Indigenous Peoples and Interstitial Federalism in Canada

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The scope and content of section 35 of the Constitution Act, 1982, *which constitutionalized the recognition of Aboriginal and Treaty rights, was intended to be negotiated at the political level. The failure of that process meant that the job of determining the meaning of the provision fell largely to the judiciary. As a result, the constitutional relationship between Indigenous peoples and the Canadian state has most frequently been theorized in terms of Aboriginal rights and the judicial doctrines interpreting section 35. This paper explicitly considers the relationship between Indigenous peoples and Canadian governments from the perspective of federalism. It does so by emphasizing the interstitial character of federalism. This articulation serves two functions. First, it recognizes the myriad ways that Indigenous peoples exercise jurisdiction as being constitutive of federalism in Canada. That is, it offers a way of re-describing existing practices of governance in Canada in order to shed light on their federal character. Second, this approach offers a view of how constitutional change can occur moving forward, providing a critique of conceptions of federalism that cement a constitutional order that has historically marginalized Indigenous practices of governance. Lastly, it suggests avenues for the development of a federalism that can support Indigenous self-determination.*

La portée et le contenu de l'article 35 de la Loi constitutionnelle de 1982, *constitutionnalisant la reconnaissance des droits ancestraux et issus de traités, devaient être négociés au niveau politique. L'échec de ce processus signifiait que la tâche de déterminer le sens de la disposition incombait en grande partie au pouvoir judiciaire. En conséquence, la relation constitutionnelle entre les peuples autochtones et l'État canadien a été le plus souvent théorisée en matière de droits des autochtones et de doctrines judiciaires interprétant l'article 35. Ce document examine explicitement les relations entre les peuples autochtones et les gouvernements canadiens du point de vue du fédéralisme. Pour ce faire, il souligne le caractère interstitiel du fédéralisme. Cette formulation remplit deux fonctions. Premièrement, elle reconnaît les innombrables façons dont les peuples autochtones exercent leurs compétences en tant que constitutifs du fédéralisme au Canada. C'est-à-dire qu'elle offre un moyen de redécrire les pratiques de gouvernance existantes au Canada afin de faire la lumière sur leur caractère fédéral. Deuxièmement, cette approche donne une idée de la manière dont le changement constitutionnel peut se produire, en proposant une critique des conceptions du fédéralisme qui cimentent un ordre constitutionnel ayant historiquement marginalisé les pratiques de gouvernance autochtones. Enfin, elle suggère des pistes pour l'élaboration d'un fédéralisme pouvant soutenir l'autodétermination des autochtones.*

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Ring the bells (ring the bells) that still can ring
Forget your perfect offering
There is a crack in everything (there is a crack in everything)
That's how the light gets in

Leonard Cohen, "Anthem"

1. Introduction

In 1992, Indigenous and non-Indigenous leaders from across Canada came to an agreement: section 35 of the *Constitution Act, 1982* would be amended to recognize self-government as an Aboriginal right.[1] This agreement resolved some unfinished business from the patriation of the Constitution a decade earlier. Then, in response to pressure from Indigenous peoples — who had been increasingly active politically at the national level since the government White Paper in 1969 motivated a unified opposition — the constitutional patriation package included a section reading: "The existing aboriginal and treaty rights of the Aboriginal People of Canada are hereby recognized and affirmed."[2] This provision, however, created considerable uncertainty: it was unclear how "aboriginal rights" were to be defined and what scope of protections they would receive. Two major Indigenous political organizations opposed the provision, going to the British courts to seek to have it excluded from the patriation package.[3] While the provision was included, section 37 of the *Constitution Act, 1982* stated that subsequent negotiations would be held to determine the scope and content of the provision.[4] While these conferences resulted in minor amendments, a substantial articulation of the scope and content of section 35 was not agreed upon. This despite the fact that many, including prominent federal politicians, believed that it should protect some form of jurisdiction or self-government.[5] The 1992 *Charlottetown Accord* was the product of over two decades

1 See Ovide Mercredi & Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto, Ontario: Viking Publishing/Penguin Books, 1993) at 207-228.

2 *Constitution Act, 1982,* s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford, United Kingdom: Hart Publishing, 2015) at 44-45; See also *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians,* [1981] 4 CNLR 86 (EWCA).

4 Webber, *supra* note 3 at 47-48. This was reflected in section 37 of the *Constitution Act, 1982.*

5 See e.g. Brian Mulroney, "Opening Statement at the First Ministers' Conference on the Rights of Aboriginal Peoples" (Address at the First Ministers' Conference on the Rights of Aborriginal Peoples, Ottawa, Ontario, 2-3 April 1985) archived at <www.collectionscanada.gc.ca/primeministers/h4-4021-e.html.>. While self-government could generally be agreed upon, Indigenous peoples wanted the clause to be justiciable in the event of conflict, which could not gain agreement; See also Webber, *supra* note 3 at 48. For an account of the political climate surrounding these conferences and the

of discussion about the place of Indigenous peoples in the constitutional order. As it turned out, however, this would mark the end of one trajectory for negotiating the content of section 35. The proposal was part of a larger package of constitutional amendments that failed at referendum, and the process of defining section 35 moved from the political realm to the judicial realm.

The decisions of the courts have only recognized limited forms of Indigenous jurisdiction; as to whether section 35 recognizes political rights, and thereby signals important changes to the federal association in Canada, or a limited set of cultural or identity-based rights, the Supreme Court has leaned toward the latter. In doing so, it has distributed the bargaining power of the parties unequally in a manner that has made achieving recognition of self-government at the negotiating table difficult.[6] The Court has done the political work of defining the constitutional powers of the parties, and it has done so in the context of a rights regime that recognizes limited constitutional authority for Indigenous peoples. This approach has consistently failed to meet the demands of Indigenous peoples for the recognition of their inherent jurisdiction. Federal and provincial governments have too frequently done only the legal minimum, meaning that a judicial framework that does not meaningfully recognize Indigenous jurisdiction has frequently resulted in a refusal to do so in negotiations. While a number of individual self-government agreements have been concluded, they have been finalized largely within the bounds of the section 35 framework the Court has established.[7]

The result has been an impasse, with Indigenous peoples asserting and exercising political rights and jurisdiction while courts and governments remain tied to a limited minority rights paradigm.[8] As a result, while there is important literature theorizing 'Aboriginal rights' in terms of federalism or the place of Indigenous peoples within the constitutional order, the emphasis, especially in legal thought, has tended to work within the doctrinal confines set by the Court.[9] Thus, despite the Supreme Court's recognition that federalism

lead up to the Meech Lake and Charlottetown negotiations, see Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16:1 Rev Const Stud 1.

6 On the distributional role of the courts in this respect, see Patrick Macklem, *Indigenous Difference and the Constitutions of Canada* (Toronto, Ontario: University of Toronto Press, 2001).

7 For an overview of the tensions present in the modern treaty process, see Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver, British Columbia: UBC Press, 2005).

8 See Kiera Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can J Political Sci 923.

9 It should be noted that a major and important exception to this is the theorizing about 'treaty federalism.' Though I will return to treaty federalism later, at this point I should note that nothing

can be described as "the dominant principle of Canadian constitutional law" and that "the principle of federalism remains a central organizational theme of our Constitution,"[10] the Court has not considered the place of Indigenous peoples in the constitutional order through the lens of federalism. This paper articulates a conception of federalism — 'interstitial federalism' — that serves two purposes. First, it provides a descriptive analysis of the myriad ways in which Indigenous peoples engage state and non-state actors at legal and political levels. In this, it provides a lens through which exercises of jurisdiction can be understood as having a federal character — as being *constitutive of* Canadian federalism. Second, it provides a frame for theorizing questions of federalism in the Canadian context. By emphasizing grounded practices of jurisdiction as practices of federalism, it seeks to theorize federalism in a manner that reflects practices of governance rather than idealized conceptions or models. In this regard, this paper is preliminary in nature, a first foray into a set of ideas that will require further testing and articulation.

2. Narratives of Federalism and Enacted Jurisdiction

The place of Indigenous peoples within Canada's federal structure has been only sporadically the subject of analysis and discussion.[11] Most texts on fed-

in this argument should be taken as excluding notions and practices of treaty federalism. Indeed, such practices may be taken as paradigmatic examples of interstitial federalism in the sense it will be described here. On treaty federalism, see James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; See also Andrew Bear Robe, "Treaty Federalism" (1992) 4:1 Const Forum 6; See also Kiera Ladner, "Treaty Federalisms: An Indigenous Vision of Canadian Federalisms" in Francois Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism,* 2nd ed (Toronto, Ontario: Broadview Press, 2003) 167.

10 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 57, 161 DLR (4th) 385 [*Secession Reference*].

11 Notable examples include Jean Leclair, "Socrates, Odysseus, and Federalism" (2013) 18:1 Rev Const Stud 1; See also Francis Abele and Michael Prince, "Alternative Futures: Aboriginal Peoples and Canadian Federalism" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, Ontario: Oxford University Press, 2002) 220; See also Kiera Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James Kelly & Christopher Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver, British Columbia: UBC Press, 2009) 273; See also Martin Papillon, "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy,* 2nd ed (Don Mills, Ontario: Oxford University Press, 2008) 291. See also Sari Graben, "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6:2 Indigenous LJ 63. See also Richard Stacey, "The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism" (2018) 46:4 Federal L Rev 669. See also Ian Peach & Merrilee Rasmussen, "Federalism and the First Nations: Making Space for First Nations' Self-Determination in the Federal Inherent Right Policy" (2005) 31:1 Commonwealth L Bull 3. See also Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in David Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*

eralism deal extensively with issues such as the place of Quebec in the federation, the federal spending power, the impact of the *Charter* on federalism, labour markets, health care, the environment, fiscal federalism, and so on.[12] Federalism is theorized as asymmetrical, flexible, or cooperative, as having 'five faces' or 'four dimensions.'[13] When discussing Indigenous peoples, the focus is less frequently on their role as partners in the federation than on the context of managing diversity within a federal system. Rarely are Indigenous peoples discussed as holders of jurisdiction within the federal association. While the historical role of Indigenous peoples in shaping the political structures in North America is increasingly recognized, conventional 'Western' historical narratives downplayed or ignored this role altogether. Indeed, nation-states are still conceived of in popular and much academic discourse as coming into being fully formed on a particular historical date; the complex forms of negotiated political authority that predated the nation state and from which it slowly and unevenly emerged are obscured.

As they have frequently been excluded from dialogues on federalism, and as section 35 Aboriginal rights have developed unevenly in the courts, Indigenous peoples have moved forward with the business of practicing their inherent jurisdiction, using the courts and negotiations with the Crown strategically while exercising jurisdiction either through state-mediated avenues or on their own terms. This marks an important distinction in the forms of Indigenous jurisdiction that are being enacted on the ground. The first is through negotiated agreements, moves under existing statutory regimes, or some combination of the two. Examples of the former include co-management boards, modern treaty arrangements, reconciliation agreements, and sectoral agreements. These practices are negotiated with state institutions and are typically supported, at least at the formal legal level in Canadian law, by statutory enactment. The latter include the exercise of the limited governance powers under the *Indian Act* or the somewhat more expansive powers included in '*Indian Act*-plus' statutes such as the *First Nations Land Management Act*.[14] At Canadian state law, jurisdiction under these instruments is considered to be a form of delegated authority, and it is therefore subject to judicial supervision. The second type of jurisdiction is exercised purely on the basis of the inherent jurisdiction of

(Montreal-Kingston: McGill-Queen's University Press, 1989) at 19. See also Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31:2 Queen's LJ 521.

12 See e.g. Alain Gagnon, *Contemporary Canadian Federalism: Foundations, Traditions, Institutions* (Toronto, Ontario: University of Toronto Press, 2009).

13 Francois Rocher & Miriam Smith, "The Four Dimensions of Canadian Federalism" in Rocher & Smith, *supra* note 9 at 21-22.

