actors who are not arranged into a static hierarchy and who posit contrasting, even contradictory theories of legitimacy and understandings of the overall system. Through the use of co-decision and conditionality, these actors undertake collective action without resolving the fundamental differences that underlie their claims. How does one understand this system, with dynamics so different from those of sovereignty? In order to explore this question, I turn to complex systems theory and Dempster's idealtypical distinction between autopoietic and sympoietic systems in particular⁸¹⁰.

Autopoiesis means self-producing. Autopoietic systems are therefore self-referential systems which determine their own structure based purely on their own logic, isolated from the influence of surrounding systems⁸¹¹. Computer programs provide a classic example – they are organizationally closed; sequences of 1s and 0s determine their nature and function; all inputs must be translated into this binary; and no amount of external persuasion or coercion will ever change their structure. Luhmann has, of course, taken up this language in relation to functionally defined social systems like law, politics, or economics⁸¹². As in computing, Luhmann conceives of systems as self-referential and organizationally closed. In essence, each system revolves around a binary (legal/illegal, for example), and all incoming information is coded according to this logic⁸¹³. Thus each system can be understood according to a single, coherent, internal logic. The classic realist interpretation of international relations displays this character as well –

⁸¹⁰ Beth Dempster, "Sympoietic and Autopoietic Systems: A New Distinction for Self-Organizing Systems," in *Proceedings of the World Congress of the Systems Sciences and ISSS 2000*, eds. J.K. Allen and J. Wilby (Toronto: International Society for Systems Studies, 2000).

⁸¹¹ Dempster, "Sympoietic and Autopoietic Systems" at 5.

⁸¹² See e.g. Niklas Luhmann, *Social Systems*, tr. John Bednarz Jr. (Stanford: Stanford University Press, 1995); Niklas Luhmann, "The Autopoiesis of Social Systems" in Niklas Luhmann, *Essays on Self-Reference* (New York: Columbia University Press, 1990).

⁸¹³ David Seidl, "Luhmann's Theory of Autopoietic Social Systems," *Munich Business Research* 2 (2004) at 14.

isolated states, each contained in well-defined borders, making decisions as if they were radically separate, autonomous units.

In contrast, sympoiesis means co-producing. Sympoietic systems are not self-referential; rather, they are collectively created by the systems the surround them⁸¹⁴. For example, it is well established that critical bodily functions like digestion and immune response are typically coordinated between multiple bacterial and other microbial agents and the host species, none of which possesses a complete genome capable of performing its own biological processes alone⁸¹⁵. In this sense, each individual body is, in fact, a composite organism co-created by multiple actors who both cooperate and compete in complex ways. Lynn Margulis therefore introduces the term “holobiont” to signify an asymmetrical community of symbionts constitutes itself collectively⁸¹⁶.

This view has also been adapted to the social sciences. Taking up this frame, Dempster argues that sympoiesis allows us to recognize that different social systems may display different internal logics, while also allowing us to recognize that these systems are neither discrete from one another nor internally coherent – rather, they are layered and interpenetrating on the one hand, and shot through with counter-dynamics and contestation, on the other. According to this view, order is not a function of reducing complexity to a simple binary; rather, order emerges a result of ongoing tension. Such systems give rise to ‘emergent properties’ – properties which are attributes of the system itself even though they are not attributes of any of its component parts⁸¹⁷. Consider, for example, the relationship between courts and governments in a checks-and-balances system of government; the system as a whole produces a rough balance between

⁸¹⁴ Haraway *Staying with the Trouble* at 58.

⁸¹⁵ See Haraway, *Staying with the Trouble* especially note 16.

⁸¹⁶ Margulis, “Symbiogenesis and Symbiogenesis”. See also Bordenstein and Theis, “Host Biology”.

⁸¹⁷ For an overview of emergence in science and philosophy see e.g. Mark Bedau and Paul Humphreys, *Emergence: Contemporary Readings in Philosophy and Science* (Cambridge: MIT Press, 2008).

individual rights and collective goods despite – indeed, precisely because – of the fact that each branch of government leans decidedly in one direction or the other. The system has a balanced character which is not reducible to its components; rather, it emerges from their interaction and contestation. As Dempster puts it, “structures or behaviours emerge at critical points of tension among interacting global and local influences ... [these structures] rely on the system poising at this position of dynamic tension, held by counteracting influences. If the tension is lost, so is the emergent structure or behaviour”⁸¹⁸.

Taking up this frame, we can see sovereignty as emulating autopoiesis, in that it envisions a world of discrete, unitary and autonomous units. In contrast, European pluralism appears to be made up of multiple, mutually interpenetrating actors who both enable and constrain one another. What then, are the features of sympoietic orders? Two dynamics are particularly central.

First, sympoietic systems lack clear, stable boundaries. In contrast to their autopoietic cousins, sympoietic systems are ‘conceptually ajar’ – neither totally open nor totally closed. Their internal structure is in part determined by the system itself, and in part by the influence of the surrounding systems with which it interacts. In this sense, its boundaries are “fuzzy”, rather than sharp. For example, a healthy forest is ordered according to complex internal relationships in interaction with the prairie, coastal, alpine or tundra ecosystems that surround it.

Second, sympoietic systems display what Dempster calls “distributed control”⁸¹⁹. Gilbert *et al.* refer to similar processes as “negotiated surveillance”⁸²⁰. In essence, each actor polices the conduct of the others multilaterally, by extending or withholding support. Thus, each actor is able to contest the terms of interaction, but each actor needs the cooperation of others in order to

⁸¹⁸ Dempster, “Sympoietic and Autopoietic Systems” at 14.

⁸¹⁹ Dempster, “Sympoietic and Autopoietic Systems” at 9.

⁸²⁰ Gilbert, Sapp and Tauber, “A Symbiotic View of Life” at 333.

do so successfully. As a result, sympoietic systems are characterized by mutual need between actors, and also by mutual ability to contest the terms of the relationship between actors.

I would like to suggest that the European Union can be fruitfully understood as a sympoietic system. The functionalist development of the EU is in many ways similar to an emergent order, creating novel political structures unpredictably in an environment of disequilibrium and change. Its legal, political, and economic structures can be understood not as water-tight compartments, ordered neatly according to a coherent internal logic, but as the result of multiple intersecting influences, each of which ebbs and flows. The boundaries between its systems can be seen to shift over time – the Commission’s power waxes and wanes, policy issues move from the national level to the supranational, etc. Similarly, control can be thought of as distributed among a number of keystone actors, each of which has the potential to radically destabilize the entire system. All of this suggests that we miss something crucial about the integration process when we understand it as purely autopoietic. A sympoietic perspective can bring new elements to the fore while backgrounding old obsessions, affording us a fresh look at the integration project.

It is precisely this open, multi-directional influence that is challenging the logic of sovereignty in Europe. It is not that European actors are not each seeking their own interests, attempting to remake the European environment according to their own preferences; it is that, increasingly, the ability to influence others requires participating in multilateral institutions which open every actor to being influenced by others as well. Indeed, each actor’s asserted parameters are, in a certain sense, legitimized precisely by their willingness to accept parameters imposed by others. In this sense, the distinction reveals something very important; sovereignty is not only about the ability to influence others, it’s also about being immune to influence by

others. Put another way, it's about uni-directionality. If there is an inner logic beginning to emerge from European pluralism, one which allows us to imagine social orders not based on sovereignty, surely the multi-directionality of sympoiesis is at its heart.

2.1 A Limited Sympoiesis

It is notable, however, that the sympoiesis emerging *between* European institutions has, for the most part, yet to emerge *within* these institutions. Internally, both member-states and EU institutions retain essentially the same institutional forms bequeathed by the sovereign state. As a result, they continue to emulate sovereignty. The Council, for example, cooperates with the Parliament and the Commission externally. Internally, however, each member of the council represents the apex of their domestic political hierarchy. The power of the Council may be exercised multilaterally, but the power of the councillors is not similarly negotiated. Rather, the power of the councillors remains both unilateral (one need not consult parliament), and all-or-nothing (one has either formed government and been named a minister, or they have not)⁸²¹.

In this sense, the scale of sympoietic change in Europe is problematically constrained. It occurs at the trans-institutional level, but not at the intra-institutional level. From the point of view of an institution, perhaps the system has become sympoietic. From the point of view of the average citizen, however, the system remains deeply hierarchical and unilateral. If anything, the complex, multilateral compromises that characterize trans-institutional relations make it even more difficult for citizens to engage with, influence, and hold their institutions accountable. The

⁸²¹ Indeed, it is frequently an issue for legal pluralists that non-state groups are counter-hegemonic vis-à-vis the state but hegemonic vis-à-vis their own membership. See e.g. Gad Barzilai, "Beyond Relativism: Where Is Political Power in Legal Pluralism?" *Theoretical Inquiries in Law* 9, no.2 (2008) at 407.

result has been a persistent and increasingly radical problematization of Europe's "democratic deficit", a surge in populist parties, and an increasingly volatile political spectrum⁸²².

The radically participatory structures of 15M or the Italian Commons represent rare but important exceptions, where the logic of codetermination has found internal as well as external expression. In both cases, loose networks of assemblies cooperate in a horizontal manner; but these networks are also radically democratic in their internal structure, such that participants can exercise meaningful control over trans-institutional relations. These institutions hint at what a more robust, complete sympoiesis might look like.

European pluralism is also a functionally delimited sympoiesis. Consider, for example, how the division of legislative decision-making procedures, the jurisprudence of the ECJ, the design of supranational institutions like the ECB, the macro-economic surveillance of the Fiscal Compact, the functional nature of Union legitimacy claims, the discipline of capitalist-market actors, and the technocratic nature of daily governance all work together to entrench a certain economic system, thereby insulating the economy from effective contestation. As a result, the market remains more autopoietic, self-referential and institutionally shielded from the influence of surrounding social systems. This represents an important closure of debate, one which is policed in coercive ways. In response, dissident actors are often forced to engage in forms of contestation that exceed formal institutional channels. The scope of European sympoiesis is therefore also problematic, as it has permeated the political and legal spheres but consciously pre-empted in the economic sphere.

⁸²² "Almost universally there is an acceptance that the architecture of the EU is somehow insufficiently representative... [populists] have resorted to direct action because of the argument that political parties, interest groups and indeed representative institutions such as parliament are all insufficiently representative." Paul Taggart, "Populism and Representative Politics in Contemporary Europe," *Journal of Political Ideologies* 9, no.3 (2004) at 277-278.

Wiener's concept of access to contestation is helpful in summarizing these limitations and counter-trends. European pluralism is a contested process, yet the questions of who has access to contestation, and where, remain highly salient.⁸²³

3. Developing European Pluralism: Some Concluding Remarks

Overall then, the ongoing reconfiguration of sovereignty in Europe represents both a challenge to, and a retrenchment of, the old assemblage of sovereignty. Power is being diffused to more and more actors who increasingly interact through dynamic and multi-directional structures. These interactions signal an important shift which may be fruitfully conceptualized as a movement along the spectrum from the intense autopoiesis of sovereign systems to a more sympoietic position. Yet, at the same time, the contours of this pluralisation reflect certain assumptions of scope and scale which work to both limit this transformation to institutional actors and retrench the autopoietic character of the capitalist-market⁸²⁴.

This contradictory and fragmented state of affairs witnesses what Polanyi might call a double-movement, as society pulls in two directions once, affirming and challenging hegemonic trends at the same time⁸²⁵. Just as Santos would suggest, the practices and discourses of European pluralism constitute weak answers to strong questions – their submissions are significant, but incomplete challenges to the logic of sovereignty⁸²⁶. Efforts to develop a more robust pluralism should begin from these challenges, exploring how the alternative logic that

⁸²³ For a discussion of access to contestation see Wiener, *Theory of Contestation* especially chapter 5 at 55-62.

⁸²⁴ Indeed, Dempster suggests that all real systems exist somewhere on a continuum between these two poles. See Dempster, "Sympoietic and Autopoietic Systems" at 4.

⁸²⁵ Polanyi, *Great Transformation* at 119.

⁸²⁶ See e.g. Boaventura De Sousa Santos, "The World Social Forum and the Global Left," *Politics & Society* 36, no.2 (2008) at 251.

sympoietic practices suggest might be broadened and deepened in the face of institutional and market barriers.

In particular, anti-austerity movements across the continent are experimenting with radically egalitarian, participatory structures which extend thoroughly into the economic realm. These are perhaps the most mature incarnations of sympoiesis that I have seen. Drawing on such practices and discourses, we might begin to contemplate more radically inclusive, participatory forms of pluralist negotiation and interrelation which challenge the assemblage of sovereignty more deeply.

Part 3 - Practices of Pluralism in Comparative Context

[Chapter Nine] A Comparative Analysis of Pluralism in Europe and on Turtle Island

Introduction – A Bridge too Far

When you spend years of your life working on a dissertation, it starts to infuse your existence. You begin to see your objects of analysis everywhere, in everything. During the middle of the night, while taking a shower, or as you stroll down the street – something triggers a connection, and suddenly the constellation of ideas that you obsess over as a profession appears to you more clearly.

One such moment occurred for me in the middle of a bridge. I was not on my way to the office. In fact, I wasn't on my way to anywhere. A group of climate activists had occupied the bridge to demand an immediate transition away from fossil fuels, and I was acting as the group's police liaison. A grey-vested officer from the police force's community relations division approached me. The first question is always the same: "Are you in charge here?". The expectation of sovereignty. The critical entry point into understanding this gathering - comprehension begins by sorting participants into those who give orders and those who follow them. The reply is also standard: "Nobody is in charge, we make decision collectively; but I am the police liaison and I will act as a conduit between you and the group".

Having failed to identify an order-giver, the officer decides to cut to the chase. "You have to move off the road". Traffic is not the concern. Drivers had been warned extensively and there is another bridge a few hundred metres from where we stand (and another a few hundred metres past that one). No one is trapped, or even seriously inconvenienced. Safety is not the concern either. The bridge has been safely closed off for hours. No, the concern is that our collective

effort is a challenge to the sovereignty of this officer, his department, and the government for which they stand. It raises the spectre of multiple sites of authority. In other words, it raises the question of pluralism. The officer is enacting the response that sovereignty provides to the question of pluralism: where there are multiple authority sites, they must be subordinated to an order-giving sovereign who will maintain peace among them.

In order to maintain its vision of social order, the state must demonstrate that its authority is total and exclusive. This is what our presence on the bridge calls into question, and that is what must be rectified. Through this lens, our meeting on the bridge becomes a standoff – an all-or-nothing battle for control of the social order!

But of course, this is hardly how things play out. The police may be concerned for public order, but they are also concerned with their public image. They prefer not to act violently in this instance. This places the officer in a position of need – he needs to get us off the bridge, and he needs to do it without force. This means that, self-professed sovereign or not, he needs our cooperation. For our part, we are concerned with the state of the environment, to be sure, but also with the safety of our participants. We, too, prefer a nonviolent resolution. And so our needs find a point of contact – both of us need the cooperation of the other to bring the situation to a close safely. Negotiation ensues. We discuss timelines, where the crowd will exit – when they do – and whether arrests will be necessary. Eventually, most of the crowd leaves and a few remain to voluntarily accept arrests. In conversation with the police, these soon-to-be arrestees negotiate whether they will be handcuffed or not, what they will be charged with, where they will be taken, and even whether they prefer to walk to the paddy wagon themselves or be carried. An agreement is reached, arrests are made, arrestees are released, and the bridge is allowed to reopen.

In the end, one is hard pressed to find an all-or-nothing contest for control of the social order in this encounter, just as one is hard pressed to find a sovereign. It would hardly be accurate to say that the police had taken control of the bridge, or that the protestors had ceded the same. Instead, the status of the bridge appears as a result of negotiation between asymmetrical parties, driven by mutual need and therefore mutual accommodation.

Rather than a clash of two distinct authority sites in violent competition, the encounter has been one of interpenetration and mutual influence. The officers have their decision making structures and we have ours, but each group also has a liaison and together they constitute a sort of shared institution in which both groups partake. The officers are autonomous, but must respect certain conditions if they want our cooperation. We, too, are independent but at the same time constrained by a knowledge of what these officers will and will not bear. Each group is shaping the behaviour of the other. Together, they are establishing norms that, if not shared, are at least mutually respected⁸²⁷. Together, they are developing institutions which, while not determinative, facilitate coordination. To the degree that this is an ordered environment, its order is a function of contestation and negotiation, not unilateralism and sovereignty.

As I leave the bridge I look over my shoulder to the departing paddy wagons. My mind is still fixated on my dissertation. I am struck by the idea that the night's events were no anomaly. This is how the world works. The world, simply put, is not as sovereign as it seems. Where we have been taught to expect exclusive, unilateral control, a closer look invariably reveals multilateral contestation and negotiation. And yet the world does work. We have been taught that contestation is contrary to order; but, in fact, order is a function of contestation. What if the officer had suffered no contestation? What if they had quickly and aggressively moved to

⁸²⁷ See Webbers thoughtful discussion of 'community' in contexts of coercion and asymmetry. Webber, "Relations of Force" at 620-627.

disperse the crowd, as befits a sovereign – would the world be more ordered? Hardly. Civil unrest may have ensued; and from this, further state violence; and from this, further unrest. No, social order not only functions in contexts of negotiation, it actually functions best in contexts of negotiation – better than it does in contexts of unilateralism. The grease that facilitates this multilateral order is mutual need. Mutual need gives rise to mutual influence, and it breeds an ethic (or at least a behaviour pattern) of respect between participants. It gives rise to shared institutions and forms of conditional authority – practices which channel conflict in a way that preserves and indeed enables order.

And yet this entire generative, order-preserving process is impeded conceptually by our most fundamental concepts of social order. We are taught that unilateralism is stable, safe, and desirable, while contestation is uncertain, risky, and threatening. As a result, we are frightened by the prospect of contestation and negotiation. We lack the skills and dispositions needed to navigate contestation and negotiation. We stumble through, despite our social ontology, receiving little of use from social imaginaries dominated by competition between self-interested individuals and institutions, barely constrained by the force of the sovereign. Mutual need and mutual decision making are foreign to us, and occur almost despite ourselves⁸²⁸. I am struck with the thought that we are in desperate need of conceptual models which allow us to foreground the co-construction of order between asymmetrically positioned, often adversarial actors. We need understandings which encourage the practices, praxis, and social structures needed to negotiate our inherently multilateral social milieu.

⁸²⁸ Yet they do occur, irrepressibly and in the face of constant suppression. See e.g. Kropotkin, *Mutual Aid* at 226, 227; Cover, “Nomos and Narrative” at 103.

As I think back upon my exploration of the fields of European and Canadian-First Nations pluralism, I see the same lessons jump out at me. There, too, the world is less sovereign and less unilateral than it seems. There, too, the world functions in spite of – indeed, because of – contestation, structured by the enduring presence of mutual need. And there, too, our social ontologies make these basic realities difficult to cognize and navigate. They steer us away from the practices, structures and concepts that we need most.

This chapter will begin by briefly recapping my analysis of the relationship between the EU and its member-states, and of the relationship between First Nations and Settler peoples on Turtle Island (Section 1). With respect to Turtle Island, I contend that the practices of pluralism that connect Settler and Indigenous communities were initially quite sophisticated, with forms of interpenetrating institutions and conditional authority claims in the political, legal and economic realms. A high level of mutual need prevailed, and all parties had the ability contest the relationship over time in dynamic and asymmetrical ways. As imperial competition on the continent ended and the economy pivoted from furs to agriculture, however, mutual need between the parties declined. At the same time, Settler conceptions of authority were becoming more deeply influenced by concepts of sovereignty, as Settler governance moved towards the modern state and capitalist-market. As a result of these concurrent trends, Settlers imposed more unilateral practices upon the relationship, working to incorporate First Nations polities, legalities, and economies into their Settler counterparts rather than treating them as independent authorities to be negotiated with. First Nations have resisted these shifts, preserving some continued space for multilateralism. As a result, contemporary pluralist practice is at once profoundly asymmetrical and marked by a historical aspiration towards unilateralism, and also filled with a variety of multilateral practices which could be fruitfully nurtured or restored.

Conversely, the European context starts from a place of state sovereignty and gradually moves towards practices that challenge sovereignty in uneven ways. Sophisticated pluralist practices have emerged in the political and legal spheres, cultivating mutual need and open-ended contestation through interpenetrating institutions and conditional authority claims. However, pluralism takes place mainly between state and EU institutions that remain internally structured by sovereignty hierarchies. Thus, power sharing takes place *between* political and legal institutions, but not *within* them. Economic practices constitute a coordinated attempt to limit contestation. Pluralism therefore takes place within an entrenched economic framework, with the most important sites of economic diversity existing outside of official institutions. Together, these three linked sets of practice produce an overall system of multilateralism that is in some ways quite advanced, but which remains problematically rooted in state and capitalist-market structures that limit access to contestation in important ways.

In Section 2, I consider similarities and differences between the European and Turtle Island contexts, mapping patterns of practice and exploring how they challenge, and are shaped by, sovereignty. I begin by arguing that, in both contexts, those times and areas that most approximate sovereignty are also the most oppressive (2.1). Next, I explore how both contexts display practices of interpenetrating authority structures and conditional authority claims, which facilitate contestation and action coordination amidst persistent difference. I argue that these practices suggest an alternative to the arbitrary hierarchies of sovereignty (2.2). Finally, I explore agonism as a framework for making sense of the generative role of conflict in both contexts, and suggest that mutual need plays a critical role in generating forms of contestation that are genuinely multilateral (2.3).

In Section 3, I consider how various institutional models facilitate or impede the mutual need and multidirectional contestation that produce multilateralism. I contend that the conceptual and institutional containers of the state and the capitalist-market are inherently oriented around sovereign unilateralism, and thus work to stifle mutual need and multidirectional contestation (3.1). Finally, I conclude by gesturing towards conceptual and institutional resources which are more oriented towards the cultivation of mutual need and multidirectional contestation, and which might therefore help us better navigate the demands of pluralism. Drawing on the cases examined here, I argue that both in Europe and on Turtle Island, three sources appear especially promising: forms of political community that pre-date sovereignty, forms of community that are built in explicit opposition to the state and capitalist-market, and forms of ecological community. I contend that each of these can provide sophisticated models that allow us to better understand and evaluate the complex relationships of interdependence and autonomy, cooperation and competition, and contestation and asymmetry that characterize pluralist practice (3.2). Section 4 offers some closing thoughts.

1. Summary – A Tale of Two Agonisms?

1.1 – An Overview of the Relationship between the EU and its Member-States

In many ways, the relationship between the EU and its member-states is quite remarkable. It is, and always has been, rather ad hoc, marked by shifting structures that reflect ongoing contestation between multiple visions of political community, rather than a single coherent underlying philosophy. In order to coordinate action in the face of these fundamental differences, each actor found itself in need of the others. Over time, this has produced a variety of structures designed to mediate between multiple different understandings of the relationship, facilitating

ongoing contestation without ever resolving the fundamental differences that lie at the heart of the European project.

Politically, the EU was founded by a combination of federalists, who see the EU as sovereign over the states; inter-governmentalists, who see the states as sovereign and the EU as a mere tool to serve state interests; and populists, who place sovereignty directly with the people themselves. Rather than resolving these fundamental differences, political actors sought narrow forms of cooperation where agreement could be reached, and set contentious concerns aside. In this way, European actors took steps to gradually cultivate mutual need between them, many hoping that this would slowly produce shared institutional structures. Over the years, this founding ambiguity has been extended, as partisans of each ideology compromise in order to pass treaties. As a result, the political structure of the EU does not embody a coherent philosophy; rather, it bears elements of all three visions, in persisting tension. The EU maintains this balance by requiring complex and evolving co-decision practices at nearly every level of bureaucratic and political decision-making. In effect, the EU's political organs operationalize legitimacy chains, drawing on multiple actors at multiple levels in order to put forth a multifaceted account of legitimacy which has something to offer ideologues of every stripe⁸²⁹. In this way, the system works not through a single, unified theory, nor through a single, dominant actor, but rather through the coexistence of multiple power sources in constant negotiation and co-facilitation.

