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Democratic Futures and the Problem of Settler States

An Essay on the Conceptual Demands of Democracy and the Need for Political Histories of Membership

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The future of democracy within settler states is, much like its past, radically contested, deeply complicated and ultimately uncertain. This fact is, in one sense, unsurprising. After all, the future of democracy has never been certain. Of the various forms of government possible within the Western world, democracy is the least stable. As a concept it refers simply to the rule of the *demos* (the common people).[1] That much is clear, but how are we to determine the boundaries of a people? Two possible methods spring to mind. We could adopt a territorial definition and thereby define membership by reference to boundaries that are set in relation with neighboring groups (*jus soli*). Alternatively, we could base the definition on a conventional set of rules for determining kinship. In this case membership becomes a function of recognized familial relationships (*jus sanguinis*). It is also possible to develop a mixed approach, but no matter the approach taken the selection is strictly *conventional*. In other words, the question of membership leaves democracy contested at its conceptual foundations – there simply is no a priori definition of *the* people.

This brings us to the next conceptual knot in democracy. If democracy is indeed the rule of the people, then the process for determining who is in and who is out needs to be broadly accepted and understood, as it is part and parcel of the authority structure within that social order. Put differently, in a democracy legal questions of membership are conceptually bound up with the question of both the legal process of determining membership and the justificatory practices that are used to legitimize those determinations. If we attempt to craft a legal process for determining membership without reference to the explanatory requirements

[1] I should note here that I am addressing the future of democracy within settler states that fit within the broad tradition of representative democracy. In this tradition there is a higher degree of tension placed on the identity of the *demos* as the authoritative body, and so the procedures and practices of legality and legitimacy must be connected to it.

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of legitimacy (which are historically and contextually specific), then the outcome will be *normatively illegible* (viz. it will not be understood as a legitimate move within the constitutional order). If we reverse our approach and instead attempt to determine membership by reference to the explanatory requirements alone, then the outcome will be *legally illegible* (viz. it will not be received as a valid legal move within the constitutional order). If we attempt to see the relationship between legality and legitimacy as an either/or problem, then it seems that democracy is stranded on the horns of a dilemma between the semantics of formal legal rules and the pragmatics that enable one to make sense of actual social practices.

This dilemma is not inevitable, it is simply a product of approaching the relationship as being fundamentally disjunctive in nature. Seen through this lens, democracy is caught up in paradoxes of membership and authority that seem to leave us with little other choice than accepting the notion that legal authority is an act of *pure independence* (viz. commands made by an actor without correlative responsibility).[2] This idea of authority as *pure independence* is as incoherent as the idea of one player in a chess match being able to self-authorize their actions as a legitimate move in the game. This leaves us with little recourse but to appeal to some makeshift conceptual black-box to cover over the paradox of authority (viz. Kant's *thing-in-itself*). We can find our way out of this paradoxical dead end by reconsidering the relationship between legality and legitimacy. For example, the fundamental constitutional convention of "what touches all should be agreed to by all" (quod omnes tangit ab omnibus comprobetur, or q.o.t.) helpfully reminds us that *legality and legitimacy* are inextricably interconnected. This interconnection is also clearly reflected in the notion of freedom that Rousseau develops, which holds that "[o]bedience to a law one has prescribed for oneself is freedom."[3] It is possible to argue that that these examples set a standard of legitimacy that is practically unrealizable and

[2] Robert Brandom's discussion of Hegel's critique of Kant via the unhappy concept of Mastery is instructive on this point. See Robert B. Brandom, *A Spirit of Trust: A Reading of Hegel's Phenomenology* (Cambridge, MA: Harvard University Press, 2019), 313–52.

[3] This citation is from book 1, chapter 7 of Rousseau's *On the Social Contract*, and its logical structure is echoed again in Rousseau's definition of law in book 2, chapter 6. See Jean-Jacques Rousseau, "On the Social Contract," in *Basic Political Writings*, trans. Donald A. Cress (Indianapolis: Hackett, 1987), 151, 161. Kant attempted to jump over the question of legal foundations (viz. the actual source of laws) by bracketing the source of semantic content and highlighting the freedom of choosing the law as your own. This leaves him with an ultimately spooky and incoherent notion of the source of authority (viz. the thing-in-itself). Hegel retains the notion of freedom that Kant helpfully developed and moves from Kant's notion of individual autonomy to a social recognitive model. As Robert Brandom clearly explains in his masterful reading of the Phenomenology, "[t]he idea, central to modernity as Hegel conceives it, that normative attitudes are *instituted* by normative statuses, is the idea that statuses are to begin with merely *virtual*, as the *objects of attitudes* of attributing and acknowledging them, become *actual* when those attitudes are suitably situated in such complex constellation." Brandom, *A Spirit of Trust*, 313

so, if we adopt them, then no legal order could be taken as being legitimate. We are thus thrust back into paradox. But, here again we are jumping over the social process of judgment and evaluation and attempting to evaluate the relationship between semantics and pragmatics in the frictionless space of armchair reasoning. It is as if we had decided that the criterion for determining the validity of legal semantics is unquestioning pragmatic acceptance, which is as absurd as looking for a game that is entirely circumscribed by rules. Simply put, if we are to begin to make sense of democratic forms of government, then the relationship between legality and legitimacy cannot simply be ignored.

Two cases draw this point home. First, even if we assume that it is possible to satisfy the ideal foundational conditions set by the convention of q.o.t., the issue of membership must remain open. This is true by virtue of the simple fact that we have to account for the consent of those who are born into membership. If the question is treated as closed, then the foundational logic of the society changes from consent to historical convention by virtue of natural reproduction. There is thus a conceptual change that takes place from the foundational moment when the membership is constituted by their consent and its continuation by future generations whose consent is not relevant. If we rigidly maintain this position, we are immediately adrift in absurdities. It seems that in order to determine whether or not a given society is a democracy or not we would need to have a very clear picture of its founding moment. We would then set off in hunt of a foundational generation, but what kinds of records would we have at our disposal? How are we to interpret these records? Here again we find that our choices bristle with political significance. This problem is further magnified if we consider the fact that the notion of what counts as consent is also necessarily *conventional*. We thus have to consider the political and legal implications of how we determine what consent means. Is the requirement that consent is indicated once and for all in a written contract? Is it to be imputed by appeal to what rational actors would be bound to commit themselves to? Is it subject entirely to the ongoing and active consent of individual members? Each interpretation of consent is a *political decision* that leads us down very different constitutional paths.