14 *First Nations Land Management Act*, SC 1999, c 24.

the nations and without recourse to the state. Examples are many, but include tribal parks, traditional forms of governance, non-state modes of dispute resolution, language reclamation, various land-based practices, etc. These practices of jurisdiction are not delegated, formally or otherwise, by the Canadian state.

The question of how these practices fit within, or sit in relation to, Canadian law is an open one. Indeed, there are important questions about whether the power of such practices would be compromised by any attempt to frame them within state law.[15] Yet, framing Indigenous jurisdiction in relation to the Canadian constitutional order can provide productive ways to think about the engagement between legal orders. Some level of engagement, some *relation to,* is, after all, unavoidable: theorizing the relationship between legal orders is a descriptive necessity regardless of one's normative stance. Absent active resistance, state law simply fills all voids it encounters. It does not admit to 'blank spots' where it does not apply — nor do the extractive industries with which nation-states are aligned. Capital, as Marx noted, does not abide by limits.[16] Such is the nature of the territorially bounded contemporary nation-state, at least at the conceptual level.

In practice, authority is much more attenuated. Pressures from above (international law and norms, transnational private actors, etc.) and below (substate peoples, cultural and linguistic minorities, various civil society organizations, internal constitutional limitations, etc.) limit the reach of state laws in important respects.[17] Because of the expansive nature of state law and capital, however, contending legal and normative orders always find themselves *in relation to* these forces. The argument I advance here is that by explicitly reading Indigenous assertions of authority and jurisdiction as practices of federalism, and by advancing the conceptual framework for what the Canadian federal association might be, we open up a set of conceptual tools that will be able to descriptively reflect the nature of Indigenous moves *in relation to,* but *separate from,* state apparatuses. It also opens up a set of practical legal and political tools that can assist Indigenous peoples in maintaining and furthering their

15 Leanne Simpson thoughtfully explores this issue. Leanee Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg, Manitoba: Arbeiter Ring Publishing, 2011); See also Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, Minnesota: University of Minnesota Press, 2014).

16 See David Harvey, *Seventeen Contradictions and the End of Capitalism* (New York, New York: Oxford University Press, 2014).

17 This is true historically and, as Lauren Benton has pointed out, should shape how we think about sovereignty in imperial arenas. Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge, United Kingdom: Cambridge University Press, 2009).

autonomy in the face of these ongoing entanglements.[18] This is done not by providing a predetermined or imposed model of governance, which is not the role of non-Indigenous theorists or politicians, and is of questionable value in any event, but by critiquing the state bodies that limit Indigenous authority so that productive spaces may be opened.

An emphasis on points of divergence, relation, and entanglement should not be taken to discount the importance of prefigurative practices that can shape those engagements. 'Resurgence' based arguments that prioritize the 'flourishment of the Indigenous inside,' to use Leanne Simpson's evocative phrase, are essential.[19] Prefigurative practices have enormous transformative potential. In practice, they frequently exist alongside engagements with the state as Indigenous peoples develop strategic counter-hegemonic practices in relation to the opportunities and constraints they encounter. The argument I advance here is that the radical transformation of current institutions and structures of governance has transformative potential that should be explicitly considered as a practical avenue of social transformation.[20] An emphasis on where Canadian institutions can be reformed so as to provide more room to recognize the self-determination of Indigenous peoples is not intended absorb or assimilate Indigenous peoples into a broader Canadian polity; rather, the suggestion is that counter-hegemonic practices that strategically engage the state can give rise to shared structures that can accommodate a plurality of political communities while maintaining their integrity and autonomy. Though there are many ways to begin developing this line of thinking, I discuss it in terms of what I call 'interstitial federalism' — a term I borrow but give new meaning to[21] — arguing that interstitial federalism can respect Indigenous autonomy and develop relationships and practices of non-domination.

18 John Borrows emphasizes the nature of the 'entanglements' in which we find ourselves. John Borrows, *Law's Indigenous Ethics* (Toronto, Ontario: University of Toronto Press, 2019).

19 Simpson, *supra* note 15 at 11. On resurgence generally, see Coulthard, *supra* note 15; See also Taiaiake Alfred, *Wasasé: Indigenous Pathways of Action and Freedom* (Toronto, Ontario: University of Toronto Press, 2005).

20 See Chantal Mouffe, *Agonistics: Thinking the World Politically* (London, United Kingdom: Verso, 2013).

21 The term is borrowed from Rhett Larson. Rhett Larson, "Interstitial Federalism" (2015) 62:4 UCLA L Rev 908. To my knowledge it has not been used elsewhere. The phrase 'interstitial law-making' has been used extensively. As I outline below, my use of the phrase 'interstitial federalism' differs from Larson's in important respects, though his formulation remains important for the argument developed here. My framing is also indebted to Jean Leclair's notion of 'Federal Constitutionalism', in particular insofar as it advocates for understanding Indigenous peoples as constitutive members of a federal association. See Leclair, "Federal Constitutionalism" *supra* note 11.

3. Interstitial as Legal and Political Term

The term interstitial is primarily used in two senses in relation to legal and political matters. In American legal thought, the phrase 'interstitial law-making' is used to describe the 'gap-filling' role that courts play when interpreting statutes or constitutional provisions. The first such use appears to have been by Holmes J.: "I recognize without hesitation that judges do and must legislate, but they can do it only interstitially."[22] This term has been occasionally taken up by Canadian commentators and courts, who have used it in the same sense.[23] In this vein, Scheibel J. wrote in *R.L. Crain Inc. et al.*: "I do not propose to attempt any exhaustive definition of the range of rights encompassed by the phrase 'life, liberty and security of the person.' Indeed, it would be impossible to define the scope of this phrase with any degree of exactness. The boundaries of this broad right will undoubtedly be developed by the courts interstitially as different claims arise."[24] As taken up by the Canadian courts, the use generally indicates that, in terms of law-making, courts must be mindful of their role in relation the legislative branch. Courts must be cautious not to impose their own meaning on a statute or constitutional text; rather, they should constrain themselves to making law *interstitially* by filling in gaps left in the legislation. This understanding was put succinctly by Peter Hogg:

> To the extent that a controversy calls for the exercise of discretion by a court, the discretion is always closely defined by rules of law. That courts "make" new law when they apply vague or ambiguous law to new fact-situations is a commonplace, but judicial law-making is interstitial and incremental, normally staying within the spirit of the pre-existing law, rarely engaging any significant new public policy, and rarely involving the expenditure of public funds.[25]

Thus, the phrase has been used extensively to describe 'gap-filling' law. In the American context, however, it also has more defined and circumstantial mean-

22 *Southern Pacific Co v Jensen,* 244 US 205 at 221 (1917). Holmes J may have borrowed the notion from Henry Maine, who, writing of the prominence of writs in early English law, argued that substantive law was "secreted in the interstices of procedure." Henry Maine, *Dissertations on Early Law and Custom: Chiefly Selected from Lectures Delivered at Oxford* (London, United Kingdom: John Murray, 1883) at 389, quoted in Mark Walters, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, Ontario: University of Toronto Press, 2017) 187 at 188.

23 See e.g. *Harrison v Carswell*, [1976] 2 SCR 200 at 218, 62 DLR (3d) 68.

24 *R.L. Crain Inc. et al. and Moore Corporation Limited et al. and Lawson Business Forms Manitoba Ltd. et al. v Couture, Restrictive Trade Practices Commission, and Lawson*, 1983 CanLII 2475 (Sask QB) at para 85.

25 Peter Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981) 30 UNB LJ 9 at 14.

ings that differentiate it from statutory interpretation writ large. As Kevin Johnson explains:

> When the judiciary is called upon to apply federal statutes, a species of federal common law frequently referred to as interstitial lawmaking comes into play. Congress almost invariably leaves gaps in laws it enacts that the courts feel compelled to fill. A prototypical example of interstitial lawmaking is adding a limitations period to a federal statute lacking one. Rather than the ordinary task of interpreting the text of a statute, the court fills in the blanks left by Congress in the statutory language. Consequently, the task of interstitial lawmaking differs somewhat from traditional statutory interpretation.[26]

The central idea here, again, is that the judiciary can play a role in filling the inevitable gaps that are revealed in the process of applying written laws to real world contexts. The judiciary can do this through a generative mode of statutory interpretation that, in Johnson's view, moves beyond the traditional modes of statutory interpretation that focus on interpreting the plain meaning of the text, the intention of the drafters, and the meaning of the statute as a whole[27] toward a more robust gap-filling exercise more akin to statutory amendment.

Further developing this original sense of gap-filling judicial law-making, the 'interstitial model' has become something of a term of art in American constitutional law scholarship, used to describe the relationship between state and federal courts. The interstitial model here moves beyond statutory and constitutional interpretation, indeed, beyond the role of the courts in relation to the legislative branch, and is used to articulate the role of state and federal courts within a picture of American federalism. Under this view, state courts can look to where the federal courts have retreated from an area when deciding whether to expand or develop the law in that area. In this sense, an interstitial model sees federal law as 'interstitial' in that it occupies vacant spaces rather than relying on a strictly dual sovereignty approach.[28] The 'interstitial model' thus emerges as an alternative to a strict 'dual sovereignty' approach, permitting courts in one jurisdiction to deal with issues that fall within another jurisdiction if that other jurisdiction is silent on the matter.

26 Kevin Johnson, "Bridging The Gap: Some Thoughts About Interstitial Lawmaking And The Federal Securities Laws" (1991) 48:3 Wash & Lee L Rev 879 at 882; See also Bradford Clark, "Federal Common Law: A Structural Reinterpretation" (1996) 144:4 U Pa L Rev 1245 at 1248.

27 See e.g. Frank Cross, *The Theory and Practice of Statutory Interpretation* (Stanford, California: Stanford University Press, 2008) at 85-101.

28 See Ernest Young, "Erie As A Way Of Life" (2018) 52:2 Akron L Rev 193.

Another legal use of the term 'interstitial' has recently emerged in the American context. Rhett Larson has used the phrase 'interstitial federalism' to refer to situations in which the conventional division between state and federal law-making authority leaves gaps in regulation: when, as Larson writes, "[b]oth the state-centric and federal-centric approaches fail to adequately seal [a] jurisdictional crack."[29] In response to such situations, where the conventional division of powers fails to adequately apportion jurisdiction between federal and state governments, Larson argues for the development of institutions of shared governance that can include a plurality of voices and redraw jurisdictional lines to better manage particular resources. In particular, Larson argues that these 'interstitial institutions' can be used to address so-called 'spillover commons,' or "common-pool resources that cross jurisdictional boundaries and are subject to scarcity and overappropriation concerns."[30] In federal systems with clear-cut jurisdictional lines, the regulation of such commons pose problems of scale: the scale of any given institution's jurisdiction must be appropriate to ensure proper management of the resource and, if it is not, the management or regulation of the resource may suffer to the detriment of all. The concern is that if a jurisdiction is too large, if it is held at too high or too distant a level, it will not be able to deal efficiently with certain issues. Water scarcity in a given watershed, for example, may be mismanaged if lawmakers are too distant or removed from the impacts of that scarcity. If a jurisdiction is too small (for example, an individual state), regulation will run into a tragedy of the commons situation as states manage the water in their territorial bounds without concern for how it will affect other states and communities into whose jurisdiction the watershed reaches.[31] Re-thinking jurisdiction in relation to 'spillover commons' leads to an articulation of interstitial federalism as the joint creation of institutions designed to respond to this type of issue in relation to a given resource. Thus, "a choice simply between state and federal jurisdiction-should be abandoned."[32]

Interstitial federalism, on Larson's model, differs from cooperative and horizontal federalism, as those terms are used in the American context, in important ways. Cooperative federalism, in Larson's view, "occurs when a federal agency, using congressionally granted authority, delegates the implementation of a federal statute to a state agency — subject to continued federal oversight."[33] There is no meaningful rearrangement of jurisdiction; the federal order simply delegates authority to a body more competent to carry out a specified task. By

29 Larson, *supra* note 21 at 927.
30 *Ibid* at 910.
31 *Ibid* at 912.
32 *Ibid*.
33 *Ibid* at 929.

contrast, interstitial federalism "redraws jurisdictional boundaries through the interstate compact process in order to be consistent with the geography of spill-over goods."[34] Under an American model of horizontal federalism, federal and state governments jointly develop targets or standards to manage a resource while leaving states with the authority to develop their own processes for how to meet those targets. Interstitial federalism, however, "places an institution whose jurisdictional scope matches that of the spillover commons as the primary regulatory body, in accordance with the internalization prescription."[35] In both instances, shared decision-making bodies are developed and jurisdictional geographies are re-worked to match the governance of a given resource. In the process, the federal order is reworked through the joint development of new institutions and jurisdictions.