Legal practice displays a similar dynamic. The initial treaties were silent as to the relation between EU and national law. When the European Court of Justice first positioned itself, and by extension the EU, as the dominant partner by claiming independence from and supremacy over

⁸²⁹ Lord and Magette, "E Pluribus Unum" especially at 184-188.

domestic legalities, national courts responded by placing limits and conditions on the ECJ's supremacy, effectively reasserting their own dominance⁸³⁰. The ECJ, deeply conscious of its need for the support of national courts, chose not to challenge this move directly. As a result, each legal order has gradually come to act as a check on the other – the ECJ must secure the support of national courts, and national courts must secure the support of the ECJ⁸³¹. In this sense, the authority of each court has become contingent upon certain minimal conditions set by its peers. These conditional authority claims allow each actor to retain its own understanding of the relationship, while at the same time providing a powerful incentive to take other positions into account. Thus, legal actors have gradually developed ways to contest and coordinate their relationship over time, without a sovereign to reign over them.

Economic practice, too, is characterized by interpenetrating institutions and conditional forms of authority. Rather than working to facilitate open-ended contestation over time, however, these institutions have been structured so as to insulate economic practices from popular contestation. In fact, both state and EU courts and political organs have been remarkably unified in the prolonged and evolving pursuit of an entrenched economic vision⁸³². Together, they have iteratively built a system of surveillance, technocratic supervision and legal and financial sanctions which has gradually placed the economic structure beyond the bounds of effective institutional contestation. Thus, Europe's remarkable ability to tolerate ad hoc and multi-polar political and legal arrangements does not extend to the economic sphere, where actors work together to limit contestation and impose finality.

⁸³⁰ See e.g. Craig, "The ECJ, National Courts".

⁸³¹ See e.g. Maduro, "Contrapuntal Law".

⁸³² See e.g. Cutler, "Common Sense".

Together, these three dimensions of European practice can be described as a limited sympoiesis⁸³³. Politically and legally, Europe defies traditional notions of sovereignty. Power is typically neither total nor exclusive. Instead, the EU has gradually developed practices for ongoing compromise between unequal actors and divergent beliefs. Through interpenetrating institutions and conditional authority claims, legal and political actors are able to coordinate and contest their relations without the exclusive, total power of a sovereign. The system is, in effect, an ongoing co-creation. Just like natural ecosystems, each component part shapes the others and is shaped by them in complex, dynamic, and asymmetrical ways.

However, the act of co-creation is limited to a small group of institutions – namely courts and governments. Each of these participating units continues to model its internal relations, based on the ideal of sovereign unilateralism. As a result, power-sharing between institutions occurs in the absence of power-sharing within them. Moreover, the pluralism and ad hocery displayed at the political and legal levels fails to extend to economic production. Thus, Europe models many forms of co-decision and conditional authority that challenge notions of sovereignty, yet preserves forms of hierarchy and closure that evoke a sovereign framework. European pluralism is in some ways quite sophisticated, but in other ways problematically limited in scale and scope.

1.2 - An Overview of the First Nations/Settler Relationship

The relationship between First Nations and Settler Canadian legalities features a set of practices which are in some ways quite similar, and in other ways quite distinct. While it, too, is marked by ongoing contestation birthing interpenetrating institutions and conditional forms of authority,

⁸³³ For discussion see Dempster, “Sympoietic and Autopoietic Systems”.

these practices have declined, rather than accelerated, over time. Initially, pluralist practice on Turtle Island was quite sophisticated in the political, legal, and economic realms. Over time, however, a series of military, commercial and demographic developments decreased mutual need between First Nations and Settlers. At the same time, Settler conceptions of authority became more total and exclusive. As a result, Settlers have sought to absorb First Nations structures into their own, thereby attempting to transform a landscape of plurality and multilateralism to one of hierarchy and constrained unilateralism. First Nations have resisted these shifts and have, to some degree, preserved space for multilateral engagement even in a context of profound power asymmetry.

In the political sphere, for example, treaties were initially a commitment to continuing, ad hoc multilateralism, built on forms of co-decision and conditional authority between independent authorities. This system allowed actors to coordinate and contest their relationships over time without recourse to an ultimate authority. As imperial competition on the continent ended and demographic balances shifted, however, Settlers worked to gradually incorporate these structures into their own institutions, re-expressing First Nations as a sub-component of the Settler state, rather than an independent and external source of authority. In so doing, Settler authorities are seeking to limit the ways in which First Nations can contest the terms of the relationship. Most First Nations have consistently defended a view of treaty as ongoing multilateralism, and their resistance has preserved pockets of co-decision and conditional authority which continually trouble Settler claims. The overall pattern is one of an attempted – but critically incomplete – process of absorption, as the Settler political order works to gradually subsume First Nations political authority into itself, and as First Nations contest, refuse, and escape this absorption.

The legal sphere displays a similar logic. Settlers initially treated First Nations legalities as roughly equal interlocutors, engaged in hybrid legal structures and negotiated jurisdictional arrangements which allowed all parties to contest and adjust their relations over time. Bit by bit, however, Settler thought slid from a view of First Nations as foreign entities, to autonomous but subordinate components of Settler empires, to subjects of the local colonial legality, to subjects whose law finds expression in domestic constitutional rights⁸³⁴. With each step, Settlers moved the system away from multilateral contestation and towards unilateralism⁸³⁵. Now, First Nations law is recognized mainly as a series of self-imposed limits contained within the Settler legality. In this way, Settler legalities have moved to incrementally absorb First Nations law into their own legal structures and deny it an independent legal existence. First Nations have, through a variety of strategies, forced a continued degree of multilateralism, but against interlocutors who increasingly understood their own power as total and exclusive.

The economic sphere is not an exception to this pattern. Economic relations between First Nations and Settlers were initially characterized by a sort of mutual incorporation, as each system incorporated inputs from the other into its own economic organization. This period was characterized by a high degree of plurality, autonomy, and mutual (if asymmetrical) benefit. As the basis of economic production shifted away from the fur trade and towards agricultural goods, however, Settlers increasingly began absorbing land, resources and labour into the emerging capitalist system⁸³⁶. As the Settler economic form grew, it also drastically undercut the

⁸³⁴ See e.g. Walters, *Continuity of Aboriginal Customs*.

⁸³⁵ As noted, the current discourse of aboriginal rights fetters government discretion and to that degree lessens unilateralism compared to the preceding period. However, these rights are interpreted and enforced by Settler courts against Settler governments. In this sense, the multilateralism they produce is internal to the Settler system, and the limits they impose can be understood as auto-limitations internal to Settler law. First Nations institutions do not participate in setting or policing those limits except insofar as they appear as plaintiffs or interveners before Settler courts. Aboriginal rights are not therefore an example of multilateral cooperation between Settler and First Nations systems.

⁸³⁶ See e.g. Coulthard, *Red Skin* especially at 13.

productive capacity of First Nations economies, forcing greater and greater First Nations participation in the Settler economy. This power imbalance undercut First Nations ability to contest the terms of economic practice. Now, the capitalist system presents itself as the only viable option, and discourse focuses on ensuring First Nations can participate fairly in it. Thus, perhaps more than any other field, the economic field can be understood as the gradual absorption and displacement of First Nations systems by their Settler counterparts. Today, most First Nations participate in the capitalist economy in some way. However, there are also structural differences in First Nations participation which suggest ongoing efforts to maintain a parallel, non-capitalist economy, supplemented as needed from the capital-market rather than being absorbed into it⁸³⁷. Here too, contestation has preserved some limited forms of co-decision and conditional authority as constraints on Settler unilateralism.

In all three spheres then, we see an initial state of mutual need and multilateralism, where various actors coordinated and contested their competing authority claims through practices of co-decision and conditional authority. Over time, however, the balance of power has shifted in favour of Settlers, and they have used that power to pursue less contestable, more unilateral relations. Indeed, Settlers have sought to deny the very independent existence of First Nations legal, political, and economic systems, by absorbing them into their own overarching structures and subjecting them to their authority. As a result, state-pluralism has become deeply asymmetrical. First Nations, however, have both made use of opportunities within the Settler system, and also persisted in enacting sources of legal, political and economic organization independent of the Settler system. In both settings, First Nations consistently center a vision of multilateralism between systems, fighting to preserve forms of co-decision and conditional

⁸³⁷ See e.g. Lutz on the “moditional” economy. Lutz, *Makuk* at 23.

authority. Overall, we might characterize the relationship between First Nations and Settler systems as a contested symbiosis – a deep interaction between two asymmetrically arranged but interdependent actors, where the larger attempts to absorb the smaller, which in turn resists its own digestion and seeks spaces of autonomy within a hostile but shared environment⁸³⁸.

2. Comparison – Apples to Apples after All?

Comparing these two settings is inherently challenging. Indeed, I deliberately chose an apples-to-oranges comparison, placing a deeply colonial, coercive, and profoundly inter-cultural relationship between state and so-called sub-state or non-state actors, alongside a non-colonial, nominally consensual, and intra-cultural relationship involving state and supra-state actors. Settler-First Nations relations began from a place of non-state, largely non-capitalist-market pluralism and progressed gradually towards these institutional forms. Conversely, European pluralism began from a place of sovereign states and capitalist-markets, and has progressed gradually and unevenly towards different institutional arrangements. In other words, these two cases were chosen so as to be as different as possible.

It is all the more instructive, then, that there are startling similarities between the two cases. In both settings, the sites and periods which most closely resemble sovereign unilateralism are those where trans-systemic relations are the most strained, the most violent, and the most oppressive. Similarly, in both settings, where multiple sites of authority coexist, society has not descended into destructive competition or chaos. Instead, actors have developed remarkably similar practices of interpenetration and mutual conditionality which allow them to navigate their

⁸³⁸ Haraway, *Staying with the Trouble* especially chapter 3; Guerrero, Margulis, and Berlanga, "Symbiogenesis".

pluralist environment, contesting and coordinating their respective claims without recourse to an overarching authority.

2.1 Sovereignty's Claims

When one looks for sovereignty in these cases, something surprising emerges. To put it simply, power was never as unitary, coherent and ordered as sovereignty suggests. Rather, power has always been multilateral, contested, negotiated, assented to, resisted, made partial, and subjected to spaces and categories of exception. In short, the power of “the sovereign” always works through, and in relation to, the subject. Agency is inherently distributed. Seen in this light, the so-called sovereign is just another of many actors struggling to shape their world. It is negotiation and contestation which are the bedrock of social order, and this is true whether there is an actor calling itself the sovereign or not.

Given that power is always partial, contested, and distributed, a charitable reconstruction of the sovereignty myth might look something like this: Although multilateralism is inescapable, order is most secure where multilateralism most closely resembles unilateralism. This version of sovereignty rephrases sovereignty as an aspirational ideal, rather than a descriptive reality. According to this ideal, order should function best where it most approximates sovereignty; in other words, where power is exclusive and total. Recall sovereignty's justification – that, absent a sovereign, competition between authority sites would create violence, chaos, and oppression. If this claim is true, the periods and sites which most approximate sovereignty should be the least violent and oppressive, while the periods and sites most marked by pluralism should be chaotic, competitive, and oppressive.

Interestingly, my two cases suggest just the opposite. On Turtle Island, the earliest stages of encounter – where no actor enjoyed total or exclusive authority – are generally seen as the golden age of Settler-First Nations relations. As Settler institutions began to impose more exclusive and total conceptions of power onto the relationship, relations became unconscionably oppressive. Indeed, the zenith of the sovereign state in the early and mid 20th century is probably the darkest period of the colonial encounter. More recently, legal and political advocacy produced some limits on settler unilateralism, and First Nations are – to that limited degree – seeing improvements to their conditions.

In Europe, too, those areas where power is least total and exclusive experience less violent contestation. The relationship between constitutional courts, for example, works precisely because every actor enjoys the power to meaningfully contest the overall relationship, and thus every actor has an incentive to accommodate the others. Power is neither total nor exclusive, yet compromise rather than chaos prevails. The relationship between the EU's political organs and those of its member-states is similar – important decisions require the participation of multiple actors, each with their own understanding of the relationship. None exercise total or exclusive power. This puts each actor in a position of need, and this facilitates iterative compromise over time. Indeed, as Europe has moved away from a sovereign-state model and towards limited forms of pluralism, the ceaseless war, internal oppression, and competitive economic relations that have defined the history of European states have faded into the background. Erstwhile enemies now cooperate closely, and the prospect of war between EU countries is all but unthinkable.

Thus, in both cases, sovereignty fails to deliver on its claims. The times and places that most approximate sovereignty have been the most violent, the most oppressive, and the most

competitive, while those periods that most closely approach pluralism have seen the development of cooperative institutions which actually appear to decrease the presence of coercion in public life. Sovereignty, then, is not only a poor description of how the world *does* work, but also a poor ideal for how it *should* work.

2.2 Practices of Pluralism

In both contexts then, the practice of sovereignty has failed to deliver on its promise to minimize violence and oppression. Likewise, where multiple sites of authority coexist, we have not seen an outbreak of competitive violence. Rather, we see two very similar sets of practices emerging – interpenetrating authority structures, and mutually conditional authority claims. Together, these practices help actors to navigate their interactions, contesting and coordinating their respective claims over time without recourse to an overarching sovereign.

2.2.1 Interpenetration

One prominent practice of pluralist practice has been the development of shared institutions which complement, rather than replace the institutions of each participant. These shared institutions do not create a new governing entity to replace their constituent parts, but rather serve to connect two partners each of whom retains the capacity for autonomous thought and action. By sharing institutional space in limited ways, actors create a system of semi-distinct social units which interpenetrate one another in complex and often asymmetrical blends of mutual autonomy and mutual influence. Both in Europe and on Turtle Island, this practice has helped actors to coordinate and contest their claims over time without recourse to a total and exclusive authority.

The state of deep, ad hoc multilateralism which White famously called the ‘Middle Ground’ example, was one of interpenetration between Settler and First Nations political, legal and economic systems. Settler leaders were given names and titles that placed them within local kin structures, Settler nations were brought into treaty alliances and confederacies, and a new class of imperial officials arose which White actually terms “French (and later English) chiefs” because they wielded authority not only within the imperial system, but also within the kin system⁸³⁹. Similarly, First Nations leaders were offered uniforms and medals – the hallmarks of authority within the settler system⁸⁴⁰ – and were drawn into European diplomacy. Settlers and Indigenous peoples also developed shared institutions like joint treaty councils, where officials drawn from both systems would participate in joint decision-making processes. Over time, these shared processes generated thin intercommunal norms of their own which stood alongside, rather than replacing, the distinct normative structures of the parties⁸⁴¹. First Nations and Settlers thus participated in one another’s political structures, and also developed shared structures. These forms of interpenetration did not replace, but rather complemented, their respective political institutions. Each party was autonomous and retained the capacity for independent thought and action; yet each also influenced the other, constraining and enabling particular courses of autonomous action for their partners.

Similarly, legal practice was often hybrid, with chiefs serving as juries, English trials ending in an exchange of gifts, or Settler and First Nations leaders meeting together in council to render a verdict⁸⁴². In the economic sphere, too, Settlers participated in the local gift economy alongside their own markets, and First Nations participated in the market alongside their own

⁸³⁹ White, *Middle Ground* at 38-39.

⁸⁴⁰ White, *Middle Ground* at 179.

⁸⁴¹ See e.g. Webber, “Relations of Force” at 650-651.

⁸⁴² See e.g. Grabowski, “French Criminal Justice”; Hermes, ““Justice Will Be Done Us””.

forms of production and consumption⁸⁴³. Settler and First Nations legal and economic systems therefore interpenetrated – each retained a distinct logic and an independent claim to authority, but this authority was not understood as exclusive. Just the opposite, authority was understood to operate in a context of plurality, where multiple actors had to participate in multiple structures over time.

Contemporary visions of Settler-First Nations relations are remarkably similar in this regard. Henderson's "treaty federalism", for example, envisions an interpenetration of Canadian and First Nations political institutions, with nations acting as constitutional units within a federation⁸⁴⁴ with guaranteed legislative representation, judicial representation, and a seat at the constitutional negotiating table⁸⁴⁵. Henderson is clear, however, that First Nations' authority is not derivative of the Settler constitutional structure, and that First Nations political agency is not exhausted by participation in Settler institutions⁸⁴⁶. Rather, Henderson argues that initial treaties created areas of shared responsibility while also reserving some areas to each community⁸⁴⁷. First Nations therefore appear as independent polities, with their own legitimacy claims and their own internal decision-making processes beyond the Settler frame, while at the same time participating in limited shared institutions. In this sense, treaty federalism is not necessarily neatly reducible to traditional federalism. While both feature multiple independent authorities, traditional federalism focuses more on dividing powers into compartments each of which acts unilaterally in its own sphere, rather than focusing on the establishment of formal co-decision structures between various levels of government (treaty). Thus we might say that Treaty

⁸⁴³ Lutz, *Makuk* especially at 23.

⁸⁴⁴ "While Aboriginal self-government is a practical necessity for reserves, this ideal can reinforce the political segregation. The dominant issue now is how to create a true federalism" Henderson, "Treaty Federalism" at 323.

⁸⁴⁵ Henderson, "Treaty Federalism" especially at 258, 327.

⁸⁴⁶ Henderson, "Treaty Federalism" especially at 310.

⁸⁴⁷ Henderson, "Treaty Federalism" especially at 266.

Federalism combines the aspect of mutual autonomy so central to federalism, and the aspect of interpenetration so central to treaty⁸⁴⁸. In this way, Treaty Federalism constitutes a more pronounced challenge to the total and exclusive nature of authority.

Consider how the practice of interpenetration is manifested in the multitude of governance strategies pursued by the Haida, for example. The Haida Nation considers its traditional governance structures authoritative on Haida Gwaii⁸⁴⁹. As such, the Haida have repeatedly taken direct action to implement Haida law in contravention of Canadian law⁸⁵⁰. At the same time, the Haida have sought redress in Canadian courts⁸⁵¹ and delivered programs through the Federal government's band council system. Thus, the Haida operate both within and beyond the colonial system, participating in ways that do not exhaust their independent authority claims. Indeed, the ground-breaking Kunst'aa Guu – Kunst'aayah Reconciliation Protocol explicitly recognizes that the Haida and the Crown hold different views of legitimate authority on Haida Gwaii.⁸⁵² Nevertheless, the Protocol establishes co-management structures which draw on both Haida and Settler political traditions⁸⁵³. Thus, Haida Gwaii models a form of political relation in which neither party relinquishes its capacity for independent action or its claim to independent legitimacy, but both also participate in shared institutions that draw on both traditions.

⁸⁴⁸ Asch, for example, likens Treaty Federalism to consociationalism at 6-9 and to Indigenous forms of “linking-arms” at 9-12. Asch, “UNDRIP, Treaty Federalism”.

⁸⁴⁹ See Haida Nation and British Columbia, “Kunst'aa Guu – Kunst'aayah Reconciliation Protocol,” especially the Haida portion of the preamble.

⁸⁵⁰ For discussion see Borrows, *Freedom and Indigenous Constitutionalism* at 55-61.

⁸⁵¹ See e.g. *Haida*.

⁸⁵² See Haida Nation and British Columbia, “Kunst'aa Guu – Kunst'aayah Reconciliation Protocol,” especially the preamble.

⁸⁵³ Webber, *Constitution of Canada* at 263.

Co-management practices like those contained in the Kunst'aa Guu – Kunst'aayah Reconciliation Protocol are becoming more common⁸⁵⁴. However, co-management occurs within the confines of the Settler constitution, with interpretation and enforcement done unilaterally by Settler courts⁸⁵⁵. Most co-management structures are also advisory in nature, leaving ultimate authority with the relevant Settler cabinet minister⁸⁵⁶, and governments often undermine or ignore them when political pressure is not sustained⁸⁵⁷. Even when they function well, co-management structures tend to be established only when they can facilitate Settler goals⁸⁵⁸. In all these ways, co-management structures can sometimes be a technology of rule whereby Indigenous peoples are offered a voice in exchange for affirming their subordinate position⁸⁵⁹.

Nevertheless, co-management and other forms of interpenetrating institutions have become important practices in the relationship between First Nations and Settlers on Turtle Island, sometimes working to reinforce hierarchy, sometimes working to create mutually acceptable outcomes, but always eschewing an exclusive conception of authority to move towards various forms of interpenetration between distinct, non-derivative authority sites.

The similarities to Europe in this regard are striking. The EU's institutional structure involves inter-governmental institutions, like the European Council and Council of Ministers, which rely on state-based legitimacy claims⁸⁶⁰. Their members are drawn from national governments and continue to play roles in domestic government. Thus, national institutions participate directly in EU decision making while maintaining their own autonomous spheres of

⁸⁵⁴ Murphy, *State of the Federation* at 137.

⁸⁵⁵ Ryan Bowie, "Indigenous Self-Governance and the Deployment of Knowledge in Collaborative Environmental Management in Canada," *Journal of Canadian Studies* 47, no.1 (2013) at 95.

⁸⁵⁶ Murphy, *State of the Federation* at 135.

⁸⁵⁷ Murphy, *State of the Federation* at 137.

⁸⁵⁸ Smith, "Natural Resource Co-Management" at 95.

⁸⁵⁹ Coulthard, *Red Skin* especially Chapter 1.

⁸⁶⁰ Liebert, "Democracy beyond the State" at 15.

action and their own authority claims. However, these inter-governmental institutions, the Councils, are balanced against supranational institutions like the Parliament, the Commission, and the Court of Justice, which rely on European legitimacy claims. Each of these also has its own forms of independent authority, its own internal deliberation practices, and its own legitimacy claims. Yet the two systems can be quite thoroughly intermixed. Members of the European Parliament are often from national parties, Commissioners are put forward by national governments, and EU referendums are often deeply tied to the popularity of national governments⁸⁶¹, thus drawing national governments into supranational institutions. Domestic courts enforce EU law and domestic governments carry out EU policies and programs, thus drawing supranational institutions into national politics. Indeed, it can be difficult to draw clear lines between them⁸⁶². In this sense, state-based institutions and European level institutions interpenetrate one another, partaking in shared decision-making practices and maintaining separate decision-making practices as well.

Importantly, this system not only tolerates, but actually relies on, multiple authority claims. As we have seen, Lord and Magnette argue that the EU relies on multiple different sources of legitimacy, including national, supranational, local, and technocratic vectors⁸⁶³. In order to function, the EU must draw on multiple institutions capable of leveraging multiple political ideologies. The EU's political organs are designed to operationalize multiple sources of legitimacy in concert – the blessing of the European Council and Council of Ministers lends the legitimacy of the member-states; the blessing of the Commission adds a technocratic form of

⁸⁶¹ For the canonical account of this argument see Karlheinz Reif and Hermann Schmitt, "Nine Second-Order National Elections - a Conceptual Framework for the Analysis of European Election Results," *European Journal of Political Research* 8, no.1 (1980).

⁸⁶² Liebert, "Democracy beyond the State" at 15.

⁸⁶³ Lord and Magnette, "E Pluribus Unum?" especially at 182.

legitimacy; and the Parliament contributes a form of legitimacy based in the people of Europe as a de-nationalized public. “These, in turn, support [overall] political systems that are not configured for the articulation of any one view of legitimacy but for the mediation of relationships between several”⁸⁶⁴. In this way, the EU is built around a foundational duality of political legitimacy claims⁸⁶⁵.