Second, if we consider the actual historical foundations of presently existing states, we quickly see that none of them can resolve the problem of membership. The political history of their rules of membership is a motley assortment of legislation and explanatory conventions (viz. they are *representative democracies*). If we omit these histories, then we necessarily view the composition of the state as a mechanical result of the legal conventions that are currently practiced there. This external and descriptive method is akin to determining the number of chess pieces on the board by watching how the players move them. This will provide us with a count of the pieces, but it will tell us next to nothing about the actual rules of chess. H. L. A. Hart clearly and

succinctly unpacks the limitations of this kind of external perspective in *The Concept of Law*:

> If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behavior, his description of their life cannot be in terms of rules at all, and so not in the terms of rule-dependent notions of obligation or duty. Instead, it will be in terms of observable regularities of conduct, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic light will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come.[4]

A political history of membership provides us with the kind of internal perspectives that allow us to make *sense* of membership in actual states. That is, it allows us to go beyond the narrowly defined limits of external descriptions (and their guesswork in the fancy dress of "objectivity") and meaningfully make our way about in the hustle and bustle of everyday politics.

The everyday reality of settler states vividly demonstrates the need for a political history of membership. On the one hand, states such as Canada, New Zealand, Australia and the United States (to select only a few of the current descendants of the British Empire) are, like every other modern state, a conventionally constructed membership. But the conventions that led to Indigenous peoples being included as *minorities within* these states do not fit neatly within the confines of either the jus soli or jus sanguinis. The settler states acquired territories by defining the peoples they encountered as lacking the legal capacities necessary to be recognized as peoples. The territories of these states were thus acquired via a complicated mixture of practices of coercion (viz. racist legal fictions, unilateral assertions, force and fraud) as well as practices of consent (viz. treaty-making and multifarious practices of intersocietal law and governance). Simply put, Indigenous peoples did not contract into the settler states; they were conscripted into them. As a result, settler states have been left with no plausible explanation for this conscription. They have generally opted to respond by claiming that their legal authority is self-authorizing and unquestionable. This sets down a bright line between law and politics and situates the question of legitimacy squarely on the political side. This strategy of nonresponse (or nonjusticiability) has not resolved these conflicts. Rather, it has produced a body of jurisprudence whose doctrines, tests and principles are so painfully confused and convoluted that they simply cannot be understood as being consistent with the rest of constitutional law. In response to the incoherence of the law in this area, jurists in settler states have opted to

[4] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 89–90.

basically wall the area off by labeling it "sui generis." If this strategy were practically effective, then we would expect these sui generis legal areas to gradually slow down and eventually simply vanish, like some kind of vestigial limb, but the opposite has proven to be the case. In other words, the legalistic approach to the question of authority has failed to make any meaningful progress in resolving the foundational crisis of legitimacy that divides settler states and Indigenous peoples. The sui generis jurisprudence of Aboriginal law has continually expanded, taking us further and further down the rabbit-hole of self-constituting and self-authorizing authority. If we are going to work our way out of this crisis, we will need to start by retracing the steps that led us here.

How did we get to this point? During the long nineteenth century, each of the settler states developed complicated constitutional structures that featured categorically distinct forms of government. We can roughly divide these forms of government into two ideal types of membership, which have a wide variety of local and regional variations. First, there are those who are recognized by the government of the settler state as citizens and thereby governed by a system of rules that they have a say in making (viz. the constitutional structure was *normatively legible* to some of those operating within it). In practice, these representative democracies developed categorical distinctions in membership and these distinctions took their color from their context. Put somewhat differently, the legal pragmatics were subject, at least in part, to the local semantics of authority, but this authority was justified in relation to the modern standard of self-governing citizens. But these categorical unfreedoms are thus normatively legible only to the degree that the citizens find them to be so. Second, there are those who are unilaterally defined as "Indians" and governed by administrative commands backed by force. This form of government was *normatively illegible* to those who were subject to it because it was using formal legal mechanisms to recode their normative framework, or, to use the terminology of the time, to *civilize* the Indians. The first type of government fits within the broad confines of the concept of democracy (albeit its fit is uncomfortable due to the politics of determining the franchise), whereas the second openly contradicts it.

This feature is by no means exclusive to settler states. All states (indeed, all associations) are riven by *political histories* of the exclusion and oppression of so-called "minorities" and "aliens."[5] Where the uniqueness of the settler states first begins to show is in terms of degree. That is, while all states deal with conflicts arising from issues of membership (e.g. secession movements, overlapping claims to territory by neighboring states), within settler states the entirety of their claim to territory rests on the legal exclusion and/or diminishment of Indigenous peoples. As a result of this unique degree of pressure on the question of membership, settler states have developed

[5] I qualify the term "minorities" because this concept presumes that there is some account that makes group B necessarily a part of the larger group A.

extensive and complicated legal and political structures to meet this challenge. This difference of degree led them to develop vocabularies of law that were *different in kind*.

The categorical difference between these legal vocabularies is particularly important when we are trying to get a sense of what the futures of democracy could be at this particular moment in history. This means that the political histories of membership in settler states offer us a unique opportunity to gain some insight into the possible futures of democracy in nation-states. Put differently, the intense pressures on the question of membership in settler states have produced something like a core sample of the political climate of Western modernity. In this way, I believe that one of our best chances to find something meaningful to say about the futures of democracy now is to begin the work of writing the political histories of membership in settler states. These histories cannot serve as prediction machines for the future of democracy (this can only ever be the territory of prophets, seers and charlatans), but they can provide us with concrete examples of situations wherein the presuppositions of membership in nation-states are exposed and contradicted by the demands of factual situations.