The key difference, then, between Larson's conception of interstitial law-making and the traditional use of the phrase in American legal thought is the emphasis on the development of new institutions and the re-drawing of jurisdictional lines. His articulation takes a prescriptive view, arguing that an interstitial model of federalism based on the development of new institutions can better respond to certain types of problems than the traditional division of powers and associated geographically bounded jurisdictions. Whereas traditional interstitial law-making sees the courts as playing a gap-filling role where jurisdictional cracks appear, in Larson's conception, new non-judicial institutions must be developed with exclusive jurisdiction in relation to subject matters that traditionally fell within state or federal jurisdiction but are not effectively managed by those jurisdictions. Larson's use, particularly the generative nature of his prescriptive account, begins to point us toward the other sense in which 'interstitial' is commonly used in the political context.

The phrases 'interstitial revolution' or 'interstitial transformation' are used, primarily in contemporary Marxist thought, to describe processes through which social systems can be transformed.[36] As Erik Olin Wright explains, "The adjective 'interstitial' is used in social theory to describe various kinds of processes that occur in the spaces and cracks within some dominant social structure of power."[37] In this sense, "[o]ne can speak of the interstices of an organiza-

34 *Ibid*.

35 *Ibid* at 930.

36 The two most prominent examples are Erik Olin Wright, *Envisioning Real Utopias* (London, United Kingdom: Verso, 2010) and John Holloway, *Crack Capitalism* (London, United Kingdom: Pluto Press, 2010).

37 Wright, *supra* note 36 at 229.

tion, the interstices of a society, or even the interstices of global capitalism."[38] In speaking of interstices in this way, one relies on an understanding in which the 'social unit' in question can "be understood as a system within which there is some kind of dominant power structure or dominant logic which organizes the system, but that the system is not so coherent and integrated that those dominant power relations govern all of the activities that occur within it."[39] Wright thus uses the term to describe processes that occur in the spaces of a hegemonic social order but outside of that order's dominant institutions. In a slightly different context, the term can refer to processes that occur in the interstices of an institution, but not according to the rules that typically bind the actors within that institution. Larson's use is more clearly aligned with what Wright terms "symbiotic transformation,"[40] or transformation that occurs with and through state institutions.

The articulation of interstitial federalism outlined here does not rely on this distinction. Understood as a reaction to hegemonic structures, the line between interstitial and symbiotic is not always clear. Some of Wright's examples of interstitial strategies illustrate the challenge of drawing a bright line. For example, he writes:

> "[t]here are certainly many interstitial activities in contemporary capitalist societies which are candidates for elements of an interstitial strategy of social emancipation: producer and consumer coops, battered women's shelters, workers factory councils, intentional communities and communes, community-based social economy services, civic environmental councils, community-controlled land trusts, cross-border equal-exchange trade organizations, and many other things."[41]

Several of these forms, while not state institutions *per se*, would be sanctioned by state law: for example, to incorporate, litigate, apportion ownership, tax, etc. As Bob Jessop notes, drawing clear-cut distinctions between state and non-state institutions can be difficult once we take the necessary step of unpacking the concept of the state and relying on an articulation of the state as an assemblage of distinct institutions, each pursuing its own ends.[42] Thus, while the analytic distinction between interstitial and symbiotic transformation is clear, in application it is clear only in respect of ideal types.

38 *Ibid*.
39 *Ibid*.
40 This distinction is addressed in more detail below.
41 Wright, *supra* note 36 at 230.
42 Bob Jessop, *State Power: A Strategic-Relational Approach* (Cambridge, United Kingdom: Polity Press, 2007).

Further, if what is emphasized is the radical transformation of existing institutions rather than working 'outside' the state, the distinction becomes less important. In both cases, the aim is to transform existing institutions through strategic counter-hegemonic practices. Working outside the state or dominant hegemonic orders is crucial but, in this sense, it plays a prefigurative role. As Wright acknowledges, both interstitial and symbiotic strategies are necessary for broad social transformation.[43] In this paper, then, interstitial refers to both types of practice: using an *Indian Act* by-law to expand jurisdiction to an area typically not within its ambit — say, to the regulation of the production and sale of cannabis on a First Nation[44] — is interstitial, as is the development of a resource management protocol on the basis of Indigenous law without engagement with the Crown. This approach is further justified by the fact that any given practice can move between the purely interstitial and symbiotic categories. Duu Guusd, the tribal park on Haida Gwaii, stands as an example: the park was established as a tribal park under Haida law and was only much later also made a park at provincial law. It is now governed by Haida law, but is also recognized by the provincial laws of British Columbia. The parties have developed models of shared governance concerning land and resource use in the park.

This conception of the interstitial is distinct from Wright's use in that it includes practices he refers to as symbiotic.[45] It is also distinct from Larson's use of the term in two important respects. First, Larson works entirely within the confines of existing state (meaning nation-state) apparatuses. While he calls for the development of new institutions, these are institutions created by and through state law. Second, Larson's use seeks to transform governance of particular resources, but it does not seem to be directed toward a substantial transformation of existing institutions in the service of democratic emancipation. While he does emphasize an expanded role for Indigenous peoples[46] in

43 Wright, *supra* note 36.

44 See e.g. Chelsea Laskowski, "How First Nations are Leaving Their Mark on the Cannabis Industry" *CBC News* (19 April 2019), online: <www.cbc.ca/news/canada/saskatoon/saskatchewan-cannabis-industry-first-nations-1.5099265>.

45 The relationship with Holloway's definition is more nuanced. Holloway acknowledges that even state transformations are interstitial in nature. Thus, strategies that engage the state can be considered strategies of interstitial change. Yet, for those challenging state hegemonies, Holloway believes they must engage in interstitial moves 'outside' the state. Holloway, *supra* note 36 at 63. Again, the argument advanced in this paper is that both types of interstitial move are important for understanding constitutional practice and transformation in Canada.

46 As Larson writes: "Tribes should be part of a commission that facilitates stakeholder participation through an inclusive and transparent process."' The aim of this process should be to integrate tribal interests into management decisions, as well as to facilitate both the quantification of tribal rights and the settlement of state general stream adjudications. Tribes should have appointed representa-

the interstitial institutions he proposes, these peoples would play a role akin to stakeholders, and the institutions he describes are not geared explicitly toward greater recognition of their jurisdiction or law-making authority. In this sense, the institutions Larson espouses are akin to many of the current co-management institutions in Canada: they provide a role for Indigenous peoples in the decision-making process but have difficulty accommodating Indigenous legal orders and jurisdiction.[47]

All of the above senses in which the term interstitial is used are important here, as each move in parallel when it comes to re-working notions of federalism in Canada to reflect Indigenous demands for self-determination. The notion of interstitial law-making by the courts can be used to understand how Indigenous law might impact the development of the common law to a greater extent. The development of interstitial institutions along the lines discussed by Larson is already well underway in Canada. Reforming these institutions and reframing them explicitly in terms of federalism can further the reach of Indigenous legal orders and expand Indigenous jurisdiction. The frame of interstitial strategies and transformations can also describe practices of indigenous governance outside provincial and federal apparatuses.

How does this differ from conventional conceptions of federalism in Canada? I do not have the space here to adequately address the myriad ways that federalism has been discussed in Canada. For the purposes of illustration, however, I will briefly address it on the basis of the familiar taxonomy between classical and modern federalism.[48] The latter includes various frames — asymmetrical, flexible, and cooperative federalism, for example — each of which are used in both descriptive and prescriptive fashions in the literature. Classical, or dualist, federalism refers to a federal order with little overlap in the distribution of powers between members of the federation.[49] Exclusive authority over

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tives to interstitial federalism institutions, should be signatories to Congressionally approved compacts dealing with spillover commons on tribal lands, and should be full participants in adjudicating and having their rights adjudicated by interstitial federalism dispute resolution forums." Larson, *supra* note 21 at 955.

47 The challenges implementing the Recommended Peel Watershed Regional Land Use Plan developed by the Peel Watershed Planning Commission — a commission with representation from the Yukon government and modern treaty nations — illustrates some of the difficulties in this regard. See *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 *[First Nation of Nacho Nyak Dun]* .

48 On this taxonomy see Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations," (1991) 36:2 McGill LJ 308 [The Demise and Rise].

49 See George Anderson, *Federalism: An Introduction* (Don Mills, Ontario: Oxford University Press, 2008) at 21. As James MacPherson writes, Beetz J. was perhaps the strongest judicial advocate of classical federalism in the postwar period. James MacPherson, "Justice Jean Beetz — A Rich and

subject matters is assigned to distinct orders of government.[50] Modern federalism, by turn, is characterized by a more restrained interpretation of the notion of 'exclusive' jurisdiction and a judicial approach that emphasizes overlap and concurrence of powers.[51] Each of the other three types of federalism mentioned above — asymmetrical, flexible, and cooperative — are examples of this modern approach.

Interstitial federalism seems at first glance to be an example of the modern approach. Interstitial federalism, insofar as it requires the development of new institutions with jurisdiction over matters previously assigned exclusively federal or provincial governments, clearly seems to point this way. Interstitial federalism draws on each of the three 'types' of federalism under the modern approach. Flexible federalism, for example, refers to the various ways that the clear jurisdictional lines of a classical federalism are blurred. Thus, instruments such as "taxation, the spending power, public ownership, interdelegation, and intergovernmental agreements" are used to "alter the formal distribution of functions and the policy responsibilities of each level of government in many areas."[52] These types of instruments are frequently interstitial in nature, or could be if used in different contexts. For example, the ability of First Nations to collect property or income tax from non-Indigenous residents in their nations — recognized under some Yukon modern treaties — can be characterized as a practice of interstitial federalism. Asymmetrical federalism refers to a federal association in which each of the constituent members do not hold identical authority within the association despite having the same constitutional status.[53] Again, this frame is relevant to interstitial federalism. It reflects the current reality that Indigenous nations across Canada have widely divergent constitutional authority at Canadian law, reflecting the content of the agreements they have entered into with the Crown and the limitations imposed by the *Indian Act*. Further,in a prescriptive sense, the possibility of envisioning federal actors with a range of constitutional authority is essential to interstitial federalism, in which institutions are designed with jurisdictions in relation to particular resources or subject matters, and governments exercise authority on significantly different scales. Similarly, cooperative federalism can be used in both descriptive and prescriptive senses. Descriptively, it simply refers to cooperative

Enduring Legacy in Canadian Constitutional Scholarship and Jurisprudence" (1994) 28:2 RJT 761 at 765.

50 *Ibid*.

51 Ryder, *supra* note 48.

52 Patrick Macklem et al, *Canadian Constitutional Law,* 4th ed (Toronto, Ontario: Emond Montgomery Publication, 2010) at 463.

53 See Bela Pokharel, "Concept of Federalism and Its Application in Nepal" (2017) 11:1 NJA LJ 211.

exercises of authority, frequently in areas of shared or overlapping jurisdiction. In *Canada (Attorney General) v PHS Community Services Society*, for example, the Supreme Court wrote: "Insite was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it."[54] While the Court has, at times, moved toward a more prescriptive reading of cooperative federalism — particularly in sidelining the doctrine of inter-jurisdictional immunity — it has tended to emphasize the descriptive sense.