Similarly, EU law is based in part on the constitutional traditions of the member-states, and member-state law is based in part on commitments made to the Union. It can be difficult, and fruitless, to try to tell exactly where one ends and the other begins. In the economic sphere, monetary policy rests with the ECB – in cooperation with a board of national central bankers. Trade policy is conducted by the Union but ratified by the nations and, in some cases, regions. Social policy is set by the nation but impacted dramatically by the common market and the case law of the ECJ. In all three spheres, we see a deep interpenetration between European and national institutions, such that the authority of each actor exists only in relation to the others. Rather than a system based on exclusive authority claims, this is a system based on mutual influence. It is a system that rejects both the watertight compartments of traditional Westphalian states and also the homogenizing totality of a world government, seeking instead a blend of mutual autonomy and mutual influence.

Civic actors have also developed practices of interpenetration. Consider the relationship between the radically participatory, grassroots, and anti-institutional 15M movement and its electoral wing, Podemos. 15M activists govern themselves through linked public assemblies in a deliberate rejection of representative structures⁸⁶⁶. Popular slogans reject the very principle of

⁸⁶⁴ Lord and Magnette, “E Pluribus Unum?” especially at 184.

⁸⁶⁵ Nicolaïdis “Demoi-cracy” at 77. Church and Phinnemore also discuss “dual legitimacy”. Church and Phinnemore, *European Constitution* at 131.

⁸⁶⁶ Ouziel, *Vamos Lentos* at 203-210.

representative politics as fundamentally inegalitarian, hierarchical and authoritarian, taking up phrases like *no nos representan* (they cannot represent us)⁸⁶⁷, *Me gustas cuando votas, porque estás como ausente* (I like you when you vote because it is as if you were absent), and *Nuestros sueños no caben en vuestras urnas* (Our dreams do not fit in your ballot box)⁸⁶⁸. Yet 15M leaders have also founded Podemos, which runs candidates in local, regional, national and European elections. In this sense, activists are able to build alternative institutions with their own revolutionary legitimacy claims while at the same time participating in the very institutional structures they reject. They have “one foot in and one foot out” of traditional institutions⁸⁶⁹.

However, many in 15M feel that Podemos leaders make the real decisions behind closed doors in a top-down manner, and bring these decisions to local assemblies as a means of generating electoral support without genuinely listening to 15M input⁸⁷⁰. Thus, 15M activists receive a minimal voice in Podemos decisions in exchange for lending Podemos leaders the movement’s legitimacy. In this way, the relationship between 15M and Podemos becomes a new expression of the hierarchy between the people and their elected representatives. While both parties retain the capacity for independent action, joint action is structured predominantly by the needs of the powerful. Interpenetrating institutions can therefore become thinly veiled practices by which dominant partners solicit support and draw on the legitimacy claims of their partners without really sharing their decision-making power.

In both Europe and Turtle Island, then, interpenetrating institutions have been a major practice through which trans-systemic relations have been managed. Sometimes, each party participates directly in the institutions of its partner. Sometimes shared, hybrid institutions

⁸⁶⁷ Ouziel, *Vamos Lentos* at 222.

⁸⁶⁸ Ouziel, *Vamos Lentos* at 276

⁸⁶⁹ Ouziel, *Vamos Lentos* at 220.

⁸⁷⁰ See Ouziel, *Democracy Here and Now* especially Chapter 5.

develop to mediate between them, or to deal with issues of joint concern. Sometimes both these practices co-occur. Regardless, practices of interpenetration position the parties as neither totally separate nor totally unified. Both partners retain the capacity for autonomous decision making and action and both parties retain their own authority claims; yet each actor also exceeds the boundaries of its own social systems, influencing those of its partners. In return, each party accepts the influence of its partners as well. This system blends mutual autonomy and mutual influence, creating ways to coordinate social systems without combining them completely.

However, mutual influence does not always mean equal influence. Indeed, interpenetrating institutions can sometimes serve to reinforce hierarchies, by offering limited forms of participation to subaltern partners in order to shore up the legitimacy of the overall process and thereby protecting the established hierarchy from critique. In this way, interpenetrating structures can serve as a way for dominant partners to coopt competing legitimacy claims. Conversely, interpenetrating institutions can also be designed as deliberate checks on the power of dominant or potentially dominant partners. The principle of subsidiarity and the participation of national elites in EU institutions, for example, is designed in part to prevent the Union from becoming too powerful and eventually dominating the member-states. At their best, practices of interpenetration offer each party roughly equal voice. The shared treaty councils of the Middle Ground, for example, or the legislative process of the EU, seem capable of producing outcomes that satisfy multiple actors and are responsive to multiple conceptions of political order. Such practices allow participants to keep one foot rooted in their own systems, while placing one foot provisionally in the systems of its partner. This “one foot in, one foot out” strategy can be fraught with tension, but it also creates space for shared decisions that reflect the political interests, norms, and processes of both parties.

2.2.2 Conditional Authority

Alongside interpenetration of authority structures, conditional forms of authority have also emerged as an important practice of pluralism in both Europe and Turtle Island. In essence, various actors recognize one another as independent authorities, but only subject to certain conditions. This allows each actor to retain its own understanding of the relationship and its own capacity for independent action, while also giving each actor an incentive to take the understandings and actions of others into account. Because the effective authority of each actor is maintained, in part, through the support of its peers, authority is not exclusive. Because each authority is subject to (multiple) limits, authority is not total. Instead, practices of conditional authority allow actors to coordinate and contest their claims over time.

Forms of conditional authority are common in Europe. For example, the Union operates through subsidiarity – the principle that program delivery ought to occur through the smallest competent government⁸⁷¹. National and regional governments police the principle, and can request control over the execution of any program in which they feel competent. Thus, insofar as it relates to direct program delivery, the Union can make valid authority claims only where lower orders of government have abstained from competing claims. The Union's claim to authority is therefore not entirely self-generated, but rather is contingent upon the ongoing, if tacit, consent of other entities. Likewise, Eurozone states are subject to the European Stability and Growth Pact and the European Fiscal Compact, which oblige member-states to maintain budget deficits of less than 3% of GDP and overall national debt levels under 60% of GDP⁸⁷². If countries violate

⁸⁷¹ For discussion see Craig and de Burca *EU Law* at 100-105.

⁸⁷² European Commission, "The Stability and Growth Pact".

these criteria they risk substantial fines and sanctions⁸⁷³. In this sense, national spending authority is conditional upon meeting certain externally-determined macroeconomic outcomes. Where states fail to meet these conditions, their authority is to that extent called into question by other actors. Loans to indebted countries are another prominent mechanism of conditionality, as credit is typically dependent on a package of policy reforms. When the Greek economy collapsed, for example, Greek voters chose a left-wing government committed to kick-starting economic growth through government spending. The ECB, EC and IMF, however, refused to offer loans unless the government committed to lowering taxes and cutting public services⁸⁷⁴. The Greek government's continuing ability to govern is – in a very real, financial way – conditioned upon meeting certain externally-imposed policy outcomes⁸⁷⁵.

In each of these cases, then, authority is not unfettered or exclusive. Rather, authority is contingent upon the support of other actors, and this support is tied to conditions. As a result, the condition-receiver must satisfy multiple standards – their own internal standards of legitimacy, as well as those of the condition-setter⁸⁷⁶.

In perhaps the most advanced example of this practice in Europe, the European Court of Justice has moved to place conditions on national law-making by proclaiming the supremacy of EU law over conflicting national legislation⁸⁷⁷, and even over national constitutions⁸⁷⁸. As a result, national legislators are constrained to exercise their authority within the parameters of EU law. National courts, however, have contested the ECJ's claims of supremacy⁸⁷⁹. As we have seen, national courts have largely embraced what has been euphemistically referred to as the *So-*

⁸⁷³ European Commission, “Six-pack? Two-pack?”. For discussion see Streeck, “Peoples and Markets”.

⁸⁷⁴ For discussion of the Greek bailout generally see Varoufakis, *the Weak Suffer*.

⁸⁷⁵ McGiffen, “Bloodless Coup” at 41.

⁸⁷⁶ For an illuminating study of this dynamic as it relates to debt, see Lazzarato, *Indebted Man* especially at 33, 72.

⁸⁷⁷ See *Costa*.

⁸⁷⁸ *Internationale Handelsgesellschaft*.

⁸⁷⁹ For discussion see Craig “The ECJ, National Courts”; Maduro “Contrapuntal Law”.

long-as approach – so long as the EU does not systematically violate core national principles, it will be considered supreme⁸⁸⁰. In effect, the Court of Justice must comply with minimal standards set by each member-state or else risk serious challenges to its own legitimacy. The European legal environment is therefore characterized by practices of conditional authority – the authority of the ECJ is conditional on meeting the limits imposed by national courts; the authority of national laws is conditional on broad compliance with ECJ judgments and continental norms. Maduro describes the resulting system as “constitutional pluralism”, while Sabel and Gerstenberg call it “coordinate constitutionalism”. Both authors stress that each court’s legitimacy and authority relies, at least in part, on the recognition of other courts⁸⁸¹. Because each actor needs other courts to accommodate its claims, each has an incentive to accommodate the claims of others. This creates a system of autonomous but closely coordinated action, as each court manoeuvres to make claims that are true to its own internal interests and ideologies, while also acceptable to their peers⁸⁸². As a result, the system gradually generates a body of trans-national precedent which is constructed and revised multilaterally. Importantly, each actor retains the ability to contest the system unilaterally, limited only by its need for the cooperation of others.

As in Europe, forms of conditional authority are common on that part of Turtle Island sometimes called Canada. Modern treaties, for example, feature equivalence provisions, allowing First Nations to legislate freely in certain areas, but only provided that they meet or exceed federal and provincial standards⁸⁸³. Paramountcy provisions are also common – First Nations

⁸⁸⁰ For discussion see Mattias Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty,” *European Law Journal* 11, no.3 (2005).

⁸⁸¹ Maduro, “Contrapuntal Law” especially at 520-522.

⁸⁸² Sabel and Gerstenberg, *Constitutionalising an Overlapping Consensus* especially at 545, 550.

⁸⁸³ Tsawwassen First Nation, British Columbia, Canada, *Tsawwassen Final Agreement* at Chapter 1, Sections 23, 24, 25. The following references take the Tsawwassen agreement as an illustrative example. For a broader range of modern treaties see Chapter 1, Section 2.1

jurisdiction is valid, unless it conflicts with federal or provincial law⁸⁸⁴. Even in areas where First Nations jurisdiction is paramount, it must operate within the confines of the Canadian Charter⁸⁸⁵. In all these ways, the authority that modern treaties grant is often premised on certain conditions. Where those conditions are not met, Settler courts will withhold their recognition of First Nations legislation, to that degree calling their authority claim into question.

Section 35 of the Canadian constitution also creates conditional forms of authority. For example, Aboriginal rights are constitutionally protected – but only if they are not incompatible with Crown sovereignty⁸⁸⁶. Aboriginal title allows a group to “choose the uses to which land is put”⁸⁸⁷, but title land cannot be used for purposes incompatible with Settler courts’ understanding of Aboriginal connection to the land, and it cannot be alienated except to the Crown⁸⁸⁸. As a result, First Nations rights are only supported by Settler institutions when their claims meet certain conditions. The Crown is also subject to conditions under this regime – it cannot infringe on Aboriginal rights or title without passing a self-imposed justificatory test⁸⁸⁹. Thus, Settler courts act as condition-setters, while both Aboriginal and Settler governments act as condition-receivers, with their authority claims valid only where the court’s criteria have been upheld.

Funding for First Nations governments is also often subject to conditions set by the federal government⁸⁹⁰. Much like the conditional loans of the IMF and ECB, these conditional funding arrangements make *de facto* governing ability contingent upon meeting the standards of the funder. In all these cases, Settler authorities set conditions and First Nations receive them, such that conditions act as a form of neo-colonialism which allow Settler authorities to control

⁸⁸⁴ Tsawwassen First Nation, British Columbia, Canada, *Tsawwassen Final Agreement* at Chapter 1, Section 19.

⁸⁸⁵ Tsawwassen First Nation, British Columbia, Canada, *Tsawwassen Final Agreement* at Chapter 2, Section 9.

⁸⁸⁶ *Mitchell* at 33.

⁸⁸⁷ *Tsilhqot’in* at 15, 67.

⁸⁸⁸ *Tsilhqot’in* at 74.

⁸⁸⁹ *Sparrow* at 1112.

⁸⁹⁰ Neu and Therrien, *Accounting for Genocide* at 125, 133, and 140.

outcomes in First Nations communities without the political and administrative costs of governing them directly.

In an illuminating study of the northwest coast Potlatch system, Trosper observes a similarly conditional logic⁸⁹¹. However, in this case conditions are set multilaterally, such that each party is both a condition-setter and a condition-receiver. According to Trosper, Indigenous governance on the northwest coast is conducted through linked groups of Houses. Each House has its own territory, and its own title-holding leadership. Each house selects its own leadership, but leadership claims have to be validated through Potlatches. That is, in order to claim a title the contender must host a ritual feast, inviting the titleholders of neighbouring houses⁸⁹². Once assembled, these neighbouring dignitaries observe rites designed to demonstrate that the claimant is qualified and of good character. They also receive gifts, which serve both as a recognition of their title and as proof that the claimant is able to manage the claimed territory well and produce wealth from it. If they are satisfied, they affirm the claimant's title. If they refuse, new claimants may manoeuvre to hold potlatches of their own. In this sense, one's claim to authority is contingent on the support of other titleholders.

Once installed, both authority and title to land remained contingent on several duties, notably a duty to take care of the claimed land and preserve its productive capacity for future generations, and a duty to redistribute a portion of the wealth generated within the territory to other Houses⁸⁹³. Once again, these duties are monitored through regular Potlatches. Because hosting a Potlatch involves distributing significant wealth, it requires efforts on behalf of the entire House. As a result, the ability to potlatch serves as proof that the members of a house are

⁸⁹¹ Trosper, *Resilience* especially the summary at 14.

⁸⁹² Trosper, *Resilience* at 22.

⁸⁹³ Trosper, *Resilience* especially chapter 5.

satisfied and willing to contribute materially to seeing the current title-holder maintain their position⁸⁹⁴. Trosper calls this system “contingent proprietorship” because valid title claims are contingent upon meeting certain conditions. Importantly, this system is multilateral and does not depend on a hierarchy of titleholders. Rather, each titleholder both places conditions on others, and is subject to the conditions of others.

Contemporary Indigenous activism on the northwest coast has also extended this logic in interesting ways. For example, when Coastal Gas Link began construction on a pipeline on Wet’suwet’en territory in northern B.C., the Unist’ot’en House group, whose traditional territory the pipeline crosses, went to the feast hall with the hereditary chiefs of their nation and sought support to erect a healing camp in the path of the pipeline, including border checkpoints to keep pipeline workers out⁸⁹⁵. When police cleared the checkpoint, a neighbouring House went back to the feast hall and sought support to erect another on their own territory. In this way, the potlatch system Trosper describes is very much in place.

The Wet’suwet’en have also developed extensive networks of supporters, both at the healing center and in urban centers around the province, the country and the world. These groups undertake autonomous actions in support of the Wet’suwet’en. Wet’suwet’en leaders are rarely involved directly in planning solidarity actions. However, they have established broad protocols for their allies – conditions which solidarity actions must meet⁸⁹⁶. Major actions usually involve check-ins, where camp leaders can ensure that protocol is being followed. In this sense,

⁸⁹⁴ Trosper, *Resilience* at 22, 67.

⁸⁹⁵ Unist’ot’en Camp, “Timeline of the Campaign,” accessed Nov. 11, 2019 <http://unistoten.camp/timeline/timeline-of-the-campaign/>

⁸⁹⁶ See e.g. the “fundraising protocols” and “supporter protocols”, as well as the process to seek approval for proposed solidarity actions. Unist’ot’en Camp, “Protocols,” accessed Nov. 11, 2019 <http://unistoten.camp/fundraiserprotocols/>

supporters can take autonomous action in the name of the Wet'suwet'en, but only subject to certain conditions. Their advocacy is therefore conditional.

In this system, relations between Wet'suwet'en Houses are multidirectional, in that each house is both a condition-setter and a condition-receiver. Relations between the Wet'suwet'en and their urban supporters are, however, unidirectional. The Wet'suwet'en place conditions on their allies, but those allies do not place, or aspire to place, reciprocal conditions on the Wet'suwet'en. Allies accept these conditions not out of desperation or coercion, but rather as a deliberate means to upset prevailing power imbalances.

All these cases involve conditional forms of authority – forms where the authority of an actor is contingent on validation by other actors. The bearer of conditional authority must therefore satisfy multiple standards at once – their own internal standards, and those of the condition-setter(s).

Often, conditional forms of authority arise in contexts of profound power asymmetry, where dominant actors impose conditions on subaltern actors unilaterally. The IMF, for example, offers conditional loans to structurally impoverished countries who have little choice but to accept them. As a result, the IMF's conditions can selectively displace local norms. In this sense, loan conditions work as a technology of rule which allows lenders to control borrowers without taking on the administrative, political, and military costs of colonizing the borrower directly. The current Greek government, for example, exercises authority within the conditions laid down by the country's lenders. Likewise, the modern treaty process in B.C. offers First Nations forms of autonomous authority, within the parameters laid out by the federal and provincial governments. Settler governments are able to displace Indigenous standards with their own, exercising forms of indirect rule over treaty nations. In all these cases, conditionality functions as

a form of top down control. Indeed, it creates the illusion of autonomy in order to mask the reality of top-down control⁸⁹⁷. These relationships are inherently asymmetrical – the condition-setter is entirely autonomous, and also enjoys the power to impose conditions. The condition-receiver enjoys only a constrained form of autonomy, and has only a severely limited ability to influence the condition-setter.

However, conditional forms of authority can also be used to deliberately upset pronounced power imbalances. The conditional forms of advocacy common on the northwest coast, for example, allow subaltern actors to exert influence over their socially-privileged supporters. Once again, the flow of influence is unidirectional. Because it works to re-insert Indigenous political authority into a landscape otherwise defined by Settler dominance, conditional advocacy can be seen as a way to re-create plurality in a monist environment, striving towards equality through the tactical use of corrective asymmetry. Careful attention to power-dynamics is therefore key – conditional authority can both express and undermine oppressive relations, in complex and context-dependent ways.

Perhaps the most interesting forms of conditional authority are those where conditions are mutual, such that each actor is both a condition-receiver and a condition-setter at the same time. In the potlatch system, or the relationship between European courts, every actor polices the others, monitoring their outputs such that each actor is both constrained and enabled by its relationship with every other actor. As a result, each actor must meet several different standards of legitimacy simultaneously⁸⁹⁸. This system does not depend on a synchronization of traditions

⁸⁹⁷ For discussion of this neo-colonial dynamic see James Tully, "Modern Constitutional Democracy and Imperialism," *Osgoode Hall Law Journal* 46, no.3 (2008) especially at 463-464.

⁸⁹⁸ This logic is very different from a Rawlsian overlapping consensus, which requires each actor to bracket certain private commitments. Rather than excluding fundamental differences from the political, conditional authority provides a way to manage their interaction over time. Compare John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7, no.1 (1987).

into a homogenous whole that allows the powerful to dominate, nor does it depend on watertight compartments which divide traditions against one another and encourage essentialism. Instead, each actor retains the capacity for autonomous action according to its own internal processes, while also being engaged in a mutually transformative dialogue with other traditions.

2.3. Theorizing Pluralism: Contestation, Need, and Social Order

So it appears that sovereignty, for all its popular caché, does not live up to its claims in either Europe or Turtle Island. Multilateralism does not necessarily cause chaos and competition, and unilateralism does not necessarily minimize violence and coercion. Rather, multilateralism can occasion the development of interpenetrating institutions and conditional forms of authority which actually enable actors to cooperate in complex ways.

These two practices, interpenetration and conditionality, both point towards a conception of authority as a form of mutual influence, rather than a form of total, exclusive and unidirectional control. Each envisions a world with multiple, non-derivative but mutually dependent, authority claims, such that society as a whole must satisfy multiple standards simultaneously, generating multiple independent forms of legitimacy based on multiple independent sites of authority. Whereas sovereignty seeks to resolve the question of which authority claim to respect by arbitrarily elevating one above the others, the logic here suggests just the opposite: rather than choosing just one authority claim and elevating it violently above the others, we can avoid the question of which authority to elevate by simply choosing to satisfy multiple standards at once.

These observations suggest an agonist lens, focused on the generative role of political conflict, may be more appropriate to understanding trans-systemic relations in Europe, on Turtle

Island, and more generally. Briefly, agonists see differences of opinion as an inevitable and irresolvable part of human existence, such that any given political arrangement necessarily reflects the dominance of some views over others⁸⁹⁹. Agonists therefore reject a politics based on consensus as a Trojan horse for imposing the interests of the powerful. Instead, agonism suggests a politics based on ongoing contestation.

For agonists like Mouffe and Connolly, contestation allows a community to revisit and revise contentious issues over time. Conflict is, in this sense, creative and generative, allowing society to respond to shifting interests, ideologies, and relationships⁹⁰⁰. Agonists therefore see the ability to contest social norms as a key feature of a healthy regime⁹⁰¹. Compared to sovereignty, agonism provides a very different answer to the question of pluralism. Where sovereignty responds to pluralism by arbitrarily elevating one claim above the others, agonism responds by regularizing a process of constant contestation between claims, such that none is permanently elevated.

If contestation is one key to a healthy society, then the degree of contestability is one criterion by which social structures can be assessed. Indeed, Ivison argues that it is contestability that ultimately legitimizes authority⁹⁰². Liberal understandings of democracy legitimize universal meta-norms by arguing that these are grounded in consent through a social contract – but this is obviously counterfactual. We are all born into social relations we did not explicitly consent to. The key question for Ivison is how easily we are able to remake inherited social relations to suit

⁸⁹⁹ Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000) at 20-28.

⁹⁰⁰ For an excellent comparison of the two thinkers see Mark Wenman, "'Agonistic Pluralism' and Three Archetypal Forms of Politics," *Contemporary Political Theory* 2, no.2 (2003). Wenman notes both share this conception of conflict as generative at 168.

⁹⁰¹ For Weiner, the principle of contestedness is "both indicative of and required in order to establish and maintain legitimacy" Wiener, *Theory of Contestation* at 4.

⁹⁰² Duncan Ivison, "Consent or Contestation," in *Between Consenting Peoples: Political Community and the Meaning of Consent*, eds. Jeremy Webber and Colin Macleod (Vancouver: University of British Columbia Press, 2010) generally and especially at 189.

present needs, interests, and conceptions of justice⁹⁰³. Thus, it is contestation and not consent that grounds legitimacy. Institutions are oppressive to the extent that they are closed to effective contestation. For Wiener, access to contestation is therefore a key concern – the issue is not simply the degree of contestability, but its distribution between actors⁹⁰⁴. Wiener therefore argues for regularized channels of contestation designed to involve all affected as a means of generating legitimate social decisions⁹⁰⁵.

The extent and distribution of access to contestation provides a helpful criterion for assessing the practices of interpenetration and conditional authority we have observed. Where interpenetrating institutions are shaped by meta-norms and goals that are not subject to contestation, they can often be technologies of oppression. In some co-management structures on Turtle Island, for example, critics complain that the development goals of the Settler parties are not open to discussion, reducing the First Nations' role to one of merely shaping how development will occur⁹⁰⁶. Likewise, the European economy creates forms of conditional authority, but those conditions are insulated from popular control by embedded structures that prevent effective institutional contestation. In effect, the ability to contest the European economic structure is confined to a very small group of powerful technocratic actors. Practices like these constitute forms of oppression because access to contestation is so limited, and because the distribution of access to contestation is so one-sided. Conversely, Maduro suggests that the relationship between European courts has been successful precisely because the conditional forms of authority it generates can be meaningfully contested by any actor at any

⁹⁰³ Ivison, "Consent or Contestation" at 193.