Among settler states, Canada provides us with a particularly unique sample: its constitutional order has been forced to respond to both the claims of Indigenous peoples and the problem of secession. The principled architecture of the Supreme Court's response to this problem can be found in two cases, namely, *R.* v. *Sparrow* and the *Reference re Secession of Quebec*. The contrast between these two cases can help us to see the different historical lenses that the Court has used to respond to these two constitutional conflicts. While a fine-grained appreciation of the details of these cases is needed to really draw out this distinction, let us simply say here that the principles of these cases are *not consistent with one another*. Rather, they are rooted in the histories of two categorically distinct *vocabularies of law*. We can label these two as "democratic constitutionalism" (e.g. the combination of mixed constitutionalism and popular sovereignty introduced by the American and French Revolutions) and "administrative governance" (e.g. Colonial Administration). They correspond to two different understandings of the relationship between law and the legitimacy of the political order that stem from the so-called Second Empire of the long nineteenth century. Therefore, by understanding the principled differences between these cases we can understand the relationship between these vocabularies of law and the future of democracy in modern nation-states.

Now that we have a rough sense of the significance of both Canada and these two cases, I will set out an itinerary for the rest of this chapter. I aim for this to be an *essay* in the etymological sense of the term. By that I mean that I am offering a limited case study and not a systematic treatise. This is merely an initial walk across very complicated terrain, and my aim is to pick out some features and draw your attention to them. The more philosophically robust and legally systematic mapping of these features in their wider context will need to come

later. That caveat in place, I have divided the chapter into two sections: first, I will elaborate on what I mean by a political history of membership. I will then make use of the concept by using it to provide readings of *Sparrow* and the *Secession Reference* as cases within a political history of membership in Canada.

WHAT IS A POLITICAL HISTORY OF MEMBERSHIP? A METHODOLOGICAL NOTE ON THE DISTINCTION BETWEEN LAW AND POLITICS

What is a political history of membership? One way of getting at this question is to understand what follows from the fact that the concept of membership cannot be removed from contestation. As I have pointed out, it is possible to remove the question of membership from one vocabulary. For example, the legal system can treat the question of membership as being nonjusticiable, but this does not settle the question; it simply shifts the venues and vocabularies of contestation. This changing of vocabularies can be difficult to see if we approach the problem from the presumption that questions of law are, in some way, categorically distinct from those of politics. While it is simply true the vocabularies of law and politics have distinct institutional practices (viz. the judicial branch of government operates by rules distinct from those found in the executive and legislative branches), we cannot plausibly claim to understand a legal system without offering an account of how the actors within that system make sense of what they are doing. We must appreciate the fact that the vocabularies of law are necessarily historical and that all competent actors need access to this dimension of the legal system to operate within it. Without this kind of account, we must limit ourselves to simply describing what the actors we observe *might be doing*. If we are depending on this kind of descriptive approach to make sense of what is happening in an actual legal system, things can go frightfully awry. In order to be able to claim that we understand what social actors are doing within the legal system we must be able to account for the rules that any current system operates by and how the social actors actually make sense of those rules. If we do not understand the relationship between the rules and how social actors interpret them, we cannot make sense of the daily operations of the legal system.

Let's try and unpack the above point a bit more clearly. If we attempt to get a clear view of the legal system by setting aside its historical development and instead working from an abstract theoretical model like the imperative theory of law, we do indeed manage to articulate a clearer picture of what the law is, but it is by necessity a picture of what the social actors *might* be doing (as H. L. A. Hart clearly shows in response to Austin by exploring the significance of legal rules[6]). It

[6] For Hart's response to Austin see *The Concept of Law*, chapters I–IV.

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is a *re-presentation* of the meaning of the actual, everyday practices of social actors that are being described. By this I simply mean that the simple imperative theory is built upon a series of presumptions, and these presumptions have significant costs. The presumptions help us by enabling us to construct a manageable view of the multiform complexity of the everyday world, but they also blind us to certain aspects of this complexity. If we presume that we are able to merely *describe* a given object or situation, then we are blind to the normative implications that are necessarily bound up with our use of language. This blindness is what Wilfred Sellers calls "descriptivism" (Robert Brandom uses the term "semantic naiveté" in a similar manner).[7] In order to make our way through this mistake we need to pay more attention to the relationship between description and evaluation. Sellers helpfully draws out this relationship:

> Although describing and explaining (predicting, retrodicting, understanding) are *distinguishable*, they are also, in an important sense, *inseparable*. It is only because the expressions in terms of which we describe objects, even such basic expressions as words for perceptible characteristics of molar objects, locate these objects in a space of implications, that they describe at all, rather than merely label. The descriptive and explanatory resources of language advance hand in hand.[8]

Once we see that describing and explaining are inseparable, we can see where we went wrong. So, with this clearly in mind, let's reconsider the presumptions implicit in laying claim to a descriptive account of the concept of law. If we choose to simply set aside the theories of law that were the historical accompaniment of the common law in a given period, we are also choosing to subtract the normative framework that actual legal actors used to make sense of their legal system. We are treating these rival theories as rival descriptions of the law and not as normative frameworks for practically doing things within a legal system. While it is true that setting the other theories to one side and starting again from a different set of presumptions does produce different possibilities for the concept of law, this cannot be understood as merely a *descriptive* account. Any such project is necessarily a *re-evaluation* of the concept of law from a limited perspective.

This theoretical lens (to use a common metaphor) provides us with a set of new explanations and ways of practically making our way about the law. But

[7] For Wilfred Sellars' use of "descriptivism" I have in mind his essay "Counterfactuals, Dispositions, and the Causal Modalities," in *Minnesota Studies in the Philosophy of Science*, vol. 2, *Concepts, Theories, and the Mind-Body Problem*, ed. Herbert Feigl, Michael Scriven, and Grover Maxwell (Minneapolis: University of Minnesota Press, 1957), §79; and Robert B. Brandom's discussion of it in chapter 1 of his excellent book *From Empiricism to Expressivism: Brandom Reads Sellars* (Cambridge, MA: Harvard University Press, 2015). For Brandom's concept of "semantic naiveté," see Robert B. Brandom, "Reason, Genealogy, and the Hermeneutics of Magnanimity" (Howison Lecture in Philosophy, University of California, Berkeley, CA, March 13, 2013), https://gradlectures.berkeley.edu/lecture/magnanimity.

