

Transforming Constitutionalism from a More-than-Human Perspective

*Jennifer Nedelsky*¹

Here “constitutionalism” means the framework for co-operating communities that include the more-than human. The nation-state is both too large and too small for optimal earth-centric decision-making. New values of responsibility, freedom, and care become foundational. “Representation” now needs to include more-than-human participants, raising questions about which of the traditional structures of democracy remain valuable. Special protection for core values require forms other than conventional judicial review. Responsibility becomes more important than rights. New approaches to property, to work and care, to economic equality, to security, and to individual responsibility are necessary to

Dans cet article, le « constitutionnalisme » signifie une cadre pour des communautés coopérantes qui incluent le plus-qu’humain. L’état-nation est à la fois trop grand et trop petit pour permettre une prise de décision optimale centrée sur la terre. De nouvelles valeurs de responsabilité, de liberté et de soin deviennent fondamentales. La « représentation » doit maintenant inclure des participants plus-qu’humains, ce qui soulève des questions pour savoir lesquelles des structures traditionnelles de la démocratie sont encore précieuses. La protection spéciale pour les valeurs fondamentales nécessite des formes autres que la révision judiciaire. La responsabilité devient plus importante que les droits. De nouvelles

1 I am a 75-year-old cis-gendered woman, an immigrant to Canada, originally from Chicago, Illinois. My father (b. 1903) was an immigrant to the US from Siberia, Russia. My mother (b. 1918) was from a farming family in Pennsylvania, of many generations of European ancestry. I have an interdisciplinary doctorate and I wrote my dissertation (and first book) on the role of property in the framing and development of the American Constitution. I am not a lawyer, but I did a year’s worth of law courses at Dalhousie as a Killam post-doctoral fellow before spending six disappointing years at a “great first job” at the Politics Department at Princeton University. In 1985 I moved to the University of Toronto with a joint appointment in law and political science (with criminology and women’s studies along the way). In 2018 I moved to Osgoode Hall Law School to take up a part-time job, putting into practice the argument in my co-authored book with Tom Malleson, *Part-Time for All: A Care Manifesto* (New York: Oxford University Press, 2023) [Nedelsky & Malleson, *Part-Time for All*]. I have been actively involved in a small congregation of the United Church since 1991. I see attention to the dazzling universe of the more-than-human, and the beauties and suffering of Earth in particular, as shaped by my spiritual commitments as much as by my academic path. Joe Carens and I happily divide our time between Toronto and our cottage on Christian Island/Beausoleil First Nation, Georgian Bay. We have two beloved sons, Michael (1987) and Daniel (1990).

I have been thinking about law in relational terms for a long time (Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) [Nedelsky, *Law’s Relations*]), but (despite Jess Eisen’s help) I was slow in extending that relational framework beyond the human. Now I am returning to a broadened relational approach to property and connecting property to care for the Earth. I am also finishing up a book on judgment. I like to think of this essay as bringing together my work on constitutionalism, property, relational approaches to law, restructuring work and care (revaluing care in particular), and judgment.

foster core values of the new constitutionalism. Both spiritual belief and secular language are important to capture the intrinsic value of “all our relations.”

approches de la propriété, du travail et de soin, de l'égalité économique, de la sécurité et de la responsabilité individuelle sont nécessaires pour favoriser les valeurs fondamentales du nouveau constitutionnalisme. La croyance spirituelle et le langage profane sont tous les deux importants pour saisir la valeur intrinsèque de « toutes nos relations ».

Contents

I.	Introduction.....	241
II.	Values	246
	A. Responsibility	246
	B. Freedom, Safety, Inclusive Participation	249
	C. Care	251
III.	Modes of Implementing More-than-Human Constitutionalism	253
	A. What are Good Ways to Talk to One Another when Making Collective Decisions, or Decisions that will Affect the Collective?.....	253
	B. Puzzles of Scale and Care	256
	C. Representation and the More-than-Human	260
	D. Special Protection for Core Values	262
	E. Democracy, Time, Coercion, and Climate Change	264
	F. Institutional Design	265
IV.	Law/Policy Changes	269
V.	Conclusion	272
	A. Scope of Change Around Caring Relations	272
	B. Hope and Challenge for Respect for the More-than-Human .	273

I. Introduction

This essay is framed around the challenges and opportunities that come with expanding the notion of constitutionalism to the more-than-human.² There are many reasons this is vitally important. One of the most urgent is that the transformations necessary for more-than-human constitutionalism are also those necessary to make climate change less deadly. In addition, I mean to detach the term constitutionalism from its traditional focus on nation-state institutions. The questions I focus on are how to constitute relations among and between human and more-than-human members of the Earth community, so that all may flourish.

These are, of course, big questions, and suggest the scale of my perspective here. In this one essay, I take up the foundational question of the values that should ground more-than-human constitutionalism, and that will require a fundamental transformation of the dominant norms, beliefs, and values of most of the Anglo world. Then I turn to some of the core puzzles of implementation and to a brief outline of necessary changes in existing law and policy. Throughout, I try to attend to both the promise and the challenges involved.

First a few words about how I see the invitation to transform constitutionalism. My most basic premise is that a more-than-human form of constitution would respond to and structure relations among the whole Earth community: plants, animals, water, soil, air, rocks, mountains, and desert, as well as humans.³ All are potential participants, and different sub-communities would be bounded by geographical territories, or groups of participants, of different sizes for different purposes. Scale accordingly becomes an important issue.⁴

One way of putting a core question of constitutionalism is: how do we best constitute ourselves as cooperating communities that are safe and inclusive for all and foster wise decision-making? I see this as a more open-ended and mutually respectful question than “how do we govern ourselves,” with its traditions

2 See Lindsay Borrows & Jessica Eisen, “Our More-than-Human Constitutions” (in this volume).

3 The Earth is, of course, also part of a solar system and galaxy. We know something about the impact of the shifting relation of the Earth to the sun and we know we rely on the sun for light and life, and that the moon affects the oceans. Most of us know far less about how these bodies are impacted by what happens on Earth. As with other forms of ignorance, it is not a reason not to see them as part of our relations. We might at least note that leaving our garbage strewn through space is not a form of respectful relations.

4 See section III of this article. For some examples of attention to scale, see Kasper Kok & Tom Veldkamp, “Scale and Governance: Conceptual Considerations and Practical Implications” (2011) 16:2 *Ecology & Society* 23; Jens Newig & Timothy Moss, “Scale in Environmental Governance: Moving from Concepts and Cases to Consolidation” (2017) 19:5 *J Envtl Pol’y & Planning* 473.

of power, control, and hierarchy. For humans, to cooperate with one another almost always means that there is some framework — of norms, practices, law, institutions — that offers guidelines, and sometimes requirements, about how we are to go about making decisions together and what the scope and content of our cooperation should be. Some of those guidelines tell us when we should advise one another, when we should make requests of one another, when we should try to “persuade,” and when we should exercise collective control, whether in the form of overt coercion (such as state sanctions), organized pressure or resistance (e.g. strikes), or social guidance and pressure (norms), which has its own distinct power of control and exclusion.

Of course, all these issues have been the subject of intense political and academic debate for centuries. However, the dominant Western tradition of debate treats the question of how humans should relate to one another as separate from the question of our relationships with the rest of Earth community — a community that humans are embedded in, dependent on, and impacting (increasingly catastrophically). In particular, questions of authority, hierarchy, respect, and equality, which are seen as central to human-to-human relationships, have often been replaced by assumptions of superiority and dominance to characterize humans’ relationship to the Earth community. With this in mind, parts of the puzzle I want to address are: what kinds of changes in core values will be necessary to generate a more-than-human constitutionalism to which those relations are seen as integral and requiring mutual care and respect? What is still valuable about Anglo-American⁵ traditions of constitutional thought and practice? Where in Indigenous legal traditions can we find new kinds of guidance/alternatives?⁶ And what are the most useful questions for developing a constitutionalism for which the relevant participants are both human and more-than-human?

I want to begin with the (widely accepted) idea that all constitutions that define and structure political and legal institutions are underpinned by basic values.⁷ Some of these values, like equality (however contested and ignored in

5 I use this term in part because of the disproportionate influence of American constitutionalism on written constitutions around the world in the last century. Also, in part because these are the traditions and versions of liberalism I know best, and that have been significantly influential in Canada.

6 I will refer primarily to North American Indigenous law. But for the main points I am making it is my understanding that there are great similarities with other Indigenous traditions, including those of South America, Australia, New Zealand, and the Celtic tradition.

7 See generally the first chapter of Nedelsky, *Law’s Relations*, *supra* note 1 (“My Relational Framework: Terms, Puzzles, and Purpose”); Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847 at 852 (“Without having begun to internalize our lifeworld, one has no hope of understanding our law”); Robert M Cover, “Foreword: Nomos and Narrative”

concrete practice), are explicitly articulated in written constitutions and their judicial interpretations.⁸ But others, like particularly individualistic conceptions of autonomy and freedom, infuse both document and interpretation, although the individualism is largely implicit. A basic framework of rights rather than responsibilities is another example of deeply embedded values. Indeed, a rights framework is so embedded that for many it is simply a self-evident part of modern constitutionalism, rather than a choice to give primacy to individual entitlement over collective responsibility.⁹

In what follows, I will identify some of the values that require fundamental rethinking to develop a constitutional framework that fully includes all our relations. I will refer (interchangeably) to more-than-human constitutionalism, Earth-centred constitutionalism, a kincentric approach,¹⁰ and constitutionalism for all our relations.

As I envision a constitutional order for the Earth community, it needs to express, foster, and be supported by norms of mutual respect, care, and responsibility. In addition, it needs to have both norms and institutions that enable freedom, equality, inclusion, and safety for all. Of course, unpacking what these values would look like concretely, in both institutional design and everyday prac-

(1983) 97:4 Harv L Rev 4 at 4 (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning”).

8 Of course, even what are widely treated as core values, such as equality and private property, are often not only in tension with one another, but have been overtly seen as not being available to everyone in the same way. For examples from the United States see Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (Chicago: University of Chicago Press, 1991). For commentary on the failures of courts to promote equality in both Canada and the US, see Michael Mandel, “Against Constitutional Law (Populist or Otherwise)” (2000) 34:2 U Rich L Rev 443. In my view, it matters both that core values such as equality are widely accepted *and* that they are widely disregarded both by courts and other institutions.

9 This is so even though most lawyers and legal philosophers will see responsibilities as flowing from rights. Rights *are* central to the contemporary discourse of justice, and many of the limitations of the individualistic liberal rights tradition can be redressed by a relational approach to rights. See Nedelsky, *Law's Relations*, *supra* note 1; Jennifer Nedelsky, “The Relational Self as the Subject of Rights” in Danielle Celermajer & Alex Lefebvre, eds, *The Subject of Human Rights* (Stanford: Stanford University Press, 2020). Nevertheless, a focus on responsibility provides an important difference. More-than-human constitutionalism will probably need both rights and responsibility, as norms, ethos, and formal law.