⁹⁰⁴ Antje Wiener, "A Theory of Contestation - A Concise Summary of Its Argument and Concepts," *Polity* 49, no.1 (2017) at 113.

⁹⁰⁵ Wiener, "Contestation—A Concise Summary" at 117.

⁹⁰⁶ Smith, "Co-management" at 95.

time⁹⁰⁷. In these ways, an agonist focus on contestation helps us understand and assess many of the observed tendencies in the two contexts explored by this dissertation.

Canonical agonists like Mouffe and Connolly also devote a great deal of attention to cultivating the conditions under which contestation is socially productive, differentiating properly political contestation from divisive and potentially dangerous conflicts⁹⁰⁸. Crucially, participants must understand one another not as Schmittian “enemies”, but as adversaries; opponents who are nonetheless worthy of respect and care⁹⁰⁹. When political struggles display this ethical quality, conflict can be generative, positive and democratic. The ethical disposition of social actors is therefore a paramount concern for many agonists.

The cases studied here, however, do not square well with an ethics-focused conception of agonism. Indeed, the golden era of First Nations-Settler relations on Turtle Island would be difficult to characterize as based on mutual respect. Settlers, by and large, viewed themselves as superior and foresaw the eventual assimilation, subjugation, or outright extinction of their “savage” interlocutors. For most colonial officials, the Middle Ground was never an ideal situation – it was a temporary accommodation on the road to eventual Settler dominance. While First Nations were often treated with respect, this respect appears to my eye to have little to do with an ethical appreciation of the other. Rather, Settler authorities engaged in multilateralism

⁹⁰⁷ Maduro “Contrapuntal Law” at 524-525.

⁹⁰⁸ Connolly rejects entrenched limits on contestation. William Connolly, *Why I am not a Secularist* (Minneapolis: University of Minnesota Press, 1999) at 92. Instead, he centers ‘agonistic respect’ and a ‘generous ethos of engagement’ as the keys to ensuring political conflict is productive and not destructive. See e.g. William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995) at xx; William Connolly, “Beyond Good and Evil: The Ethical Sensibility of Michel Foucault,” *Political Theory* 21 no.3 (1993) at 368, 381. Likewise, Mouffe distinguishes between agonism and antagonism, arguing that the state must transform antagonism in productive political debate by fostering ethical respect between participants. See e.g. Chantal Mouffe, *The Return of the Political* (London: Verso, 1993) at 2-3. Mouffe argues that citizens are ‘friendly enemies’ Mouffe, *Democratic Paradox* at 13.

⁹⁰⁹ “Envisaged from the point of view of “agonistic pluralism”, the aim of democratic politics is to construct the “them” in such a way that it is no longer perceived as an enemy to be destroyed, but an “adversary”, i.e. somebody whose ideas we combat but whose right to defend those ideas we do not put into question” Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” *Social Research* 66, no.3 (1999) at 760.

because they had to. Economically, militarily, politically, and legally, Settlers *needed* their First Nations interlocutors. It was need, rather than an ethic of mutual respect, which drove pluralism.

Likewise, when the EU first began to take hold of the European imagination and political landscape, the countries involved harboured deep, centuries-old antagonisms towards one another. To say that the EU was possible because the Germans and the French had come to respect each other as adversaries rather than enemies, is in my mind, too simple. Rather, erstwhile enemies – their economies ravaged, their citizens hungry for durable peace, their eastern borders menaced by the Red Army, and their collective influence eclipsed by the US – found themselves in a context of *mutual need*. It was the promise of security, global influence, and prosperity that pulled European countries together, not an abiding mutual respect or a sudden disappearance of age-old antagonisms. If the EU today is characterized by an agonist respect between the participants, I submit that this has been a result of, rather than a precondition for, the integration process.

All of this tentatively suggests that agonist *behaviour* is not necessarily so dependent on an agonist *ethic*. If anything, the ethic seems to flow from the behaviour, rather than the other way around. Indeed, Webber argues that pragmatic concerns often lead parties to accommodate one another, and that the resulting institutions and shared expectations can gradually develop normative force after the fact⁹¹⁰. What was once a mere matter of prudence, over time becomes a matter of principle, as both sides attach normative value to regularized patterns of interaction. Gradually, a shared normative grammar emerges, but this is as often as not a result, rather than a precondition, of community⁹¹¹. Webber's analysis suggests that the conditions which allow

⁹¹⁰ See Webber, "Relations of Force"; Jeremy Webber, "A Two-Level Justification of Religious Toleration," *Journal of Indian Law and Society* 4, no.2 (2014) especially at 11, 13.

⁹¹¹ As Shinko puts it, "democratic agonists paradoxically presume the existence of that which can only emerge from within the terms of the agonistic encounter. In an agonistic political encounter, respect and recognition are not the

contestation to be generative, rather than destructive, have less to do with the ethical dispossession of the participants, and more to do with the presence of pragmatic reasons for mutual accommodation. In other words, agonist behaviour seems to spring, at least in part, from a context of *mutual need*. Just as action so often precedes thought, so need often precedes respect.

The founders of the EU seemed to understand this point. They worked to erect a machinery of shared governance and a context of economic interdependence gradually and largely behind the scenes, precisely because they worried that the public at large did not share an agonist ethic and would not consent to such cooperation if it was presented all at once. Rather, they preferred a piecemeal approach, believing that the gradual accumulation of shared institutions and shared interests would gradually generate the necessary ethical commitments and group identities. White's influential account of the Middle Ground on Turtle Island also provides support. Throughout, White emphasizes that the Middle Ground depends on a suitable "infrastructure", a dense network of lived connections, mutual endeavours, and mutual need⁹¹². When new governors arrived from France, they typically brought continental arrogance with them, and began their tenures by attempting unilateralism. Over time, each successive governor came to an awareness of mutual need and, with it, came to accept multilateral negotiations⁹¹³. Agonist behaviour, in other words, often appears to flow from mutual need and shared endeavours, producing rather than resulting from agonist ethics.

terms that precede the struggle as a precondition of its emergence, but are rather the hard-won fruits of a struggle". Rosemary Shinko, "Agonistic Peace: A Postmodern Reading," *Millennium: Journal of International Studies* 36, no.3 (2008) at 480.

⁹¹² White, *Middle Ground* at 34-35, 248.

⁹¹³ For discussion see Webber, "Relations of Force" at 638-641.

Just as institutional structures create and distribute access to contestation, they also create and distribute need. This suggests that the distribution of need between actors is another key criterion that can be used to assess interpenetrating institutions and conditional forms of authority. For example, Canadian law requires that Settler governments consult First Nations regarding development projects on their lands, but does not generally require that they actually obtain First Nations consent⁹¹⁴. This purely consultative approach works to limit the extent to which Settler governments are in need of their First Nations partners. At the end of the day, Settler needs can often be met even over First Nations objections. First Nations have long argued for a veto over development projects on their lands. This would place First Nations, corporations, and Settler governments in a context of greater mutual need. If the patterns observed in this dissertation are any guide, we might expect such mutual need to give rise to shared institutions and practices of mutual influence. In other words, it would enable order. Just as importantly, it would provide a way past the all-or-nothing contests that currently characterize resource development; and it would do so in a manner that does not require the parties to come to the table as friends, but rather provides them with the means to build friendships over time. This example shows how legal, political, and economic structures work to distribute need within our society, and how the distribution of need is one key criterion that can be used to differentiate forms of conditionality and interpenetration that are oppressive from forms which are genuinely multilateral.

⁹¹⁴ In those rare cases where Aboriginal Title has been declared by the courts, and where the proposed project's impact on that title is severe, consent may indeed be required. Even then, however, governments can override First Nations' objections subject to a justificatory test. See *Tsilhqot'in*. To the degree that this justificatory test puts Settler governments in need, they are not in need of their First Nations partners; they are in need of the approval of their own judges.

The growing, but still inadequate, role of the European Parliament can be understood in a similar manner. Initially, the Parliament was a merely advisory body with little formal or public clout. The Council and Commission did not need the Parliament, and so its influence was minimal. Over time, successive treaty reforms have empowered the Parliament, and the growing visibility of the EU has give parliamentarians greater public influence. To this degree, Parliament is becoming a more central player in European politics. In essence, the Treaties work to distribute need between the various institutions. To the degree that need exists, agonist behaviour ensues. Once again, the distribution of need between actors provides a valuable way to assess how multilateral their relationship really is.

The cases studied here therefore suggest an agonist understanding of politics which centers the generative role of contestation, but one which also centers mutual need. In particular, this analysis suggests that where institutional arrangements can be used to foster mutual need and widespread contestability, this will allow actors to develop practices of interpenetration and mutual conditionality which are minimally oppressive.

3. Towards a Post-Sovereign Pluralism

The preceding sections suggest that sovereignty is a poor response to the presence of multiple authority sites. Sovereignty embraces arbitrary, order-maintaining violence and oppression in the name of avoiding destabilizing conflicts. In the absence of sovereignty, however, the cases studied here have not shown patterns of destabilizing conflict. Instead, they have shown the development of interpenetrating institutions and practices of mutual conditionality which allow actors to navigate one another's claims cooperatively. Upon analysis, such practices are rooted in mutual need and shared endeavours. This suggests that, where multiple authority sites coexist,

the cultivation of mutual need ought to be of primary concern. This focus is, however, at odds with the dominant institutional containers in which trans-systemic relations are conceptualized today – the state and the capitalist-market. I therefore suggest turning scholarly attention away from forms of pluralism that are grounded in the state and capitalist-market, and towards forms of pluralism which are grounded in institutional settings that do not presuppose a sovereign frame.

3.1 The State and Capitalist-Market are not Helpful Models

The sovereign state aspires not to mutual need, but to unilateralism. It envisions not contestation, but obedience. Indeed, a sovereign's power is, by definition, exclusive. If a sovereign were in need of another, this other would have power and the sovereign would, to that extent, no longer be sovereign at all. More than this, because the presence of need would signal multiple authorities, it would raise the spectre of competing authorities, threatening the violence and chaos of conflicting claims. Under the schema of sovereignty, reliance on others is presented as a threat to social order – it compromises the ability of the sovereign to maintain peace and order by preventing contestation. Sovereignty is therefore fearful of need and contestation – both threaten the very sort of multilateral chaos that sovereignty was designed to escape.

The capitalist-market is based on a similar logic. Just as there is one sovereign per polity, there is one owner per property. The mutually exclusive nature of property claims supposedly works to prevent economic conflict, in the same way that the presence of a single ruler on a given territory supposedly prevents political conflict – by preventing competing claims to the same things. Just as states are conceptualized as atomistic, self-interested, and competitive, so

too are individuals in a capitalist-market setting. In this way, *dominion* and *imperium* are conceptually related.

Imperium and *dominion* are also materially related – people need access to things in order to survive, such that the ability to exclude others from resources gives rise to the ability to compel behaviour⁹¹⁵. In this sense, authority over property is also a form of authority over people. Indeed, forms of private authority and forms of public authority tend to co-evolve⁹¹⁶. For example, Mattei and Capra argue that the contest between public and private ownership in contemporary society actually works to shore up a shared logic of exclusive control, precluding layered ownership claims by reducing ownership questions to a choice between two forms of exclusive, top-down control⁹¹⁷. The logic of the state and of the capitalist-market are not therefore neatly separable – they support and constitute one another in important ways.

Together then, the state and the capitalist-market work as a conceptual and institutional pair. The logic that this pair co-expresses is fundamentally fearful of the mutual need and contestation that have characterized pluralist practice in the cases this thesis examines. The conceptual framework that the state and capitalist-market provide therefore leads us away from the conditions under which interpenetrating institutions and mutual conditions can produce genuine multilateralism.

Moreover, when agonism does occur in the institutional containers of the state and capitalist-market, it takes on a particular character. Since power is all-or-nothing (either one is a sovereign or one is a subject), agonist contestation becomes an all-or-nothing contest where all

⁹¹⁵ Cohen, “*Property and Sovereignty*,” at 13.

⁹¹⁶ For discussion see Hugh Ward, “The Co-evolution of Regimes of Accumulation and Patterns of Rule: State Autonomy and the Possibility of Functional Responses to Crisis,” *New Political Economy* 8, no.2 (2003).

⁹¹⁷ Mattei and Capra, *Ecology of Law* at 96.

participants compete for the ability to dictate to the others unilaterally⁹¹⁸. Conflict can perhaps play a generative role, but it can scarcely generate an agonist ethic because it fails to generate the forms of mutual need and interdependence which have been shown to be so crucial. Instead, the capitalist-market is a product of the unbridled, individualist competition of owners, each striving exclusively for their own good. The modern electoral system too, is based on the unbridled pursuit of individual self-interest. Conflict produces motivation, perhaps, but it does not incentivize cooperation. Neither does it seem to create an agonist ethic, as the state of public debate in contemporary democracies around the world will surely attest. Rather, conflict generates only cycles of further conflict and counter-conflict, as each seeks to impose their will temporarily on others rather than reach durable compromises over time⁹¹⁹. We suffer through having others dictate to us because we aspire to one day dictate to them. With the prospect of total power on the table, there is little incentive to accept shared power. In this way, the capitalist-market and state prefigure a society where power – political, legal and economic – is both exclusive and total, and where progress depends on self-interested competition. Since control is always unilateral, competition is decidedly winner-takes-all. As a result, everyone plans for the day when they will be freed of mutual need.

Such a society also creates a cultural apparatus which mirrors its political, legal and economic structures – an agon culture in which the individual is conceptualized as a mini-sovereign, and social relations are cast as exclusively competitive⁹²⁰. Here, the individual is autonomous, sovereign over their self, making their own decisions in accordance with their own inner voice. Individual growth and development is likewise conceived of as the result of self-

⁹¹⁸ Claudio Colaguori, *Agon Culture: Competition, Conflict and the Problem of Domination* (Whitby: de Sitter, 2012) especially at 35. For complementary discussion see Gregg, *Nonviolence* generally but especially at xxxiv.

⁹¹⁹ See Gregg, *Power of Nonviolence* generally and especially at xxxviii-xxxix, lii, liv, 117.

⁹²⁰ Colaguori, *Agon Culture* especially at vv, xi, xiii, 6, 35, 38, 69.

interested competition. There is no room in this schema for interdependence. Thus, the state and capitalist-market are not only conceptually opposed to mutual need, they actively work to cultivate dispositions, habits, and incentive structures that militate against mutual need.

In both these ways, the capitalist-market and the state each participate in a conceptual schema which minimizes the need for interdependence, erecting in its place a competition for exclusive powers. This is significant, because contemporary pluralism takes the state and the capitalist-market almost entirely for granted. When we speak about pluralism, we speak about the relationship between a state and a group within it. We ask whether the group warrants its own state, and if not, how its concerns can be accommodated within the existing state. Intuitively, our eyes turn to federal structures, and groups claiming accommodation are offered provincial or municipal-style autonomy in ways that divide sovereignty, but do not cultivate mutual need⁹²¹. In the alternative, we offer to make the institutions of the state more diverse and plural, incorporating special group representation in the legislature, or bringing local law into state courts. In either case, we remain “captives of sovereignty” – continually thinking about our political possibilities through the form of the state⁹²².

The capitalist-market is even more naturalized⁹²³ – so much so that it rarely enters our discussions at all. Typically, we speak of pluralism in terms of political or legal authority, and ignore economic practices altogether. Sometimes, we speak of redistribution as a prerequisite for true political control⁹²⁴. Yet such redistribution takes place implicitly within a persisting

⁹²¹ See *Supra* note 18

⁹²² Havercroft, *Captives of Sovereignty* especially Chapter 1.

⁹²³ For a discussion of “capitalcentric” thinking see J.K. Gibson-Graham, Jenny Cameron and Stephen Healy, “Commoning as a Postcapitalist Politics” in *Releasing the Commons: Rethinking the Futures of the Commons*, eds. Ash Amin and Philip Howell (London: Routledge 2016).

⁹²⁴ See e.g. Axel Honneth and Nancy Fraser, *Redistribution or Recognition?* (London: Verso, 2003), especially Honneth’s contributions.

capitalist-market economy⁹²⁵. When we transfer land we transfer it as a commodity. When we reallocate resources we reallocate dollars. Often, political pluralism works as a way to secure the capitalist-market. This is certainly the case with the EU or the modern treaty process on Turtle Island. Likewise, material benefits to marginalized groups are typically conceptualized as facilitating robust market participation, or as more equitably dividing the capitalist-market's fruits.

Thus, both the state and the capitalist-market constitute the backdrop against which we think about pluralism. They provide the institutional forms through which we conceptualize social organization. Yet, as we have seen, the state and the capitalist-market both revolve, conceptually, around a sovereign ideal. As a result, both draw us away from the practices, dispositions, and institutions which appear most conducive to pluralism.

3.2 A Research Agenda

Even in an “apples to oranges” comparison, then, some clear lessons emerge. In pluralist contexts, actors tend to develop practices that involve interpenetrating institutions and conditional forms of authority. These practices can be either oppressive or liberatory, depending on the distribution of access to contestation and mutual need. The state and the capitalist-market, however, revolve conceptually around a sovereign ideal which re-presents need and contestation as threatening. This ideal encourages actors to minimize both mutual need and contestation. As a result, the state and capitalist-market either frustrate the development of pluralist practices or they deform pluralist practices, making them so deeply asymmetrical that they function as veiled forms of hegemonic rule.

⁹²⁵ Coulthard, *Red Skin* at 66.

This suggests that pluralist research should turn away from practices based on the capitalist-market and the state. Instead, we need to turn towards other practices which explicitly center ideals of mutual need and contestability. The cases examined in this dissertation suggest at least three promising sites of inspiration: forms of community that predate the sovereign state and capitalist-market, forms of community that are built in deliberate opposition to it, and ecological forms of community. Together, sites such as these offer new models of social organization, giving us conceptual and institutional tools with which to respond to the presence of multiple authority sites in ways that avoid the arbitrary hierarchies of sovereignty.

3.2.1 Before State/Capitalism: Pre-Sovereignty forms of Political, Legal and Economic Community

On Turtle Island, First Nations forms of political and economic organization provide excellent sources of inspiration for imagining social systems based around multilateral negotiation between all actors at all levels. Indeed, many First Nations social orders explicitly center a cosmological principle of mutual need, and derive from this a principle of contestability – because we are all in need of one another, it is paramount to each that social arrangements be to the satisfaction of all⁹²⁶. In this sense, control is distributed both across and within groups, fields, and territories. This broad, ontological foundation lends itself to institutional structures in which power tends to be dispersed between multiple semi-autonomous, often overlapping sites of authority, all of which engage the others as roughly equal negotiating partners.

Moreover, First Nations are continually and creatively working to bring these institutional forms into contemporary practices and discourses of pluralism. On a discursive

⁹²⁶ Mills, *Miinigowiziwin* generally and especially at 68-84.

level, the academic field of Indigenous Studies is now dominated by the so-called Resurgence school of thought, which centers a turn away from European institutions and a revitalization of indigenous forms of political, economic, legal and social organization as the foundation for a decolonized society⁹²⁷. Numerous scholars are also applying indigenous understandings of treaty relationships to suggest novel hybrids of treaty and federalism⁹²⁸. On an institutional level, nations across the country are pushing practices of shared and conditional authority. In their submissions to the BCTC, Tsleil-Waututh negotiators suggested varied rights in different parts of the traditional territory. This approach disaggregates the unitary structure of private ownership in favour of a system of multiple, overlapping authority claims. Likewise, the Stó:lō have proposed forms of multi-level governance where confederacy, nation, clan, and family units would all enjoy equal relationships amongst each other and to various sites of Canadian authority, creating a system of multidirectional, multilayered negotiation⁹²⁹. Their submissions center shared decision making between multiple levels of settler and Stó:lō governance⁹³⁰. This system replaces the division of sovereignty, which is the heart of traditional federalism, with a sharing of sovereignty, thus pivoting from a system of competing sovereigns to a system of non-sovereign negotiating units. In their submission to the NEB hearings on the Kinder Morgan Pipeline, the Tsleil-Waututh insist that the Crown “engage with First Nations as jurisdictions” by committing to “joint decision making and co-management regimes”⁹³¹. Similarly, when the Barriere Lake Algonquin sought a resolution to conflicts on their land, they pushed for a trilateral agreement

⁹²⁷ For a thoughtful discussion of Resurgence in the context of the field see Mills, “Rooted Constitutionalism”.

⁹²⁸ See e.g. Asch, *On Being Here to Stay*; Henderson, “Treaty Federalism”.

⁹²⁹ Stó:lō Nation, *Cultural Assessment* especially at sections 12, 14.

⁹³⁰ Stó:lō Nation, *Cultural Assessment* especially at chapter 18.

⁹³¹ Cited in *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, [2018] CNLR 3 at 580-561.

where the jurisdiction of each party is concurrent, contingent on good management, and defined in relation to the laws of the others⁹³².

In each case, Canadian officials were utterly unwilling to consider these proposals, insisting instead on dividing powers and ownership⁹³³. In each case, trilateral negotiations were abandoned, the BCTC rejected heterodox proposals, and the NEB hearings all but ignored creative solutions, as state actors worked within the state-based institutional forms with which they are familiar. In those cases where the government has countenanced co-management – the Kunst’aa Guu - Kunst’aayah Reconciliation Protocol, for example, or the later abandoned Trilateral Agreement with the BLA – they have been lauded by all sides as historic success stories⁹³⁴. This dissertation suggests that government negotiators ought to be open to, and indeed seek out, the non-capitalist, non-state forms of political organization that First Nations are bringing to the table.

European scholars are also reaching back into Europe’s own pre-sovereignty traditions and making them relevant to contemporary practice. For example, Bellamy describes a school of contemporary “post-sovereignty” theorists who reject total and exclusive authority in favour of older republican and medieval conceptions of authority⁹³⁵. These theorists observe both the vertical dispersal of state authority to sub-state and supranational actors, and the horizontal dispersal of authority towards corporations, NGO’s and interest groups, and conclude that state sovereignty is being lost without being transferred to any other actor⁹³⁶. Instead, a variety of

⁹³² Pasternak, *Grounded Authority* at 150. At 269 Pasternak describes the BLA conception of sovereignty as “the right to be properly entangled”.

⁹³³ For discussion see Woolford, “Transition and Transposition” especially at 70-72; Thom, “Disagreement-in-Principle” especially at 28-30.

⁹³⁴ Pasternak, *Grounded Authority* at footnote 310.

⁹³⁵ See generally Bellamy, “European Republic”. As noted on 202, Bellamy himself once accepted a variant of this position, but has since taken a more state-centric approach.

⁹³⁶ Bellamy, “European Republic” at 201.

territorial and functional units at different scales interact without clear hierarchies, each acting as a check on the others⁹³⁷. For many, this situation is comparable to the republican systems of antiquity, where powerful guilds, gentry, merchants, monarchs, clergy and others all enjoyed overlapping military, economic, political and legal authority⁹³⁸. Neo-republican theorists therefore reach back to Europe's pre-sovereignty traditions to imagine post-sovereignty forms of political community⁹³⁹.

Similarly, Kropotkin, in his enthusiastic discussion of the medieval city, emphasizes precisely how production, as well as political decision making, took place primarily through dynamic arrangements of self-organized, overlapping, and interdependent territorial and functional units⁹⁴⁰. Guilds, farming villages, and commercial cities alike controlled their consumption and production collectively, embodying a system of mutual need and therefore mutual aid between community members.