[8] Wilfred Sellers, "Counterfactuals, Dispositions, and the Causal Modalities" in *Minnesota Studies*, vol. 2, ed. Feigl, Scriven, and Maxwell, §108.

the lens is also shaping the world that we practically navigate.[9] In this way it is like a pair of glasses: they enable us to see more clearly, but only within a limited field of view – as Wittgenstein reminds us, in the case of the eye and the field of sight, "you do *not* really see the eye."[10] These glasses cannot provide us a direct and unmediated view of objective reality (Wilfred Seller's attack on the "myth of the given" comes to mind here).[11] All that these glasses can offer us is a historical picture of the law. This necessarily means that by picking up the glasses of contrasting theoretical perspectives (e.g. those of Hobbes and Harrington or Blackstone and Bentham) we get a clearer view of what historical actors were doing in their context and what they built into the legal vocabulary that we have inherited. In other words, these glasses can help us understand why historical actors made the moves that they did within their contexts *and* we can begin to notice how versions of these vocabularies continue to be active in the everyday workings of the legal present.

If we set all of these accumulated glasses aside and chose instead another pair, then we risk forgetting that they are on our face.[12] In this case, we lose track of

[9] Nelson Goodman's classic text *Ways of Worldmaking* (Indianapolis: Hackett, 1978) comes to mind here.

[10] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. Charles Kay Ogden (London: Routledge, 1922), §5.633.

[11] For Wilfred Sellars' concept of the "myth of the given," see his essay "Empiricism and the Philosophy of Mind," in *Minnesota Studies in the Philosophy of Science*, vol. 1, *The Foundations of Science and the Concepts of Psychology and Psycho-Analysis*, eds. Herbert Feigl and Michael Scriven (Minneapolis, MN: University of Minnesota Press, 1956), 253–329. This essay was originally presented at the University of London Special Lectures in Philosophy for 1956 as "The Myth of the Given: Three Lectures on Empiricism and the Philosophy of Mind."

[12] Hart's critique of Austin's theory in the first half of *The Concept of Law* is clear, thorough, and forceful. There is room for nuance in Hart's positivism, but its limitations are nonetheless built into the presuppositions that accompany its claim to being merely *descriptive*. For example, how exactly does Hart ground his notion of "primitive law"? While it may be true that what he means is simple (and not the pejorative notion of "primitive" that resonates so strongly with the dark legacy of Colonial Imperialism) it is altogether unclear how exactly this determination is made outside of the confines of armchair thought experiments. How exactly does Hart's descriptive sociologist arrive at the conclusion that the social order s/he is observing lacks a *legal system*? After all, if a legal system is defined simply as a coupling of primary and secondary rules, how does one determine if a given society has the "minimum content" required to establish that they do indeed possess a legal system? Before we jump into a catalog of descriptive methodology, we should carefully consider if a society composed only of primary rules would even be possible? That is, is it possible for a society to have no rules about their rules? This idea of a society outside of the possibility of change (or outside of history) has a long history in the justifications of Colonial Imperialism. For example, Kant argued that the Tahitians lived in this static space of unreflective normative life, and on this basis he argued that their lives were no different (or more valuable) than sheep. Immanuel Kant, *Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (New York: Cambridge University Press, 1991), 219–20. Returning to Hart, is it not more plausible that the descriptive sociologist can only describe the observed behavior in the evaluative and explanatory context that s/he operates in? And so, there is no way for the descriptive sociologist to say for certain whether or not a given society lacks rules about rules. Even if the descriptive sociologist is equipped with the more prescient and circumspect capacities of observation and description, those

the fact that our view is partial, and we lose the ability to make sense of the everyday practical reality of the legal system. At the extreme, this blinkered approach to the law produces a legal system whose reality fits Weber's description of the "iron cage" of the future, which was inhabited by a

> mechanized petrifaction, embellished with a sort of convulsive self-importance. For of the last stage of this cultural development, it might truly be said: "Specialists without spirit, sensualists without hearts – this nullity imagines it has attained a level of civilization never before achieved."[13]

The deeply rooted pessimism here is palpable, but it does not close off the horizon of the future. The "iron cage" is *a view* of the future. Weber was cognizant of this. As Skinner helpfully demonstrates, Weber's historical project in *The Protestant Ethic and the Spirit of Capitalism* was to account for how the vocabularies of the Protestant reformation played a central role in "*legitimizing* the rise of capitalism."[14] This kind of history offers us something like "*its own time comprehended in thoughts*" (to borrow Hegel's evocative phrase).[15] In other

descriptions are looking for what they are familiar with. It is caught by the same limits that Hart so clearly stated those observing behavior at a stop sign would have. Thus, the capacities of descriptive sociology for pointing out rules and talking about rules is limited by their evaluative context. This does not mean that Hart's account of the law is somehow unworkable. Rather, it simply indicates a problem that Hart was aware of, but those who have extended his work outside of the context he was working in have stretched his concept of law past its evaluative limitations. We can think through the problem via Quine's notion of radical translation. In his famous though experiment from chapter 2 of *Word and Object*, Quine presents a case in which translation of a natural language must proceed without any prior linguistic knowledge and solely on the basis of the observed behavior of the speakers who sees a rabbit (Willard Van Orman Quine, *Word and Object* [Cambridge, MA: MIT Press, 1960]). The native speaker (who uses the unknown language of Arunta) uses the word "gavagai," which leads the interpreter to believe that the word is equivalent to "rabbit." But there is no way of being certain that this is what the speaker means because the interpreter does not have access to the other speaker's frame of reference or "space of implications" (to borrow Sellers' phrase). This does not lead to strong cultural relativism. This would be like jumping from the indeterminacy of translation to the impossibility of translation. Rather, as Donald Davidson shows us in his account of radical interpretation, understanding is not possible without mutual recognition. If an interpreter begins by doubting whether the beliefs of their interlocutor have an equal claim to holistic coherence and correspondence, only misunderstanding and confusion can result (Davidson's work on these concepts is spread throughout his work, but the obvious starting point is his seminal essay "Radical Interpretation," *Dialectica* 27 (1973): 313–28). This can help them build the kind of tenuous connections that allow for translation between natural languages to make some degree of *sense*. I believe that Hart's notion of law as being composed out of primary and secondary rules is far more helpful when it is paired with the philosophical tools that are needed to escape the dogma of descriptivism (*pace* Quine and Sellers for the oversimplified conjunction).

[13] Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (London: Routledge, 1992), 182.

[14] Quentin Skinner, *Visions of Politics*, vol. 1, *Regarding Method* (Cambridge: Cambridge University Press, 2002), 157.