10 See the five volumes of Gavin van Horn, Robin Wall Kimmerer & John Hausdoerffer, eds, *Kinship: Belonging in a World of Relations* (Libertyville, IL: Center for Humans and Nature Press, 2021); see also Donna Haraway, *Staying in the Trouble: Making Kin in the Chthulucene (Experimental Futures)* (Durham, NC: Duke University Press, 2016) at 2: “Kin is a wild category that all sorts of people do their best to domesticate. ... Who lives and who dies, and how, in this kinship rather than that one? What shape is this kinship, where and whom do its lines connect and disconnect, and so what? What must be cut and what must be tied if multispecies flourishing on earth, including human and other-than-human beings in kinship, are to have a chance?”

tice, is beyond what this essay can do. I will instead focus on some of the ways these norms and values depart from the understandings characteristic of the constitutional thought that is dominant in Canada and most of the Anglo world.¹¹

I want to acknowledge that such a project faces many challenges. There are both practical, institutional, power-based challenges (which I will not be addressing) and challenges of imagination. As I see it, we collectively need to reimagine what equality for both humans and more-than-humans looks like, when virtually all of us are embedded in societies shaped by multiple, intersecting forms of systemic inequality.¹² No large society has managed to create a truly safe, inclusive environment for all. Violence against women is one obvious example of how our societies fall short of this ideal.¹³ Systemic racism and an enduring colonial mindset¹⁴ are others. These structures of belief and practice seriously limit both individual and collective self-determination and well-being. A different example is the violence of industrialized, corporate farming that characterizes the production of food eaten by large portions of contemporary humanity. Most people are still (or just) learning the full impact of the violence of mining, logging, and agri-business. Most people participate in the use of the products of those practices.

I see the task as envisioning what a truly equal system of cooperation would look like, even though, collectively, we do not even know all the ways the current systems of inequality are operating. Similarly, vital details of how the natural world functions and communicates are just beginning to be understood in the dominant culture.¹⁵ These forms of ignorance will inevitably hamper our

11 I include the United Kingdom, Ireland, Australia, New Zealand, and the United States.

12 “[N]o industrialized society has ever really tried full gender equality — in the workplace, in government, or in the allocation of care-taking tasks or household labor. ... Indeed, all industrialized societies have been characterized by many forms of inequality, such as those organized around class and racialization.” Nedelsky, *Law’s Relations*, *supra* note 1 at 169.

13 See generally the fifth chapter of Nedelsky, *Law’s Relations*, *supra* note 1 (“Violence against Women: Challenges to the Liberal State and Relational Feminism”).

14 I have in mind a blindness to the injustice of stolen land and its implications for claims of sovereignty, as well as an enduring sense of civilizational superiority, which includes a sense that belief in the spiritual nature of all our relations is a form of primitive superstition. See Jennifer Nedelsky, “A Relational Approach to Property” in Nicole Graham, Margaret Davies & Lee Godden, eds, *The Routledge Handbook of Property, Law, and Society* (Abingdon: Routledge, 2022) 325 at 330: “[I]n settler societies, ownership of land comes with a terrible history. In many cases, Indigenous peoples’ very relationship of stewardship with the land marked them as ‘uncivilised’ in the eyes of settlers, and thus unsuitable as property owners or citizens.” See also Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Durham: Duke University Press, 2018).

15 See, for example, Diana Beresford-Kroeger, *To Speak for the Trees: My Life’s Journey from Ancient Celtic Wisdom to a Healing Vision of the Forest* (Toronto: Random House Canada, 2019); Suzanne Simard, *Finding the Mother Tree: Discovering the Wisdom of the Forest* (New York: Allen Lane, 2021); Karen Bak-

vision, thus requiring flexibility for ongoing transformation in whatever values are articulated, whatever structures are implemented.

The institutions/communities that take on the task of implementing equality will be hindered by the patterns of inequality in existing beliefs, values, frameworks of thought, and institutional structures. It will be a challenge to ensure equal access to the decision-making for transformation just among humans. Further distortions will come from the individualism that is so pervasive in dominant society that few have remained unaffected by it — even when they have had countervailing influences in their lives.

With those caveats, let me lay out the basic structure of the essay. I begin with values such as mutual responsibility, freedom, safety, inclusive participation, and care to demonstrate how both cooperation and competition could guide more-than-human constitutionalism (as opposed to models only appealing to competitive self-interest). Next, I examine modes of implementation that resist compulsion by engaging lands, languages, and scope of time in ways that move us beyond conventional “reasoning.” After considering implementation, the article explores more-than-human constitutionalism’s commitment to scaling care in ways which address local, global, and interconnected interdependencies. This leads to a discussion about the need to create better scales for collective decision-making that would challenge current state-centric, economic constitutional models. Issues of scale lead to further questions about more-than-human representation in constitutional life, and the potential role of assemblies, education, and epistemic humility. These questions problematize the role of judicial review, and raise the issues of climate change, Indigenous law, and systems of public accountability where states interact with more-than-human constitutionalism. These issues signal the need to create policy changes aimed at economic restructuring in the areas of financialized and corporate capitalism, inequalities of wealth and income, and the material impoverishment of far too many human and more-than-human beings. Finally, the article concludes by considering the role of hope in more-than-human constitutionalism’s future.¹⁶

ker, *The Sounds of Life: How Digital Technology is Bringing Us Closer to the Worlds of Animals and Plants* (Princeton: Princeton University Press, 2022); Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (London: Penguin Books, 2020).

16 My thanks to John Borrows for offering a draft of this summary.

II. Values

A. Responsibility

Earth-based or kincentric¹⁷ constitutionalism would need to be supported by widely embraced norms of individual and collective responsibility. I have in mind a principle of *mutual* responsibility for the thriving of the interdependent members of the Earth community. For humans, that would include particular responsibility to those humans, plants, animals, and other dimensions of an ecosystem directly under a person's care or affected by their actions. There would also be wider circles of responsibility among kin groups, chosen communities, neighbourhoods, nations, states, federations, and the Earth in all her dimensions.

This idea of *mutual responsibility* is different from mutual respect for individual rights, which are entitlements, claims upon others which in the Anglo liberal tradition have mostly been for refraining from harm or interference.¹⁸ In the Anglo tradition of constitutionalism, the primary focus of rights-based thinking and discourse has been on *limits* on what the state can legitimately do.¹⁹ Positive obligations of the state are the exception. The duty of care in tort law is an exceptional legal responsibility of individuals to one another, but it is largely a duty not to cause harm (a form of responsibility that I think could be expanded upon in a re-conception of property in land that entailed a duty of care for the land). The obligation to refrain from harm (including violating rights) comes with a different orientation toward the “others” of the world than does a caring disposition of responsibility towards one's kin.²⁰

Mutual responsibility is also subtly but importantly different from a belief in human responsibility to “others” (such as animals or even an ecological sys-

17 See *Kin Centric Circles*, online: <<https://www.kincentriccircles.org>> [perma.cc/UNH3-6QMN].

18 See Nedelsky, *Law's Relations*, *supra* note 1 at 97: “Much of American constitutional protection can be understood as a (misguided) attempt to protect individual autonomy. The primary content of this underlying conception of autonomy is protection from the intrusion of the collective. The autonomy the American system is designed to protect can be achieved by erecting a wall of rights around the individual.”

19 See generally the discussion in the second chapter of Nedelsky, *Law's Relations*, *supra* note 1 (“Law, Boundaries, and the Bounded Self”). See also the discussion of rights as “trumps” in the American constitutional understanding, which is distinct from Canadian and European approaches, in the sixth chapter of *Law's Relations*, *ibid* (“Reconceiving Rights and Constitutionalism”).

20 See e.g. Nedelsky, *Law's Relations*, *supra* note 1 at 121: “Drawing boundaries around the sphere of individual rights to protect those individuals from the intrusions of others (individuals or the state) takes for granted the existence and interaction of independent (potentially threatening) others. Such an assumption, however, has little in common with the claim that every person is in significant part constituted by her interactions with others.” This is not to say that there are no differences among one's responsibilities to different forms of kin relations. And there remains a question of whether the “distancing” of rights claims has some value even in more-than-human constitutionalism.

tem) who are often imagined as the *objects* of concern and benevolent action, but rarely as fellow *subjects*, as agents who are participants in collective cooperation and interdependence, and thus with their own reciprocal responsibilities and their own role in shaping the structures and patterns by which we live together.

Responsibility as hierarchical benevolence, from true subjects to lesser objects, has a long history. Of course, the claimed benevolence of masters to slaves or servants, men to women, colonists to those whose lands they take, racial superiors to racial inferiors, humans to the rest of creation, have always been marked by violence and exclusion from decision-making.²¹

21 This kind of responsibility is meant to invoke the complex, sober history we need to remember when envisioning humans as the guardians of “non-humans,” which many humans see as intrinsically “lesser.” For example, a once-famous rejection of what I am calling “hierarchical benevolence” was the American colonists’ rejection of “virtual representation” by the British Parliament, which claimed to represent the entire British Empire, such that no actual representation of the colonists (or the colonialized) was necessary. Members of Parliament could best understand and protect the true interests of all. American colonists were not persuaded, however (“no taxation without representation” was a famous rallying call for the American Revolution). In the fight over female suffrage, there was a similar rejection of the idea that there was no need for women to vote because their husbands and fathers represented their interests: see e.g. Alice Stone Blackwell, *Objections to Woman Suffrage Answered* (Baltimore: Just Government League of Maryland, 1910) at 2 (rebutting the assertion that “[w]omen are represented already by their husbands, fathers and brothers”). A particularly sophisticated justification for limiting suffrage to property owners (and designing institutions so that men of significant property would be elected) was articulated during the debates around a new constitution for the former American colonies, as I note in Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990) at 174: “The Madisonian Federalists could ... consistently invoke both the natural rights of all and design a government to ensure the rule of the [propertied] elite — who were the only ones who could be relied upon to secure the rights of all. This comfortable mix of hierarchy and natural rights is made possible by distinguishing and subordinating political liberty as a mere means to achieving civil liberty.” Both slavery and the dispossession and denial of the franchise to Indigenous people were justified in “civilizational” terms. The slave owners and colonizers brought not just “superior civilization,” but the possibility of salvation through Christianity: see e.g. Russell Pepper Dill, *A Rhetorical Analysis of Selected Pro-Slavery Sermons by Presbyterian Clergy in the Antebellum South* (PhD Dissertation, Louisiana State University, 1994) at 106–109 [unpublished]; Robert J Miller et al, eds, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) at 262–64; Chris Chapman & AJ Withers, *A Violent History of Benevolence: Interlocking Oppression in the Moral Economies of Social Working* (Toronto: University of Toronto Press, 2019) at 234: “According to the ethos of the day, the US settler state and the Canadian settler colonies imagined themselves morally obligated to transform Indigenous peoples to make them more like white people.” The precise terms of the claims of benevolence of the superiors toward their inferiors varied. But the common theme was that it was for their own good: it was the superiors who actually knew how to advance the best interests of those they excluded from political power. Violence was always part of the history. When people have no power to protect themselves, violence accompanies exclusion and exploitation (the violence of slavery and colonization is now widely accepted, and there is a great deal of research about the violence that has long characterized the subordination by race, class, and gender). History reminds us that “benevolent” intention towards “less evolved” life forms, necessarily excluded from actual participation, cannot be an adequate basis for respect or protection.