Zielonka's concept of the EU as a classical empire explores similar territory. According to Zielonka, empires are units with fuzzy boundaries, characterized by varying degrees and forms of control over different territories⁹⁴¹. Thus, authority is always shared between the center and periphery, though how and to what degree varies with local circumstances. The focus is therefore on particular relationships between local, regional and imperial actors, none of whom expect unilateral power. Hardt and Negri have also taken up the concept of Empire, using it to

⁹³⁷ Bellamy, "European Republic" at 202.

⁹³⁸ See e.g. Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge: Cambridge University Press, 2019); Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty" especially at 170. Note, however, that Bellamy now adopts a more state-centric position. See Bellamy, "European Republic" especially 202-206.

⁹³⁹ For further discussion see Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty".

⁹⁴⁰ Kropotkin, *The Essential Kropotkin* especially at 188.

⁹⁴¹ See e.g. Jan Zielonka, *Europe as Empire* (Oxford: Oxford University Press, 2006).

describe the decentralized forms of control exercised through the economic system⁹⁴². For them, Empire connotes the fading salience of national borders in favour of new state/military/corporate assemblages which exert differentiated control around the world. In a sense, their description is similar to the limited symposium of the EU itself – no single actor is sovereign, power is shared, but it is shared only between institutional elites who exercise a sort of joint sovereignty over the masses. Their corrective – the commonwealth – envisions a radical democratization, whereby the sort of diffuse power sharing currently occurring between elites becomes inclusive and participatory. Here too, then, pre-sovereign forms of political organization provide ways of thinking about power as non-unitary and inherently multilateral, across political, economic and legal spheres.

Thus, Europe also has indigenous traditions of political, legal and economic organization which move away from the unilateralism of the state and capitalist-market, towards more negotiated, layered forms of social organization. As on Turtle Island, many are working hard to bring these institutional traditions to bear on contemporary practices of pluralism. This thesis suggests that policymakers in both settings would do well to engage with these ideas and experiment with the institutional forms and relational logics they suggest, drawing on their experiences to inform contemporary practices of pluralism.

3.2.2 Against State/Capitalism: Counter-Hegemonic forms of Political, Legal and Economic Community

Another source of non-sovereign institutional forms comes from popular movements designed in explicit opposition to the state and capitalist-market.

⁹⁴² Antonio Negri and Michael Hardt, *Empire* (Cambridge: Harvard University Press, 2000); Antonio Negri and Michael Hardt, *Commonwealth* (Cambridge: Harvard University Press, 2009).

The Italian Commons Movement provides an excellent example. As we have seen, Commons activism revolves around the idea that certain resources are “common” – that is to say, neither state-owned nor privately-owned, but rather owned directly by the community of resource users⁹⁴³. This vision accepts multiple, dynamic, overlapping authority claims – essentially anyone who depends on a resource can make a claim to control its use. These claims are coordinated through local, participatory structures⁹⁴⁴. They are also conditional on the needs of future generations⁹⁴⁵. Mattei perceives these structures as constituent powers, in that they make authority claims which are not derivative of or subordinate to the state⁹⁴⁶. Nevertheless, Commons activists contest elections, organize referenda, and use state courts⁹⁴⁷. They have one foot in and foot out of state institutions, so to speak. They participate in state institutions without sacrificing their own institutional structures or exhausting the range of their political agency. Indeed, Mattei suggests that the legitimacy of state institutions is conditional on certain democratic and ecological criteria⁹⁴⁸.

In this way, Commons activists participate in the practices of interpenetration and conditionality that this dissertation has observed. They are also working to bring these practices into contemporary governance directly, experimenting with radically democratic, commons-inspired forms of public management⁹⁴⁹. For example, Commons activists in the city of Naples have created the post of “assessor to the commons”, a position designed to experiment with new forms of local participatory democracy, and have established a participatory institutional system of public governance for the local water corporation, aptly named *Acqua Bene Comune* (Water a

⁹⁴³ Mattei, “Protecting the Commons” at 368.

⁹⁴⁴ Bailey and Mattei, “Social Movements as Constituent Power” at 987.

⁹⁴⁵ Bailey and Mattei, “Social Movements as Constituent Power” at 997.

⁹⁴⁶ Bailey and Mattei, “Social Movements as Constituent Power” at 979, 981.

⁹⁴⁷ Bieler, “Mobilising for Change” at 26-27.

⁹⁴⁸ Bailey and Mattei, “Social Movements as Constituent Power” at 979, 981.

⁹⁴⁹ Mattei, “Protecting the Commons” at 373.

Common Good)⁹⁵⁰. Such institutions lie at the intersection of Commons communities and state structures, allowing forms of mutual influence, contestability, and autonomy.

On Turtle Island, the *Watch House* provides an interesting example. Built in the path of the proposed TMX pipeline, the *Watch House* is a traditional Tsleil-Waututh structure, a center of cultural resurgence, and a site of mass civil disobedience⁹⁵¹. The physical *Watch House* is occupied by a small group Tsleil-Waututh leaders, supported by a team of core organizers drawn mostly from NGOs, and reinforced by a far-flung network of grassroots supporters and allied activist groups across the region⁹⁵². Grassroots activists plan actions and events and stage civil disobedience. NGO staff dedicate staff time, resources, materials, technical know how, communications support, research, social media support and political legitimacy to help scale-up these autonomous grassroots actions. The Tsleil-Waututh leaders provide political legitimacy, spiritual leadership, and the grounds on which to launch legal challenges.

To facilitate this cooperation, the *Watch House* uses a system that might be called contingent advocacy. Tsleil-Waututh members have laid down protocols on how to relate respectfully to the land and to other people⁹⁵³, and NGOs have laid down principles on which their support is conditioned⁹⁵⁴. Both groups respect one another's' protocols, and independent grassroots allies can respect, one, the other, or both depending on whose cooperation they are

⁹⁵⁰ Mattei, "Protecting the Commons" at 374.

⁹⁵¹ Protect the Inlet, "Kwekwecnewtxw," accessed Nov 12, 2019, <https://protecttheinlet.ca/structure/>.

⁹⁵² For an excellent resource see Cam Fenton, "KM Action Hive Proposal," accessed Nov.11, 2019 https://www.scribd.com/document/372938530/KM-Action-Hive-Proposal-QP-Feb-26#from_embed; see also Larry Pynn, "Author of Environmental Manifesto Stands by Document Aimed at Promoting B.C. Civil Disobedience," *Vancouver Sun*, March 19th, 2018, accessed Nov. 11th, 2019 <https://vancouver.sun.com/news/local-news/author-of-environmental-manifesto-stands-by-document-aimed-at-promoting-civil-disobedience?>. Though this document predates the *Watch House*, the basic structure there envisioned has continued on. See also Pynn, "Author of Environmental Manifesto".

⁹⁵³ Protect the Inlet, "Statement from the Watch House – Kwekwecnewtxw Protect the Inlet Project, July 21, 2018, Unceded Coast Salish Territories" accessed Nov.11, 2019 <https://protecttheinlet.ca/indigenous-led-watch-house-remains-on-burnaby-mountain-beside-kinder-morgan-facility/>

⁹⁵⁴ Fenton, "KM Action Hive Proposal" at 2.

seeking. Participants are even free to organize unilaterally, outside of the collective structure, when this suits their needs⁹⁵⁵. Within the broad confines of these two sets of protocols, there is a great deal of autonomy for allies to organize their own actions under a shared banner supported by NGO staff and resources. All joint actions are taken to organizers to make sure they meet protocol. Beyond this, some actions are totally independent while others involve forms of action-specific co-decision and co-execution between small local groups and NGO organizers. Major movement decisions are made through ‘spokes councils’⁹⁵⁶ representing all three groups. Thus, the *Watch House* is at the center of a series of shared institutions, some temporary and specific, others general and durable.

Together, these structures allow each group to enjoy a sort of conditional autonomy, facilitating and constraining their partners even as their own authority is, in turn, facilitated and constrained. Central decisions are made collectively, allowing actors to influence one another without exhausting their independent political agency. These relationships are not always equal. A great deal of financial and political clout remains concentrated in the NGOs and indeed, this is a point of internal criticism among organizers. Nevertheless, it is clear that the Watch House model aspires to move away from the unidirectional command/control relationship of the sovereign frame, aiming instead for forms of conditional autonomy and interpenetration. Thinking through this model therefore provides an interesting means to explore political arrangements based on mutual need between asymmetrically arranged actors.

Each of these examples is grounded in a context of deliberate opposition to the liberal-capitalist model of unilateral authority. Instead, each centers a logic of mutual need, and thus explores

⁹⁵⁵ Fenton, “KM Action Hive Proposal” at 4.

⁹⁵⁶ A spokes council is a council of spokespeople, each representing a larger organization. Like the spokes on a wheel, each spokesperson serves to connect the central hub to their respective organization. For discussion see Occupy Vancouver, “Method: Spokes Council,” accessed Nov 11th, 2019 <https://participedia.net/method/518>

forms of conditionality or interpenetration as a means of creating multilateral authority structures. Sites such as these can help us escape the ideology of sovereignty and reimagine relationships between actors that draw on the practical insights of engaged actors on the ground.

3.2.3 Ecological Communities

I would be remiss not to mention one final source of conceptual models that emerges from this work. This source comes not through the practices I have observed, but through my own process as a scholar in trying to understand the complexity of my material. Throughout this dissertation, I have grasped intuitively at ecological metaphors to capture the complex forms of interdependence and autonomy, co-decision and asymmetry, and cooperation and competition that animate pluralist practice.

In describing pluralist practice on Turtle Island, I have used the concept of symbiogenesis to try to capture the complex ways in which pluralism and sovereignty co-exist – how coercion and consent can stand side by side, creating a highly variable relationship that blends interdependence and impunity. The concept of symbiogenesis gave me new ways to understand the gradual movement towards unilateralism, showing me how Settler authorities are working to absorb First Nations political, legal and economic systems into their own. It helped me conceptualize how First Nations are able to continually exercise agency in conditions of profound power asymmetry, both by leveraging the opportunities their attempted absorption creates and by continuing to exercise authority outside of their relationship to Settler institutions. Symbiogenesis provided me with a way to think of this relationship without collapsing the units into a single structure or denying their mutually constitutive relationships.

In describing pluralist practice in Europe, I have used concepts of sympoiesis to try to capture how diverse actors can gradually come to co-constitute one another, each retaining its own logic yet each being influenced by others in ways that are mutual, but not necessarily equal. Rather than understanding political community as the expression of a coherent ideology or set of institutions, sympoiesis has given me a way to think of community as a blend of layered, interacting influences and counter-influences. Sympoiesis captures how the interplay of competing influences over time can give rise to emergent structures – practices which are not reducible to their component parts, but rather result from ongoing interaction and contestation. This has helped me understand both the gradual, functionalist development of the EU and its enduring hybrid nature. Sympoiesis has also allowed me to express how the entrenchment of economic structures works to limit the layered and fluid nature of European governance, isolating economic decision-making and limiting the generative contestation prevalent in other spheres.

I have found these metaphors useful in ways that political terminology drawn from traditions of sovereignty is not. Because ecological communities are such a complicated mixture of mutualist and competitive behaviours, dynamic systems kept in balance by asymmetrical and countervailing forces, I have found ecological concepts well suited to capturing similar social dynamics, allowing me to analyze dynamics that sovereignty works to make invisible. In fact, this tradition of analogizing social and ecological relations has long roots and contemporary expressions, both in Europe and on Turtle Island.

John Borrows, for example, speaks of *akinoomaagewin* – learning from the earth – as one of the principle sources of Indigenous law and legal reasoning⁹⁵⁷. Indigenous peoples, Borrows

⁹⁵⁷ Borrows, *Indigenous Constitution* at Chapter 2. For further discussion see John Borrows, “Earth-Bound: Indigenous Resurgence & Environmental Reconciliation,” in *Resurgence and Reconciliation*, eds. James Tully,

argues, draw analogies to ecological practices in order to better understand their own forms of community. In particular, Mills argues that Indigenous legalities revolve around an ontology of social interdependence that is extrapolated from the observed fact of ecological interdependence⁹⁵⁸. Stories of “treaties” made with the animal clans speak to just how closely social and ecological communities are analogized⁹⁵⁹. In this sense, Indigenous legal, political and economic systems are rooted in the dynamics of the living earth. Speaking of Settler authorities, James Tully argues that the same conceptual problems that plague our oppressive relationship with First Nations are also present in our domineering relationship to nature⁹⁶⁰. Reforming social practices and reforming ecological practices are therefore inseparable goals for Tully.

Europeans also have a long tradition of understanding political community through biology and ecology. The concept of a body-politic, for example, portrays medieval society as a collection of functionally differentiated but mutually dependent parts, like the organs of body⁹⁶¹. The metaphor captures both mutual need, and also asymmetry, with the King pictured as the head, directing the rest. Similarly, the modern state and capitalist-market reflect a view of human nature as individualistic, self-interested, and competitive. This understanding is drawn from Darwinist conceptions of ecological order as driven by individual competition⁹⁶². Likewise, Kropotkin’s critique of the state and capitalist-market and his embrace of practices of mutual aid

Michael Asch, and John Borrows (Toronto: University of Toronto press, 2018); Borrows, *Freedom and Indigenous Constitutionalism* especially at 10, 95-97.

⁹⁵⁸ Mills, *Miinigowiziwin* especially at 79-84.

⁹⁵⁹ See e.g. Leanne Simpson, *The Gift Is in the Making: Anishinaabeg Stories* (Winnipeg: Highwater Press, 2013) at 9-13.

⁹⁶⁰ James Tully, “Reconciliation Here on Earth,” In *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows (Toronto: University of Toronto press, 2018).

⁹⁶¹ For extended discussion see Kenneth Olwig, *Landscape, Nature, and the Body Politic: From Britain's Renaissance to America's New World* (Madison: University of Wisconsin Press, 2010) generally, and for the analogy between the organs of physical body and the components of society specifically at 127.

⁹⁶² Kropotkin, *Mutual Aid* especially the Introduction.

are modeled on an understanding of ecological community as primarily a function of cooperation, rather than competition⁹⁶³.

In both contexts studied in this dissertation, scholars have found ecological metaphors useful in understanding complex social relations. So have I. Because these metaphors are oriented around the complex asymmetry and independence of nature, they are well suited to providing concepts that allow us to hold contradictory dynamics in tension, seeing how competition and cooperation, balance and asymmetry, can be constitutively related. In so doing, they provide conceptual tools that the framework of sovereignty does not.

4. Conclusions – A Bridge Over Troubled Water

This dissertation was born from an encounter with multiple competing authority claims. Long educated in theories of sovereignty, I was primed to expect that one claim would be arbitrarily elevated above the other – that this was simply the inevitable cost of social order. What I witnessed at the *Watch House*, however, was a complex set of interactions between different sources of authority – a set of dynamic practices that could not be easily expressed through the total, exclusive conceptions of power inherent in the concept of sovereignty. Agency appeared multilateral in ways that I found difficult to cognize and assess. I found myself floundering for appropriate concepts and criteria.

I therefore set out to map the ways in which pluralist practice challenges, and is shaped by, concepts of sovereignty, asking how far and in what ways it is possible to think differently about social order in contexts of persistent difference. In particular, I wanted to see if there were ways to respond to plurality that didn't rely, in the final instance, on arbitrary violence,

⁹⁶³ Kropotkin, *Mutual Aid* especially the Introduction.

hierarchy, and oppression. I choose two very different cases where contemporary practice is putting the concept of sovereignty into question, and began to explore the political, legal and economic dimensions of pluralist practice in both contexts.

With respect to Turtle Island, I contend that Settler and First Nations communities initially developed sophisticated forms of interpenetrating institutions and conditional authority claims in the political, legal and economic realms. Both need and access to contestation were reasonably well distributed, and actors were able to contest and coordinate their respective claims without recourse to an overarching authority. As imperial warfare ended and the economy pivoted towards agriculture, however, mutual need between the parties declined. At the same time, Settler conceptions of authority were being shaped by emerging concepts of sovereignty. Together, these trends led Settlers to impose less contestable practices, attempting to absorb First Nations polities, legalities, and economies into their Settler counterparts. First Nations have resisted this absorption and continued to enact non-derivative authority claims. In so doing, they have preserved some continued space for multilateralism. I have concluded that contemporary pluralist practice on Turtle Island is filled with a variety of multilateral practices, but that many are shaped by an historical aspiration towards sovereign unilateralism, such that they distribute need and contestation in profoundly asymmetrical ways.

Conversely, the European context begins from a place of state sovereignty. By gradually cultivating mutual need and open-ended contestation, European actors have been able to iteratively develop multilateral political and legal practices. Both interpenetrating institutions and conditional forms of authority have emerged in ways that harness contestation as a generative force over time, allowing actors to contest and coordinate their claims in the absence of an order-providing sovereign. Economic practice, however, works to limit access to contestation. As a

result, the forms of conditional authority and interpenetration that prevail in economic practice tend to be deeply asymmetrical, preventing the generative kinds of need-informed contestation that prevail in other realms. Together, these three sites of practice produce an overall system of multilateralism that is in some ways admirable, but which remains problematically limited in scope and scale.

In mapping the similarities and differences between Europe and Turtle Island, I have made three related claims. First, I contend that in both contexts, those times and areas that most approximate sovereignty are also the most oppressive. Second, I argue that where practice does not approximate sovereignty, similar practices of interpenetration and conditional authority emerge to facilitate contestation and action coordination. Finally, I have drawn on and built off of agonist theory to argue that interpenetrating authority structures and conditional authority claims can be assessed based on how they distribute need and access to contestation.

Finally, I have argued that a pluralist research agenda that centers state forms and which takes the capitalist-market for granted is conceptually counterproductive. By starting from political, legal and economic forms which idealize total, exclusive authority, such approaches represent mutual need and contestation as threatening. This either stifles the development of pluralism, or else mis-shapes pluralist practice, encouraging actors to distribute need and access to contestation so asymmetrically that co-decision simply masks and legitimizes hegemonic control. The state and capitalist-market thus lead us away from the conditions under which pluralist practices, like interpenetration and conditional authority, can be genuinely multilateral.

My future scholarship will therefore turn away from sites of social organization which are molded on a sovereign ideal, and turn towards sites of social organization which value interdependence and contestation. These heterodox but extant sites of social organization – pre-

sovereignty communities, counter-hegemonic communities, and ecological communities – are more than sites of resistance defined in opposition to, or relative to, a perceived place within the state/capitalist world system. Rather, these sites represent extant alternatives to the logic of the state and capitalist-market, and should be taken seriously as sites of democracy, law and economic production.

Indeed, as I think back to the bridge occupation, I am struck by how the forms of social organization on display there were not well understood, even by their participants. The group(s) assembled on that bridge were inherently plural, asymmetrically arranged, and engaged in a number of cross-cutting, generative conflicts with no central authority to unite them. Somehow, all of this was being managed. Yet all of our attention was on the police. As is so often the case, we remained captives of sovereignty, overlooking the lived practices that bind us together. If writing this dissertation has convinced me of anything, it is that these overlooked practices of pluralism offer us new political, legal, and economic horizons, furnishing the rough ground that enables us to seek justice in a world of persistent plurality.

Bibliography

- 1536412 Ontario Ltd. v. Haudenosaunee Confederacy Chiefs Council*, ONSC 08/82, [2008] CanLII 28041.
- A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.*, [1897] AC 199, [1896] CR 11 AC 308.
- Abele, Frances. *Like an Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary Indian Act*. Ottawa: National Centre for First Nations Governance, 2007.
- Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECJ Case 106/77, [1978] ECR 629.
- Albi, Anneli. "Postmodern Versus Retrospective Sovereignty? Two Different Discourses in the EU and the Candidate Countries?" In *Sovereignty in Transition*, ed. Neil Walker. Portland: Hart Publishing, 2003.
- Alcantara, Christopher. "Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession." *The Canadian Journal of Native Studies* 23, no.2 (2003).
- Stone Sweet, Alec. "Constitutional Dialogues in the European Community." In *The European Court And National Courts: Doctrine And Jurisprudence*, eds. Ann-Marie Slaughter, Alex Stone Sweet and J.H.H. Weiler. Oxford: Hart Publishing, 1998.
- Alfred, Taiaiake. "Sovereignty." In *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. Joanne Barker. Lincoln: University of Nebraska Press, 2005.
- Alfred, Taiaiake. *Peace, Power, Righteousness: An Indigenous Manifesto*. Oxford: Oxford University Press, 2008.
- Alfred, Taiaiake. *Wasáse: Indigenous Pathways of Action and Freedom*. Toronto: University of Toronto Press, 2005.
- Algonquins of Barriere Lake. "Submission by the Algonquins of Barriere Lake, United Nations Economic and Social Council Permanent Forum On First Nations Issues, 1st Session, New York, May 13-24, 2002." Accessed Nov. 10, 2019 <http://www.turtleisland.org/news/news-algonquin3.htm>.
- Alter, Karen. "The European Court's Political Power." *West European Politics* 19, no.3 (1996).
- Ariss Rachel and Cutfeet, John. "Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law", *Indigenous Law Journal* 10, no.1 (2011).

- Asch, Michael. "Confederation Treaties and Reconciliation: Stepping Back into the Future." In *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows. Toronto: University of Toronto press, 2018.
- Asch, Michael. "UNDRIP, Treaty Federalism, and Self-Determination." *Review of Constitutional Studies* 24, no.1 (2019).
- Asch, Michael. *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. Toronto: University of Toronto Press, 2014.
- Aziz, Miriam. "Sovereignty Über Alles: (Re)Configuring the German Legal Order." In *Sovereignty in Transition*, ed. Neil Walker. Portland: Hart Publishing, 2003.
- Baier, Gerald. "The EU's Constitutional Treaty: Federalism and intergovernmental relations – lessons from Canada." *Regional & Federal Studies* 15, no.2 (2005).
- Bailey, Saki and Mattei, Ugo. "Social Movements as Constituent Power: The Italian Struggle for the Commons." *Indiana Journal of Global Legal Studies* 20, no.2 (2013).
- Banana 2*, BVerfGE Case 1/97, [2000] 21 HRLJ 251 (German Constitutional Court) at 60-61.
- Banner, Stuart. "The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850." *American Journal of Legal History* 41, no.1 (1997).
- Banner, Stuart. "Transitions between Property Regimes." *Journal of Legal Studies* 31, no.2 (2002).
- Banner, Stuart. *How the Indians Lost Their Land: Law and Power on the Frontier*. Cambridge: Harvard University Press, 2007.
- Barcevičius, Egidijus; Weishaupt, Timo; and Zeitlin, Jonathan eds. *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination*. London: Palgrave Macmillan, 2014.
- Barsh, Russell Lawrence. "First Nations and Contemporary International Law." *Oregon Law Review* 62, no.1 (1983).
- Barzilai, Gad. "Beyond Relativism: Where Is Political Power in Legal Pluralism?" *Theoretical Inquiries in Law* 9, no.2 (2008).
- Bauerkemper, Joseph and Stark, Heidi Kiiwetinepinesiik. "The Trans/National Terrain of Anishinaabe Law and Diplomacy." *Journal of Transnational American Studies* 4, no.1 (2012).
- BBC News. "Migrant crisis: EU-Turkey Deal comes into Effect." March 20th, 2016. Accessed Nov. 10, 2019 <https://www.bbc.com/news/world-europe-35854413>.