Exclusivity, however, also proves an important principle in interstitial federalism. Without exclusive jurisdiction, interstitial institutions may be left without clear jurisdiction or final decision-making authority, limiting their powers of governance. In a more classical model, the emphasis on exclusivity cuts in two directions: while a rigid assignment of exclusivity in the federal or provincial governments can exclude other bodies or institutions from holding jurisdiction, overlapping and shared jurisdiction can give more powerful institutions of governance the ability to encroach on the jurisdiction of other bodies.[55] Beetz J.'s support for the classical model, for example, was premised in part on the protection of provincial autonomy, especially for Quebec.[56] And, as Bruce Ryder has argued:

> the modern paradigm has been applied to First Nations people; that is, they are subject to the concurrent jurisdiction of federal and provincial laws even when those laws touch matters at the heart of their collective identities. I will argue that the classical paradigm should be used to promote the autonomy of First Nations people by protecting them from the application of provincial laws, by giving a broad scope to the doctrine of federal paramountcy, and by prohibiting delegation of federal jurisdiction over "Indians and lands reserved for Indians" to the provinces without the consent of First Nations people.[57]

While interstitial federalism draws heavily on a modern approach, the categorization should be nuanced. It is not clear, for example, that elements of a classical approach are inimical to the type of multinational federalism that the interstitial model outlined here is meant to support.

Another argument, of course, surrounds centralized and decentralized visions of federalism, which can each exist in both classical or modern para-

54 *Canada (AG) v. PHS Community Services Society*, 2011 SCC 44 at para 19.

55 For a comprehensive analysis of the benefits and drawbacks of each model see Ryder, *supra* note 48.

56 MacPherson, *supra* note 49. For an argument from the American context that co-operative federalism leads to greater state autonomy, see Roderick Hills Jr, "The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and Dual Sovereignty Doesn't" (1998) 96:4 Mich L Rev 813.

57 Ryder, *supra* note 48 at 332.

digms. The interstitial practices described here are undoubtedly decentralized in nature. Some of the benefits that have been argued as accruing under a decentralized model therefore apply. For example, a pluralist federalism "allows us to think of the modern nation-state in terms that extend beyond monistic and unitary sovereignty, to re-conceptualize the state in multinational terms that accord with the principle of autonomy."[58] In the context of a multinational or plurinational federalism, a decentralized federal order can move beyond conceptions of the nation state and Crown sovereignty that have historically excluded Indigenous peoples from full participation. Emphasizing these features of, or possibilities for, the federal order may lend credence to Richard Stacey's view that "Canada's federal system seems well suited, in form if not yet in its actual details, to accommodating the structures of Indigenous government through which Indigenous peoples have always responded to the particular concerns and interests of their communities."[59] The next section explores these themes along three axes: the reform and development of shared or joint institutions; enacted Indigenous jurisdictions; and the role of the Canadian courts.

4. Interstitial Federalism in Canada

i) Shared and Co-operative Institutions: Existing and Reformed

One significant area for the interstitial development of federalism is the reform of existing federal institutions and the creation of new institutions of shared governance. First, the traditional "shared institutions of 'intrastate federalism,' such as the federal Parliament, the Cabinet, or the Supreme Court"[60] could be reformed to create space for Indigenous peoples and laws. Historically, Indigenous peoples have been largely excluded from these institutions. The importance of these institutions as a means of ensuring influence over shared governance has long been recognized, with customarily fixed regional representation on the Supreme Court and in the Senate as two examples. Yet, there has been little movement to accommodate Indigenous peoples in these ways. There are many possible reforms. I will mention a few here. This list is by no means

58 François Rocher & Marie-Christine Gilbert, "Re-Federalizing Canada: Refocusing the Debate on Decentralization" in Ruth Hubbard & Gilles Paquet, eds, *The Case for Decentralized Federalism* (Ottawa, Ontario: University of Ottawa Press, 2010) 116 at 120. On the importance of decentralized federalism to Indigenous governance see John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285 at 312-314.

59 Stacey, *supra* note 11 at 675

60 Macklem et al, *supra* note 52 at 463.

exhaustive; rather, it is meant to illustrate the type of reform that fit within this category of interstitial transformation.[61]

First, Sakej Henderson has argued that seats should be added to the federal Parliament for representatives from treaty regions.[62] There would be a seat in Parliament for each of the treaty regions, chosen according to a process to be determined by the peoples of those territories. This would add at least 11 seats to Parliament: one for each numbered treaty. Indigenous peoples would, of course, continue to participate in conventional party politics. But, there would be fixed representation from these areas, representation tied not to partisan interests, but to those of Indigenous treaty signatories. This proposal raises additional questions: would there be representation from all historical treaty areas? The Maritime Peace and Friendship treaties, Robinson-Huron, and Vancouver Island treaties, for example, could also be included. Should there be additional representation from modern treaty areas? Does this unduly disadvantage Indigenous peoples who have never entered into treaty with the Crown? If so, how could this be remedied? Adding a seat for each of the above mentioned historical treaty regions, one for Quebec, and one for British Columbia (as areas without historical treaties who may desire representation in a manner they would determine) would move the total number of seats in the house from 338 to 354, sixteen of which would be allocated to Indigenous peoples in the manner just outlined, an allotment that would conveniently reflect the proportion of Indigenous peoples in the Canadian population, at a little over 4%. This would be only slightly more than the number of seats reserved for Maori in the New Zealand legislature, which is about 3.5%.[63]

Second, Indigenous peoples could be better represented on the courts. While there is little empirical research in the Canadian context on the impacts of race and gender on judicial decision-making, in the US context, such

61 For discussion of further examples along these lines see Joanne Cave, "From Rights Recognition to Reconciliation: Reflecting on the Government of Canada's Proposed Indigenous Rights Recognition Framework" (2019) 77:2 UT Fac L Rev 59 at 74-77.

62 Shared in discussion at the "Treaty Federalism and UNDRIP Implementation" workshop, held at the University of Alberta on May 18-19, 2019. Elsewhere, Henderson has also argued for the establishment of an office of "Aboriginal Attorney-General" mandated to protect section 35 rights and interests: James Youngblood Henderson, "Aboriginal Attorney General" (2003) 22 Windsor YB Access Just 265.

63 Of course, the Maori also form a greater percentage of the population in New Zealand, at nearly 15%, so their representation in parliament is not proportional to their representation in the population as a whole. For commentary see Augie Fleras, "From Social Control Towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand" (1985) 18:3 Can J Political Sci 551.

effects have been noted.[64] Further, the ample evidence that bias informs decision-making in other institutional contexts (juries, for example) suggests that courts should not be seen as immune from such concerns.[65] While it may be logistically challenging to ensure an Indigenous appointee sat on the Supreme Court at all times, ensuring that a given percentage of new judicial appointees were Indigenous would have the effect over time of increasing the pool of Indigenous jurists available to serve on the highest court while also ensuring that other courts — which, it should be recalled, deal with many more cases than the Supreme Court — always have Indigenous representation. Ensuring that one in ten new appointments were Indigenous would only slightly 'over-represent' Indigenous peoples relative to their numbers in the population as a whole.

The possibilities and limitations of these forms of representation within existing state structures were displayed during the Honourable Jody Wilson-Raybould's tenure as Canada's Minister of Justice and Attorney-General. While Wilson-Raybould will perhaps be best remembered both as Canada's first Indigenous Attorney-General and for her role in the SNC Lavalin scandal, her ability to impact the direction of government policy towards Indigenous peoples will require the benefit of greater hindsight to properly assess. Under her guidance the government developed a set of ten principles guiding Crown-Indigenous relations, some of which have transformative potential.[66] Wilson-Raybould also released a Directive on Civil Litigation Involving Indigenous Peoples, advising Crown lawyers to act according to a mandate of reconciliation.[67] As with the 1995 federal policy recognizing the right of inherent self-government,[68] however, such policy changes can often have little impact:

64 See Christina Boyd, "Representation on the Courts? The Effects of Trial Judges' Sex and Race" (2016) 69:4 Political Res Q 788.

65 Indeed, while I have not found empirical studies in Canada, it has been widely accepted in the context of sexual abuse that the gender of judges has historically impacted their approach to these issues. The most well-known recent example is likely Judge Robin Camp who asked a plaintiff in a sexual assault case why she did not 'keep her knees together.' See Sean Fine, "Judge in Knees Together Trial Resigns After Council Recommends he be Fired", *The Globe and Mail* (9 March 2017), online: <www.theglobeandmail.com/news/national/judicial-council-recommends-justice-robin-camp-be-fired/article34249312/>.

66 Department of Justice, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (last modified 14 February 2018), online: *Canada's System of Justice* <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

67 Department of Justice, "The Attorney General of Canada's Directive on Civil Litigation Invovling Indigenous Peoples" (last modified 11 January 2019), online: *Canada's System of Justice* <www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

68 See Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (last modified 15 September

their potential relies on people taking them up and using them. The most pronounced example of how Indigenous peoples in traditional institutions can make change interstitially, however, came during Wilson-Raybould's testimony about the SNC Lavalin scandal. During that testimony, Wilson-Raybould stated:

> I was taught to always be careful what you say because you cannot take it back. I was taught to always hold true to your core values and principles and to act with integrity. These are the teachings of my parents, my grandparents and my community. I come from a long line of matriarchs and I am a truth teller in accordance with the laws and traditions of our big house. This is who I am and this is who I always will be.[69]

The significance of Wilson-Raybould's invocation of Indigenous legal orders, of the law of the Kwakwaka'wakw long house, was not lost on people.[70] Here, Canada's highest-ranking lawyer and Minister of Justice said plainly that she was acting not only in accordance with her obligations under Canadian law, but also in light of the obligations placed on her by Kwakwaka'wakw law. This is an example of one of the ways that Indigenous legal orders can be brought into conversation with Canadian laws when Indigenous peoples are represented in Canadian institutions.

Apart from these 'foundational' institutions of Canadian federalism, there are a number of existing institutions and practices of governance in Canada that can be characterized as interstitial. These examples represent what Martin Papillon has described as the "emerging mosaic of Aboriginal multilevel governance."[71] Foremost among these may be modern treaties and co-management regimes.[72] In one view, modern treaties and self-government agreements provide the avenue for the most robust inclusion of Indigenous peoples in the federal association.[73] While the agreements differ in important respects, speaking in general terms, they recognize governing authority in respect of a considerable range of subject matters. In the most ambitious framing, these constitute a negotiated federal order in which Indigenous nations assume ju-

2010), online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

69 The Canadian Press, "'An Inappropriate Effort': Quotes from Wilson-Raybould at Justice Committee", *National Post* (27 February 2019) online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/an-inappropriate-effort-quotes-from-wilson-raybould-at-justice-committee>.

70 Cassandra Szklarski, "The Significance of Jody Wilson-Raybould Invoking Indigenous 'Big House' Laws", *National Post*, (1 March 2019) online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/the-significance-of-jody-wilson-raybould-invoking-indigenous-big-house-laws>.

71 Papillon, *supra* note 11 at 291.

72 For analysis of the Nisg'a Treaty in light of principles of federalism see Graben, *supra* note 11.

73 See Woolford, *supra* note 7.

risdiction on the basis of their inherent rights, a path to self-determination that clearly delineates the relationship between the treaty nation's government and other members of the federation. They include a number of institutions of shared governance, which will be discussed below, the possible development of Indigenous courts, the ability to create property rights, and, in the case of Nunavut, a public government.[74]

In another framing, these agreements represent assimilation and incorporation into colonial governance. They include only delegated forms of authority and are the equivalent to a municipal model of governance. To the extent that they include Indigenous peoples in the federation, they do so on the terms of the federal and provincial governments, maintaining Indigenous peoples in a subservient constitutional position.[75] 'Extinguishment clauses,' which were required in many of the agreements, have the effect of extinguishing Aboriginal rights and replacing them with the rights outlined in the treaty. As a result, these agreements are seen as conceding too much to the Crown and cementing colonial forms of governance.[76]

The case law to date has been mixed. The Supreme Court has had limited opportunities to interpret modern treaties. The Court has held that the duty to consult exists in relation to modern treaties, that even where the Crown is exercising authority that is recognized in the treaty it may be required to satisfy consultation obligations.[77] The decisions dealing most squarely with issues of governance under the treaties are those related to two challenges to the constitutionality of the Nisga'a Final Agreement: *Campbell* and *Chief Mountain*.[78] In both cases, the challenge was based on the reasoning that the agreement amounted to an impermissible constitutional amendment. In *Campbell* the BCSC upheld the constitutionality of the agreement on the basis that the inherent right of self-government had not been extinguished by the BNA Act 1867. In *Chief Mountain,* the BCCA declined to rule on the inherent right of self-government. In two important findings, though, the Court upheld the constitutionality of the agreement on the basis that 1) the powers in the agreement were delegated and could be rescinded and 2) the self-government agree-

74 See Government of Canada, "Treaties and Agreements" (last modified 11 September 2018), online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp4>.