Sadly, the gradual transformation of such patterns has also been marked by exclusionary line drawing. For example, all *white* men should have the vote, Black men formally have the vote but cannot exercise it, white women should have the vote but remain subordinated in both home and workplace, all adult citizens have the vote but “workers” are subordinate to “owners,” animals should have their welfare protected (as long as it is consistent with the demands of agri-business), animals similar to humans might have rights but plants can be ignored, living things all deserve some consideration but rocks, mountains, deserts, lakes, and oceans are just the inert material that life happens on or in. In short, the expansion of rights has repeatedly been carefully limited by exclusion.

The idea that the interdependence of the entire Earth community generates truly mutual responsibility has only fairly recently gained some recognition within cultures that have long denied it. Fortunately, for those of us raised in those cultures, there is also a growing awareness that for thousands of years people all over the Earth have recognized that interdependence and have built systems of law, norms, values, and practices that respected it. Indigenous peoples across the globe continue to practice law, norms, and story-telling that carry those teachings, despite the efforts of colonial powers to eradicate them.

The challenge of transforming an individualist culture (aimed at promoting the well-being of the rational, self-interested agents that citizens are reduced to) can be helped by the growing awareness of these counter traditions. But, as far as I can see, the wisdom in the traditions that have survived is not transferable to large scale, post-industrial societies in any simple, instrumental way. It is generally *wisdom* — not rules or institutional structures — that can be offered as gifts to those able to receive them.

Wisdom does not primarily tell people what to do. For example, in his essay in this volume, John Borrows tells a wonderful story about animal participants in decision-making. In the story, a group of Anishinaabeg humans consult a turtle and then a rattlesnake on their way to negotiate the Niagara treaty with the British.²² They receive conflicting messages about whether attending this treaty-making is a good idea. Borrows reminds us that even when we learn to listen to the guidance of animals, we cannot expect unambiguous direction. All law needs interpreting, and different views are therefore inevitable. The stories show the contributions of the animals; they can be participants in decision-

22 See John Borrows, “Learning Anishinaabe Law from the Earth” (in this volume).

making for those able to listen to them. But the stories will not provide all the details we need to learn how to listen, interpret, and work out how to deal with different interpretations in a contemporary context.

Those of us who were not raised with the skills to listen to the Earth, to understand it as a source of law, face many layers of challenges in figuring out how to reconfigure constitutionalism so that the violence and exclusion that have been long built into it can be replaced by full participation, cooperation, and mutual responsibility. Learning to listen — to those who *do* have the knowledge, skills, and norms (humans and more-than-humans) — is the first huge task. It may seem that it would be easier to learn to listen to the human voices that have been excluded and ignored than to take seriously that animals and plants have something to contribute. But I think some similar massive shift toward humility is required to listen to excluded human voices. What counts as relevant competence or expertise for the collective decision-making of self-governance has changed a lot over time — from noble birth to property ownership, to race and gender, to technocratic knowledge — but in Western societies the norms have been exclusionary for longer than living memory.²³

B. Freedom, Safety, Inclusive Participation

If mutual responsibility requires a departure from dominant constitutional norms, freedom is an easily recognized value. Calls for freedom echo from the French (*liberté*) and American Revolutions to the anti-slavery movement to contemporary calls to end colonial systems (including claims of sovereignty that have tacitly relied on repudiated “doctrines of discovery”). Of course, calls for freedom for some have routinely involved exclusion of others. To link freedom to equality, to ask what it would take to provide freedom for all humans, involves complicated questions about economic inequality as well as issues of safety. Rauna Kuokkanen persuasively argues that there can be no real self-determination for communities unless there is self-determination for all their members, and for that, in turn, safety from violence is essential.²⁴ Inequality almost always ends up begetting violence, often with impunity. We know this both from long history and from ongoing practices and the norms that toler-

23 Relatedly, see the observation in Nedelsky, *Law's Relations*, *supra* note 1 at 186 that “at different times, the working class, women, and racialized people have been treated as so characterized by uncontrolled passions, or limited intellect, or dependency — and thus lacking in autonomous rational agency — that they cannot be treated as equal responsible members of society entitled to the same civil and political rights as white men of property.” See also note 21.

24 Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (New York: Oxford University Press, 2019).

ate them — whether that is violence against women or police violence against marginalized groups.²⁵ The human to human violence I am referring to here is not the inevitable violence of life forms who live off one another.

Full inclusion in collective decision-making is a norm that has both inherent value (as this is a form of “relations of freedom”²⁶ vital to human thriving and is part of recognition as a fellow subject) and is essential for ensuring that caring responsibility is extended to all. I will return to the question of inclusive participation for the more-than-human in the section on representation, below.

Freedom and responsibility are complex issues even when only humans are envisioned. In the Anglo tradition, mutual responsibility as a core constitutional value was virtually erased by the priority of individual rights and freedom²⁷ (this has been less true of European liberalism and is less true in Canada than the US, as we can see in the difference between the two countries’ health care systems²⁸). This priority created serious problems, but it does reflect a real tension.

Both freedom and individual autonomy require collective support. They require structures of relationship that nurture those values. They can never actually be simply free-standing individual values to be “enjoyed” in isolation. Nevertheless, it is also true that individual freedom and autonomy can be in tension with the needs and values of communities.²⁹ Optimal forms of constitutionalism will need to address the tension between freedom and responsibility, and it is likely that different communities will find different forms of balance.

25 On the issue of violence against women in particular, see Nedelsky, *Law's Relations*, *supra* note 1 at 217: “[W]hat is required to end violence against women is, ultimately, a transformation of the relations between men and women.” As well, at 310: “Male violence against their intimate partners is shaped by the wider patterns of violent inequality — whether the physical forms of police brutality or their failure to protect or the routinely tolerated violence towards children or the humiliation of poverty and the indignities suffered by welfare recipients or the insult and deprivation caused by prejudice and discrimination. These are all harms that can be experienced as violent and can give rise to violent rage.”

26 Linda MG Zerilli, *Feminism and the Abyss of Freedom* (Chicago: University of Chicago Press, 2005); Jennifer Nedelsky, “Relations of Freedom and Law's Relations” (2012) 8:2 *Pol & Gender* 231 [Nedelsky, “Relations of Freedom”].

27 On individualism in the Anglo legal tradition, see generally the third chapter of Nedelsky, *Law's Relations*, *supra* note 1 (“Reconceiving Autonomy”).

28 The particular priority given to individualism in American political and legal thought is noted in Nedelsky, *Law's Relations*, *ibid* at 124. See also the comparison between American and Canadian/European approaches towards constitutional rights in this book's third chapter.

29 See Nedelsky, *Law's Relations*, *ibid* at 131: “There is a real and enduring tension between the individual and the collective, and any good political system will recognize it. The problem with the Anglo-American tradition is that this tension so predominates that there is only a limited view of the nonoppositional aspects of the relation and of the social dimension of human beings.”

Freedom and safety are also inherently complex values for creatures living in interdependent relations with both their own species and the wider Earth community. Safety will never mean a guarantee against harm or even violent death (think about hungry lions and vulnerable gazelles). Among humans, punishment (including violent prisons) and war are ancient and ongoing practices. While it may be possible to vastly reduce such overt forms of violence, we should not underestimate how integral violence has been to most human societies. One reasonable aspiration to freedom and safety among humans is “equal protection,” such that no group of humans is routinely subject to the violence of another. Although the American equal protection clause has, of course, never achieved anything close to this.³⁰

When taking into account the more-than-human community, the first step (to which I keep returning) is for humans to learn to listen and genuinely embrace mutual respect and responsibility. Humans will need to learn to listen to understand what role they should have in fostering freedom and safety. Collectively, we will need to figure out what kinds of safety and non-violence interdependent life forms can aspire to — when we live by eating one another even as we also rely on many forms of co-operative exchanges (such as with oxygen and carbon dioxide). Given the sometimes-violent cycles of consumption, I must admit that many of the practical details of how to live in mutual respect and responsibility remain a mystery to me. I take comfort from the fact that Indigenous cultures that take this interdependence seriously have thought about this question for thousands of years. In addition, some problems are simpler than others; there are forms of violence, such as factory farms and clear cutting of forests, that seem obviously unnecessary for human life and inimical to mutual respect and responsibility.

We do not need to have all the answers, or even all the questions, to try to advance the core values of more-than-human constitutionalism by ending the worst forms of violence humans inflict on our relations, including one another.

C. Care

Just as responsibility needs to take on new meanings and a new centrality in constitutionalism, care needs to be fundamentally revalued for more-than-human constitutionalism to thrive. I have recently co-authored a book, *Part-Time for All: A Care Manifesto*,³¹ arguing that revaluing care requires a

30 For example, in the US and Canada, as all over the world, there is still routine (largely “private”) violence against women and (state) police violence against marginalized people, both largely with impunity.

31 See Nedelsky & Malleon, *Part-Time for All*, *supra* note 1.

fundamental restructuring of both work and care. The short version of the argument is that throughout their life everyone needs to provide direct, unpaid care (about 22 hours a week) — for other humans and the earth community — in order to learn the significance of care for relationships and for the well-being of all. In addition, the exercise of care requires, and thus teaches, important skills, in particular humility and the capacity to take the perspectives of others. For this to be possible for everyone, and to dismantle the current hierarchy of work and care, everyone should limit their paid work to 30 hours a week.

What I want to add here is that the mutual responsibility I discussed needs to be infused with care.³² People need to learn that care for one another and for the Earth are essential forms of reciprocity, necessary for both individuals and communities to thrive. Working together in equal partnerships to make collective decisions requires a caring disposition, for one's fellow participants and for all those whom their decisions will affect. A full revaluing of care will not only put work and consumption power in their place, but will redefine what counts as success, as competence, as excellence, as maturity, as leadership. I see all of this as part of the transformation entailed in more-than-human constitutionalism. Changes to institutional structures to make them a bit more inclusive of all humans, or laws to prevent some of the worst violence to humans and the natural world, cannot accomplish what is needed without a fundamental transformation in values and perspective. Part of that transformation is a recognition of the true value of care.

These core, connected values, responsibility and care, presuppose that humans, like other entities in nature, are not simply competitive creatures. The model of humans as “rational,”³³ self-interested agents competing and negotiating for resources is wholly inadequate for the purposes of envisioning any optimal form of constitutionalism, and certainly unsuitable for more-than-human constitutionalism. There is abundant evidence that the interconnected entities on Earth are characterized by both cooperation and competition.³⁴ A model of competitive self-interest as the basic framework for collective decision-making will therefore be misleading and destructive — as indeed it has been.

32 See Nedelsky, *Law's Relations*, *supra* note 1 at 82: “Recognizing the inherently dependent and interdependent nature of human existence draws one's attention to the importance of care.”

33 I put rational in quotations because it is not really rational to follow a model of self-interest that ends up rendering the planet unfit for human habitation.

34 See e.g., Martin A Nowak & Roger Highfield, *SuperCooperators: Altruism, Evolution, and Why We Need Each Other to Succeed* (New York: Free Press, 2011); Sarah Blaffer Hrdy, *Mothers and Others: The Evolutionary Origins of Mutual Understanding* (Cambridge, Mass: Harvard University Press, 2009).

I turn now to the section on implementation. But I want to highlight the point that optimal institutional design or lists of rights or core values in a constitution cannot themselves achieve the deep transformation of values that will be necessary for more-than-human constitutionalism. This will require engagement by all dimensions of society.