- BC Treaty Commission. "Negotiations Update." Accessed November 10, 2019
<http://www.bctreaty.ca/negotiation-update>.
- Beaton, Ryan. "De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada." *Constitutional Forum* 27, no.1 (2018).
- Bedau, Mark and Humphreys, Paul. *Emergence: Contemporary Readings in Philosophy and Science*. Cambridge: MIT Press: 2008.
- Bellamy, Richard. "A European Republic of Sovereign States: Sovereignty, Republicanism and the European Union." *European Journal of Political Theory* 16, no.2 (2017).
- Bellamy, Richard. *A republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU*. Cambridge: Cambridge University Press, 2019.
- Belmessous, Saliha ed. *Empire by Treaty: Negotiating European Expansion, 1600-1900*. Oxford: Oxford University Press, 2014.
- Biebricher, Thomas. "Europe and the Political Philosophy of Neo-liberalism." *Contemporary Political Theory* 1, no.38 (2013).
- Biebricher, Thomas. "The Return of Ordoliberalism in Europe – Notes on a Research Agenda," *i-lex* 21, no.1 (2014).
- Bieler, Andreas. "Mobilising for Change: The First Successful European Citizens' Initiative 'Water is a Human Right'." Paper presented at the *ETUI Monthly Forum*. Brussels, January 22, 2015.
- Blackhouse, Constance. "'Bedecked in Gaudy Feathers': The Legal Prohibition of Aboriginal Dance." In Blackhouse, Constance. *Colour-Coded: a Legal History of Racism in Canada, 1900-1950*. Toronto: University of Toronto Press, 1999.
- Block, Fred. "Understanding the Diverging Trajectories of the United States and Western Europe: A Neo-Polanyian Analysis." *Politics and Society* 35, no.1 (2007).
- Blome, Nikolaus; Böll, Sven; Kuntz, Katrin; Kurbjuweit, Dirk; Mayr, Walter; Von Rohr, Mathieu; Scheuermann, Christoph; and Schult, Christoph. "The Fourth Reich': What Some Europeans See When They Look at Germany." *Der Spiegel* March 23, 2015. Accessed Nov. 10, 2019 <https://www.spiegel.de/international/germany/german-power-in-the-age-of-the-euro-crisis-a-1024714.html>.
- Blyth, Mark. *Austerity - The History of a Dangerous Idea*. Oxford: Oxford University Press, 2013.
- Boldt, Menno and Long, Anthony. "Tribal Philosophies and the Canadian Charter of Rights and Freedoms." *Ethnic and Racial Studies* 7, no.4 (1984).

- Bordenstein, S.R. and Theis, K.R. "Host Biology in Light of the Microbiome: Ten Principles of Holobionts and Hologenomes." *PLOS Biology* 13, no.8 (2015).
- Borrows, John and Rotman, Leonard. *Aboriginal Legal Issues - Cases, Materials and Commentary, 4th Edition*. New York: LexisNexis, 2012.
- Borrows, John. "Earth-Bound: Indigenous Resurgence & Environmental Reconciliation." In *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows. Toronto: University of Toronto press, 2018.
- Borrows, John. *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press, 2002.
- Borrows, John. "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*." *Osgoode Hall Law Journal* 37, no.1 (1999).
- Borrows, John. "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government." *Osgoode Hall Law Journal* 30, no.2 (1992).
- Borrows, John. "Canada's Colonial Constitution." In *The Right Relationship: Reimagining the Implementation of Historical Treaties*, eds. John Borrows and Michael Coyle. Toronto: University of Toronto Press, 2017.
- Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self Government." In *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch. Vancouver: UBC Press, 1997.
- Borrows, John. *Canada's Indigenous Constitution*. Toronto: University of Toronto Press, 2010.
- Borrows, John. *Freedom and Indigenous Constitutionalism*. Toronto: University of Toronto Press, 2016.
- Bosphorus v. Ireland*, ECtHR Application no.45036/98, [2005] ECHR 440.
- Bourgeois, Donald. "The Six Nations: A Neglected Aspect of Canadian Legal History." *The Canadian Journal of Native Studies* 6, no.2 (1986).
- Bowie, Ryan. "Indigenous Self-Governance and the Deployment of Knowledge in Collaborative Environmental Management in Canada." *Journal of Canadian Studies* 47, no.1 (2013).
- Bracken, Christopher. *The Potlatch Papers: A Colonial Case History*. Chicago: University of Chicago Press, 1997.
- Braddick, Michael. *State Formation in Early Modern England, C.1550-1700*. Cambridge: Cambridge University Press, 2000.
- Breuilly, John. "Modern Empires and Nation-States." *Thesis Eleven* 139, no.1 (2017).

- Brown, Desmond. "'They Punish Murderers, Thieves, Traitors and Sorcerers': Aboriginal Criminal Justice as Reported by Early French Observers." *Social History* 35, no.70 (2002).
- Brown, Saul. "Indigenous Marine Response Centre Breathing Life into Reconciliation," *National Observer*, April 6th, 2018.
- Brunet-Jailly, Emmanuel; Hurrelmann, Achim and Verdun, Amy eds. *European Union Governance and Policy Making: A Canadian Perspective*. Toronto: University of Toronto Press, 2017.
- Bullmann, Udo. "The Politics of the Third Level," *Regional & Federal Studies* 6, no.2 (1996).
- Cain, P. J. and Hopkins, A. G. "Gentlemanly Capitalism and British Expansion Overseas I. The Old Colonial System, 1688-1850." *The Economic History Review* 39, no.4 (1986).
- Cain, P.J. and Hopkins, A.G. "Gentlemanly Capitalism and British Expansion Overseas II: New imperialism 1850–1945." *South African Journal of Economic History* 7, no.1 (1992).
- Calder et al. v. Attorney-General of British Columbia*, [1973] 1 SCR 313, [1973] 4 WWR 1.
- Caligiuri, Andrea and Napolitano, Nicola. "The Application of the ECHR in the Domestic Systems." *The Italian Yearbook of International Law* 20, no.1 (2010).
- Cameron, Jenny and Hicks, Jarra. "Performative Research for a Climate Politics of Hope: Rethinking Geographic Scale, 'Impact' Scale and Markets," *Antipode* 46, no.1 (2014).
- Canada; Erasmus, Georges; and Dussault, René. *Report of the Royal Commission on Aboriginal Peoples - Volume 1: Looking Forward, Looking Back*. Ottawa: Royal Commission on Aboriginal Peoples, 1996.
- Canada; Erasmus, Georges; and Dussault, René. *Report of the Royal Commission on Aboriginal Peoples - Volume 5 - Renewal: A Twenty-Year Commitment*. Ottawa: Royal Commission on Aboriginal Peoples, 1996.
- Cantore, Carlo Maria. "We're One, but we're Not the Same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU." *Perspectives on Federalism* 3, no.3 (2011).
- Caporaso, James and Tarrow, Sidney. "Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets." *International Organization* 63, no.4 (2009).
- Capra, Fritjof and Mattei, Ugo. *The Ecology of Law: Toward a Legal System in Tune with Nature and Community*. San Francisco: Berrett-Koehler, 2015.
- Cardinal, Harold and Hildebrandt, Walter. *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations*. Calgary: University of Calgary Press, 2013.

- Cardinal, Harold. *The Unjust Society*. Vancouver: Douglas & McIntyre, 1969.
- Carlos, Ann and Lewis, Frank. "Property Rights, Competition, and Depletion in the Eighteenth-Century Canadian Fur Trade: The Role of the European Market." *Canadian Journal of Economics* 32, no.3 (1999).
- Carter, Sarah. *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*. Kingston: McGill-Queens University Press, 1993.
- Cavanagh, Edward. "A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company, 1670–1763." *Canadian Journal of Law and Society* 26, no.1 (2011).
- Cayuga Indians (Can. v. U.S.)*, [1926] 173 R. Int'l Arb. Awards 309.
- CBC News, "Attawapiskat chief won't attend PM meeting in GG's absence." Accessed Nov. 10, 2019 <http://www.cbc.ca/news/politics/attawapiskat-chief-won-t-attend-pm-meeting-in-gg-s-absence-1.1369435>
- Cerny, Philip. "In the Shadow of Ordoliberalism: The Paradox of Neo-liberalism in the 21st Century." *European Review of International Studies* 3, no.1 (2016).
- Cerny, Philip. "Embedding Neo-liberalism: The Evolution of a Hegemonic Paradigm." *The Journal of International Trade and Diplomacy* 2, no.1 (2008).
- Chen, James. "Race to the Bottom." Accessed November 11, 2019 <https://www.investopedia.com/terms/r/race-bottom.asp>.
- Church, Clive and Phinnemore, David. *Understanding the European Constitution*. London: Routledge, 2005.
- Ciola v. Land Vorarlberg*, ECJ Case C-224/97, [1999] ECR I-2517.
- Clark, Bruce. *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada*. Kingston: McGill-Queen's University Press, 1990.
- Clifton, Judith; Comín, Francisco and Fuentes, Daniel Díaz. "Privatizing Public Enterprises in the European Union 1960–2002: Ideological, Pragmatic, Inevitable?" *Journal of European Public Policy* 13, no.5 (2006).
- Coates, Kenneth and Morrison, William. "In Whose Best Interest? The Federal Government and the Native People of Yukon, 1964–1991." In *Rebirth: Political, Economic, and Social Development in First Nations*, ed. Anne-Marie Mawhiney. Toronto: Dundurn Press, 1993.
- Cohen, David and Richardson, Jeremy. *Lobbying the European Union: Institutional, Actors and Issues*. Oxford: Oxford University Press, 2009.

- Cohen, Morris. "Property and Sovereignty." *Cornell Law Review* 13, no.8 (1927).
- Colaguori, Claudio. *Agon Culture: Competition, Conflict and the Problem of Domination*. Whitby: de Sitter, 2012.
- Commission of the European Communities. *European Governance White Paper COM 428*. Brussels: CEC, 2001.
- Commission v. Luxemburg*, ECJ Case C-573/93, [1996] ECR 1-3207.
- Connolly, William. "Beyond Good and Evil: the Ethical Sensibility of Michel Foucault." *Political Theory* 21 no.3 (1993).
- Connolly, William. *The Ethos of Pluralization*. Minneapolis: University of Minnesota Press, 1995.
- Connolly, William. *Why I am not a Secularist*. Minneapolis: University of Minnesota Press, 1999.
- Constitutionality of the Accession Treaty*, PCT Case K 8/04, [2005] 86 PLG 744. (Polish Constitutional Tribunal).
- Constitutionality of the Lisbon Treaty*, PCT Case K32/09, [2010] 9 OTK-A 108 (Polish Constitutional Tribunal).
- Cooper, Ian. "Comment: Will National Parliaments Use their New Powers?" *EU Observer*, 16 October 2009. Accessed Nov. 11, 2019 <https://euobserver.com/opinion/28839>.
- Copeland, Paul. "IPE and European Integration: Applying Karl Polanyi's The Great Transformation." *IPEG Working Papers in Global Political Economy* no.40 (2009)
- Cornstassel, Jeff. "Re-envisioning Resurgence: First Nations Pathways to Decolonization and Sustainable Self-Determination." *Decolonization: Indigeneity, Education & Society* 1, no.1 (2012).
- Costa v. ENEL*, ECJ Case 6/64, [1964] ECR 585.
- Coulthard, Glen. *Red Skin, White Masks*. Minneapolis: University of Minnesota Press, 2014.
- European Council. "European Council - Voting System." Accessed Nov. 10, 2019 www.consilium.europa.eu/en/council-eu/voting-system/.
- Cover, Robert. "Nomos and Narrative." in *Narrative, Violence and the Law*, eds. Martha Minnow, Mark Ryan, Austin Sarat. Ann Arbor: University of Michigan Press, 1995.
- Craig, Paul and De Burca, Grainne. *EU Law: Text, Cases, and Materials. 5th Edition*. Oxford: Oxford University Press, 2011.

- Craig, Paul. "The ECJ, National Courts and the Supremacy of Community Law." In *The European Constitution in the Making*, eds. Ingolf Pernice and Roberto Miccu. Baden-Baden: Nomos, 2004.
- Crane, Brian; Mainville, Robert and Mason, Martin. *First Nations Governance Law*. New York: LexisNexis, 2008.
- Curtis, Bruce. "Representation and State Formation in the Canadas, 1790–1850." *Studies in Political Economy* 28, no.1 (1989).
- Cutler, Claire. "Legal Pluralism as the 'Common Sense' of Transnational Capitalism." *Oñati Socio-legal Series* 3, no.4 (2013).
- Darwin, John. *The Empire Project: The Rise and Fall of the British World-System, 1830-1970*. Cambridge: Cambridge University Press, 2011.
- Daschuk, James. *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life*. Regina: University of Regina Press, 2013.
- Davey, James. *A Bridge to Nowhere: British Columbia's Capitalist Nature and the Carmanah Walbran War in the Woods (1988-1994)*. M.A. Diss., University of Victoria, 2019.
- De Burca, Grainne. "Sovereignty and the Supremacy Doctrine of the European Court of Justice." In *Sovereignty in Transition*, ed. Neil Walker. (Portland: Hart Publishing, 2003).
- de La Serre, Françoise and Wallace, Helen. "Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?" *Notre Europe: Research and Policy Papers* 2 (1997).
- De Witte, Bruno. "Do Not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands." In *Sovereignty in Transition*, ed. Neil Walker. Portland: Hart Publishing, 2003.
- De Witte, Bruno. "Sovereignty and European Integration: the Weight of Legal Tradition." In Anne-Marie Slaughter, *The European Courts and National Courts: Doctrine and Jurisprudence*, eds. Alec Stone Sweet and J.H.H Weiler. Portland: Hart publishing, 1998.
- Defrenne v. Sabena*, ECJ Case 43/75, [1976] ECR 455.
- Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, [1997] 153 DLR (4th) 193.
- Della Porta, Donatella and Caiani, Manuela. *Social Movements and Europeanization*. Oxford: Oxford University Press, 2009.
- Della Porta, Donatella and Mattoni, Alice. "Cultures of Participation in Social Movements." In *The Participatory Cultures Handbook*, eds. Aaron Delwiche and Jennifer Jacobs Henderson. London: Routledge, 2012.

- Dempster, Beth. "Sympoietic and Autopoietic Systems: A New Distinction for Self-Organizing Systems." In *Proceedings of the World Congress of the Systems Sciences and ISSS 2000*, eds. J.K. Allen and J. Wilby. Toronto: International Society for Systems Studies, 2000.
- Demsetz, Harold. "Toward a Theory of Property Rights." *American Economic Review* 57, no.1 (1967).
- Dicey, Albert. *Introduction to the Study of the Law of the Constitution*, 3rd ed. London: MacMillan & Co., 1889.
- Dokis, Carly. "Modern Day Treaties: 'Development', Politics, and the Corporatization of Land in the Sahtu Dene and Métis Comprehensive Land Claim Agreement." *Geography Research Forum* 30 (2010).
- Douglas, Angela and Werren, John. "Holes in the Hologenome: Why Host-Microbe Symbioses Are Not Holobionts." *mBio* 7, no.2 (2016).
- Eeckhout, Piet. "Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC." *European Journal of International Law Blog*, Feb 2, 2009. Accessed Nov. 11th, 2009 <https://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/#>.
- Egan, Brian. "Towards Shared Ownership: Property, Geography, And Treaty Making in British Columbia." *Geografiska Annaler* 95, no.1 (2013).
- Eichengreen, Barry. *The European Economy since 1945 - Coordinated Capitalism and Beyond*. Princeton: Princeton University Press, 2008.
- Eirksen, Erik. "Deliberative Supranationalism in the EU." In *Democracy in the European Union: Integration Through Deliberation?*, eds. Erik Eirksen and John Fossum. New York: Routledge, 2000.
- European Arrest Warrant*, PCT Case P1/05, [2005] CMLR 1181. (Polish Constitutional Tribunal).
- European Commission. "Six-pack? Two-pack? Fiscal compact? A short guide to the new EU fiscal governance." Accessed Nov 11, 2019 http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm.
- European Commission. "The Committee of the Regions." Accessed Nov. 10, 2019 https://europa.eu/european-union/about-eu/institutions-bodies/european-committee-regions_en,
- European Commission. "The Stability and Growth Pact." Accessed Nov 11, 2019 http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm.
- European Commission, "Euro Area," accessed Nov. 10, 2019 http://ec.europa.eu/economy_finance/euro/world/outside_euro_area/index_en.htm

- European Commission. *Humanitarian Aid and Civil Protection: Syria Crisis Factsheet*. Brussels: ECHO, 2016.
- European Commission. *Managing the Refugee Crisis: EU Support To Lebanon And Jordan Since The Onset Of Syria Crisis*. Brussels: ECHO, 2016.
- European Council. "European Semester." Accessed Nov. 11th, 2019, consilium.europa.eu/en/policies/european-semester/.
- European Council. "Laeken Declaration on the future of the European Union (15 December 2001)." In *Bulletin of the European Union no.12*. Luxembourg: Office for Official Publications of the European Communities, 2001.
- European Council. Intergovernmental Committee on European Integration, *The Brussels Report on the General Common Market*. Luxemburg: Information Service, High Authority of the European Coal and Steel Community, 1956.
- European Parliament. "About the European Parliament – Legislative Powers." Accessed Nov. 10, 2019 <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers>.
- European Parliament. "Rules of Procedure of the European Parliament." Accessed Nov. 10, 2019 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20070101+RULE-101+DOC+XML+V0//EN&language=EN&navigationBar=YES>.
- European Union. "Integrated Financial Reporting Package Overview, Financial year 2017." Accessed Nov. 10, 2019 <https://europa.eu/!hK34QQ>.
- European Union. "Treaty Establishing a Constitution for Europe." *Official Journal of the European Union* C 310 (2004).
- European Union. *Consolidated version of the Treaty on the Functioning of the European Union*. Accessed No.10, 2019 http://data.europa.eu/eli/treaty/tfeu_2012/oj
- Extinction Rebellion. "Act Now." Accessed Nov.11, 2019 <https://rebellion.earth/act-now/>.
- Extinction Rebellion. "Resources." Accessed Nov.11, 2019 <https://rebellion.earth/act-now/resources/citizens-assembly/>.
- Eyford, Douglas. *A New Direction: Advancing Aboriginal and Treaty Rights*. Ottawa: Indigenous and Northern Affairs Canada, 2015.
- Fattori, Tommaso. "Commonification of the Public Realm." *South Atlantic Quarterly* 112, no.2 (2013).

- Feir, Donna; Gillezeau, Rob; and Jones, Maggie. "The Slaughter of the Bison and Reversal of Fortunes on the Great Plains." *Center for Indian Country Development Working Paper* 2019-01 (2019).
- Fenton, Cam. "KM Action Hive Proposal." Accessed Nov.11, 2019
https://www.scribd.com/document/372938530/KM-Action-Hive-Proposal-QP-Feb-26#from_embed.
- Finke, Barbara. "Civil Society Participation in EU Governance." *Living Review of European Governance* 2, no.2 (2007).
- Fisher, Robin. *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*. Vancouver: University of British Columbia Press, 1992.
- Fitzgibbon, John. "Citizens against Europe? Civil Society and Eurosceptic Protest in Ireland, the United Kingdom and Denmark." *Journal of Common Market Studies* 51, no.1 (2013).
- Fitzgibbon, John. "The Failure of Political Parties and the Triumph of Civil Society: Ireland's two Lisbon Votes in Wider Perspective." Paper presented at the *European Consortium for Political Research General Conference*. Porto, Portugal, June 24, 2010.
- Flanagan, Tom. *First Nations? Second Thoughts*. Kingston: McGill-Queen's University Press, 2000.
- Fossum, John and Menéndez, Agustín José. "Which crises? Whose crises?" In *The European Union in Crises or the European Union as Crises?* eds. John Fossum and Agustín Menendez. Oslo: ARENA Reports, 2014.
- Fossum, John Erik and Trenz, Hans-Jorg. "The EU's Fledgling Society: From Deafening Silence to Critical Voice in European Constitution-Making." *Journal of Civil Society* 2, no.1 (2006).
- Foster, Hamar. "We Are Not O'Meara's Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1908-1928." In *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, eds. Hamar Foster, Heather Raven and Jeremy Webber. Vancouver: UBC Press, 2007.
- Foster, Hamar. "British Columbia: Legal Institutions in the Far West, from Contact to 1871." *Manitoba Law Journal* 23, no.1 (1995).
- Foster, Hamar. "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada *Jurisdiction Act Cases*." *Manitoba Law Journal* 21, no.1 (1992).
- Foster, Hamar; Raven, Heather and Webber, Jeremy eds. *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*. Vancouver: University of British Columbia Press, 2007.
- Foto-Frost v. Hauptzollamt Lübeck-Ost*, ECJ Case 314/85, [1987] ECR 4199.

- Foucault, Michel. *The History of Sexuality, Vol. 2: The Use of Pleasure*. Tr. Robert Hurley. New York: Random House, 1990.
- Foucault, Michel. *Discipline & Punish: The Birth of the Prison*. New York: Pantheon, 1977.
- Franklin, Mark; Marsh, Michael and McLaren, Lauren. "Uncorking the Bottle: Popular Opposition To European Unification in The Wake of Maastricht." *Journal of Common Market Studies* 32, no.4 (1994).
- Fromagerie Franco-Suisse Le Ski v. État Belge*, BCC Case 4750, [1972] CMLR 330. (Belgian Court de Cassation).
- Galbraith, John. "Land Policies of the Hudson's Bay Company, 1870–1913." *The Canadian Historical Review* 32, no.1 (1951).
- Galois, Robert. "The History of the Upper Skeena." *Native Studies Review* 9 no.2. (1993).
- Gauweiler and ors v. German Bundestag*, BVerfGE Case 134/366, [2014] 2 BvR 2728/13. (German Constitutional Court).
- Gavigan, Shelley. "Prisoner Never Gave Me Anything for What He Done: Aboriginal Voices in the Criminal Court." *Socio-Legal Review* 3 (2007).
- Gibson-Graham, J.K.; Cameron, Jenny and Healy, Stephen. "Commoning as a Postcapitalist Politics." In *Releasing the Commons: Rethinking the Futures of the Commons*, eds. Ash Amin and Philip Howell. London: Routledge 2016.
- Gilbert, Scott; Sapp, Jan and Tauber, Alfred. "A Symbiotic View of Life: We Have Never Been Individuals." *Quarterly Review of Biology* 87, no.4 (2012).
- Gill, Stephen and Cutler, Claire. *New Constitutionalism and World Order*. Cambridge, Cambridge University Press, 2015.
- Gill, Stephen. "European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neo-liberalism in Europe." *New Political Economy* 3, no.1 (1998).
- Gill, Stephen. "Globalisation, Market Civilisation, and Disciplinary Neo-liberalism." *Millennium Journal of International Studies* 24, no.3 (1995).
- Gill, Stephen. "Market Civilization, New Constitutionalism and World Order." In *New Constitutionalism and World Order*, eds. Stephen Gill and Claire Cutler. Cambridge: Cambridge University Press, 2015.
- Government of the U.K., *Why the Government Believes that Voting to Remain in the European Union is the best Decision for the UK*. London: Cabinet Office Publishing Service, 2016. Accessed Nov 10, 2019
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515068/w

[hy-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk.pdf](#).

Grabowski, Jan. "French Criminal Justice and Indians in Montreal, 1670-1760." *Ethnohistory* 43, No.3 (1996).

Grammond, Sebastien. *Terms of Coexistence: Indigenous Peoples and Canadian Law*. Toronto: Carswell, 2013.

[Grand Council of the Crees of Quebec, Northern Quebec Inuit Association, Hyrdo Quebec, Quebec, and Canada, The James Bay and Northern Québec Agreement](#). Ottawa: Indian and Northern Affairs, 1976. Accessed Nov.11, 2019
<http://www.naskapi.ca/documents/documents/JBNQA.pdf>.