[15] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. Hugh Barr Nisbet (Cambridge: Cambridge University Press, 1991), 21(original emphasis).

words, it demonstrates that situated historical actors can and do play a role in constructing the normative vocabularies that allow them to act within the legal and political systems of their time. Skinner unpacks the significance of this in relation to Weber:

> the earliest capitalists lacked legitimacy in the moral climate in which they found themselves. They therefore needed, as a condition of flourishing, to find some means of legitimizing their behavior … one of the means they found was to appropriate the evaluative vocabulary of the Protestant religion – greatly to the horror of the religious, who saw themselves as the victims of a trick … If it was a trick, however, it certainly worked. The distinctive moral vocabulary of Protestantism not only helped to increase the acceptability of capitalism, but arguably helped to channel its evolution in specific directions, and in particular towards an ethic of industriousness. The relative acceptability of this new pattern of social behavior then helped in turn to ensure that the underlying economic system developed and flourished. *It is for this reason that, even if the early capitalists were never genuinely motivated by the religious principles they professed, it remains essential to refer to those principles if we wish to explain how and why the capitalist system evolved.*[16]

This is precisely what I am calling the "political histories of membership" provide us with. But they are not confined to explaining how and why a given system evolved. Rather, they orient us toward the present moment of a legal system and, in the best case, provide us with the opportunity to intervene and "channel its evolution in specific directions." That is, they provide us with the practical tools necessary to interpret the everyday reality of actual legal systems and open avenues for encouraging principled change in ordinary language.

SPARROW AND THE SECESSION REFERENCE AS CHAPTERS IN THE POLITICAL HISTORY OF MEMBERSHIP

In the introduction I argued that settler states are unique in relation to other states because their claim to territory rests on the legal exclusion and/or diminishment of Indigenous peoples. This is a uniqueness of degree. For example, Spain has contested areas of jurisdiction in the substate nationalities of Catalonia, Galicia and the Basque Country, but these contested regions do not extend over the entirety of Spain. Thus, settler states are unique due to the degree of contested jurisdiction over their territory. This difference meant that in settler states the question of constitutional legitimacy was existential (viz. without a legitimate legal claim these nation-states could not exist) and so they developed vast administrative systems to address the issue, which were constructed with two categorically distinct legal vocabularies. This meant that the settler states of the long nineteenth century had a kind of bicameral constitutional order. There was the normal constitutional order built upon

[16] Quentin Skinner, *Visions of Politics*, 157 (emphasis added).

the principles of self-determination and constitutional law, and the Indian administrative system that operates as a state of emergency whose object was the interminable work of civilizing the uncivilized.

These administrative systems were constructed on the basis of a legal vocabulary whose concept of authority is self-constituting, irresponsible to those it governs, and ultimately incoherent. J. S. Mill attempted to legitimize this irresponsible form of government in the following manner:

> Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.[17]

Let's unpack this a little. Mill effectively claims that the criterion for determining the legitimacy of this form of government rests in the capacity of those who claim authority to objectively know the civilizational status of those subject to it (viz. the conflict of interest here is clear). Thus, normative legibility is still the criterion of legitimacy, but (thanks to a claim to the universality of one normative framework) the onus is reversed. In this model of the state, if the basis of authority is not legible to you that is proof that you have not attained the degree of enlightenment that is required for freedom. The Kafkaesque nature of this model of government is obvious: there is no possibility of barbarians attaining liberty, there is only the "iron cage" of the future.

As a consequence of these two vocabularies of law, the theories of sovereignty that the courts have developed in settler states are not consistent with one another. By this I mean that the theory of sovereignty that is used to explain the constitutional order for citizens is distinct from the one that is used to explain the constitutional order for Indians. One of the basic criteria of the former was its *normative legibility* to the citizenry (viz. authority required their recognition and so the pragmatic doings of law had to reflect the semantic context) whereas the latter was *normatively illegible* by design (viz. authority required only their obedience).[18]

This two-chambered constitutional structure was explicit for the nineteenth and much of the twentieth century, but the post-WWII process of decolonization required them to formally abandon the "temporary despotisms" of Indian administration. This has led settler states to use the legal vocabulary of minority rights to address the claims of Indigenous

[17] John Stuart Mill, *On Liberty and Considerations on Representative Government*, ed. Ronald Buchanan McCallum (Oxford: Basil Blackwell, 1948), 9.

[18] I have found David Dyzenhaus' work on the form of public law particularly instructive in spelling out the contrast I have in mind and mapping out its possible consequences for the rule of law. In particular, see David Dyzenhaus, "Process and Substance as Aspects of the Public Law Form," *Cambridge Law Journal* 74, no. 2 (2015): 284–306; and David Dyzenhaus, "The Inevitable Social Contract," *Res Publica* 27 (2021): 187–202, https://doi.org/10.1007/s11158-020-09467-z.

peoples. This can make it difficult to appreciate the seriousness of the constitutional problem. On the surface it seems that Indigenous peoples are categorically distinct from substate national groups, but that is only because the settler states have unilaterally categorized the object of these conflicts. They are not seen as conflicts over jurisdiction (like those with subnationalists) but as conflicts over minority rights. The problem here is that the unilateral categorization of one party by the other does not determine the actual object of a conflict between parties. It simply confuses the matter. For the last 150 years, Indigenous peoples in settler states have consistently articulated their claims in the vocabulary of jurisdiction and settler states have unilaterally responded with the vocabulary of rights. They have done so because the vocabulary of rights is downstream of the question of sovereignty (viz. it is a question of finding the right mix of rights to stabilize the sovereign-to-subjects relationship). This has led them down a kind of constitutional rabbit-hole wherein the courts make decisions based on policy and then half-heartedly assemble the legal authorities after the fact. It is a rabbit-hole because the resultant body of jurisprudence would only make sense within the nonsensical confines of a Lewis Carrol novel. The source of this confusion is that these settler states have retained theories of sovereignty that are theoretically unilateral, legally unquestionable and ultimately incoherent.[19] We can see how these two vocabularies persist within Canadian constitutional law by analyzing *Sparrow* and the *Secession Reference*.