III. Modes of Implementing More-than-Human Constitutionalism

I want to move now to some of the ways basic values would shape the reimagination of the sorts of political and legal institutions traditionally associated with constitutionalism. I begin by raising questions about how humans should talk to one another in a spirit of caring responsibility for all our relations. This will bring us to questions of scale and how they intersect with the vital project of revaluing care. We will come then to brief discussions of representation and democracy and the institutions for implementing them. These, of course, are the more traditional subjects of constitutionalism and will raise the question of what is still of value in the Western tradition and the extent to which we can find alternatives in Indigenous legal systems.

A. What are Good Ways to Talk to One Another when Making Collective Decisions, or Decisions that will Affect the Collective?

A core norm of mutual responsibility and respect will affect not only the content of collective decisions (e.g. how we define property in land or the legal framework humans use for governing their interactions with animals), but how we relate to one another in the process of deliberation and decision-making. One question is: when, if ever, should *persuasion* play a role?³⁵ In the dominant Western tradition of political thought, persuasion has been juxtaposed to violence and coercion. In that context, it is surely almost always the better option. But the “forceless” force of reason has never really been forceless.³⁶ Some people believe that the better argument (and certainly truth) can and should *compel* agreement. I think most people have at some point felt (coercively) pushed or compelled to agree because they could not find ways to articulate their dis-

35 I have thought a lot about this because Hannah Arendt invokes persuasion as an important part of the process of taking other people's perspectives into account in making judgments. See Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed by Ronald Beiner (Chicago: University of Chicago Press, 1989).

36 The phrase is derived from Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT Press, 1998) at 305: “unforced force of the better argument.”

agreement (I see it as one of the functions of constructive theory to provide people with tools for articulation and resistance).

“Getting” others to agree to join in collective efforts of transformation has long been an accepted part of social activism. In my view, that means that activism, and political engagement more generally, have often had a large component of control built into them. The object is to “get” other people to believe or act differently. I do not think that control is a respectful way for humans to treat one another, and most people hate feeling controlled — even if they don’t always recognize that that is what is happening (it is a complex question whether humans who are responsible for non-human animals can avoid a responsibility for control). I think that for humans and perhaps others who use language, open, attentive listening and efforts at open and honest expression offer a better model than persuasion.

The claims above are all judgments; they are judgments about how to exercise judgment. I am persuaded (by Arendt, drawing on Kant) that taking the perspectives of others is crucial in exercising judgment. Arendt also talks about the important role of persuasion, “wooing the consent” of others (in contrast to the compulsion of truth claims).³⁷ But I have my doubts. It is pretty clear to me that in working through differences with intimate partners and close friends and family, attentive listening and expression is different from persuasion. Coming to understand the perspective of another can shift one’s own perspective, and one’s judgment. But exercising that capacity³⁸ does not require being persuaded. Persuasion seems to me to border on efforts at control,³⁹ unless what we mean by it is helping another to understand our perspective.

More-than-human constitutionalism will have to explore what norms, practices, and institutions foster open listening and open, honest expression among humans. I think contemporary courtrooms, or negotiations, or what normally happens in parliamentary debates are rarely good models of open listening. Perhaps more-than-human models of conversation and deliberation

37 Arendt, *supra* note 35 at 72.

38 The capacity for the “enlarged mentality” as Arendt, following Kant, calls it: *ibid.*

39 I first thought about this at a meeting with students in 1995 at Queens University, Faculty of Law after I presented an early version of “Law, Judgment, and Relational Autonomy” (now in Ronald Beiner & Jennifer Nedelsky, eds, *Judgment, Imagination and Politics: Themes from Kant and Arendt* [Lanham, Md: Rowman and Littlefield, 2001] 103). An Indigenous student commented that in her experience persuasion was not seen as appropriate in circle discussions. The job of each person was to communicate their own experience and perspective and to listen carefully and try to understand that of others. I have been thinking about this ever since. But see also note 41, below.

will have to take into account a range of modes: sometimes open expression is a workable ideal; sometimes when coercion looms as an option (say, in criminal trials or for slowing climate change),⁴⁰ persuasion will be a necessary part of the process of both choosing and implementing collective action. My point here is to urge attention to the dimensions of control that persuasion may incorporate.⁴¹

What, then, are our best models of talking to one another, and at what scale (to anticipate the next topic) do they work? And, of course, there is a deeper question of how people learn to listen to those who do not communicate the way they do, which can take many forms from different languages to different cultural norms about exchange (loud, emphatic, even angry is ok or not ok). It can also take the form of learning how to learn from and listen to those who do not use language as most adult humans know it. Learning from the land is one example, and learning to listen to one's body and attend to the bodily communications of others is another. What kind of listening/observation must be cultivated to understand and communicate with those who do not use language, or the type of language that most humans are familiar with? How much time should most humans, or human communities, devote to acquiring the skills for this kind of unfamiliar listening, learning, and communicating?⁴²

The question of time is a good connection to the next section on scale and care. There is a famous saying that "socialism takes too many evenings." I have reflected on that because my proposal for *Part-Time for All* calls for everyone to participate in communities of care, not just to provide care but to make decisions about how to implement the new norms of work and care. I think many people will initially think of this as an additional burden, but I have argued that it is important to see communities of care as communities of judgment that build relations of freedom, and thus a positive benefit of the new structures.⁴³

Connecting to one another to build good lives together — whether in families, communities, or larger entities — is how we exercise freedom, and build the relationships that matter most in our lives. I believe all of this can be ex-

40 See section E in this part of the article: "Democracy, Time, Coercion, and Climate Change."

41 My thanks to Hadley Friedland for raising this point and for reminding me that John Borrows sees persuasion as a deliberative part of all law in *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 35–36.

42 Learning to listen is an important theme in Van Horn, Kimmerer & Hausdoerffer, eds, *supra* note 10, vol 1, *Planet*.

43 Nedelsky, "Relations of Freedom", *supra* note 26 at 231–38.

panded to the more-than-human. We need to recognize the time it will take and see building relationships as a benefit of a thriving form of constitutionalism.⁴⁴

B. Puzzles of Scale and Care

To most people raised in the dominant cultures it is not at all obvious how to learn what we need to learn to relate respectfully and responsibly with our more-than-human relations. That broad issue takes more specific form: what is needed to address pressing (interconnected) problems of inequality and climate change. Both of these issues are tied to the questions of *how* to make our decisions about the values, norms, practices, and institutions appropriate for more-than-human constitutionalism. These questions raise the issue of scope or scale. Some of the important knowledge is best gained at a local scale. For example, it will often be important to have a detailed knowledge of particular land, with its plants, animals, microbes, water sources, rocks, and minerals. But at the same time global forces of many kinds are affecting that land, and if one builds factories or mines on the land, the impact may be global. So, we need knowledge of these inter-connections, and we need consultation and decision-making structures (norms, practices, and institutions) that are both local and global, and allow fluid exchanges among them. Reflections on constitutions need to take these issues of scale and scope into account.⁴⁵

We also need to pay attention to the ways economic inequality among humans affects participation in decision-making at different scales (e.g. it is often easier for those with fewer economic resources to participate at a local rather than national level). More broadly there is the challenge of ensuring that the needs, interests, preferences, and values of all are heard in the context of large-scale decision-making. In addition, I think some of the framers of the American Constitution had valuable insights about the different ways in which group conflict, the problem of “faction,” plays out at different scales: local prejudices and local “undue influence” can be counteracted at a larger scale, but

44 My own preliminary experience is that coming to connect with the natural world is more a matter of openness and a kind of almost passive, ongoing attentiveness, rather than active “work” at learning or listening. It is thus not actually something I set aside time for, beyond my desire to be in nature. Perhaps this is just a first step.

45 The *Kinship* volumes also address the issues of scale and care. In particular the following is the summary of Volume 2, *Place* (from Van Horn, Kimmerer & Hausdoerffer, eds, *supra* note 10, vol 1, *Planet* at 8): “Given the place-based circumstances of human evolution and culture, global consciousness may be too broad a scale of care for us. To what extent does crafting a deeper connection with Earth’s bioregions, reinvigorate a sense of kinship with the place-based being, systems and communities that mutually shape one another.” One of my interests is in the link between property and place. At present, in common law systems, property is the primary legal means for recognizing human’s interest in place. But it is a very crude tool for articulating and protecting the values connected to place.

historically, the wealthy and powerful also can exert more influence at larger scales (the American Framers were interested in both mitigating the effects of faction and enabling the influence of the wealthy⁴⁶).

When we think about constituting communities at different scales, should we pay attention to the power of intimate relations? Are people's attachments to their families, to the animals they are close to, something to be valued, even if it means that they do not give *equal* consideration to other people's parents, children, or animals? Can love and connection to particular places and particular land be adequately taken account of by abstractions of "property," or even by recognizing the importance of land in general? I think many forms of particularity of attachment are valuable and important for learning the skills and importance of listening, of mutual responsibility, and of care.

The more intimate a relationship, the more likely it is to be reciprocal (for example, personal care vs. charitable donations). It is also likely to have a smaller scale "impact" than the relationships one forms in paid work, especially work coded as "important." Indeed, the larger the scope of impact — say university dean or president, or Member of Parliament, or judge, or head of a large corporation or NGO — the less intimate the relationships with the subject/objects of one's work. These "important" roles involve less direct human-to-human care and relationship.

At the same time, though, people who take up intimate care responsibilities find them treated as barriers to their participation or success in work with broad impact. Women, in particular, often choose to care for their children (especially those with special needs) in ways that limit their ability to write books about care or implement new child-care policies.⁴⁷ This often means that those with the greatest ability to have an impact on how care is organized or funded are those without the knowledge that comes from actually providing care. Overcoming this care/policy divide is one of the objectives of *Part-Time for All*.

In short, *scope and scale of impact seem to be in an inverse relationship with intimate relations and direct care*. At present, Western societies code success as being as high up a hierarchy of power and impact as possible. This almost always means doing little direct care.

46 Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990); see also Nedelsky, *Law's Relations*, *supra* note 1 at 93–96.

47 On this point, see Nedelsky & Malleson, *Part-Time for All*, *supra* note 1 at 143: "All over the world, the burdens of combining work and care fall heavily on women."

I think this is part of why some people are resistant to the proposal of *Part-Time for All* to limit paid work to a maximum of 30 hours a week and not to let even activism interfere with the core commitment of 22 hours a week of direct care.⁴⁸ I think it looks like too much important, high impact work (or its excellence) would be sacrificed to the low impact, small scale care. Something similar is true, I think, about relations with the natural world. For example, we can learn directly, experientially about receiving care from the Earth, and providing care in return by gardening.⁴⁹ We can learn about the deep bond possible with more-than-human creatures, like dogs, when we live with them, and give and receive care with them. But the *impact* (not importance) is less than if one is successfully organizing sanctuaries for animals, or creating conservation trusts, or lobbying for laws that will make such projects easier. Even trying to come to know animals (both “domestic,” like cows, and wild, like gorillas or giraffes) well enough to know what they are like and how our actions can harm them, takes a kind of time similar to what is called for in intimate relationships. This time can generate expense and interference with the speed of “productive” publishing.

I think most humans thrive best and learn what they need to know to support good values in their communities if they are regularly involved in *both* direct care and in activities at larger scales where they can feel their contribution to a wider range of Earth’s constituents, human and more-than-human. Trying to organize these different kinds of contribution through the age old (and gendered) “division of labour” cannot be an adequate approach.⁵⁰ It has reinforced hierarchy and robbed everyone of important skills, knowledge, and recognition.⁵¹ As long as one subset of people provides direct care and another makes high level, high impact decisions, policy makers will be ignorant, and care and those who do it will be devalued.