75 See Woolford, *supra* note 7; See also Peter Kulchyski, "Trail to Tears: Considering Modern Treaties in Northern Canada" (2015) 35:1 Can J Native Studies 69.

76 Kulchyski, *supra* note 72.

77 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

78 *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 [*Campbell*]; *House of Sga'nisim v Canada (AG)*, 2007 BCCA 483 [*Chief Mountain*].

ment was part of a treaty protected under section 35 and, therefore, is subject to possible Crown infringement.[79] The case was denied leave to appeal to the Supreme Court, not disturbing the holding regarding the constitutionality of the Nisga'a agreement. The BCCA's reasoning, however, also established potentially damaging precedent that could confirm many criticisms of the modern treaty model, holding that the powers of governance recognized in the treaty are delegated ones subject to rescindment and infringement.[80]

Experience to date suggests that both the proponents and critics of modern treaties and self-government agreements have much to support their arguments.[81] There is not a clear and objective answer about whether the agreements are ultimately beneficial, and any assessment must be made with reference to the experiences of particular Indigenous nations. The treaties undoubtedly represent important moves toward greater recognition of Indigenous autonomy, but they do so on the basis of very real constraints set by Crown notions of sovereignty and the historical development of the law. What do they mean in light of the framework of interstitial federalism outlined above? The agreements themselves and many of the institutions developed under them, some of which will be explored below, are clearly institutions of interstitial federalism on the model outlined by Larson. The treaties and self-government agreements are negotiated agreements that create new governance institutions with jurisdiction over matters historically — in Canadian law — under the exclusive jurisdiction of federal or provincial governments. The cracks in the conventional jurisdictional model reveal themselves when the question of Indigenous jurisdiction is raised. Indigenous demands for recognition of their jurisdictional powers reveal gaps in a constitutional order that fails to acknowledge such jurisdiction. Modern treaties and self-government agreements seek to address these gaps by recognizing areas of shared and exclusive jurisdiction. In doing so, they delineate authority within a shared federal association.

Another form of interstitial institutions are co-management boards of various types.[82] West Coast Aquatic (previously the West Coast Vancouver Island Aquatic Management Board), for example, is an institution of shared governance for marine resources on the west coast of Vancouver Island. Decision-

79 *Chief Mountain*, *supra* note 78.

80 Joshua Nichols, "A Reconciliation Without Recollection? *Chief Mountain* and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

81 See e.g. the implementation problems outlined in the report of the Senate, Standing Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes* (May 2008) (Chair: Gerry St.Germain).

82 See Derek Armitage, Fikret Berkes & Nancy Doubleday, eds, *Adaptive Co-management: Collaboration, Learning, and Multi-level Governance* (Vancouver, British Columbia: UBC Press, 2007).

making is "[m]ulti-party, consensus-based."[83] The board is composed of "representatives from the federal, provincial and regional governments, Nuu-chah-nulth First Nations, commercial harvest, aboriginal harvest, sport/recreational harvest, aquaculture, environment, labour, processing, tourism/recreation, marine transportation and forestry."[84] As Larson writes of interstitial federal institutions, "[t]he responsibility for integrated management decisions should coincide with the ecological unit, nature of the issue, the scale of impact, the ability to collect relevant information, and management capacity."[85] Well-designed co-management structures such as West Coast Aquatic meet these requirements.[86] There are, of course, a number of co-management arrangements in Canada, many under modern treaty agreements. Despite their differences, they represent interstitial institutions on Larson's model. Ideally, they in fact expand on his model; whereas Larson's concern is primarily environmental and ecological, co-management boards are more directly concerned with issues of jurisdiction and sovereignty. Indigenous representation may or may not be necessary when strictly considering optimal resource management, but it surely is if such institutions are to enable practices of Indigenous jurisdiction. As such, their 'federal' nature should be made explicit: they are institutions of interstitial federalism.

These types of co-management institutions can drive a new version of federalism which respects Indigenous autonomy on the basis of "principles of cultural integrity, political liberty and equality of economic opportunity."[87] They may provide avenues for re-thinking jurisdictional boundaries to more appropriately manage lands and resources that cross boundaries between provinces, Indigenous territories, municipalities, and federal lands. Larson's writings on river management illustrate how these jurisdictional lines can be redrawn: "The watershed is thus the natural jurisdictional boundary, and the catchment the appropriate scale of jurisdiction, under the internalization prescription. The jurisdiction of governance institutions should be consistent with geography wherever possible."[88] Interstitial federal institutions can address issues on a number of different geographical bases: traditional territory of a nation, range of a migratory animal or bird population, or the reach of the effects of pol-

83 West Coast Aquatic, "Collaborative Management" (2016), online: *West Coast Aquatic* <westcoastaquatic.ca/>.

84 *Ibid* at "Governance Board".

85 *Ibid* at "Collaborative Management".

86 For an analysis of co-management on the west coast, see Evelyn Pinkerton & Leonard John, "Creating Local Management Legitimacy" (2008) 32:4 Marine Policy 680.

87 Henderson, *supra* note 9 at 337.

88 Larson, *supra* note 21 at 912.

lution of a development. The importance of shared institutions grounded in the recognition and exercise of inherent indigenous jurisdiction is stated in Heiltsuk Nation's *Declaration of Heiltsuk Title and Rights*: "it is our position that reconciliation requires our free, prior, and informed consent to development on Heiltsuk territories and waters as we move forward in a collaborative-management regime."[89] The Heiltsuk thus emphasize both the consent standard — that is, their autonomous self-determination in their traditional territory — and the development of collaborative regimes.

The ability of this style of institution to contribute to robust interstitial transformation will depend on a number of factors. In particular, the degree to which they are autonomous within their sphere is important. Their decision-making authority must be respected. Larson argues that "Strong interstitial federalism institutions with dispute resolution, enforcement, regulatory, permitting, monitoring, and apportionment authority will serve to internalize water management costs to a single jurisdiction whose boundaries are consistent with the watershed itself."[90] In the context of co-management in Canada, problems arise where interstitial bodies do not have final decision-making authority.[91] Assuming for the moment that the structure of such boards provides for fair representation, as most seem to, the extent to which they are able to act as meaningful vehicles in which Indigenous legal traditions can travel alongside state forms of law will depend on the nature of the authority of the institutions. That is, if their decisions are merely suggestive and may be overridden by federal or provincial decision-makers, the transformative potential of the institutions is severely undermined. If, on the other hand, they have final decision-making authority, they can play a much more substantial role. Following Larson, if this is pushed a step further to include dispute resolution functions or regulatory capacities, such institutions can have a genuinely transformative effect on the shape of federalism in Canada. They may then come to be seen more as agreements of co-jurisdiction rather than co-management.[92] For this model to prevail, co-design of the institutions is fundamental.

ii) Indigenous Institutions: Space-Filling Practices of Jurisdiction

The institutions and practices in this category are not shared, co-operative, or co-managed. They are Indigenous exercises of jurisdiction and governance.

89 Heiltsuk Tribal Council, "Declaration of Heiltsuk Title and Rights", online (pdf): *Heiltsuk Nation* <www.heiltsuknation.ca/wp-content/uploads/2015/11/Heiltsuk-Declaration_Final.pdf>.

90 Larson, *supra* note 21 at 952.

91 See *First Nation of Nacho Nyak Dun, supra* note 47.

92 Thanks to Nigel Bankes for drawing this distinction in conversation.

They fill 'jurisdictional cracks' in two ways. First, they can recognize an area where federal or provincial law is insufficient and fill it: where there is an absence of law, they can provide it. Second, they can create a crack through re-description: the jurisdictional crack is created when inherent jurisdiction is asserted and the assumed federal or provincial authority is challenged. Creating new modes of governance in respect of a resource or territory can cause a shift in jurisdiction. These exercises also become more visible if we re-think what is meant by the term 'jurisdiction.' Terms such as 'federalism' and 'jurisdiction' have a normative aspect: they are defined so as to bring about given visions.[93] Both have conventionally been defined in Canada narrowly in ways that exclude Indigenous governance unless it conforms to prefabricated ideas about the place of Indigenous peoples in the constitutional order and the nature of their political authority. This can be re-thought so that notions of federalism and jurisdiction can reflect both past practice — the history of treaty federalism that pre-dated confederation and recognized the autonomy of a plurality of peoples in association with the Crown — and contemporary grounded practices of governance that reflect lived jurisdiction. New articulations of federalism can be modelled on the actual practices of, and dialogues surrounding, governance.[94] They can cause a shift from seeing a given hegemonic assemblage as absolute, solid, and unchanging, to seeing it is subject to contestation and renegotiation — and as already other than what it is construed as through colonial narratives.

One example of this kind of enacted jurisdiction is the creation of tribal parks. There are a number of such parks in Canada. Few are recognized as parks in Canadian law and, for the most part, they occupy an ambivalent space in the state legal system. Their existence is generally accepted, though the scope and nature of the authority in those areas is not delineated in Canadian law, nor does that law have any formal legal recognition of them or formal legal categories into which they can be placed. One example of how tribal parks can represent exercises of jurisdiction is the Wah-nuh-jus — Hilth-hoo-is (Meares Island) Tribal Park on the west coast of Vancouver Island in Tla-o-qui-aht territory. The park was created in 1984 during a dispute over commercial logging in the area. The provincial government has never formally recognized the park. Nonetheless, it was created to stop logging on the island and has been successful in that for over 30 years.[95] As is frequently the case with 'aboriginal

93 As John Whyte writes, "[a] nation's constitutional character is more a function of ethical vision, or even aesthetic rendering, than it is a product of statecraft design." John Whyte, "Federalism Dreams" (2008) 34:1 Queen's LJ 1 at 1.

94 See Graben, *supra* note 11; Leclair, "Federal Constitutionalism", *supra* note 11.

95 *MacMillan Bloedel Ltd. v. Mullin*, 1985 CanLII 696 (BCSC). <http://canlii.ca/t/22kwb>.

rights' issues, this dispute can most productively be understood as a dispute over jurisdiction: both the Tla-o-qui-aht and the province were asserting the authority to determine whether logging would be permitted on the island. That such disputes are frequently cast as 'rights' claims is a function of the Canadian legal system and should not obscure the jurisdictional nature of the disputes.

Similar parks have been created on Haida Gwaii, in the traditional territory of the Tsilhqot'in, and in the territory of the Doig River First Nation. The Haida park, which was created by a resolution of the House of Assembly of the Haida Nation in 1982, was recognized as a park by British Columbia in May 2008.[96] The co-created management plan states, "Duu Guusd is now formally protected by both the Haida Nation as a Haida Heritage Site and the Province of British Columbia as a conservancy."[97] The Tsilhqot'in and Doig River parks have not been recognized by federal or provincial authorities.[98] This lack of recognition, however, has little impact on the nature of the parks as exercises of inherent jurisdiction. As Grant Murray and Leslie King write, "Tribal Parks can be understood as a projection of sovereignty over contested terrain."[99] The contested nature is a function partly of the complex array of legal interests within a park, which may include "a patchwork of different tenures, including Crown (government owned) land, British Columbia Provincial Parks, forest tenures, private lands, and portions of Pacific Rim National Park Reserve."[100]

Another example of this form of Indigenous jurisdiction are inter-Indigenous treaties. The Buffalo Treaty, for example seeks to develop a framework

96 On May 29, 2008, Bill 38 — 2008 (the Protected Areas of British Columbia (Conservancies and Parks) Amendment Act, 2008) established Duu Guusd. On December 17, 2008, the Province of British Columbia passed Order in Council No. 977/2008 which added 6,793 hectares and established revised boundaries for Duu Guusd that included Langara Island and an area of land in Rennell Sound. See *Protected Areas of British Columbia Act,* SBC 2000, c 17.