Granital S.p.A. v. Amministrazione finanziaria, n.170/66, [1984] 1 Foro Italiano 2062. (Italian Constitutional Court).

Greenwood, Justin. "Organized Civil Society and Democratic Legitimacy in the European Union." *British Journal of Political Science* 37, no.2 (2007).

Greer, Alan. *Property and Dispossession: Natives, Empires and Land in Early Modern North America*. Cambridge: Cambridge University Press, 2018.

Greer, Allan and Radforth, Ian eds., *Colonial Leviathan: State Formation in Mid-nineteenth-century Canada*. Toronto: University of Toronto Press, 1992.

Greer, Allan. "Commons and Enclosure in the Colonization of North America." *The American Historical Review* 117, no.2 (2012).

Greer, Allan. "Land, Property and Colonization: Some Conceptual Issues." Paper presented at the Workshop *Property in the Making of the Portuguese Empire*. University of Lisbon, 13 November 2013.

Greer, Allan. "Wage Labour and the Transition to Capitalism." *Labour* 15 (1985).

Gregg, Richard. *The Power of Non-Violence*. New York: Fellowship Publications, 1959.

Guerin v. The Queen, [1984] 2 SCR 335, [1984] 13 DLR (4th) 321.

Guerrero, Ricardo; Margulis, Lynn and Berlanga, Mercedes. "Symbiogenesis: the Holobiont as a Unit of Evolution." *International Microbiology* 16, no.3 (2013).

Guiraudon, Virginie. "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping." *Journal of Common Market Studies* 32, no.2 (2000).

Gutteridge, Nick. "EU migrant relocation plan 'DEAD' as Poland REFUSES to take in Thousands of Asylum Seekers." *Sunday Express*, April 15, 2016. Accessed Nov. 11th,

2019 <https://www.express.co.uk/news/politics/661166/EU-migrant-relocation-plan-dead-Poland-refuse-take-in-asylum-seekers>.

Haas, Ernst. *Beyond the Nation State*. Stanford: Stanford University Press, 1964.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press, 1996.

Haesly, Richard. "Euroskeptics, Europhiles and Instrumental Europeans European Attachment in Scotland and Wales." *European Union Politics* 2, no.1 (2001).

Haida Nation and Her Majesty the Queen in Right of the Province of British Columbia. "Kunst'aa Guu – Kunst'aayah Reconciliation Protocol." Accessed Nov 10, 2019 <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2010/462194/haida_reconciliation_protocol.pdf>.

Haida Nation v. British Columbia, 2004 SCC 73, [2004] 3 SCR 511.

Hake, Eric and Neale, Walter. "Karl Polanyi's Great Transformation and the Current Transformations in Central Europe." In *Economic Transition in Historical Perspective: Lessons From the History of Economies*, eds. Charles Andres Clark and Janina Rosicka. London: Ashgate, 2001.

Halberstam, Daniel. "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13." *German Law Journal* 16, no.1 (2016).

Hamilton, Robert. *Sovereignty, Terra Nullius, Crown Lands, and Indian Reserves*. Ph.D. Diss., University of Victoria, 2016.

Hanley, Sarah. "Engendering the State: Family Formation and State Building in Early Modern France." *French Historical Studies* 16, no.1 (1989).

Haraway, Donna. "Staying with the Trouble Anthropocene, Capitalocene, Chthulucene." In *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism*, ed. Jason Moore. Cambridge: MIT Press, 2016.

Haraway, Donna. *Staying with the Trouble: Making Kin in the Chthulucene/* Durham, Duke University Press, 2016.

Harring, Sidney. "'There Seemed to Be No Recognized Law': Canadian Law and the Prairie First Nations." In *Laws and societies in the Canadian prairie West 1670-1940*, eds. Jonathan Swainger and Louis Knafla. Vancouver: University of British Columbia Press, 2005.

Harring, Sidney. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Toronto: University of Toronto Press, 1998.

Harris, Cole. *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia*. Vancouver: University of British Columbia Press, 2003.

- Havercroft, Jonathan. *Captives of Sovereignty*. Cambridge: Cambridge University Press, 2011.
- Hayek, Friedrich. "The Economic Conditions of Interstate Federalism." In *Individualism and Economic Order*, ed. Friedrich Hayek. Chicago: University of Chicago Press, 1939.
- Heffer, Simon. "Rise of the Fourth Reich, How Germany is Using the Financial Crisis to Conquer Europe." *Daily Mail*, August 17, 2011. Accessed Nov. 11th, 2009 <https://www.dailymail.co.uk/news/article-2026840/European-debt-summit-Germany-using-financial-crisis-conquer-Europe.html>.
- Heiltsuk First Nation and the Government of B.C. "Strategic Land Use Planning Agreement." Accessed Nov 10, 2019 <http://archive.ilmb.gov.bc.ca/slrp/lrmp/nanaimo/central_north_coast/docs/Heiltsuk_FN_Signed_SLUPA.pdf>.
- Hein, Josef. "The Ordoliberalism that Never Was." *Contemporary Political Theory* 12, no.4 (2013).
- Henderson, James Youngblood. "Empowering Treaty Federalism." *Saskatchewan Law Review* 58, no.1 (1994).
- Hermes, Katherine. "'Justice Will Be Done Us' Algonquian Demands for Reciprocity in the Courts of European Settlers." In *Many Legalities of Early America*, eds. Christopher Tomlins and Bruce Mann. Chapel Hill: University of North Carolina Press, 2001.
- High, Steven. "Native Wage Labour and Independent Production during the 'Era of Irrelevance'." *Labour* 37 (1996).
- Hill, Gord. *500 Years of Indigenous Resistance*. Oakland: PM Press, 2010.
- Hollis, Grant. "The 'Sovereignty' Debt Crisis?" *North East Law Review* 10, no.2 (2014).
- Honneth, Axel and Fraser, Nancy. *Redistribution or Recognition?* London: Verso, 2003.
- Honeywell*, BVerfGE Case 2661/06, [2010] NJW 3422. (German Constitutional Court).
- Hooghe, Liesbet and Marks, Gary. *Multi-Level Governance and European Integration*. Lanham: Rowman & Littlefield, 2001.
- Hueglin, Thomas. "Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union." *Canadian Public Administration* 56, no.2 (2013).
- Hunt, Alan. "Encounters with Juridical Assemblages: Reflections on Foucault, Law and the Juridical." In *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder. New York: Routledge, 2012.
- Ince, Onur Ulas. "Between Equal Rights: Primitive Accumulation and Capital's Violence." *Political Theory* 46, no.6 (2018).

- Ince, Onur Ulas. "Primitive Accumulation, New Enclosures, and Global Land Grabs: A Theoretical Intervention." *Rural Sociology* 79, no.1 (2014).
- Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECJ Case 11/70, [1970] ECR 1125.
- Isiksel, Turkuler. *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*. Oxford: Oxford University Press, 2016.
- Isitt, Ben. *Patterns of Protest: Property, Social Movements, and the Law in British Columbia*. Ph.D. Diss., University of Victoria, 2018.
- Island of Palmas (U.S. v. Neth.), [1928] 2 R. Int'l Arb. Awards 831, [1932] HCR (2nd) 83.
- Ivaldi, Gilles; Elisabetta, Maria and Woods, Lanzone. "Varieties of Populism across a Left-Right Spectrum: The Case of the Front National, the Northern League, Podemos and Five Star Movement." *Swiss Political Science Review* 23, no.4 (2017).
- Iverson, Duncan. "Consent or Contestation." In *Between Consenting Peoples: Political Community and the Meaning of Consent*, eds. Jeremy Webber and Colin Macleod. Vancouver: University of British Columbia Press, 2010.
- Jachtenfuchs, Markus. "Theoretical Perspectives on European Governance." *European Law Journal* 1, no.2 (1995).
- Jacobs, Beverly. *International Law/The Great Law of Peace*. M.A. Diss., University of Saskatchewan, 2000.
- Jacques Delors. "Speech by Jacques Delors (9 September 1985)." In *Bulletin of the European Union no.9*. Luxembourg: Office for Official Publications of the European Communities, 1985.
- Jamieson, Stuart. "Native Indians and the Trade Union Movement in British Columbia." *Human Organization* 20, no.4 (1962).
- Kaldora, Mary and Selchow, Sabine. "The 'Bubbling Up' of Subterranean Politics in Europe." *Journal of Civil Society* 9, no.1 (2013).
- Kawashima, Yasu. "Jurisdiction of the Colonial Courts over the Indians in Massachusetts, 1689-1763" *The New England Quarterly* 42, no.4 (1969).
- Keating, Michael. "Sovereignty and Plurinational Democracy: Problems in Political Science." In *Sovereignty in Transition*, ed. Neil Walker. Portland: Hart Publishing, 2003.
- Keller, Hellen and Stone Sweet, Alec eds. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford: Oxford University Press, 2009.

- King, Thomas. *The Inconvenient Indian: A Curious Account of Native People in North America*. New York: Doubleday, 2012.
- Kitchenuhmaykoosib Inninuwig First Nation and the Algonquins of Barriere Lake. "Joint Submission by the KI and the Algonquins of Barriere Lake, United Nations Economic and Social Council Permanent Forum on First Nations Issues, 7th Session, New York, April 21 - May 2, 2008." Accessed Nov. 10, 2019
www.barrierelakesolidarity.org/2008/04/canada-quebec-condemned-before-un.html.
- Knight, Rolf. *Indians at Work: An Informal History of Native Labour in British Columbia, 1858-1930*. Vancouver: New Star, 1996.
- Kohler-Koch, Beate. "Civil Society and EU Democracy: 'Astroturf' Representation?" *Journal of European Public Policy* 17, no.1 (2010).
- Kokkelvisserij v. Netherlands*, ECtHR Application no.13645/05, [2009] ECHR 286.
- Krasner, Stephen. "Westphalia and All That." In *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, eds. Judith Goldstein and Robert Keohane. Ithaca: Cornell University Press, 1993.
- Kropotkin, Peter. *Mutual Aid: A Factor of Evolution*. Mineola: Dover, 2006.
- Kropotkin, Petr. *The Essential Kropotkin*, Emile Capouya and Keitha Tompkins eds. London: Palgrave Macmillan, 1975.
- Krzysztof Filipiak Case*, ECJ Case 314/08, [2009] ECR I-11049.
- Kumar, Chandra. "Foucault and Rorty on Truth and Ideology: A Pragmatist View from the Left." *Contemporary Pragmatism* 2, no.1 (2005).
- Kumm, Mattias. "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty." *European Law Journal* 11, no.3 (2005).
- La Rusic, Ignatius; Bouchard, Serge; Penn, Alan; Brelsford, Taylor; Deschênes, Jean-Guy; and Salisbury, Richard. *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement* (Ottawa: Department of Indian and Northern Affairs, 1979).
- Lazzarato, Maurizio. *The Making of the Indebted Man: An Essay on the Neoliberal Condition*. Los Angeles: Semiotext(e), 2012.
- Leibfried, Stephan and Pierson, Paul. "Prospects for Social Europe." *Politics and Society* 20, no.3 (1992).
- Levmore, Saul. "Two Stories about the Evolution of Property Rights." *Journal of Legal Studies* 31, no.2 (2002).

- Liebert, Ulrike. "Postnational Constitutionalisation in the Enlarged Europe." In *Democracy beyond the State: Assessing European Constitutionalisation*, eds. U. Liebert, J. Falke and A. Maurer. Baden-Baden: Nomos, 2005.
- Lindahl, Hans. "Sovereignty and Representation in the European Union." In *Sovereignty in Transition*, ed. Neil Walker. Portland: Hart Publishing, 2003.
- Lindberg, Leon and Scheingold, Stuart. *Europe's Would-be Polity: Patterns of Change in the European Community*. Englewood: Prentice-Hall, 1970.
- Linderfalk, Ulf. "Cross-fertilisation in International Law." *Nordic Journal of International Law* 84, no.3 (2015).
- Lisbon Treaty*, BVerfGE Case 2/08, [2010] 2 CMLR 712. (German Constitutional Court).
- Logan v. Styres*, [1959] 20 DLR. (2d) 416, 5 CNLC 261 (Ont. HC).
- Lombardo, Emanuela. "The Participation of Civil Society in the European Constitution-Making Process." Paper presented to the CIDEL Workshop *Constitution Making and Democratic Legitimacy in the EU*. London, November 10, 2004.
- Loo, Tina. "Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia." In *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. Carolyn Strange. Vancouver: University of British Columbia Press, 1996.
- Lord, Christopher and Magnette, Paul. "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU." *Journal of Common Market Studies* 42, no.1 (2004).
- Lovelace v. Canada*, UNHRC Communication No.24/1977: Canada 30/07/81, [1977] UN Doc. CCPR/C/13/D/24/1977.
- Luhmann, Niklas. "The Autopoiesis of Social Systems." In *Essays on Self-Reference*, ed. Niklas Luhmann. New York: Columbia University Press, 1990.
- Luhmann, Niklas. *Social Systems*. Tr. John Bednarz Jr. Stanford: Stanford University Press, 1995.
- Lutz, John. *Makuk*. Vancouver: UBC Press, 2009.
- Maastricht Treaty*, BVerfGE Case 89/155, [1993] 33 ILM 388. (German Constitutional Court).
- Mac, Johnny. "Hoquotist: Reorienting Through Storied Practice." In *Storied Communities: Narratives of Contact and Arrival in the Constitution of Political Community*, eds. Hester Lessard, Rebecca Johnson, Jeremy Webber. Vancouver: UBC Press, 2010.
- Macarthys v. Smith*, 1980 EWCA Civ 7, [1981] QB 180. (U.K. England and Wales Court of Appeal).

- Maduro, Miguel. "Contrapuntal Law." In *Sovereignty in Transition*, ed. Neil Walker. Portland: Hart Publishing, 2003.
- Maduro, Miguel. "Three Claims of Constitutional Pluralism." In *Constitutional Pluralism in the European Union and Beyond*, eds. Matej Avbelj and Jan Komárek. Portland: Hart Publishing, 2012.
- Magoc, Chris and Bernstein, David eds. *Imperialism and Expansionism in American History: A Social, Political, and Cultural Encyclopedia and Document Collection*. Santa Barbara: ABC-CLIO, 2015.
- Mahoney, Christine. "The Power of Institutions State and Interest Group Activity in the European Union." *European Union Politics* 5, no.4 (2004).
- Majone, Giandomenico. "The Common Sense of European Integration." *Journal of European Public* 13, no.5 (2006).
- Mar, Rachel. "France's Yellow Vests Are Rebels Without a Cause, French President Emmanuel Macron is Trying to Figure out What They Want." *The Atlantic*, March 18, 2019. Accessed Nov. 11th, 2019
<https://www.theatlantic.com/international/archive/2019/03/france-yellow-vest-protesters-want/585160/>.
- Margulis, Lynn. "Symbiogenesis and Symbiogenesis." In *Symbiosis as a Source of Evolutionary Innovation: Speciation and Morphogenesis*, ed. Lynn Margulis. Cambridge: MIT press, 1991.
- Marks, Gary and McAdam, Doug. "Social Movements and the Changing Structure of Political Opportunity in the European Union." *West European Politics* 19, no.2 (1996).
- Marsden, Susan and Galois, Robert. "The Tsimshian, the Hudson's Bay Company, And the Geopolitics Of The Northwest Coast Fur Trade, 1787–1840." *Canadian Geographer* 39, no.2 (1995).
- Martínez López, Miguel and García Bernardos, Ángela. "The Occupation of Squares and the Squatting of Buildings: Lessons From the Convergence of Two Social Movements." *ACME: An International E-Journal for Critical Geographies* 14, no.1 (2015).
- Martinico, Giuseppe. "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts." *European Journal of International Law* 23, no.2 (2012).
- Mattei, Ugo "Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neo-liberal Governance." *South Atlantic Quarterly* 112, no.2 (2013).
- Matthews v. U.K.*, ECtHR Application no.24833/94, [1999] ECHR 12.

- McGiffen, Steve. "Bloodless Coup d'Etat: The European Union's Response to the Eurozone Crisis." *Socialism and Democracy* 25, no.2 (2011).
- McNeil, Kent. "Aboriginal Title and the Provinces after Tsilhqot'in Nation." *The Supreme Court Law Review* 71, no.1 (2015).
- McNeil, Kent. "Aboriginal Title as a Constitutionally Protected Property Right." In *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision*, eds. Owen Lippert, Melvin Smith, Tom Flanagan, Gordon Gibson. Vancouver: Fraser Institute, 2000.
- McNeil, Kent. "First Nations Sovereignty and the Legality of Crown Sovereignty: An Unresolved Constitutional Conundrum." *Osgoode Digital Commons* 320 (2017).
- McNeil, Kent. "The Onus of Proof of Aboriginal Title." *Osgoode Hall Law Journal* 37, no.4 (1999).
- McNeil, Kent. "The Source, Nature, and Content of the Crown's Underlying Title to Aboriginal Title Lands." *The Canadian Bar Review* 96, no.2 (2018).
- McNeil, Kent. "Aboriginal Governments and the Canadian Charter of Rights and Freedoms." *Osgoode Hall Law Journal* 34, no.1 (1996).
- McNeil, Kent. "The Doctrine of Discovery Reconsidered: Reflecting on Discovering First Nations Lands: *The Doctrine of Discovery in the English Colonies* by Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg and *Reconciling Sovereignties: Aboriginal Nations and Canada* by Felix Hoehn." *Osgoode Hall Law Journal* 53, no.2 (2016).
- Menéndez, Agustín José. "The European Crises and the Undoing of the Social and Democratic Rechtsstaat." In *The European Union in Crises or the European Union as Crises?* eds. John Fossum and Agustín Menendez. Oslo: ARENA Reports, 2014.
- Miller, J.R. *Skyscrapers Hide the Heavens*. Toronto: University of Toronto Press, 1989.
- Mills, Aaron "Rooted Constitutionalism." In *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows. Toronto: University of Toronto press, 2018.
- Mills, Aaron. "Miinigowiziwin: All That Has Been Given for Living Well Together" *One Vision of Anishinaabe Constitutionalism*. Ph.D. Diss., University of Victoria, 2019.
- Milward, David. *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*. Vancouver: UBC Press, 2012.
- Minister for Justice and Equality v LM.*, ECJ Case 216/18, [2018] ECR 0000.
- Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911.

- Monteyne, David. "Constructing Buildings and Histories: Hudson's Bay Company Department Stores, 1910-1930." *Bulletin: The Journal of the Society for the Study of Architecture in Canada* 20, no.4 (1995).
- Monture, Patricia. "Notes on Sovereignty." In *Justice for Natives: Searching for Common Ground*, eds. Andrea P Morrison & Irwin Cotler. Montreal: McGill-Queens University Press, 1997.
- Moravcsik, Andrew. "Preferences and Power in the European Community: A Liberal Intergovernmental Approach." *Journal of Common Market Studies* 31, no.4 (1993).
- Moravcsik, Andrew. *The Choice for Europe*. Berkeley: University of California Press, 1999.
- Mouffe, Chantal. *The Democratic Paradox*. London: Verso, 2000.
- Mouffe, Chantal. "Deliberative Democracy or Agonistic Pluralism?" *Social Research* 66, no.3 (1999).
- Mouffe, Chantal. "Rorty's Pragmatist Politics." *Economy and Society* 29, no.3 (2000).
- Mouffe, Chantal. *For a Left Populism*. London: Verso, 2018.
- Mouffe, Chantal. *The Return of the Political*. London: Verso, 1993.
- Mourlon-Druol, Emmanuel. "The Making of a Lopsided Union: Debates about Economic Adjustment in Europe before the Euro." *West European Politics* 37, no.6 (2014).
- Mudde, Cas. "The populist Zeitgeist." *Government & Opposition* 39, no.3 (2004).
- Murphy, Hannah, and Kellow, Aynsley. "Forum Shopping in Global Governance: Understanding States, Business and NGOs in Multiple Arenas." *Global Policy* 4, no.2 (2013).
- Murphy, Michael ed. *Canada: The State of the Federation: Reconfiguring Aboriginal-State Relations*. Kingston: Institute of Intergovernmental Relations, 2005.
- Nahanee, Teresa. "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter." In *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues*. Ottawa: Minister of Supply and Services Canada, 1993.
- Napoleon, Val and Friedland, Hadley. "First Nations Legal Traditions: Roots to Renaissance." In *The Oxford Handbook on Criminal Law*, eds. Tatjana Hörnl and, Markus Dubber. Oxford: Oxford University Press, 2014.
- Native Women's Association of Canada, "What is Gladue?," accessed Nov 10th 2019, <https://www.nwac.ca/wp-content/uploads/2015/05/What-Is-Gladue.pdf>
- Negri, Antonio and Hardt, Michael. *Commonwealth*. Cambridge: Harvard University Press, 2009.

- Negri, Antonio and Hardt, Michael. *Empire*. Cambridge: Harvard University Press, 2000.
- Neu, Dean and Therrien, Richard. *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People*. Blackpoint: Fernwood Publishing, 2003.
- Newell, Ryan. "Only One Law: First Nations Land Disputes and the Contested Nature of the Rule of Law." *First Nations Law Journal* 41, no.1 (2012).
- Niblett, Robin. "Shock Therapy," *Euro-Focus* 11, no.2 (2005).
- Nichols, Joshua. *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada*. Toronto: University of Toronto Press, 2019.
- Nichols, Joshua. "Sui Generis Sovereignties: The Relationship between Treaty Interpretation and Canadian Sovereignty." In *Reflections on Canada's Past, Present and Future in International Law*, eds. Oonagh Fitzgerald, Valerie Hughes, and Mark Jewett. Waterloo: CIGI Press, 2018.
- Nichols, Joshua. *Reconciliation and the Foundations of Aboriginal Law in Canada*. Ph.D. Diss., University of Victoria, 2016.
- Nichols, Robert. *Theft Is Property! Dispossession and Critical Theory*. Durham: Duke University Press, 2019.
- Nicolaïdis, Kalypso. "The New Constitution as European 'Demoi-crazy'?" *Critical Review of International Social and Political Philosophy* 7, no.1 (2004).
- Nisga'a Nation, British Columbia, and Canada, *Nisga'a Final Agreement*. Ottawa: Federal Treaty Negotiation Office, 1999. Accessed Nov.11, 2019 <https://www.nnkn.ca/files/u28/nis-eng.pdf>.
- Nold v. Commission*, ECJ Case 4/73, [1974] ECR 491.
- Occupy Vancouver. "Method: Spokes Council." Accessed Nov 11th, 2019 <https://participedia.net/method/518>.
- Office of the Premier. "Premier John Horgan's statement on his visit to 'Namgis First Nation in Alert Bay.'" Accessed Nov 11, 2019 <https://news.gov.bc.ca/releases/2017PREM0096-001713>.
- Olwig, Kenneth. *Landscape, Nature, and the Body Politic: From Britain's Renaissance to America's New World*. Madison: University of Wisconsin Press, 2010.
- Opinion Pursuant to Article 218(11) TFEU*, ECJ Case 2/13, [2014] EUR-Lex CELEX 62013CV0002.
- Orfinger v. Belgian State*, BCE Case 62/922, [1997] 116 JLT 256. (Belgian Conseil d'Etat).