Sparrow and Administrative Government

In *Sparrow*, the Court had to provide an interpretive framework for an unusual constitutional provision. The wording of s. 35(1) of the *Constitution Act, 1982* does little more than point to content that is not actually provided (viz. existing Aboriginal and treaty rights). The position of the provision in the scheme of the act provides some insight into its significance, but it also greatly magnifies the problem posed by its vague wording. Section 35 is outside the scope of the

[19] Two examples of this will suffice for my purposes here: in 1886 the US Supreme Court issued their decision in *United States* v. *Kagama*, 118 US 375 (1886) and attributed plenary power over Indian tribes to Congress based on an interpretation of the Commerce Clause of the Constitution that has no plausible basis in constitutional law. For more on this, see Robert N. Clinton, "There is No Supremacy Clause for Indian Tribes," *Arizona State Law Journal* 34, no. 1 (2002): 113–260; and Philip P. Frickey, "Domesticating Federal Indian Law," *Minnesota Law Review* 81, no. 1 (1996): 31–95. Similarly, in Canada we could point to the unquestionable presumption that the Crown is in possession of sovereignty, legislative power and underlying title, which extends from the UK Privy Council decision in *St. Catharine's Milling and Lumber Co.* v. *R.* [1888] UKPC 70, 14 App Cas 46, to the foundational case of the post-1982 constitutional order, *R.* v. *Sparrow* [1990] 1 SCR 1075, [1990] 70 DLR (4th) 385. For more on this, see Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019); and Joshua Nichols, *A Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

Charter and thus it is not subject to the reasonable limitations of s. 1 or the override power of s. 33. This means that the legal quality of s. 35 has more in common with the relationship between ss. 91 and 92 of the *Constitution Act, 1867*. It establishes a jurisdictional line within the division of powers. But this left the Court in a very difficult position. If they interpreted the provision in this manner, they would effectively be declaring any and all legislation that touched on "existing Aboriginal and treaty rights" null and void. This would doubtlessly result in constitutional deadlock and so they set out to find the "appropriate interpretive framework for s. 35(1)" by starting with an examination of its "background."[20] One would naturally presume that the background the Court has in mind would include a consideration of the legislative context of the provision (e.g. the extensive collection of Hansard, committee reports, related litigation, the history of the treaties), but instead they simply stated that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[21] The first authority that they cite for this (curious) proposition is *Johnson* v. *M'Intosh*, which is the *locus classicus* for the so-called "doctrine of discovery."[22]

The Sparrow framework is built upon the most pernicious legal fictions of the nineteenth century (viz. an unstable amalgam of the doctrine of discovery and the civilization thesis). By failing to address these foundations the Courts have given the Crown's assertion of sovereignty over Indigenous peoples a strange extratextual quality: it simply has what it claims to have and is not required to tether this power to the constitutional order. Instead of securely limiting Crown sovereignty within the constitutional order the Courts have positioned Indigenous peoples as a special minority within Canada that has access to

[20] *Sparrow*, 1102. [21] *Sparrow*, 1103.

[22] It should also be noted that the Court does not explain how *Johnson* v. *M'Intosh*, 21 US (8 Wheat.) 543 (1823) supports their account of Crown sovereignty. First, *Johnson* v. *M'Intosh* is by no means settled authority within the United States as it is the first case of three that Chief Justice Marshall decided in relation to the Piankeshaw. His decisions in *The Cherokee Nation* v. *The State of Georgia*, 30 US 1, 5 Pet. 1, 8 L Ed 25 (1831) and *Samuel S. Worcester* v. *State of Georgia*, 31 US 515, 6 Pet 515, 8 L Ed 483 (1832) considerably modify the legal effect of discovery from something that seemingly enables the discoverer to diminish the legal rights of the other party to the desired level (like some kind of constitutional procrustean bed) to a first in time, first in right negotiating right with Indigenous peoples contra other European powers. Second, it is not clear that *Johnson* v. *M'Intosh* actually is authority for the strong version of the doctrine of discovery as it is a case that involves a land purchase agreement between a private citizen of the United States and the Piankeshaw. The citizen is trying to enforce the terms of this contrast within the US courts, but the US policy is that its citizens cannot make these kinds of agreements as that is the sole purview of Congress (mirroring the *Royal Proclamation of 1763*). In this case the only legal decision in *Johnson* v. *M'Intosh* is that the plaintiff is seeking the remedy in the wrong court as his contract is only subject to the law of the Piankeshaw. For this reading of the case, see Philp P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107 (1993): 381.

a sui generis set of group rights. They did so by basing their interpretation of the background of s. 35(1) on the vocabulary of administrative government, which starts from the presupposition that the Crown has unilateral *power-over* Indigenous peoples (viz. what Brandom – following Hegel – labels as "pure independence"). This vocabulary of law systematically mistakes the distinction between power and authority (viz. it assumes that to have *power* is to have *authority*). This mistake has systematic effects that ultimately render its account of the actual legal order incoherent. As Hart forcefully argues contra Austin, a theory that mistakes the distinction between power and authority purchases "the pleasing uniformity of pattern to which they reduce all laws at too high a price: that of distorting the different social functions which different types of legal rules perform."[23]

By looking to this "background" to determine the meaning of s. 35(1) the Court in *Sparrow* ensured that the Canadian project of reconciliation with Indigenous peoples could never make progress toward its stated purpose. This is because it unilaterally fixes the constitutional framework that the two parties are contesting. That is, the position taken in *Sparrow* presumes that Indigenous peoples are minorities and that the Crown is in possession of (unquestionable) sovereignty, legislative power, and underlying title. This assertion of *power as authority* locks Indigenous peoples into the framework of the Canadian constitutional order as conscripts.

Within the confines of the *Sparrow* framework, the parties cannot resolve their conflict because the legal vocabulary for resolving that kind of conflict has been removed from the board. As a result, the court has forced the parties into a surreal game in which a conflict between foundational partners over the jurisdiction in a federal constitutional order can only take place through the vocabulary of Charter-like rights. This is surreal precisely because the legal vocabulary of rights necessarily presumes that the actual issue of the conflict (viz. the nature of the constitutional relationship between the parties) is settled. This has effectively led to the development of a jurisprudence that can, at best, be described as thin principled and fact bound. Or, to be more direct, it has led to the creation of a legal labyrinth whose shifting walls and doors have rendered the constitutional order normatively illegible.