97 BC Parks, "Duu Guusd Heritage Site/Conservancy" (last visited 21 November 2019), online: *Find a Park Alphabetically* <www.env.gov.bc.ca/bcparks/explore/cnsrvncy/duu_guusd/>.

98 See Dasiqox Tribal Park, "Press Release: Introducing the Nexwagwez?an: Dasiqox Tribal Park Position Paper" (30 June 2016), online (pdf): <dasiqox.org/wp-content/uploads/2018/03/PressRelease-DasiqoxPositionPaper-June302016.pdf>; See also Emma Gilchrist, "'It's No Longer About Saying No': How B.C.'s First Nations Are Taking Charge With Tribal Parks", *The Narwhal* (29 March 2016), online: <www.desmog.ca/2016/03/29/it-s-no-longer-about-saying-no-how-b-c-s-first-nations-are-taking-charge-through-tribal-parks>; For an overview of Tsilhqot'in legal principles, especially governing issues of consultation and consent, see Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873.

99 See Grant Murray & Leslie King, "First Nations Values in Protected Area Governance: Tla-o-qui-aht Tribal Parks and Pacific Rim National Park Reserve" (2012) 40:3 Human Ecology 385 at 389.

100 *Ibid*.

for managing buffalo populations, restoring their habitats, and renewing their population numbers.[101] As Sa'ke'j Henderson explains:

> In 2014, the Blackfoot confederacy and allied nations initiated the continental Buffalo Treaty — titled The Buffalo: A Treaty of Cooperation, Renewal and Restoration — on the Blackfoot reservation in Montana. The treaty is a historic, inspiring, multi-faceted and living agreement. It was the first treaty among the nations in the United States and Canada in more than 150 years, since the 1855 Treaty of Fort Laramie, which adjusted the jurisdiction over buffalo hunting grounds. The Buffalo Treaty is an agreement among the nations, federal and provincial governments, non-governmental organizations, corporations, conservation groups, researchers, and farming and ranching communities.[102]

The treaty leaves it up to each signatory to decide how to approach buffalo and ecological restoration. The treaty acts as an assertion of Indigenous law by articulating standards and norms derived from Indigenous legal traditions and worldviews.[103] For example, the treaty states: "We, collectively, agree to perpetuate all aspects of our respective cultures related to BUFFALO including customs, practices, harvesting, beliefs, songs, and ceremonies."[104] Like the Haida park, then, what began as a strictly Indigenous act of jurisdiction became entangled with a state law in ways that ultimately proved productive. There are examples of contemporary inter-indigenous treaties that do not involve state or non-indigenous actors. For example, the Heiltsuk — Haida Peace Treaty was an oral treaty agreed to in the 19th century which was renewed in 2014.[105] These treaties should be understood as constitutive of Canadian federalism. The frame of interstitial federalism allows them to be seen as such. Of course, caution must be exercised here: the intention is not to alter the nature of these agreements by domesticating them within a colonial constitutional order. Rather, the intention is to re-work a constitutional order that positions

101 James Youngblood Henderson, "Wild Buffalo Recovery and Ecological Restoration of the Grasslands" (27 June 2019), online: *Environmental Challenges on Indigenous Lands* <www.cigionline.org/articles/wild-buffalo-recovery-and-ecological-restoration-grasslands>.

102 *Ibid*.

103 Robert Hamilton, "Buffalo in Banff National Park: Frameworks for Reconciliation in Wildlife Management" (A Symposium on Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection, Canadian Institute for Resources Law, University of Calgary,2-3 March 2018), online (pdf): <live-cirl.ucalgary.ca/sites/default/files/Mar%202018%20Symposium?ENG_Buffalo%20in%20Banff%20national%20Park_Hamilton.pdf>.

104 "The Buffalo: A Treaty of Cooperation, Renewal and Restoration" (last visited 21 November 2019), online (pdf): *University of Saskatchewan* <sens.usask.ca/documents/BuffaloTreaty_2014.pdf>.

105 Heiltsuk Tribal Council, "Heiltsuk-Haida Peace Treaty" (last visited 21 November 2019), online (pdf): *Heiltsuk Naiton* <www.heiltsuknation.ca/wp-content/uploads/2015/06/Peace-treaty-Poster.pdf>; See also Coastal First Nations, "Haida and Heiltsuk Women Rising" (11 April 2018), online: *Coastal First Nations* <coastalfirstnations.ca/haida-and-heiltsuk-women-rising/>.

Indigenous peoples as subject minority populations such that they may be constitutive members of a decolonized federal association.

Examples of the revitalization of Indigenous law abound. Re-thinking what it means to exercise jurisdiction in a federal association can lead us to see these in new ways. They represent avenues for interstitial change by challenging hegemonic state orders of law and governance. Rather than seeing these as an existential threat to those orders, they can be conceived of as part of the ongoing dialogue through which constitutional and federal associations are continually renegotiated. They can be seen as part of the process of renewal that is so central to how many Indigenous peoples understand the treaty relationship.

iii) The Role of the Courts

With attempts to negotiate the content of section 35 ultimately failing, the task of determining the content of the provision fell to the Supreme Court. In developing a framework for the interpretation of section 35, the Court took jurisdictional questions and re-framed them as contingent rights issues. Parsing the moves that took the Court in this direction can help us get a clear view of the constitutional vice-grip Indigenous peoples have been working to loosen. The process began in *Sparrow*,[106] where the Court addressed section 35 for the first time and made two important moves. First, the Court developed a framework permitting the Crown to unilaterally infringe section 35 rights, despite there being no textual support for such authority in the Constitution. The Court recognized that section 35 is not part of the *Charter* and should not therefore be subject to the limitations clause found in section 1. The Court applied such a limitation nonetheless, on the basis that the Crown had *always* had the power to unilaterally infringe rights: section 35 did not change this; rather, it constitutionalized the Crown's fiduciary duty that existed at common law, thereby permitting the courts to supervise exercises of the Crown's discretionary authority.[107] This is an important move, as it is inimical to how courts frame issues of jurisdiction: the Court would not say that the federal government has the power to infringe provincial or municipal jurisdiction. While the federal power may well be paramount in many cases, that is analytically and practically distinct from an infringement test.

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

107 See Joshua Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto, Ontario: University of Toronto Press, 2019); See also Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729.

The second move the Court made relates to the authority to regulate the exercise of a right: the contours of the move can be seen clearly in how the Court dealt with Ronald Sparrow's claim that the aboriginal right to fish included the right to regulate the fishery. The Court dismissed this argument by asking itself whether the Crown had the authority to regulate the fishery. Concluding that it did, the Court considered the question of Musqueam jurisdiction settled: if the Crown has authority to regulate, no one else does.[108] This regulatory power, in the Court's view, is derived from section 91(24) power in relation to "Indian, and lands reserved for the Indians." This head of power then not only establishes that as between federal and provincial governments it is the federal government that will manage affairs in relation to Indigenous peoples, it establishes, on the Court's reading, a regulatory power over Indigenous peoples and their lands that erases their own authority. Again, any limits on the Crown's discretionary power are sourced not from the protection of Aboriginal rights in section 35, but from the Crown's pre-existing fiduciary obligations to Indigenous peoples.[109]

In *Van der Peet,*[110] section 35 was taken further from the recognition of jurisdiction. Here the Court developed its roundly criticized "integral to the distinctive culture" test. The question before the Court was how to determine whether a given activity constitutes an Aboriginal right under section 35. The Court decided that to be recognized as a section 35 right, an activity must be demonstrated to have been integral to the distinctive culture of the group in question at the date of European contact. This is an incredibly onerous test that poses significant evidentiary problems for Indigenous claimants and places the burden on colonized peoples to prove their rights on a case by case basis. It relies on troubling notions of indigeneity rooted in an oversimplified past, undermines the historical exercise of Indigenous agency in the face of European incursions into North America, and ties contemporary Indigenous peoples to Eurocentric visions of 'pre-contact' Indigenous society.

In the *Pamejewon*[111] decision, this problematic framework was applied to a question of self-government in a manner that effectively precludes successful self-government claims. There the Shawanaga and Eagle Lake First Nations claimed the right to regulate gaming activity on reserve on the basis of an Aboriginal right of self-government. Historically, they argued, they regulated economic activity in their nations through self-governing authority. Accordingly, a con-

108 *Sparrow, supra* note 106.
109 *Ibid*.
110 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].
111 *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*].

temporary right of self-government protected their authority to regulate economic activity, including gaming, on reserve. The Court constrained future self-government claims by holding that the right could not be made out, not only because evidence would have to be brought of governance at the time of contact, but because the claim had to be narrowly characterized to match the specific governance power in question. In the result, the First Nations had to prove not that they exercised powers of governance, but that they regulated high stakes gaming. Emphasizing the specific issue of regulation imposes a nearly insurmountable evidentiary burden when combined with the *Van der Peet* test.[112]

What these cases illustrate is that the Court has limited its ability to meaningfully respond to Indigenous jurisdictional claims owing to its commitment to treating Indigenous peoples as cultural minorities rather than as political communities or partners in confederation. This background presumption was made explicit in the *Secession Reference,*[113] where the Court grouped 'aboriginal peoples' with the protection of minority rights in its analytical taxonomy.[114] Issues mediating conflicting constitutional claims of political communities within the federation, the court held, attract the attention of unwritten constitutional principles such as democracy, federalism, constitutionalism, and the rule of law.[115] These principles take the Court beyond technocratic legal reasoning, as they raise the connection between law and legitimacy.[116] Specifically, where a partner to a constitutional arrangement expresses a democratic will to modify the nature of that relationship, the legitimacy of the constitutional order will be put at risk if the courts rely on technical reasoning to thwart that democratic will. Accordingly, the Court held that where the nature of the constitutional relationship itself is being disputed, the parties have a duty to negotiate at the political level.[117] Indigenous peoples, by contrast, were dealt with

112 See Bradford Morse "*Permafrost Rights*: Aboriginal Self-Government and the Supreme Court in. *R. v. Pamajewon"* (1997) 42:3 McGill LJ 1011; See also Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009-2010) 41:1 Ottawa L Rev 101. For lower court cases applying *Pamajewon* in dismissing self-government claims, see *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; See also *Canada (Minister of National Revenue) v Ochapowace Ski Resort Inc*, 2002 SKPC 84; See also *Conseil des Innus de Pessamit v Association des policiers et policières de Pessamit*, 2010 FCA 306; See also *Gauthier (Gisborn) v The Queen,* 2006 TCC 290; See also *Kátlodééche First Nation v HMTQ et al,* 2003 NWTSC 70.

113 *Secession Reference, supra* note 10.

114 *Ibid* at para 96.

115 *Ibid* at para 32.

116 *Ibid* at para 33; See also Hamilton & Nichols, *supra* note 107.

117 *Secession Reference, supra* note 10 at paras 88-90. This, of course, was not unproblematic. Both Quebec and the Federal government declared victory following the decision. From the legal perspec-

as cultural minorities. Indeed, they were not treated as *peoples* at all, despite the arguments put forward by the Grand Council of the Crees as interveners arguing that they must be recognized as such.[118] Thus, while the Court hesitated at the prospect of engaging in explicitly political work where a province challenged the constitutional order, owing to its inability to see Indigenous claims as political — again, they are considered minority rights claims — the Court remained (and remains) comfortable resolving political questions where Indigenous peoples are concerned.