In *Part-Time for All* I talk about revaluing care and putting work in its place. But the challenge for envisioning optimal constitutional structures for human and more-than-human beings involves that and more. It involves thinking hard about scale. There is a difference between the kinds of reflective conversations that can go on in small groups (like the workshop that generated this essay), and what happens when one gets to the scale (and norms) of

48 *Ibid* at 115–19.

49 Kimmerer, *supra* note 15.

50 See Nedelsky & Malleson, *Part-Time for All*, *supra* note 1 at 122–24.

51 See in particular the discussion in *ibid* at 79–80. “To the extent that men do not have long experience with caring, they are deprived of the immense cognitive benefits that come from it, in particular, the skills of empathy and emotional intelligence.”

parliamentary debate. How do we organize things to reflect and implement values that take care seriously, with its inevitable small-scale impact and time demands, and make space for the need for large scale action and decision-making, without re-enacting the hierarchies of “impact” that have prevailed for so long? I think that question needs to be central to reimagining constitutionalism. Status and salaries for different roles in collective decision-making must no longer track the hierarchy of impact.

When we then turn to governing units there are many kinds of questions of scale. Over the past couple of hundred years, when people talk about constitutions they are usually talking about constitutions for nation states, and sometimes for smaller units within nation states, like US state constitutions.

I think we need to rethink the basic units of collective decision-making. The “territorial sovereignty” of settler states is increasingly recognized as closely tied to repudiated doctrines of discovery. The implications of claiming sovereign authority over stolen land — or land claimed through treaties that have not been respected by the sovereign power — do not seem to have been fully taken up by either the judiciary or the legislatures in Canada (or anywhere else). But this might be the moment to recognize that nation states and their claims of sovereignty may be historical factors, but should no longer be the starting point for thinking about who should decide about what and how they should do it. In addition to questions of legitimacy, nation states are both too large and too small for many forms of decision-making.

A related issue is that in the face of the almost inevitable wave of climate refugees, claims of “sovereign authority” to keep people out will fail. It will be better to recognize that failure ahead of time than face armed clashes at borders. The authority to exclude that has been built into the meaning of state sovereignty over the past couple centuries cannot hold when the states seeking to exclude are the causes of the climate change that has rendered others’ land uninhabitable. And even without those causal claims, desperate people cannot and should not be excluded from access to habitable land. Existing nuances of refugee law (built around sovereignty) cannot hold. Animals will also be migrating as their habitats cease to be life-sustaining.⁵²

Transforming the world’s political economies into sustainable and equitable systems almost certainly needs to be done on both smaller and larger scales than those provided by existing nation-states. Local knowledge of land,

52 On a relatively small scale this is already happening as humans in cities share space (generally grudgingly) with raccoons, coyotes, deer, rabbits, skunks, and foxes.

community control, and deliberation will be necessary. Smaller-scale production and local consumption are likely to be important for many reasons, and the purported benefits of “economies of scale” from agri-business need to be recalibrated with “externalities” factored in, including harm to land and animals.

At the same time, however, both climate and equality problems are global, so some of the solutions will need to be global too. Local practices routinely have global impact, meaning that responsibilities are therefore global. Of course, there are a variety of international decision-making bodies from the UN to the EU to the WTO. But none of them are models of democratic engagement and accountability, and all of them have a virtually exclusive human focus (even if they recognize that humans need to change their behaviour to mitigate climate change).

If we are going to think about creating global decision-making systems that can actually enforce sustainability commitments as well as some basic equality provisions, we have to figure out how to “constitute” them in genuinely egalitarian and democratic ways. The larger the scale, the more complex the problem of both human and more-than-human participation.

C. Representation and the More-than-Human

Thousands of pages have been written on how humans should represent other humans in democracies whose scale makes direct participation impossible. Standard questions include whether it is the job of “representatives” to mirror the current views of those they represent or provide a wider view and greater reflection on the long-term interests of these constituents and how they connect to the interests of others and to the core values of society. Today we need to add to that list: both long-excluded humans and the rest of the Earth community.

Another way of putting that question is whether the job of elected representatives is to transmit constituents’ views or to provide judgment and leadership as well (the standard version of this question assumes representatives and represented are all human). A related (human) question is whether it is important that representatives come from backgrounds that mean they will have experienced many of the conditions facing their constituents. Whether taken as a whole, the group of representatives should mirror the (class, religious, ethnic, racialized, gendered) characteristics of the whole body of constituents.

While in dominant cultures elections are widely treated as essential to democracy, there are other methods of creating representative decision-making institutions. “Sortition,” a form of random selection to generate a body that

represents a variety of difference in the population, is one alternative.⁵³ It is often held out as a solution to both the elitism of conventional representation and its tendency to be unduly influenced by economic power. I think that more-than-human constitutionalism should take these “citizen assembly” alternatives seriously. They are likely to be far more amenable to generating forms of representation by those best placed to know about the perspectives of the more-than-human world. They might also help make space for the insights of children and for non-verbal humans, who are routinely excluded from political representation. In all these cases there would be complex issues of selection and accountability of those asked to communicate the views, insights, and preferences of those who cannot speak for themselves in the dominant formats for deliberation.

Citizen assemblies would also help resist the status hierarchy of large-scale decision-makers. Different scales and different purposes of decision-making might require different structures. More imagination is needed than the dominant tradition offers, and fortunately there are many new ideas available.

Whatever the institutional structure, questions of representation become more complex when humans take on the role of communicating not just what they are learning from the earth community (land, water, plants, mountains, animals), but what they discern these community members to need or want. What skills, knowledge, experience, and temperament are needed when humans take on the role of representatives of the more-than-human community? This is a complex problem, as is the related problem of who is to determine the answers to those questions. How are suitable representatives/guardians/spokespeople/facilitators for supported decision-making (for humans and more-than-humans) to be recognized, selected, or trained? What happens when they disagree?

Unless I am missing something, some form of human “representation” or trusteeship for the more-than-human community will be necessary for good decision-making. This will be true whether entities such as rivers are invested with rights,⁵⁴ or (human) property ownership in land comes to entail an obliga-

53 “Assemblies or deliberative bodies chosen by random selection are called deliberative mini-publics or citizens’ assemblies. Their use is growing within representative democracies to address all sorts of problems, as is their popularity among ordinary citizens.” Simone Chambers, *Contemporary Democratic Theory* (Cambridge, UK: Polity Press, 2024) at 153.

54 Craig M Kauffman & Pamela L Martin, “How Ecuador’s Courts Are Giving Form and Force to Rights of Nature Norms” (2023) 12:2 *Transnat’l Envtl L* 366. For a list of other examples, see Gavin Van Horn, “Kinning: Introducing the Kinship Series” in Van Horn, Kimmerer & Hausdoerffer, eds, *supra* note 10, vol 1, *Planet* at 5.

tion to care for the land,⁵⁵ or there are some other means of bringing mutual responsibility into collective decision-making. I think there is always likely to be a kind of trustee relationship involved for the humans trying to ensure rights are protected, responsibilities carried out, or care provided.

I think many people still assume that asking humans to represent the interests of the more-than-human members of the Earth community means asking humans to determine what those interests are and how best to protect them — although we have long known that “virtual representation” rarely works well.⁵⁶ The shift that I now see happening in multiple sites (scientific studies of plant and animal communication and interdependence, turning to Indigenous law, animal rights and welfare advocates) is to focus on how humans can learn to understand the diverse forms of communication among their more-than-human relations. Humans might remain mediators or translators, but that is different from traditional guardianship, just as supported decision-making for humans is. Humans educated in the mainstream of Western culture (including law, ethics, and the natural sciences) are still in the very early stages of learning the skills to take up such roles.

Most humans, therefore, face the challenge of taking up our responsibilities to all our relations without the requisite skills for doing so. This means, among other things, seeking out those who are better educated in these skills (such as some Indigenous people) and taking the time to seek out as much knowledge as possible. Fortunately, there are still humans who are alive to the participatory interconnection of the world around us. But for those of us who were not raised to foster this capacity, the scope of transformation that would be required is daunting. For many years we will have to find ways of recognizing, respecting, and asking those with (differing degrees of) this gift to help the rest of us understand what we need to do to enable a second-hand transmission of information and insight. I am afraid it will be a long time before most humans are in routine touch with the interconnections that are already part of their independent life, but which are barely perceptible to many.

D. Special Protection for Core Values

Constitutions usually outline structures of decision-making, and since WWII have commonly also included lists of “rights” (and very occasionally duties) that are to be treated distinctly. These rights may require special justifications if governmental power infringes on them, or the infringement may be officially

⁵⁵ Nedelsky, “A Relational Approach to Property”, *supra* note 14.

⁵⁶ See note 21.

(notionally) precluded absolutely.⁵⁷ Unfortunately, in Western countries, the institutional mechanism for ensuring the proclaimed protection has almost always been courts, almost always composed largely or exclusively of lawyers, and almost always unelected. This means that vital decisions about what rights mean in practice, and how they are to be implemented, are made by an elite group of people that have (so far) never been fully representative of the human population. The decisions about how to interpret, protect, and implement the foundational structure of government and its core values are accordingly made in highly undemocratic ways.⁵⁸ The overwhelming consensus across all the new constitutions that have been adopted over the past hundred years seems to have been that if democracies are to be constrained from infringing on rights, an undemocratic mechanism will be necessary.

I think it is probably a good idea to identify a set of issues, including basic requirements for equality and democracy, as well as respect for all our relations, that are insulated in some ways from every change of popular opinion (leaving aside for the moment the links and differences between popular opinion, careful collective deliberation and judgment, and current forms of legislation and regulation). As I argued a long time ago, I do not think that judiciaries (as the dominant Western tradition currently understands them) are the ideal institutional mechanism for monitoring or enforcing constraints on democratic decision-making.

The key insight behind the traditions of judicial review is that for some core values there should be an added layer of “democratic accountability.” Simple majoritarianism, however institutionalized, is unlikely to be an adequate means of ensuring that core values do not fall prey to temporary passions or conflicts of interest. There need to be institutions that can provide some form of democratically justifiable second thought, and these institutions must anticipate changes (as well as conflicts) in interpretation of the meaning of core values (Craig Scott and I proposed an alternative many years ago for adjudicating social and economic rights, which is referenced in my book, *Law’s Relations*).⁵⁹

57 Nedelsky, *Law’s Relations*, *supra* note 1 at 231.

58 *Ibid.* “Courts are, of course, among the least democratically accountable institutions of government. And the legal language of debate over the meaning of rights is among the least popularly accessible forms of public deliberation.”

59 Originally published as “Constitutional Dialogue”, co-authored with Craig Scott, in Joel Bakan & David Schneiderman, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 59. See also Nedelsky, *Law’s Relations*, *supra* note 1 at 265–70.

The core values will need to be more than “human rights.” In trying to envision alternative means of protection, we should be imaginative about the kinds of people who would have the wisdom to provide protection for the core values surrounding respectful interdependence, and how they are to be recognized and organized as decision-makers.