To repurpose Bentham's phrase, *Sparrow* has left the Canadian constitutional order looking like "non-sense upon stilts."[24] The problem with this kind of "non-sense" is that it is often contagious. The vocabulary of

[23] Hart, *The Concept of Law*, 38

[24] This was the phrase that Jeremy Bentham used in 1796 to attack the notion of natural rights in the French *Declaration of the Rights of Man and the Citizen* in his *Anarchical Fallacies*. I am repurposing his polemical metaphor to the opposite effect as I view his collapse of the distinction between the state and the government – which begins with his attack on Blackstone in *Fragment on Government* in 1776 – as making the legal distinction between legal authority and coercive force unintelligible. For more detailed criticism on this move in Bentham's work and its consequences, see David Dyzenhaus, "The Genealogy of Legal Positivism" *Oxford Journal of Legal*

administrative government is not confined to one corner of the constitutional order. It lives in the worrying and multiform expansions of the discretionary powers of the executive. After all, the vocabulary of administrative government includes that key legal tool in the kit of nineteenth-century colonial empire: *martial law*. Legally unresponsible forms of government have been expanding in the twenty-first century, but they have deep roots in the nineteenth century. If we fail to notice how these administrative systems and their legitimating legal vocabulary work together within existing legal systems, then we cannot begin to understand the future of democracy.

The *Secession Reference* and Democratic Constitutionalism

The vocabulary of democratic constitutionalism in the *Secession Reference* has presented the Canadian constitutional order with the possibility of moving past the limitations of the nation-state and toward the deep pluralism of diverse federalism (borrowing Charles Taylor's instructive work on "deep diversity").[25] This gist of the case is rather simple: when a partner of a federal constitutional order voices a desire to leave the federation, all of the partners are obligated to come to the negotiating table and see if they can find a way to meet the underlying concerns of the aggrieved partner. This is how the Court openly mediates between the demands of *legality and legitimacy*.[26] Legality alone would have counseled them to find that any claim to alter the constitutional order without fulfilling its amending formula is simply without legal effect. This would provide a formally correct answer, but it would have the same binding force that the Imperial Crown's formally correct claims to sovereign power had once the Declaration of Independence was issued – namely, very little. The Court clearly pointed to the risks of this narrow interpretive approach when they characterized the constitutional order that would result from it as a "straitjacket."[27] Alternatively, if they had heeded the demands of legitimacy alone, then a unilateral right to secession would be consistent with the principle

Studies 24, no. 1 (2004): 39–67; and Quentin Skinner's analysis in *From Humanism to Hobbes: Studies in Rhetoric and Politics* (Cambridge: Cambridge University Press, 2018), 374–83.

[25] Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. Guy Laforest (Montreal: McGill-Queen's Press, 1994), 155.

[26] *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 33. Some legal scholars may object to the use of the term "legitimacy" by claiming that it is a political concept without purchase in legal analysis. In my view this objection trades on a distinction between law and politics that strongly resembles the fact-value distinction in philosophy and suffers from the same kind of metaphysical confusions (i.e. the notion of facts without values or values without facts, which is needed to maintain the bright line version of the distinction). While there are indeed meaningful distinctions between the use of the concept of legitimacy in political and legal vocabularies, the concept of legitimacy itself is not somehow out of bounds in legal analysis. For a more detailed and sophisticated account of this distinction, see David Dyzenhaus' account of legal legitimacy in "Process and Substance," 284–306.

[27] *Reference re Secession of Quebec*, para. 150.

of self-government. This would effectively remove the binding effect of constitutional law *holus bolus*. In such a world, the form and substance of political association is lost, leaving only an endless cycle of fracture and subdivision. By mediating between these two principles the Court successfully avoids both of these risks.

The combination of diverse federalism and democratic constitutionalism that the Court put forward in the *Secession Reference* is built on the presumption that the Canadian state is composed of plural legal orders.[28] This presumption of plurality is of central importance because it leads to the construction of legal vocabulary that acknowledges that legal orders require both formal coherence and normative legibility. By taking a step back from the stifling confines of *Sparrow* and its nineteenth-century conception of absolute sovereignty we see that sovereignty can be the product of negotiations between jurisdictional partners within a federal or confederal relationship. In other words, this vocabulary of law carefully distinguishes between power and authority and thereby has the interpretive resources to show how authority is dependent on processes of mutual recognition. Once we understand the vocabulary that the Court makes use of in the *Secession Reference*, we can apply them to the problem of *Sparrow* and provide a meaningful path forward in reconciliation. This means that tools for modification and adjustment are no longer the exclusive purview of a cadre of legal engineers working on the magical combination of rights that will achieve the formal requirements of reconciliation behind the backs of Indigenous peoples. Rather, the vocabulary of legitimacy is openly set on the table between partners so that they can use them together to renegotiate the shared constitutional framework.

CONCLUSION

Those without a political history of membership are blind to the profound risk posed by the vocabulary of administrative governance, and this vocabulary was used to build part of the constitutional order in the settler states. In these states, sovereignty has been attributed to the executive branch on the basis of its unilateral assertion alone, and this commits these states to systematically mistaking power for authority.[29] This legal fiction is so potent that it has been used to recharacterize treaties as surrender agreements.[30] The concern with the idea of democratic nation-states in the nineteenth century was that they would

[28] See Tully's foundational contribution to constitutional thinking in James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); as well as James Tully, "The Unattained Yet Attainable Democracy: Canada and Quebec Face the New Century" (Desjardins Lecture, McGill University, Montreal, QC, March 23, 2000).

[29] Examples of this fact can be seen in *United States* v. *Kagama* and *St. Catharines Milling*.