At times, it has seemed that the court has recognized many of these problems. In *Mitchell,* Binnie J. referred to 'sovereignties,' indicating the co-existence of Crown and Indigenous sovereignties.[119] Drawing the distinction between *de jure* and *de facto* sovereignty in *Haida Nation* set up a frame wherein the Indigenous peoples continued to hold legal sovereignty until such time as it was ceded to the Crown.[120] Or, as Ryan Beaton has argued, the Crown — in the Court's view — perfected its sovereignty through the procedural requirements outlined by the Court in *Haida* as 'the duty to consult and accommodate.'[121] Certainly, this duty, at its most robust, has provided space for Indigenous peoples to influence decision-making.[122] In *Mikisew Cree #2,* Abella J., in a dissenting opinion, clearly framed the constitutional issue at stake by noting that section 35 is not part of the *Charter* and deals instead with the 'other parts of the [C]onstitution', particularly those that deal with the division of constitutional authority.[123] That is, she recognized section 35 as being jurisdictional in nature.

The Supreme Court has also repeatedly noted its preference that the issues before it be resolved through negotiation, recognizing the undesirable situation of having the Court resolving Crown-Indigenous conflict over the

tive, the decision left open complicated problems their reasons would create for the existing modes of constitutional amendment. Further, the courts use of history — particularly its claim that the unwritten principles it identified were *always* part of the Canadian constitutional order — has been persuasively called into question: see history paper. See David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto, Ontario: Lorimer & Company, 1999).

118 See H Wade McLaughlin, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76:1-2 Can Bar Rev 155.

119 *Mitchell v. MNR,* 2001 SCC 33 [*Mitchell*].

120 *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 [*Haida Nation*].

121 Ryan Beaton, "De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25. Richard Stacey refers to this as remedying the 'sovereignty deficit.'

122 See e.g. *Tsleil-Waututh Nation v Canada* (*AG*), 2018 FCA 153. For commentary, see Robert Hamilton, "Uncertainty and Indigenous Consent: What the Trans-mountain decision tells us about the current state of the Duty to Consult" (10 September 2018), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2018/09/Blog_RH_TMX_Sept2018.pdf>.

123 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree #2*].

nature of their constitutional relationship. The problem to date has been that the Court's doctrine has not sufficiently motivated the type of negotiations the Court hoped to spur. Because the doctrine continues to permit unilateral Crown action in the face of persistent disagreement, negotiation tables are always tilted toward the Crown at the outset in a way that undermines the bargaining power of the Indigenous parties and frequently prevents Indigenous peoples from having a meaningful role in decision-making.[124] In structuring this dynamic, the Supreme Court has frequently been inattentive to the effect of its decisions on distributing bargaining power to the parties.[125] As a result, the gains made in the case law have remained largely rhetorical; the doctrine as a whole has remained shaped by the early commitments of the Court situating Indigenous peoples in a fixed constitutional position and has been unable to move past the limits those cases put in place.

There are at least three ways that courts can decide cases interstitially: current practice, judicial restraint, and incorporation. Referring to current practice is an acknowledgment that the courts already make law 'interstitially' in this area on a regular basis. As outlined above, section 35 is ambiguous, and the courts have been left to develop its meaning. This is an example of interstitial law-making on the basic American approach, though one could argue that it represents more substantial judicial law-making than advocates of 'interstitial law-making' have in mind. Though this fits within the conventional definition of interstitial, this form of law-making runs counter to the notion of interstitial federalism put forward here. This is not owing to structural issues — if we have courts, they will unavoidably make interstitial law — but substantive issues. As discussed, the Supreme Court's framework for section 35 has severely circumscribed the avenues available for the exercise of Indigenous jurisdiction. To allow practices of interstitial federalism to flourish, the courts must unwind some of the section 35 framework. Joshua Nichols and I have argued elsewhere that a generative 'duty to negotiate' based not on *Sparrow,* but on the *Secession Reference,* would provide a sound legal basis for an incremental shift to a jurisdictional reading of section 35. It is in this sense, also, that judicial restraint is required if interstitial practices are to flourish. Questions of constitutional legitimacy arise when the Court does political work in denying parties to a federal arrangement the ability to democratically revise the nature of their constitutional relationships. In the face of practices of interstitial federalism that challenge established constitutional arrangements — tribal parks or inter-in-

124 For a development of this argument see Hamilton & Nichols, *supra* note 107.

125 See Macklem, *supra* note 6.

digenous treaties, for example — the courts should exercise restraint and limit themselves to providing guidance regarding negotiated solutions.

Finally, the courts can develop interstitial federalism by incorporating Indigenous legal orders. The most well used example of this is the *Connolly and Woolrich*[126] decision, decided in 1867, which upheld the validity of Cree marriage laws.[127] There are many contemporary examples. In two cases arising from the same facts, *Harpe v Massie*[128] and *Harpe v Ta'an Kwach'an Council*,[129] the Yukon Territory Supreme Court dealt with the interpretation of a First Nation constitution developed under a self-government agreement. Specifically, the Court was asked to determine the role of custom in interpreting the Ta'an Kwach'an Constitution and what role elders might play.[130] At issue was the decision of the band to allow the Elders Council to appoint an interim Chief pending an election.[131] The appointment was made necessary due to an apparent oversight in legislative drafting that left the Constitution without provisions for appointing an interim Chief while requiring the presence of a Chief to meet quorum so the council could act.[132] Importantly, the Court characterized the dispute as "an internal dispute between citizens of the Ta'an Kwach'an"[133] as opposed to a dispute between the Crown and the Ta'an Kwach'an, thereby confirming that First Nations constitutions are distinct from the Crown in this regard. Also of significance was the finding that "the interpretation of a First Nation constitution is not the same as the interpretation of a statute."[134] Having made this distinction, the Court went on to describe the relevant principle of interpretation to be applied when interpreting a First Nations constitution:

1. a First Nation constitution must be interpreted as a constitutional document, not a statute;
2. the living tree doctrine should be applied to a First Nation constitution. This means that, as with other constitutions, a First Nation constitution should be given a large and liberal, or progressive interpretation to ensure its continued relevance (see Reference Regarding Same Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79, at para. 23

126 *Connolly v Woolrich et al* (1867), 17 RJRQ 75.
127 *Ibid.* For commentary see Mark Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22:3 Rev Const Stud 347.
128 *Harpe v Massie and Ta'na Kwäch'än Council*, 2006 YKSC 39 [*Harpe v Massie*].
129 *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1 [*Harpe v Ta'an Kwäch'än Council*].
130 *Harpe v Massie*, *supra* note 128 at para 1.
131 *Harpe v Ta'an Kwach'an Council, supra* note 129 at para 1.
132 *Ibid* at para 2.
133 *Ibid* at para 79.
134 *Ibid* at para 94.

and R.W. Hogg, Constitutional Law of Canada, loose leaf, 4th ed. (Toronto: Thomson Canada Limited, 1997) at page 33-16);

3. while a constitutional document should be read generously within its contextual and historical guidelines, it must not overshoot its purpose by giving it an interpretation the words cannot bear (see R. v. Blais, [2003] 2 S.C.R. 236, 2003 SCC 44, at para. 18);
4. aboriginal understanding of words are to be preferred over more legalistic interpretations (see Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at para. 13); and
5. the right to self-government for First Nations should be preserved by giving an interpretation that is the least intrusive (see R.v. Sioui, [1990] 1 S.C.R. 1025, at p. 1055).[135]

Applying these interpretive principles, the Court held that the Ta'an Kwach'an Constitution undoubtedly intended that customs and traditions "would continue to play an important role in their society and laws."[136] As elders traditionally held important decision-making roles in society, it was not a violation of the Ta'an Kwach'an Constitution for them to have done so in this case. The need for judicial deference to Indigenous decision-makers, both in contemporary and traditional modes of governance, was also emphasized by the Federal Court in *Pastion v Dene Tha First Nation*.[137] There, the Court held that "Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue."[138] Accordingly, the Court held, judicial forbearance should be the rule in reviewing decisions from Indigenous decision-makers.[139] There cases have important implications for the interpretation of Indigenous constitutions, both as constitutional documents and as incorporated customary and unwritten laws. This provides the start of an outline for the interpretation of Indigenous constitutions — themselves interstitial federal instruments — in a manner that reflects the traditions and unwritten constitutional principles of the nation.

Courts have continued to find ways to incorporate Indigenous law. In *Restoule v Canada,* the Ontario Superior Court was asked to interpret the Robinson-Huron Treaty of 1850. In doing so, the Court explicitly relied on Anishinaabe legal principles of respect, responsibility, reciprocity, and renewal

135 *Ibid*.
136 *Ibid* at 78.
137 *Pastion v Dene Tha' First Nation,* 2018 FC 648.
138 *Ibid* at para 22.
139 *Ibid* at paras 19-20.

in trying to discern the "Anishinaabe perspective" on the treaty at issue.[140] Hennessy J. detailed how this knowledge had come to the Court through extensive expert witnesses and evidence, and outlined how the Anishinaabe procedures and ceremonies brought their customs, norms, and law into the court proceedings. She writes:

> As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. During the ceremonies, there were often teachings, sometimes centered on *bimaadiziwin* — how to lead a good life. Often teachings were more specific (e.g. on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies). The entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. I believe I speak for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices.[141]

The decision ends: "Miigwech, Miigwech, Miigwech"[142] (thank you, thank you, thank you). This type of approach by the courts is not without risk. Problems of cross-cultural misunderstanding can always persist, and the effort to make Indigenous legal norms cognizable in Canadian courts can alter those norms in the process, bending them to fit Canadian conceptions of 'law.'[143] At worst, such an approach can appropriate and domesticate Indigenous law in the service of maintaining the colonial legal order. Yet, a willingness to bring Indigenous legal orders into discussion with the common law in Canadian courts opens up a new form of interstitial law-making in which Indigenous laws become part of the fabric of Canadian law and shape the constitutional relationships between the parties. There is an incredible transformative potential for Indigenous peoples who chose to try to have their laws shape the application of the common law in this way. This question of transformative potential brings us to the final section of this paper, which examines the potential of interstitial change to meaningfully recalibrate power.

140 *Restoule v Canada (AG),* 2018 ONSC 7701 at paras 412-423 [*Restoule*]. For more on these and other principles of Anishinaabe law see John Borrows, *Law's Indigenous Ethics* (Toronto, Ontario: University of Toronto Press, 2019). For commentary, see Darcy Lindberg, "Historical Lawsuit Affirms Indigenous Laws on Par with Canada's", *The Conversation* (15 January 15, 2019), online: <theconversation.com/historical-lawsuit-affirms-indigenous-laws-on-par-with-canadas-109711>.

141 *Restoule, supra* note 140 at para 610.

142 *Ibid* at para 611.

143 See Aaron Mills, "*The Lifeworlds of Law*: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

5. Interstitial Change and Federal Association

What I have just outlined is an idea of interstitial federalism that encompasses a diverse range of practices of governance and constitutional dialogues. It is a view of how federalism *can* work in the context of multinational democracy, but also an explanatory frame that captures *how* federalism is already being practiced in Canada. The interstitial nature of these structures and practices can be laid out in terms of three distinct categories of practice: shared or co-managed institutions of governance, developed collaboratively and recognizing areas of shared and exclusive jurisdiction; independent practices of indigenous governance that do not engage federal or provincial actors; and interstitial law-making in Canadian courts. These practices are significant, if incomplete, steps towards Indigenous self-determination in the context of a shared federal framework. Yet, colonial practices of law and governance continue to constrain Indigenous jurisdiction in their traditional territories. The question, then, is whether the interstitial practices discussed here can be the basis of the type of systemic change required to meaningfully respond to Indigenous assertions of autonomy and self-determination and whether this can be achieved in a shared federal association.