E. Democracy, Time, Coercion, and Climate Change

Democracy (consultation, deliberation, hearing the voices of all) takes time — especially when the needed forums and institutions are not really in place. The need for response to the climate emergency, by contrast, is urgent: we are running out of time. What are ways of putting these two demands together?

With or without fully adequate democratic decision-making, almost certainly the response to climate change is going to need more than “incentives.” Some unsustainable practices will need to be prohibited or rationed. Some practices should be mandatory, like codes for new buildings and transportation (for the feasibility of this, see the analogies Seth Klein makes to the radical changes in the economy and practices of production and consumption that were mandated in Canada during WWII).⁶⁰ For this coercion to be at all acceptable to most of the population it will need to integrate equality into sustainability. This could be the beginning of a long-term shift.

One urgent first step toward democratic more-than-human constitutionalism will be ensuring that Indigenous groups have decision-making authority over their lands, especially in the context of environmentally sensitive issues like mining, forestry, fishing, and clean water. One need not have romantic views of all Indigenous people as supporters of sustainability or as having some inherent knowledge about ecology to recognize both their rights to land taken from them and their access to wisdom traditions that will be vital to implementing more-than-human constitutionalism. Unfortunately, we can expect strong resistance from both powerful corporate actors and politicians fearful about shifting power relations and voter backlash.

In short, on the way to more-than-human constitutionalism we will need policies that can quickly avert climate disaster and decision-making that is inclusive, thoughtful, and fast. I cannot yet see a way to put those criteria together.

60 Seth Klein, *A Good War: Mobilizing Canada for the Climate Emergency* (Toronto: ECW Press, 2020).

Finally, as we turn to traditional Western constitutionalism, we should remember a profound failure: its institutional designs have rarely addressed the links between systemic violence, basic safety, and equality, and their importance for democratic participation.⁶¹ These links are a much-neglected dimension of the challenge of inviting all voices to be heard in societies characterized by hierarchy and multiple forms of exclusion and violence.⁶²

F. Institutional Design

Most Western written constitutions outline different structures of institutions that correspond to distinctions between legislative, executive, and judicial branches. I see this recognition of different kinds of decision making as valuable. This traditional tripartite scheme now also has to include the structures of the modern administrative state, characteristic of most countries since the early part of the twentieth century.

I want to point to a few puzzles about the traditional structures that are relevant to envisioning new forms of constitutionalism. For humans, the administrative state has posed problems both for the functioning of democracy and for the response to abuses of power in what is commonly termed the “executive” branch: delegated decision-making by elected policy makers to agencies providing social supports (e.g. health, welfare) and those tasked with formulating and enforcing regulations (e.g. environmental, workplace safety). In most wealthy “democratic” countries there is a whole sphere of law, administrative law, whose primary project is ensuring that agencies act within their scope of legislatively defined power and that they apply their decisions fairly to individuals. Both rights protection and democratic participation face new challenges in this context.⁶³ Some versions of the problem of preventing the abuse of delegated power are likely to endure in more-than-human forms of constitutionalism, as are the puzzles of how to ensure democratic participation in these forms of governance.

61 See notes 24 and 25.

62 The South African Constitution may be thought of as an exception in its overt attempt to treat transformation of existing inequality as a central purpose. This is not a comment on what has led to the limits of its success.

63 On the issue of autonomy in relation to the administrative state, see generally the third chapter of Nedelsky, *Law's Relations*, *supra* note 1. To quote a relevant passage: “The central problem in the modern administrative state is no longer the traditional liberal objective of protecting individual autonomy by keeping the state at bay. The problem is how to protect and enhance the autonomy of those who are within the (many) spheres of state power, from welfare to public education to securities regulation. The objective is not to achieve a mythic independence, but to structure relations so that they foster autonomy.” Nedelsky, *Law's Relations*, *ibid* at 118.

Some of the democratic challenges of the administrative state are connected to serious doubts about a basic premise that guided the rise of the administrative state: “experts” should translate broad legislative policy into the regulations that govern the actual practices of the state (which affect the lives of virtually all members of society), and, when necessary, apply rules to individual cases. In my mind there is both a question about when “expertise” is a good replacement for (or criterion for) democratic participation, and what expertise would look like in the context of more-than-human constitutionalism.

But, in whatever ways people rethink organizing and monitoring public services and regulatory frameworks, in large-scale societies there will be issues of how to make democratic participation work in these contexts. The answers are likely to be different from those aimed at *legislative* law making. For example, public hearings were once thought to be the vehicle for public participation in the administrative context, but the results have been mixed, at best.⁶⁴

How to make democracy work simultaneously and interactively on large and small scales involves puzzles that are vital to rethinking constitutionalism, in both the administrative and legislative context. There is widespread agreement that existing forms of democracy distribute political power very unevenly, to the point that many doubt the term “democracy” is actually appropriate for many governments that claim it. The fact that there are elections matters, of course, but is not sufficient for a form of democracy in which all citizens have an equal say. No country has solved the problem of ensuring political equality in the face of high levels of economic inequality. The new challenges of more-than-human constitutionalism thus invite us to take up existing problems of institutions that have failed to be respectful, functional, and equal. In some ways, this invitation can make the challenge seem even more daunting, but it is also a reminder about the many dimensions of its urgency and the need for innovation.

Fortunately, the Indigenous traditions in Canada can offer important sources of innovative insight. Here, the specific question that interests me is what the Indigenous traditions in Canada teach us about alternatives to Western forms of lawyers and courts (the judicial branch) for providing protections against the abuse of power. And more particularly still: how are those alternatives shaped by a sense of interdependence with and responsibility towards more-than-human entities? The main point I have gleaned so far is that the capacities for disinterested and wise judgment are not limited to people with

⁶⁴ See the discussion of problems with hearings in Nedelsky, *Law's Relations*, *ibid* at 146.

specific legal education. It does matter to discern who has those capacities, and the question of how to discern this may vary with the context. In large-scale contexts the identification of suitable *individuals* may not be feasible without relying on *categories* of people with particular experience or training. But that is far from saying that a law degree is a good proxy for good judgment.

As with the existing structures of the administrative state, there may be different kinds of capacities and criteria necessary for the different levels of decision-making. For example, how should we select those who make the legislative decisions about the institutional framework to provide social assistance; who should work out the details (regulations?) for applying this framework; who should be the “front line” decision-makers applying the rules to individuals; and who should do the work of oversight to ensure both fairness to individuals and that no one is overstepping the bounds of what they have been authorized to do or failing to carry out their responsibilities? Different skills, life experiences, and knowledge may be useful for these different kinds of decisions, but the norm that decision-makers should always include those to whom decisions will apply (“nothing about us without us”⁶⁵) should apply at all levels. Of course, including the more-than-human brings additional challenges.

Thus, while very different institutional structures and norms of collective decision making may evolve, in large-scale contexts it is likely to remain useful to distinguish between legislative policy-making, its implementation, and the oversight of that implementation. Rethinking democratic collective decision-making does not have to start from scratch. But judgments about appropriate capacities and how they are to be identified will require new approaches. This is also a sphere in which to reflect in new ways about the kinds of decisions that should be made at local levels (small scale) and, again, how to integrate small- and large-scale forms of decision-making.

Of course, most forms of Western constitutionalism also treat checks and balances and/or separation of powers (not the same concepts) as a general means of avoiding the abuse of power. So, in envisioning alternatives to one branch, it would be important to consider the implications of an alternative for the traditional interactive forms of protection. Of course, new forms of constitutionalism will have to take into account abuses of power impacting the more-than-human. For example, Maneesha Deckha’s article in this special double issue⁶⁶ points to violence against animals in factory farming as a kind of

65 See James I Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (Berkeley: University of California Press, 1998) at 3.

66 Maneesha Deckha, “Animals, Colonialism, and the Rule of Law” (in this volume).

abuse of power that should be governed, and prevented, by rule of law norms (presumably largely within the framework of administrative law). My view is that it is helpful to identify these current practices as abuses of power, but that existing judicial structures of oversight are probably not the best choice. Judicial education and experience are not particularly attuned to the needs and value of animals, nor to the norms of human responsibility toward them, nor the core realities of our interdependence.⁶⁷

I should add a further note about the grounds for my suspicion of lawyers, courts, and judges. First and most important is the matter of exclusion. This is an elite, exclusive, and exclusionary group. There is nothing intrinsic about law or legal education that requires them to be unequally accessible to the poor and marginalized. But virtually every legal profession in the Western world is severely limited in its accessibility to these groups.

In addition, despite my (partial) admiration for the intellectual precision and agility that much legal analysis requires, I think a great deal of legal training in law schools, and legal professional norms in practice, effectively exclude attention to the embodied, affective, relational creatures that humans are.⁶⁸ There is a similar lack of any serious recognition of interdependence and responsibility among humans and more-than-humans. And sadly, we have more and more evidence that despite the formal commitment to equality before the law, “justice” systems everywhere discriminate among humans on all the same grounds the rest of society does: economic advantage, gender (including identity and sexual preference), race, citizenship status, ethnicity, religion, etc. The failures in the *criminal* branch of the justice system are just the best known.⁶⁹

In re-thinking the role of lawyers and the judiciary, we can recognize that dispute resolution — from conflicts between neighbours to multi-million-dollar contractual disputes — might continue to need something like “legal” resolution. But there may be different kinds of legal training and legal “jobs” for

67 Of course, in the short term, it often makes sense to use whatever resources are available to stop violent abuse. My point here is that in reimagining more-than-human constitutionalism, the task of the new constitutionalism is different.

68 On the issue of legal education’s difficulties with embodiment in particular, see Nedelsky, *Law’s Relations*, *supra* note 1 at 163: “The ‘A’s and ‘B’s of law school examples have none of the characteristic ways bodies are experienced and interpreted as part of identity: no gender, no race, no particular physical strengths and weaknesses.” See also Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42:1 McGill LJ 91.

69 See for example Inbar Peled, “Professionalizing Discrimination: Legal Actors and The Struggle against Racialized Policing in Multicultural Societies” (PhD dissertation, Osgoode Hall Law School, 2023) [unpublished]; Danardo S Jones, “Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence” (2023) 46:1 Dal LJ 83.

handling such diverse issues as child custody, embezzlement, and animal cruelty. In all cases, the questions of the requisite skills, experience, and training should be taken up free from long-standing assumptions about expertise and implemented in ways that make these important roles in a community widely accessible. And, of course, all relevant actors will need the skills to attend to the potential impact of any given dispute or policy beyond the human. This will challenge the “two contesting parties” model of common law: the need to consider impact beyond the human “plaintiff” and “defendant” must become the rule, not the exception.

IV. Law/Policy Changes

Constitutionalism usually engages with the big questions of institutional design and core values, such as those addressed above. I turn now, however, to more specific questions about a few substantive areas of law and policy that will need to change for more-than-human constitutionalism to thrive.

Neither a legal constitutional framework nor particular laws can “single-handedly” create an ethos of responsibility (such as that noted above). But law can, and does, support an ethos that *undermines* such responsibility: an ethos of individualism or wealth as a marker of merit, and notions of autonomy as independence. In the modern world, the organization of production (of houses, cars, computers, etc.) requires law: corporate law, labour law, property law defining who owns the things workers design and build. The vast new structures of financialized housing require a complex legal system to enable and protect the profits of these global systems that are making housing unaffordable for many. The structures of law presuppose and entrench norms concerning questions such as what are acceptable labour practices, or what are acceptable disparities between the income of CEOs and low-status workers in their companies. One might even say that, under the dominant approach to these questions, greed is encouraged. Individual financial success rather than contribution to community is recognized as an indication of “value” and importance. Even widely recognized “rights,” like the right to housing,⁷⁰ can be ignored in the pursuit of profit and the power that goes with large-scale money.