- Ouziel, Pablo. *Vamos Lentos Porque Vamos Lejos': Towards a Dialogical Understanding of Spain's 15Ms*. Ph.D Diss. University of Victoria, 2015.
- Paine, Robert ed. *The White Arctic. Anthropological Essays on Tutelage and Ethnicity*. St John's: Memorial University, 1977.
- Paine, Robert. "The path to Welfare Colonialism." In *The White Arctic: Anthropological Essays on Tutelage and Ethnicity*, ed. Robert Paine. St. John's: Memorial University, 1997.
- Panitch, Leo. "Class and Power in Canada." *Monthly Review* 36, no.11 (1985).
- Parker, David. *Privatization in the European Union: Theory and Policy Perspectives*. London: Routledge, 1998.
- Parmenter, Jon William. "Pontiac's War: Forging New Links in the Anglo-Iroquois Covenant Chain, 1758-1766." *Ethnohistory* 44, no.4 (1997).
- Pasternak, Shiri. "How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada." *Antipode* 47, no.1 (2015).
- Pasternak, Shiri. *Grounded Authority: The Algonquins of Barriere Lake Against the State*. Minneapolis: Minnesota University Press, 2017.
- Pasternak, Shiri. *On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy*. Ph.D. Diss., University of Toronto, 2014.
- Pastorella, Guilia, "Technocratic Governments in Europe: Getting the Critique Right." *Political Studies* 64 no.4 (2016).
- Patzer, Jeremy. *Histories that Bind: Doctrinal Productivity and Legal Governance in Canadian Aboriginal Law*. Ph.D. Diss., Carleton University, 2016.
- Pavone, Tommaso. "The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis." *SSRN* no.2042867 (2012).
- Payandeh, Mehrdad. "The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture." *European Law Review*, 13, no.1 (2017).
- Petersen, Hanna. "Premier John Horgan talks salmon farms in Alert Bay," *North Island Gazette* Oct 12, 2017. Accessed Nov. 11th, 2019
<https://www.northislandgazette.com/news/premier-john-horgan-visits-alert-bay-to-talk-salmon-farms/>.
- Petrovic v. Austria*, ECtHR Application no.20458/92, [1998] ECHR 21.
- Polanyi, Karl. *The Great Transformation: The Political and Economic Origins of Our Time*. Boston: Beacon Press, 2001.

- Pollack, Mark. "Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?" *Annual Review of Political Science* 8, no.1 (2005).
- Pratt, Mary Louise. *Imperial Eyes: Travel Writing and Transculturation*. London: Routledge, 1992.
- Prins, Harald. *Storm Clouds Over Wabanakiak: Confederacy Diplomacy Until Dummer's Treaty (1727)*. Amherst: The Atlantic Policy Congress of First Nations Chiefs, 1999.
- Procureur du Roi v Benoît and Gustave Dassonville*, ECJ Case 8/74, [1974] ECR 837.
- Promislow, Yanna. "Treaties in History and Law." *University of British Columbia Law Review* 47, no.3 (2014).
- Protect the Inlet. "Kwekwecnewtxw." Accessed Nov 12, 2019, <https://protecttheinlet.ca/structure/>.
- Protect the Inlet. "Statement from the Watch House – Kwekwecnewtxw Protect the Inlet Project, July 21, 2018, Unceded Coast Salish Territories." Accessed Nov.11, 2019 <https://protecttheinlet.ca/indigenous-led-watch-house-remains-on-burnaby-mountain-beside-kinder-morgan-facility/>.
- Pynn, Larry. "Author of Environmental Manifesto Stands by Document Aimed at Promoting B.C. Civil Disobedience." *Vancouver Sun*, March 19th, 2018. Accessed Nov. 11th, 2019 <https://vancouver.sun.com/news/local-news/author-of-environmental-manifesto-stands-by-document-aimed-at-promoting-civil-disobedience?>.
- R v. Gladstone*, [1996] 2 SCR 723, [1996] 137 DLR (4th) 648.
- R. v. Commanda*, [1939] DLR 635, [1939] 72 CCC 246 (Ont. H.C.).
- R. v. Day Chief*, 2007 ABCA 22, [2008] 412 AR 29.
- R. v. Fournier*, [2004] OTC 260, [2004] CanLII 66288 (ON SC).
- R. v. Francis*, ONSC 05/17, [2007] 85 OR (3d) 45.
- R. v. Ignace*, [1998] 103 BCAC 273, [1998] 156 DLR (4th) 713.
- R. v. Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513; *R. v. Bernard*, 2005 SCC 43, [2005] 2 SCR 220.
- R. v. Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204.
- R. v. Secretary of State for Transport, ex p. Factortame Ltd.*, 1989 UKHL 1, [1990] 3 CMLR 867. (U.K. House of Lords).
- R. v. Sparrow*, [1990] 1 SCR 1075, [1990] 70 DLR (4th) 385.

- R. v. Syliboy*, [1929] 1 DLR. 307, 50 CCC. 389.
- R. v. Van der Peet*, [1996] 2 SCR 507, [1996] 4 RNLR 177.
- R. v. Yellowhorn*, 2006 ABQB 307, [2006] 399 AR 144.
- R. v. Côté*, [1996] 3 SCR 139, [1996] 138 DLR (4th) 385.
- Rachel, Ariss and John Cutfeet. *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law*. Blackpoint: Fernwood Publishing, 2012.
- Rafoss, Bill. "First Nations and the Charter of Rights." In *Moving Toward Justice: Legal Traditions and Aboriginal Justice*, ed. John Whyte. Saskatoon: Purich Publishing, 2008.
- Rawls, John. "The Idea of an Overlapping Consensus." *Oxford Journal of Legal Studies* 7, no.1 (1987).
- Reif, Karlheinz and Schmitt, Hermann. "Nine Second-Order National Elections - a Conceptual Framework for the Analysis of European Election Results." *European Journal of Political Research* 8, no.1 (1980).
- Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, [2019] CNLR 1, (Plaintiffs' Memorandum of Argument May 4, 2018).
- Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECJ Case 120/78, [1979] ECR 649.
- Reynolds, Joan. "'Pragmatic Humanism' in Foucault's Later Work." *Canadian Journal of Political Science* 37, no.4 (2004).
- Roberts v. Canada*, [1989] 1 SCR 322, (1990) 57 DLR (4th) 197.
- Rose Peña, Deborah. "The Power to Punish: Conflicts of Authority in the Case of Jack Fiddler." *Hypocrite Reader* 2 (2011).
- Russell, Peter and Jones, Roger. "Aboriginal Peoples and Constitutional Reform." Paper prepared for the *Royal Commission on Aboriginal Peoples*. Ottawa: Royal Commission on Aboriginal Peoples, 1995.
- Rynard, Paul. "'Welcome In, but Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada." *Canadian Journal of Political Science* 33, no.2 (2000).
- Ryner, Magnus. "Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and its Management." *Journal of European Public Policy* 22, no.2 (2015).
- Sabel, Charles and Gerstenberg, Oliver. "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order." *European Law Journal* 16, no.5 (2010).

- Sahtu Dene and Métis Nations, the Northwest Territories, Canada. *Sahtu Dene and Metis Comprehensive Land Claim Agreement*. Ottawa: Indian and Northern Affairs, 1993. Accessed Nov.11, 2019 https://www.eia.gov.nt.ca/sites/eia/files/sahtu_dene_and_metis_comprehensive_land_claim_agreement_0.pdf.
- Sanders, Douglas. "The Indian Lobby." In *And No One Cheered: Federalism, Democracy, and the Constitution Act*, eds. Keith Banting and Richard Simeon. Toronto: Taylor & Francis, 1983.
- Sanderson, Douglas. "The Residue of Imperium: Property and Sovereignty on Indigenous Lands." *University of Toronto Law Journal* 68, no.3 (2018).
- Sanoma Uitgevers BV v. the Netherlands*, ECtHR Application no.38224/03, [2010] ECHR 1284.
- Santos, Boaventura de Sousa. "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges." *Fernand Braudel Review* 30, no.1 (2007)
- Santos, Boaventura de Sousa. "A Non-Occidental West? Learned Ignorance and Ecology of Knowledge." *Theory, Culture & Society* 26 no.8 (2009)
- Santos, Boaventura de Sousa. "The World Social Forum and the Global Left." *Politics & Society* 36, no.2 (2008).
- Santos, Boaventura de Sousa. *Epistemologies of the South: Justice Against Epistemicide*. Boulder: Paradigm, 2014.
- Saurugger, Sabine. "The Social Construction of the Participatory Turn: The Emergence of a Norm in the European Union." *European Journal of Political Research* 49, no.4 (2009).
- Sauter, Wolf. "The Economic Constitution of the European Union." *Columbia Journal of European Law* 4, no.27 (1998).
- Scharpf, Fritz. "The Asymmetry of European Integration or why the EU cannot be a 'Social Market Economy'." *Kolleg-Forschergruppe Working Paper No.6* (2009) at 211.
- Scharpf, Fritz. "Problem Solving Effectiveness and Democratic Accountability in the EU." *IHS Political Science Series* no.107 (2006).
- Scharpf, Fritz. *Governing in Europe. Effective and Democratic?* Oxford: Oxford University Press 1999.
- Schouls, Tim. "Between Colonialism and Independence: Analyzing British Columbia Treaty Politics from a Pluralist Perspective." Paper presented to the *Canadian Political Science Association Annual Meeting*. London, June 3rd, 2005.
- Seidl, David. "Luhmann's Theory of Autopoietic Social Systems." *Munich Business Research* 2 (2004).

- Selwood, John. "An Early Example of Globalisation: the Hudson's Bay Company's Interlocking Directorships." *Prairie Perspectives* 3 (2000).
- Serralles, Roberto. "Electric Energy Restructuring in the European Union: Integration, Subsidiarity and the Challenge of Harmonization." *Energy Policy* 34 (2006).
- Shinko, Rosemary. "Agonistic Peace: A Postmodern Reading." *Millennium: Journal of International Studies* 36, no.3 (2008).
- Simeone, Tonina. *Federal-Provincial Jurisdiction and Aboriginal Peoples*. Ottawa: Parliamentary Information and Research Service, 2001.
- Simpson, Audra. *Mohawk Interruptus: Political Life Across the Borders of Settler States*. Durham: Duke University Press, 2014.
- Simpson, Leanne. *The Gift Is in the Making: Anishinaabeg Stories*. Winnipeg: Highwater Press, 2013.
- Slattery, Brian. "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada." *Osgoode Hall Law Journal* 34, no.1 (1996).
- Slaughter, Anne-Marie. "A Global Community of Courts." *Harvard International Law Journal* 44, no.1 (2003).
- Slaughter, Anne-Marie. "Security, Solidarity and Sovereignty: The Grand Themes of UN Reform." *American Journal of International Law* 99, no.3 (2005).
- Sloan, W.A. "The Native Response to the Extension of the European Traders into the Athabasca and Mackenzie Basin, 1770–1814." *The Canadian Historical Review* 60, no.3 (1979).
- Smith, D.B. "Nahnebahwequay (1824-1865): 'Upright Woman'." *Canadian Methodist Historical Society Papers* 13, no.1 (2001).
- Smith, M.A. "Natural resource co-management with Aboriginal peoples in Canada: Coexistence or Assimilation." In *Aboriginal Peoples and Forest Lands in Canada*, eds. D.B. Tindall, Ronald Trosper and Pamela Perreault. Vancouver: UBC Press, 2013.
- Snyder, Gary. "The Rediscovery of Turtle Island." In *Deep Ecology for the 21st Century*, ed. George Sessions. Boulder: Shambhala, 1995.
- Solange I*, BVerfGE Case 37/271, [1974] 14 CMLR 540. (German Constitutional Court).
- Solange II*, BVerfGE Case 73/339, [1987] 3 CMLR 225. (German Constitutional Court).
- Sovereignty in Transition*. ed. Neil Walker. Portland: Hart Publishing, 2003.
- Squatting Europe Kollektive eds. *Squatting in Europe: Radical Spaces, Urban Struggles*. New York: Minor Compositions, 2012.

- Sridharan, Vasudevan. "EU to triple funding for 'Operation Triton' to tackle Mediterranean Migrant Crisis." *International Business Times*, April 24th, 2015. Accessed Nov. 11th, 2019 <https://www.ibtimes.co.uk/eu-triple-funding-operation-triton-tackle-mediterranean-migrant-crisis-1498100>.
- Stein, Eric. "Lawyers, Judges and the Making of a Transnational Constitution." *American Journal of International Law* 75, no.1 (1981).
- Stern, Philip. "'A Politie of Civill & Military Power': Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State." *Journal of British Studies* 47 (2008).
- Stern, Philip. "Politics and Ideology in the Early East India Company-State: The Case of St Helena, 1673–1709." *Journal of Imperial and Commonwealth History* 35, no.1 (2007).
- Stó:lō Nation, "Integrated Cultural Assessment for the Proposed Transmountain Expansion Pipeline Project 2014." In *NEB Application and Environmental Impact Assessment*, Kinder Morgan Canada. Calgary: National Energy Board, 2014.
- Streeck, Wolfgang. "Peoples and Markets: Democratic Capitalism and European Integration." *New Left Review* 73, no.1 (2012).
- Taggart, Paul. "Populism and Representative Politics in Contemporary Europe." *Journal of Political Ideologies* 9, no.3 (2004).
- Tanguay, Liane. "Governmentality in Crisis: Debt and the Illusion of Liberalism." *Symploke* 23, no.1 (2015).
- Taricco and Others*, ECJ 42/17, [2017] ECLI: EU:C:2017:936.
- Taylor, Alan. "The Divided Ground: Upper Canada, New York, and the Iroquois Six Nations, 1783-1815." *Journal of the Early Republic* 22, no.1 (2002).
- Taylor, Alan. *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution*. New York: Knof, 2006.
- Thoburn v. Sunderland City Council*, 2002 EWHC 195, [2003] UKQB 151 (U.K Queen's Bench).
- Thom, Brian. "Disagreement-in-Principle: Negotiating the Right to Practice Coast Salish Culture in Treaty Talks on Vancouver Island, BC." *Journal of Marxism and Interdisciplinary Inquiry* 2, no.1 (2008).
- Thompson, E. P. *The Making of the English Working Class*. London: Penguin, 1991.
- Thompson, E.P. *The Poverty of Theory*. London: Merlin Press, 1995.

- Tömmel, Ingeborg. "Transformation of Governance: The European Commission's Strategy for Creating a 'Europe of the Regions'." *Regional & Federal Studies* 8, no.2 (1998).
- Tough, Frank. "Indian Economic Behaviour, Exchange and Profits in Northern Manitoba During the Decline of Monopoly, 1870–1930." *Journal of Historical Geography* 16, no.4 (1990).
- Tovias, Blanca. "Navigating the Cultural Encounter: Blackfoot Religious Resistance in Canada." In *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. Dirk Moses. New York: Berghahn Books, 2008.
- Treaty Alliance, "Treaty Alliance Against Tar Sands Expansion." Accessed Nov. 10, 2019 at www.treatyalliance.org/wp-content/uploads/2016/12/TreatyandAdditionalInformation-20161216-OL.pdf.
- Trosper, Ronald. *Resilience, Reciprocity and Ecological Economics: Northwest Coast Sustainability*. New York: Routledge, 2011.
- Truth and Reconciliation Commission of Canada. *Final report of the Truth and Reconciliation Commission of Canada*. Winnipeg: Truth and Reconciliation Commission of Canada, 2015.
- Tsawwassen First Nation, British Columbia, and Canada, *Tsawwassen Final Agreement*. Ottawa: Aboriginal Affairs and Northern Development Canada, 2007. Accessed Nov.11, 2019 https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf.
- Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256.
- Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, [2018] CNLR 3.
- Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press, 1995.
- Tully, James. "Lineages of Contemporary Imperialism." In *Lineages of Empire: The Historical Roots of British Imperial Thought*, ed. Duncan Kelly. Oxford: Oxford University Press, 2009.
- Tully, James. "Modern Constitutional Democracy and Imperialism." *Osgoode Hall law Journal* 46, no.3 (2008).
- Tully, James. "Reconciliation Here on Earth." In *Resurgence and Reconciliation*, eds. James Tully, Michael Asch, and John Borrows. Toronto: University of Toronto press, 2018.
- Tully, James. "Two Ways of Being Colonial: Guest and Settler." Paper presented to the *Workshop on Colonization and Decolonization*. University of British Columbia, April 12 2017.

- Tully, James. *Public Philosophy in a New Key: Volume 1*. Cambridge: Cambridge University Press, 2009.
- Tulugak, Harry. "Governance in the James Bay and Northern Québec Agreement: an Inuit Perspective." In *Reflections on the James Bay Northern Quebec Agreement*, eds. Alain Gagnon and Guy Rocher. Montreal: Québec Amérique, 2002.
- Turpel, Mary Ellen. "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences." *Canadian Human Rights Yearbook* 6, no.3 (1989).
- Unist'ot'en Camp, "Coastal Gas Link Bulldozes Unist'ot'en Trapline." Accessed Nov. 10, 2019 <https://unistoten.camp/cgl-bulldozes-trapline/>.
- Unist'ot'en Camp. "Protocols." Accessed Nov.11, 2019 <http://unistoten.camp/fundraiserprotocols/>.
- Unist'ot'en Camp. "Timeline of the Campaign." Accessed Nov.11, 2019 <http://unistoten.camp/timeline/timeline-of-the-campaign/>.
- Vallance, Neil. *Sharing the Land: the formation of the Vancouver Island (or 'Douglas') Treaties of 1850-1854 in Historical, Legal and Comparative Context*. Ph.D. Diss., University of Victoria, 2015.
- Van den Brink, Ton and Van Rossem, Jan "Sovereignty, Stability and Solidarity: Conflicting and Converging Principles and the Shaping of Economic Governance in the European Union." *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper no.04* (2014).
- Van Dooren, Thom and Despret, Viciane. "Evolution: Lessons from Some Cooperative Ravens." In *The Edinburgh Companion to Animal Studies*, eds. Lynn Turner, Ron Broglio and Undine Sellbach. Edinburgh: University of Edinburgh Press, 2017.
- Van Duyn v. Home Office*, ECJ Case 41/74, [1974] ERC 01337.
- Van Gend en Loos v. Netherlands*, ECJ Case 26/62, [1963] ECR 1.
- Varoufakis, Yanis. *And the Weak Suffer What They Must?* New York: Nation Books, 2016.
- Vasudevan, Alexander. *The Autonomous City: A History of Urban Squatting*. Brooklyn: Verso, 2017.
- Veracini, Lorenzo. *Settler Colonialism: A Theoretical Overview*. London: Palgrave Macmillan, 2010.
- Vibert, Frank. *The Rise of the Unelected Democracy and the New Separation of Powers*. Cambridge: Cambridge University Press, 2007.

- Walters, Mark. "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America." *Osgoode Hall Law Journal* 33, no.4 (1995).
- Walters, Mark. "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shawanakiskie Case (1822-26)." *University of Toronto Law Journal* 46, no.2 (1996).
- Walters, Mark. "According to the Old Customs of Our Nation: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847." *Ottawa Law Review* 30, no.1 (1998).
- Walters, Mark. *The Continuity of Aboriginal Customs and Government Under British Imperial Constitutional Law as Applied in Colonial Canada, 1760-1860*. Ph.D. Diss., University of Oxford, 1995.
- War Resisters International, *Handbook of Nonviolent Campaigns*. London: War Resisters International, 2014.
- Ward, Hugh. "The Co-evolution of Regimes of Accumulation and Patterns of Rule: State Autonomy and the Possibility of Functional Responses to Crisis." *New Political Economy* 8, no.2 (2003).
- Webber, Jeremy and Gover, Kirsty. "Proprietary Constitutionalism." In *Routledge Handbook of Constitutional Law*, eds. Mark Tushnet, Thomas Fleiner and Cheryl Saunders. New York: Routledge, 2013.
- Webber, Jeremy and Macleod, Colin eds. *Between Consenting Peoples: Political Community and the Meaning of Consent*. Vancouver, University of British Columbia Press, 2010.
- Webber, Jeremy. "A Two-Level Justification of Religious Toleration." *Journal of Indian Law and Society* 4, no.2 (2014).
- Webber, Jeremy. "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples." *Osgoode Hall Law Journal* 33, no.4. (1995).
- Webber, Jeremy. "We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty." In *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, eds. Patrick Macklem and Douglas Sanderson. Toronto: University of Toronto Press, 2016.
- Weiler, J.H.H. "In Defense of the Status Quo: Europe's Constitutional Sonderweg." In *European Constitutionalism beyond the State*, eds. J.H.H. Weiler and Marlene Wind. Cambridge: Cambridge University Press, 2003.
- Weiler, J.H.H. "A Quiet Revolution: The European Court of Justice and Its Interlocutors." *Comparative Political Studies* 26, no.4 (1994).

- Wenman, Mark. "'Agonistic Pluralism' and Three Archetypal Forms of Politics." *Contemporary Political Theory* 2, no.2 (2003).
- Western Sahara Advisory Opinion*, ICJ GL No.61, [1975] ICJ Rep 12.
- White, Richard. *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*. Cambridge: Cambridge University Press, 2010.
- Wien, Thomas. "Selling Beaver Skins in North America and Europe, 1720-1760: The Uses of Fur-Trade Imperialism." *Journal of the Canadian Historical Association* 1, no.1 (1990).
- Wiener, Antje and Diez, Thomas. *European Integration Theory*. Oxford: Oxford University Press, 2009.
- Wiener, Antje and Liste, Philip. "Lost Without Translation?: Cross-Referencing and a New Global Community of Courts," *Indiana Journal of Global Legal Studies* 21, no.1 (2014).
- Wiener, Antje. "A Theory of Contestation - A Concise Summary of Its Argument and Concepts." *Polity* 49, no.1 (2017).
- Wiener, Antje. *A Theory of Contestation*. New York: Springer, 2014.
- Wilkins, David and Lomawaima, Tsianina. *Uneven Ground: American Indian Sovereignty and Federal Law*. Norman: University of Oklahoma Press, 2002.
- Wilkins, Kerry. "Still Crazy after All These Years: Section 88 of the Indian Act at Fifty." *Alberta Law Review* 38, no.2 (2000).
- Wilkins, Kerry. "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government." *University of Toronto Law Journal* 49, no.1 (1999).
- Wilkinson, Michael. "Austerity, Grexit and the Battle for the Euro." *LSE Law & Policy Briefing Series* no.10 (2015).
- Wittgenstein, Ludwig. *Philosophical Investigations*, tr. G. M. Anscombe. Oxford: Basil Blackwell, 1967.
- Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no.4 (2006).
- Wolff, Jonas and Zimmermann, Lisbeth. "Between Banyans and battle scenes: Liberal Norms, Contestation, and the Limits of Critique." *Review of International Studies* 42, no.3 (2014).
- Woo, Grace Li Xiu. "Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations." *Law, Social Justice and Global Development Journal* 1 (2003).

- Woolford, Andrew and Ratner, R. S. "A Measured Sovereignty: The Politics of Nation-Making in British Columbia." *Canadian Journal of Native Studies* 24, no.2 (2004).
- Woolford, Andrew. "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process." *Canadian Journal of Sociology* 29, no.1 (2004).
- Woolford, Andrew. "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process." *Canadian Journal of Sociology* 29, no.1 (2004).
- Woolford, Andrew. "Transition and Transposition: Genocide, Land and the British Columbia Treaty Process." *Journal of Marxism and Interdisciplinary Inquiry*, no.2 (2001).
- Woolford, Andrew. *Between Justice and Certainty: Treaty Making in British Columbia*. Vancouver: University of British Columbia Press, 2006.
- Worcester v. Georgia*, [1832] 31 U.S. (6 Pet.) 515, [1832] 31 USR 63.
- Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECJ Joined Cases C-402/05 P and C-415/05 P, [2008] ECR I-06351.
- Zielonka, Jan. *Europe as Empire*. Oxford: Oxford University Press, 2006.
- Zobbe, Henrik. "The Economic and Historical Foundation of the Common Agricultural Policy in Europe." Paper presented at the *Fourth European Historical Economics Society Conference*. University of Oxford, September 2001.