Of course, the question of social change is a very old one, and the question of the extent to which state institutions might profitably be engaged in struggles for emancipation, from both theoretical and practical perspectives, has a long provenance. An added layer of complexity is added in colonial contexts. Where it is believed that "systemic ruptural strategies" — that is, strategies that aim at the wholesale rupture of existing structures — are either undesirable or impossible, the question becomes which strategies best promote gradual transformations. As Olin Wright puts it, "the only real alternative [to ruptural strategies] is some sort of strategy that envisions transformation largely as a process of metamorphosis in which relatively small transformations cumulatively generate a qualitative shift in the dynamics and logic of a social system."[144] The framing as metamorphosis, however, "does not imply that transformation is a smooth, non-conflictual process that somehow transcends antagonistic interests."[145] As Benjamin Arditi frames it, "the interstice is a space of tension and not a region of unmitigated freedom where the ruled can do as they please. A politics of disturbance uses this interstice to make inroads into the partition of the sensible; it is a space for staging negotiations concerning freedom and

144 Wright, *supra* note 36 at 228.
145 *Ibid*.

equality in everyday life."[146] It does not suggest, in other words, that gradual change is achieved without struggle; rather, it suggests a shift in perspective in which we "see the strategic goals and effects of struggle in a particular way: as the incremental modifications of the underlying structures of a social system and its mechanisms of social reproduction that cumulatively transform the system, rather than as a sharp discontinuity in the centers of power of the system as a whole."[147]

As discussed at the outset, in Wright's view, the adoption of a metamorphic vision of social change gives rise to two approaches: "interstitial transformation and symbiotic transformation."[148] Both visions seek democratic emancipation and social empowerment through gradually enlarging social spaces in which transformation can occur. They differ, in his view, in terms of their engagement with the state, with symbiotic models engaging with the state and interstitial models resisting such engagement.[149] As Wright notes, however, "[t]hese need not constitute antagonistic strategies — in many circumstances they complement each other, and indeed may even require each other."[150] On the basis of this concession and the use of the term "interstitial" in American legal thought, I here proceed without the interstitial/symbiotic distinction for the purposes of understanding how a model of interstitial federalism may facilitate social change.

Interstitial change, then, includes approaches that challenge hegemonic assemblages by working within cracks in systems of power, both through engaging the institutions of those systems and by working outside them.[151] Without explicitly drawing on the terminology of the 'interstitial,' several theorists make arguments along similar lines. James Tully, for example, discusses resistance in terms of the 'practices of freedom' that citizens take up in challenging structures and practices of governance.[152] Gene Sharp, by turn, refers to both "microresistance" and "cultural resistance," the former denoting resistance by individuals or small groups, the latter defined as the "[p]ersistent holding to one's own way of life, language, customs, beliefs, manners, social organization,

146 Benjamin Arditi, *Politics on the Edges of Liberalism: Difference, Populism, Revolution, Agitation* (Edinburgh: Edinburgh University Press, 2007) at 106.
147 Wright, *supra* note 36 at 228.
148 *Ibid*.
149 *Ibid*.
150 *Ibid*.
151 The metaphor of cracks is developed at length by Holloway, *supra* note 36.
152 James Tully, *Public Philosophy in a New Key: Volume 1, Democracy and Civic Freedom* (Cambridge, United Kingdom: Cambridge University Press, 2008).

and ways of doing things despite pressures of another culture."[153] Cultural resistance, which can arise in direct opposition to colonialism, includes the use of language, artistic endeavor, and the practice and revival of cultural practices. As Tully argues, in resisting the various forms of coercion employed by colonial powers, "there is always a range of possible comportments — ways of thinking and acting — that are open in response, from the miniscule range of freedom exercised in hidden insubordination in total institutions such as residential schools to the larger and more public displays."[154] These are what Tully calls a "vast repertoire of arts of infrapolitical resistance."[155] The importance of these forms of 'infrapolitical resistance' are reflected in Mouffe's argument that "radical politics consists in a diversity of moves in a multiplicity of institutional terrains, so as to construct a different hegemony."[156] Articulated slightly differently, Paul Berman argues that legal pluralists seek "to identify places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision."[157] In each of these articulation, the acts of resistance work to prevent alternative modes of social and normative ordering from being subsumed within a sovereign whole. In the result, these forms of resistance have a constitutive effect, maintaining and also producing legal hybridities grounded in alternative constitutional visions.[158] As Wright argues, "The important idea is that what appear to be "limits" are simply the effect of the power of specific institutional arrangements, and interstitial strategies have the capacity to create alternative institutions that weaken those limits."[159] This is the historical perspective taken up by agonistic thinkers, and the notion that struggles over those limits can take place in agonistic, rather than antagonistic, ways, supports the idea that this form of change can happen in the context of shared practices and structures, without violence.[160]

153 Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (New York, New York: Oxford University Press, 2012) at 107.

154 Tully, *supra* note 152 at 265.

155 *Ibid*.

156 Mouffe, *supra* note 20 at XIV.

157 Paul Schiff Berman, *Global Legal Pluralism: Jurisprudence of Law Beyond Borders* (Cambridge, United Kingdom: Cambridge University Press, 2012) at 54.

158 As Wright puts it "The state contains a heterogeneous set of apparatuses, unevenly integrated into a loosely-coupled ensemble, in which a variety of interests and ideologies interact. It is an arena of struggle in which contending forces in civil society meet. It is a site for class compromise as well as class domination. In short, the state must be understood not simply in terms of its relationship to social reproduction, but also in terms of the gaps and contradictions of social reproduction." Wright, *supra* note 36 at 236.

159 *Ibid*.

160 See Mouffe, *supra* note 20 at 9-15.

The above points to strategies of resistance grounded in activities of everyday life. In theorizing such modes of resistance and their relationship to interstitial federalism, an important distinction in Enlightenment thought should be attended to. Amartya Sen describes the distinction as between what he calls the 'transcendentalist' and 'comparativist' approaches to social thought. He articulates the distinction this way: "'transcendental institutionalism,' has two distinct features. First it concentrates its attention on what it identifies as perfect justice, rather than on relative comparisons of justice and injustice… second, in searching for perfection, transcendental institutionalism concentrates primarily on getting the institutions right and it is not directly focused on the actual societies that would ultimately emerge."[161] The comparativist approach, on the other hand, focuses on "the actual behavior of people" and "involved … comparisons of societies that already existed or feasibly could emerge, rather than confining their analyses to transcendental searches for a perfectly just society."[162] The concern for the comparativists was primarily with the removal of injustice from society. The transcendental inquiry addressed a fundamentally distinct question, "a question that may well be of considerable intellectual interest, but which is of no direct relevance to the problem of choice that is to be faced."[163] That is, the question of what an ideal social order might look like has little value to people making strategic decisions in light of the real limits and constraints within which they are operating.

There are two important points to draw out of Sen's argument for present purposes. The first is the caution not to overemphasize institutions themselves and fall into the trap of thinking that there is an ideal set of institutions that will lead to a just social order. People who make up institutions and behave according to their own values or interests have a significant impact on the social order regardless of how institutions are formally structured. Idealized visions conceived at the theoretical level and imposed to bring about a 'just' social order fail to reflect lived reality and the push and pull of political life as these visions are re-worked to meet the demands of groups and individuals. The second is the emphasis on creating change not in light of a predetermined ideal,

161 Amartya Sen, *The Idea of Justice* (Cambridge, Massachusetts: Belknap Press of Harvard University, 2009) at 6-7.

162 *Ibid*. Others, of course, have identified and articulated a similar distinction, albeit sometimes using different terminology. Ian Hunter, for example, draws a distinction between the 'metaphysical' philosophy of Kant and Leibnitz and the 'civil' philosophy of Pufendorf and Thomasius in German enlightenment thought. Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge, United Kingdom: Cambridge University Press, 2001). For commentary see James Tully, "Diverse Enlightenments" (2003) 32:3 Economy and Society 485; See also Mouffe , *supra* note 20 at 35-36.

163 Sen, *supra* note 161 at 17.

but with the materials at hand. A single vision of a just society is never possible. The terms by which competing visions are negotiated, including the institutional forms through which political authority is mediated, must themselves be subject to ongoing contestation and renegotiation. This approach, of strategic counter-hegemonic resistance that itself is generative in nature, can then be thought of in terms of jurisdiction. This requires re-thinking jurisdiction, opening it up to reflected grounded practices and conceptions of those living them out. It moves away from the imposition of top-down theoretical models to a vision that incorporates, indeed is shaped by, the dialogues on governance of those involved.

How, then, does this apply to interstitial federalism? As outlined above, interstitial federalism can be considered as both descriptive and prescriptive. From a descriptive perspective, it allows for the articulation of conceptions of federalism and jurisdiction that reflect actual practices of governance. It allows us to see federalism differently. From a prescriptive perspective, it provides a way to envision how the social order may change to better accommodate Indigenous autonomy and self-determination. The view being put forward here is not a totalizing one. It is not the goal to subsume all Indigenous acts of jurisdiction within a comprehensive federal frame. Rather, it is to re-think jurisdiction and federalism in a way that allows exercises of Indigenous jurisdiction to prefigure transformations in shared federal structures. It opens space for ongoing dialogues about jurisdiction and political authority. By framing the issues as questions of federalism, the languages of engagement shift. With the shift in languages comes a shift in the terms of engagement as well as the available legal tools. The nature of interstitial strategies of social change, as outlined in this section, illustrate that interstitial federalism can prefigure social change. Further, seeing the actual practices of governance and dialogues around jurisdiction and nationhood as constitutive of a federal association allows for the contestation of inherited narratives of unilateral and fixed sovereign authority. With the state and its legal apparatus seen as historically contingent assemblages, interstitial approaches to federalism can work to construct and establish alternative practices and visions.

6. Conclusion

Though Indigenous peoples have often been excluded from discussions of federalism in Canada, this has not always been the case. When European peoples began to settle in North America, they were brought into Indigenous legal orders. Later, as European communities grew beyond the isolated outposts and forts that characterized their early settlement, they entered into extensive treaty relationships with the Indigenous nations whose territories they were entering. These treaties established a constitutional structure governing the relationships between the parties and their rights, responsibilities, and authorities in relation to each other. They established what has been called 'Treaty Federalism.' That a type of federal arrangement would emerge is unsurprising: Indigenous peoples frequently used models of confederation to structure their political relationships as the histories of the Iroquois, Wabanaki, Blackfoot, Creek, and Delaware confederacies, to name but a few, attest.

The strength of federal models of association are that they recognize the autonomy and political character of constituent members while creating negotiated forms of collective governance. It is notable that there are long histories of federal association in North America that pre-date the existence of the Canadian federation. With the benefit of hindsight, it can be seen that the marriage of federalism and the modern nation-state undermined the autonomy and political status of Indigenous peoples, situating them as minority populations within colonial structures of governance. Treaty federalism, which grounded the legitimacy of non-Indigenous governments on the continent, were effectively erased from non-Indigenous accounts, treaties reduced to the protection of a limited range of resource-access rights. It is in response to this that many people have argued for a revitalization of treaty federalism. Sakej Henderson and Andrew Bear Robe both put forward visions of treaty federalism that can structure Crown-Indigenous relations in Canada, giving life to a vision of federalism that recognizes Indigenous autonomy and sovereign authority.[164]

The argument put forward in this paper should not be taken to exclude treaty federalism. Indeed, treaty federalism can be understood as an example of the form of interstitial federalism articulated here. The understanding of interstitial federalism articulated here has both descriptive and prescriptive elements. Descriptively, understanding the many discrete forms of governance that take place in the spaces left open by the formal federal structure as practices of federalism — that is, as constitutive of the model of federalism that

164 See Henderson, *supra* note 9; see also Robe, *supra* note 9; see also Ladner, *supra* note 9.

is actually being practiced — provides a basis for re-articulating practices of Indigenous governance and their relationship to other orders of government in Canada. Prescriptively, it does not provide an outline for a 'model' of federalism; rather, it articulates a vision of how political and legal relationships can be re-worked on the basis of the actual practices of governance that the parties are engaged in. It opens up the possibility of seeing the diverse ways in which governance is being contested and re-negotiated on an ongoing basis as being directed towards new articulations of Canadian federalism.