These intertwined systems of value and law are not consistent with a constitutional structure that is designed to both promote and rely on the full range of responsibility I have outlined. I think this is part of what is meant by saying that capitalism is inconsistent with the more-than-human constitutionalism to

70 See *Push* (2019), online (video): <<https://www.pushthefilm.com/>> [perma.cc/LZ7Z-5Z2Y].

which many aspire. Without going into the details here, I would just note that I think a great deal of specificity is required to make that inconsistency claim. I doubt that it is generally meant to exclude all forms of market economies, or even the calculation of “profit” (earnings minus costs) as a metric to measure wise use of resources. All economies are political economies, and all political structures rely on some form of economy. Ultimately, the project of more-than-human constitutionalism must take on the multilayered puzzles of how to restructure economies (and the laws that enable them) so that they foster and rely on a similar value structure to that of the new constitutionalism — including the way in which that new constitutionalism conceptualizes freedom, of course. Here I do little more than identify this economic issue as inseparable from the project of fostering a new value structure, which will be necessary for a sustainable form of more-than-human constitutionalism.

While I will not go into detail about the complex issues of political economy that affect more-than-human constitutionalism, there are three points I want to note. First, the existing structures of financialized and corporate capitalism work against the transformation of core values that I advocate. Second, great inequalities of wealth and income undermine human well-being,⁷¹ the cultivation of an inclusive democracy, and a general ethos of equal respect.⁷² Third, poverty (which is not the same issue as inequality because poverty can be alleviated and leave great inequality intact) undermines not only human well-being, democracy, and norms of equality; it also undermines cognitive capacities, including the vital capacity for judgment. All three of these points are usually thought of in terms of humans’ relations with one another. But the harms spill over to our more-than-human relations as well. People who are encouraged to be driven by competition, self-interest, and greed are unlikely to be attuned to the harm their actions wreak on the Earth community. People who are encouraged to think of themselves as superior and their self-interest entitled to prevail are likely to find kincentric thinking alien and unreasonable. The cognitive impairment of poverty has been likened to the effects of going without a night’s sleep,⁷³ meaning that people continuously stressed by scarcity (as well as taught that they have failed) will often have a hard time extending their concern with survival to their impact on the more-than-human world.

71 Kate Pickett & Richard Wilkinson, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (New York: Bloomsbury Press, 2011).

72 Tom Malleon, *Against Inequality: The Practical and Ethical Case for Abolishing the Superrich* (New York: Oxford University Press, 2023).

73 Sendhil Mullainathan & Eldar Shafir, *Scarcity: The New Science of Having Less and How It Defines Our Lives* (New York: Picador, 2014).

With this broad framework in mind, I offer (with very little elaboration) a short list of questions and specific areas that require change:

1. Ownership of property needs to be reimagined. All property in land should be held with a trust-like obligation to care for the land, bearing both all our relations and future generations in mind.⁷⁴ Justice and equality require new legal structures defining the ownership of productive enterprises and their products. This might entail not just a norm of shared ownership between those who invest their labour and those who invest capital, but shared decision-making with the communities (of all our relations) where the production takes place, and possibly with consumers too.
2. Work and care need to be restructured in ways that re-value care and enable everyone to acquire the knowledge, skills, and dispositions that come with sustained practice of care. This needs to be done in a way that promotes equality, ends the care/policy divide, and reduces time scarcity and the stresses on all forms of family. Care for the Earth also needs to be included in this reframing so that the connection to all our relations is not just an abstraction.⁷⁵
3. Economic inequality needs to be limited to what is compatible with political equality, or with the possibility of all voices being heard and respected.
4. What are appropriate norms and law about interspecies violence in the context of caring responsibility for all our relations? I think that “do no harm” sounds good, but is not actually a viable model. As I noted above, life forms live off other life forms, and often kill those they live off. This is true for plant eaters, bacteria, viruses (maybe not officially “alive”) as well as carnivores. When we look to nature for lessons, we find that animals mostly kill only what they need to live (though they don’t always eat every bit of the creatures they kill, and raccoons notoriously take a bite of a tomato and leave the rest to rot). It is also by no means unheard of that animals do violence to other species recreationally: cats playing with mice is a common occurrence, for example. Minimizing pain and suffering from human action seems an obvious application of wide-spread human norms (of course rarely fully honoured) to our more-than-human relations. But does that mean all hunting or meat-eating is wrong? Should humans have standards of avoiding violence that are different from those of other creatures? Do our capacities generate a greater responsibility to take care and avoid harm or suffering? What in this context should be state-enforced law?

74 Nedelsky, “A Relational Approach to Property”, *supra* note 14.

75 Nedelsky & Malleson, *Part-Time for All*, *supra* note 1 at 83–87.

5. Criminal law is another part of the law that fosters or undermines collective responsibility. While the dominant talk in the US and Canada is about individual responsibility, criminal law can and should be organized around a combined sense of individual and collective responsibility. Individuals who cause harm to another should be helped to understand the harm, to take responsibility for their actions, and to try to make amends. But there is a collective responsibility to provide help both to those harmed and to those who did the harm. Individual accountability in this sense is consistent with a recognition that neither what drove the “perpetrator” to cause the harm nor the vulnerability of the “victim” can be understood without attention to the network and history of relationships (small and large scale, e.g. family and economic power structures, patterns of exclusion) that were the context for individual choices. In this sense, if autonomy is relational, so is responsibility,⁷⁶ and if autonomy is enabled by constructive relations and undermined by destructive ones, so is responsibility. Assigning exclusively individual responsibility for criminal harm in the context of systemic inequality cannot lead to justice.

The shift away from an exclusive focus on punishment and individual responsibility in the criminal context is a vital part of the transformation of more-than-human constitutionalism. Even though “criminal justice” is almost entirely human-centric, this transformation is central to making new understandings of responsibility part of the core values of new forms of collective life.

V. Conclusion

A. Scope of Change Around Caring Relations

I think all these issues of core values, institutional design, and specific policy change require something more: an over-arching change in stance toward life that connects the issues of scale, care, and relationship with the tasks of collective cooperation.

Good collective decision-making is not likely to be fostered by a norm of tension and stress for those delegated to do this work, either in the daily form of carrying out policies, or adjudicating disputes, or deciding on the laws, policies, or norms that are to organize collective life. The dominant picture of the “busy, important” person must give way to forms of human interaction that are slow enough, reflective enough, relationally connected enough to foster not only clear, creative thinking, but a stance of care and compassion toward one’s co-workers and towards those who will be affected by one’s decisions. I think

⁷⁶ Jennifer Nedelsky, “The Challenges of Relational Responsibility” (on file with author).

almost every adult has experienced moments when they manage to escape the pervasive sense of stress and time scarcity and notice how their insight and judgment improves as well as their capacity to enjoy what they are doing and pay attention to those around them.

Making such moments the norm would be a huge change involving general structures of work and care in institutions of decision-making, norms of what success and excellence look like, and core values. It is hard to know exactly how these changes would be connected to the large-scale design of institutions traditionally mapped out in constitutions. But I am confident that any designs need to be implemented in ways that allow people to work without constant stress. Of course, anyone taking on governance responsibilities in the near future will face ongoing crises caused by long embedded injustice and the pressing challenges of climate change. It might therefore seem naïve to prescribe calm, caring, and reflective public workplaces under such conditions. But I am convinced that envisioning constitutionalism transformed by a more-than-human perspective must include a caring and reflective disposition among the humans who are charged with fostering the long-term well-being of all their relations. It would be a mistake to think that we can tinker with institutional design, and advocate a kincentric approach, but continue the sorts of behavior and attitudes characteristic of contemporary big government and big law, of busy and important people in universities and corporations, and of the rich and powerful. To cooperate in ways that will care for all our relations, humans and more-than-humans, will require change at every level. Reflections on institutions must take that into account.

B. Hope and Challenge for Respect for the More-than-Human

More-than-human constitutionalism cannot take hold unless most people give up their assumptions about human superiority. This section discusses the ground for my hope for this radical transformation.

When I first started to think about the pervasive scientific recognition of the interdependence of life on Earth,⁷⁷ I felt hopeful that such recognition could be a substitute for seeing the Earth community as fellow subjects deserving of respect and care. But then I thought that those were really two different kinds of insights, of relations to the Earth. Interdependence is still consistent with a moral hierarchy with humans on top and with the Earth as a source of resources that just need to be better managed.⁷⁸ I began to think that only a

⁷⁷ After a conversation with John Borrows.

⁷⁸ See the discussion on this point in Nedelsky, *Law's Relations*, *supra* note 1 at 194–99.

sense of humans as part of a shared spiritual universe could ground the care and respect that I think a more-than-human constitutionalism requires. This left me deeply worried about how this could be possible in diverse, democratic societies. Then I had a chance to present a version of this essay as a lecture for “Constitution Day” at Johns Hopkins University.⁷⁹ The Political Science Department there is full of people deeply interested in dislodging human-centric thinking and finding new ways to articulate the beauty and value of the Earth community. In particular, my conversations with Tvrtko Vrdoljak (a recent PhD) showed me that his passion for connection and respect for the Earth was just as powerful (and better informed) than mine, even though he did not experience it as having any spiritual grounding. This section traces out my evolving sense of hope and challenge for the transformation needed.

I still see hope in the recognition of interdependence as a fact of life. I think interdependence is the most foundational lesson we learn from both human and more-than-human life forms. This core insight should guide both our substantive judgments and the norms, practices, and institutions we use to structure how we interact with one another. When I wrote *Law’s Relations*, I thought I needed to spend a lot of time explaining why humans were fundamentally dependent on one another, not just for the care we need as infants or in old age, but for the development of our core capacities such as autonomy and creativity.⁸⁰ But now I think the interdependence of all life forms is an increasingly recognized scientific fact⁸¹ (even though the powerful association of individual autonomy with independence remains a deep part of Anglo-American culture.)

I think it is reasonable to hope that the science of interdependence will finally overcome the philosophy of individualism. The values, laws, norms, and institutions of more-than-human constitutionalism could then be guided by an ethics of interdependence (which, of course, people will interpret differently).

79 September 18, 2023.

80 See Nedelsky, *Law’s Relations*, *supra* note 1 at 28: “We are dependent on others for the social world that enables us to develop all of our core capacities — for love, for play, for reason, for creativity, for autonomy, among others.”

81 For many examples (with a somewhat human focus) see Samantha Frost, *Biocultural Creatures: Toward a New Theory of the Human* (Durham, NC: Duke University Press, 2016). Interpenetration might be a better term for what she sees in current research. She notes that Karen Barad has suggested that the concept of “intra-action” or action within a field might better capture the processes by which the biological and the social reciprocally work on one another: Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham, NC: Duke University Press, 2007).