[30] I address the history of treaty interpretation in the Canadian courts in Joshua Nichols, "A Narrowing Field of View: An Investigation into the Relationship Between the Principles of

be totalizing (Burke, Acton, Tocqueville and others voiced this concern) and so would not leave open the space for rational dissent. The risk was that a loss of the division of powers (so prized by Montesquieu) would concentrate power in a way that compelled obedience without providing any kind of *normative guidance* (viz. law understood – through Bentham and Austin – as the fancy dress of threats backed by force). This concern is by no means theoretical; rather, it is the everyday constitutional reality of Indigenous peoples in settler states. The vocabulary of law that catches them in this "web of meaning" (to repurpose Geertz's phrase[31]) is not confined to that little traveled attic of constitutional law known as Aboriginal law. Philp Frickey provides us with a clear and forceful analysis of the US version of this legal vocabulary:

> *Kagama* was the first case in which the Supreme Court essentially embraced the doctrine that Congress has plenary power over Indian affairs. Its apparent inconsistency with the most fundamental of constitutional principles – the *McCulloch* understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution – is an embarrassment of constitutional theory. Its slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity.[32]

In settler states, the need to mediate between the demands of the nation-state (viz. a single people with sovereign authority over a bounded territory) and the realities of colonial empire presented two paths: the first leaned hard on the formal requirements of the nation-state and set to work civilizing those populations that could not be seamlessly fused into the body politic (the focus on children as the tabula rasa for the uniform citizenry of the future). Those following this perspective jumped over the issue of legitimacy with the thousand-league boots of colonial fictions that simply determined the legal rights of others on the fiction that such work could be done via objective evaluation alone (viz. it is possible to objectively define and identify the uncivilized). This work of constructing a legal vocabulary for the problem of legally acquiring occupied territory and conscripting Indigenous peoples was done in libraries, courtrooms and legislatures far away from those it presumed to diminish. The systematic distortion that accompanies the conflation of power and authority was missed because the legal process was designed to treat this as its unquestionable background presumption. Put otherwise, the cause of these distortions is baked into the rules of the game, and thus those playing the game in the courts are left with the maddening task of making sense of the whirlwind of principles, doctrines and tests that exist in the jurisprudence. But this should

Treaty Interpretation and the Conceptual Framework of Canadian Federalism," *Osgoode Hall Law Journal* 56, no. 2 (2019): 350–95.

[31] Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, NJ: Princeton University Press, 2000), p. 17.

[32] Philip P. Frickey, "Domesticating Federal Indian Law," 35.

not be taken as grounds for a pessimistic rejection of constitutional law within settler states. We must remember that this was only one of the vocabularies of law that were used to account for the relationship between settler states (and the Imperial families) and Indigenous peoples.

The other vocabulary of law (which I have labeled "democratic constitutionalism") was used in more workaday contexts than its rival. Whereas the vocabulary of administrative governance often dominated the specialized registers of colonial bureaucracy, legislatures and the courts, the vocabulary of democratic constitutionalism was more commonly used on the ground by treaty negotiators.[33] This was by no means a process that can be idealized. It was plagued by fraud and coercion, but nonetheless this was part of the on-the-ground practice of law and politics on the frontier. It could not function with background presumption that power and authority are one and the same as this would make the entire process of treaty-making senseless. How could one conduct negotiations on such terms? The only possible case that comes to mind is a kind of caricature of surrender negotiations following a crushing military defeat, but even in this extreme case, power and authority are not strictly equivalent. Courts have interpreted the treaties with exactly this distorting presumption, but the constitutional risks of this narrow formalism are frighteningly high. As Chief Justice Marshall clearly explained in *Worcestor*, the narrow interpretive approach should be rejected because

> [s]uch a construction would be inconsistent with the spirit of this and of all subsequent treaties, especially of those articles which recognise the right of the Cherokees to declare hostilities and to make war. *It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties*.[34]

The significance of this move to retain the "political existence" of the Cherokee nation is difficult to overstate. It is not simply that the Chief Justice is preoccupied with doing justice to the Cherokee nation. He clearly recognizes that this act of justice is a two-way street. By maintaining that the Cherokee nation is a "distinct community, occupying its own territory" he preserves the legal and normative coherence of the constitutional order.[35] Simply put, this interpretation retains the sense-making capacity of constitutional law by maintaining the distinction between power and authority.

If the Courts of settler states accept such a construction, it would allow the legislative and executive branches to effectively have the ability to remove the sovereign character of another party by unilateral declaration. This could seem

[33] For more on this, see Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014); Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishnabe Understanding of Treaty One* (Vancouver: UBC Press, 2013); and Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (Oxford: Oxford University Press, 1997).

[34] *Worcester* v. *Georgia*, 31 US 515 (1832), 519 (emphasis added).

[35] *Worcester* v. *Georgia*, 520.

to be compulsory for the "courts of the conqueror" (viz. the sovereignty of the Crown is understood to be nonjusticiable, and for good reason: if it were treated as a zero-sum proposition then the courts could delegitimate the constitutional order they operate within), but allowing this move introduces a strange loophole within the constitutional order. There are no constitutional norms to connect the declaration of legality to a comprehensible legitimating explanation (e.g. it is not conquest, not a normal surrender). This leaves it as a kind of free-floating – or, perhaps more clearly, "extra-constitutional" – plenary power that cannot be openly expressed as it contradicts the legal and normative principles that render the constitutional order legible to its citizenry.[36] Now, if we continue to attribute legitimacy to the background presumption that settler states have unquestionable power over Indigenous peoples, we also necessarily have attributed absolute sovereign power to the executive. This loss of the distinction between power and authority could be used to eclipse the distinction between the government and the state. In other words, when the courts take this kind of sovereignty as the background presupposition, they have used their judicial discretion to untether the executive from its constitutional bounds. The sole criterion for the legitimacy for such a sovereign is its self-determined power. In this instance the courts have left their constitutional posts and taken up work as the sovereign's valet. If we accept this as a coherent and reliable picture of reality, then it seems that the futures of democracy are rather dim. After all, these spooky bootstrapping sovereigns will only suffer the rights of its citizens so long as it is convenient for them to do so. But we do not need to give into this pessimism. We can reject that vocabulary of law as incoherent. We can remind ourselves that for law to be binding (in more than the crude sense of the power of the gunman) it must be normatively legible; it must make sense to us as a rule. This means that we have to face the fact that legality and legitimacy are necessarily connected and that we cannot jump over this requirement with the pseudo-descriptive categorization of custom versus system. The only viable way forward is to make use of the imperfect tools that have developed within the vocabulary of democratic constitutionalism to construct a constitutional order that is legible to all of those it claims to include. If Western liberal democracies fail to properly understand this history, then they are doomed to suffer a similar fate.

[36] Philip Frickey uses the phrase "extra-constitutional" to characterize the so-called doctrine of the plenary power of Congress over Indian Tribes that the US Supreme Court first formulated in *United States* v. *Kagama*. See Philip P. Frickey, "Domesticating Federal Indian Law," 67.