Nevertheless, a challenge remains. A recognition of interdependence is not the same as a recognition of animals, plants, and rocks as fellow subjects in a community of more-than-human constitutionalism. Many people still see humans as (obviously) at the top of a value hierarchy, even though they are (also obviously) dependent on the (interdependent) plants, animals, soil, water, and air.⁸² We need to understand what can ground, or move people toward, a view of the whole Earth and all its creatures as fellow subjects with their own claims to respect, integrity, and care (rather than objects or lesser beings that humans need and are entitled to use).⁸³ If our new constitutional norms and structures are based on the value of all our relations as fellow subjects, it will be necessary to find widely acceptable language(s) to articulate and ground that value.

One of the most common — and for many, powerful — forms of language invokes a sense of shared “spirit” that infuses all of the natural world. Thomas Berry, for example, says, “[a]wareness of an all-pervading mysterious energy articulated in the infinite variety of natural phenomena seems to be the primordial experience of human consciousness, awakening to an awesome universe filled with mysterious power.” For him, this awareness is both a spiritual and a scientific/empirical state. “Not only is energy our primary experience; energy, and its multiple modes of expression, is also the primary concern of modern physics, its ultimate term of reference in describing the most fundamental reality of the universe.”⁸⁴ Throughout his work he calls on this emergent intertwining of spiritual and scientific creativity to bring humans to the awareness that can save our planet:

Because the exaltation of the human and the subjugation of the natural have been so excessive, we need to understand how the human community and the living forms of Earth might now become a life-giving presence to each other ... Our future destiny rests ... on our capacity for intimacy in our human-Earth relations. ... That future can exist only when we understand the universe as composed of subjects to be communed with, not as objects to be exploited.⁸⁵

82 See Nedelsky, *Law's Relations*, *supra* note 1 at 195–96: “To virtually anyone schooled in Western political thought, it is self-evident that if one were interested enough to ask about the proper relations between humanity and our fellow creatures, the answer would not be equality.”

83 See Nedelsky & Malleson, *Part-Time for All*, *supra* note 1 at 87: “Let us begin with what (most) people need to learn. First, they need to unlearn a human centric vision of the earth. They need to unlearn a confident, unquestioned sense of the superiority of human beings that yields ignorance and disinterest in the capacities for responsiveness of other living beings. They need a visceral sense of interdependence; they need to recognize (and, ideally, marvel at) the intricacies of different forms of life by engaging with them close up.”

84 Thomas Berry, *The Dream of the Earth* (San Francisco: Sierra Club Books, 1988) at 24.

85 Thomas Berry, *The Great Work: Our Way into the Future* (New York: Bell Tower, 1999) at ix–xi.

Relatedly, Joanna Macy invites us into “a wild love for the world” grounded in Buddhist teachings, and opening out to a wide variety of spiritual connections to the living Earth.⁸⁶

In part because it is urgent that many people are drawn to these new forms of awareness and values, the invocation of something like “mysterious energy” often comes in language that is both obviously spiritual and not tied to any one tradition (even though partially inspired by one — Christian for Berry, and Buddhist for Macy). Nevertheless, if the language of all our relations takes a form such as “all of creation,” it can be heard to invoke “a creator” in ways that signal religious belief. Of course, many Indigenous people explicitly invoke the Creator in articulating humans’ mutual responsibilities with the Earth community. And it is often clear that for many who write with inspiring passion about finding our way to intimacy with the Earth, there *is* an important spiritual foundation/inspiration for their ideas.

A challenge then arises from the complex role of religion in traditional Western constitutionalism, and then a further challenge from colonial history. Since the Enlightenment, dominant Western thought has claimed to draw a line between the political and the spiritual (the language of “religion” is more often used in this context, despite the continued existence of institutions like the Church of England and the still pervasive, though increasingly contested, norms of Judeo-Christian traditions throughout Western institutions). Indeed, many forms of Anglo-American liberalism claim that the state (and its constitution) should not promote any particular vision of “the good life.” By contrast, helping people live a good life is explicitly part of the intertwined ethical, spiritual, and legal teachings of the Anishinaabeg.⁸⁷ So, for some, an explicit grounding of more-than-human constitutionalism in what sounds like a spiritual basis for treating the whole Earth community as “relations,” fellow subjects deserving of respect and care, will be an unacceptable mingling of state law with religion and/or a mandatory, freedom-constraining ethics.

86 Kaye Jones, “Introducing Joanna’s Stories” in Stephanie Kaza, ed, *A Wild Love for the World: Joanna Macy and the Work of Our Time* (Boulder, Colo: Shambala Publications, 2020) xxv at xxv: “Joanna explained, ‘An awakening is a full-body insight, an intuitive realization that you can’t achieve by argument, persuasion, or thinking it through — you are delivered into it, held within its hands, like birth and death.’ In this book we experience these epiphanies — in quiet, in chaos, with mentors and spiritual teachers, in nature, in groups, in dark times, in times of not knowing, and in times of surrender. These stories speak to faith, to grace, to trust.”

87 Lindsay Keegitah Borrows, *Otter’s Journey through Indigenous Language and Law* (Vancouver: UBC Press, 2018).

Sadly, colonial history means that even among those who are comfortable with the intertwining of ethical, spiritual, and legal norms (and who recognize the long *Western* history of such entanglement), some will strongly resist expressions of kinship that sound like the “primitive superstition” they were taught characterized Indigenous spirituality. Christian settlers so successfully denigrated Indigenous spirituality as primitive “animism” that Anglo-American traditions still bear this legacy.⁸⁸ Any version of rocks, plants, or animals being imbued with spirit — and probably even Berry’s “mysterious energy”⁸⁹ — runs the risk of being tainted by this denigration.

Thus, regardless of compelling arguments that legal frameworks are never wholly separate from normative frameworks (whether coded as ethical or spiritual), and despite evidence that the denigration of Indigenous spirituality was a central part of racist colonialism, too many people would now be unable to accept the grounding of respect for our more-than-human fellow subjects in language that sounds “spiritual” or religious.”

Fortunately, there is now a very wide range of forms of expression of respect for more-than-human subjects, and many kinds of arguments about why humans should not be treated as the top of some moral hierarchy. Societies will not need to have a single linguistic or symbolic form everyone accepts. Just as a deep commitment to freedom of religion generally comes with a recognition that religion is important to many (but not all) people and that there will be deep disagreements about religious beliefs, a commitment to respect for more-than-human relations need not come with a commitment to a shared way to explain the grounds for that respect.

That hopeful thought should not, however, minimize the extent of the transformation in values, culture, practices, institutions, and beliefs that must ultimately come with a new, intimate, and respectful approach to our relations with the Earth. A commitment to more prudent resource management will not be enough (even if ending the use of fossil fuel still sounds radical to many).

We can, however, take heart from the resources available for this transformation. There has been an explosion of research in multiple fields on interdependence, on the capacities for communication in multiple life forms, on

88 Christian denigration of “primitive animism” was not limited to Anglo colonialism.

89 See Jennifer Nedelsky, “My COVID Pause” (2020) 25:4 *Lex Electronica* 84 at 87: “The puzzle of the ongoing, permanent, dangerous harm to the earth is connected to the denigration of care, but it has an additional dimension: the idea, promoted for centuries by Christianity, that seeing plants and animals as having spirits or the earth as truly a living entity deserving of care and respect is a mark of a primitive religion and civilization.”

cooperation as well as competition, on Indigenous law, on the beauties of interconnection as well as the terrors of the devastation currently being wrought on the Earth. The scope of this work is both encouraging and overwhelming. Some of it explicitly tries to reveal agency in the multiple forms of material being in the world without any kind of reference to “spirit.” Different people will find different kinds of work, and different kinds of concrete experience, that will provide grounds for the mutual respect and “intimacy with the Earth” that Thomas Berry calls for, some version of which I see as ultimately required for more-than-human constitutionalism to take hold and thrive.⁹⁰ Even curiosity about interdependence may encourage people to explore the natural world. We can hope that as people take the time to engage closely with nature, some sense of intimacy and wonder will emerge. For others, the physics of the interrelation of energy and matter may be of help.

As we embrace the challenges of more-than-human constitutionalism, we can imagine the thousands of different ideas, arguments, and stories that are relevant to these important and contested questions as a form of the rich biodiversity that still characterizes the planet Earth. We cannot know of, much less appreciate, the detail and context of it all, even though if we could, we might make better judgments. This rich multiplicity is a gift to dip into, using our best guides, not a challenge of inevitable failure to encompass it all. This applies also to the multiplicity of forms of these contributions — from poetry, dance, sculpture, story, science, and close observation of nature to the analytic intricacy of legal argument.⁹¹

90 For example, in addition to the sources I have already cited, see William E Connolly, *Facing the Planetary: Entangled Humanism and the Politics of Swarming* (Durham, NC: Duke University Press, 2017); Jane Bennet, *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010); Alfred North Whitehead, *Process and Reality* (New York: The Free Press, 1979); Thom van Dooren, *Flightways: Life and Loss at the Edge of Extinction* (New York: Columbia University Press, 2014); John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019); Basil H Johnston, *Honour Mother Earth: Mino-Audiaudaubh Mizzu-Kummik-Quae* (Cape Croker Reserve: Kegeonce Press, 2003); Glen Aikenhead & Herman Michell, *Bridging Cultures: Indigenous and Scientific Ways of Knowing Nature* (Toronto: Pearson Canada, 2011).

91 For examples of diverse approaches see the resources cited in César Rodríguez-Garavito, ed, *More Than Human Rights: An Ecology of Law, Thought and Narrative for Earthly Flourishing* (New York: NYU MOTH Project, 2024). On “analytic intricacy,” I want to note my experience in attending parts of Osgoode’s 2023 Annual Constitutional Cases conference. I was observing with fascination and some attraction the clever and thoughtful examination of how the Supreme Court of Canada was analyzing issues and how the contributors thought the Court *should* be analyzing them. I felt like I was remembering the pull (attraction) of flexing my analytic muscles in this way, and I could see that it was important that talented people committed to equality were spending their time doing this. It also felt like I was watching a complex game that I used to play. I knew its impact was real, but it felt very distant from “life.” I didn’t feel inclined to return to the game. But then I needed to read a student paper deep into that game. And I realized I was still responsible for helping people learn to do it well. And I am

We will need a wide array of studies, arguments, and experience for the transformation that is needed. My hope is that the scope of change outlined here is not just daunting, but deeply appealing. To respond to climate change we need hope about possible futures, not despair.

More-than-human constitutionalism provides a lens for rethinking the norms and institutions traditionally associated with constitutionalism. It invites us to rethink equality, and to take seriously our interdependence with the Earth community and our responsibilities for respect and care. It invites us to rethink foundational assumptions of individualism and of institutions like private property. The learning curve to accomplish this is daunting, but the opportunities to thrive together in justice and care will be worth it. Together with the dark demands of climate change, I hope the vision of more-than-human constitutionalism inspires both new learning and action.

Finally, I want to close with a note about the hope I find in the workshop that gave rise to this essay: I experienced it as a kind of model of what more-than-human constitutionalism could look like. We gathered together to constitute a cooperating community. We spent a morning learning about and appreciating the sights, smells, and sounds of the natural beauty of Broom Hill in T'Sou-ke First Nation. We daily took in the beauty of the sea-scape.

The human participants came from different backgrounds and sub-disciplines within law (and not all of us were lawyers). We drew on different experiences and resources to ground our commitment to respect and care for the more-than-human. We were at different stages in our lives and our careers. There were very different views among us about hunting and eating animals. But, in a very short time we managed to generate a spirit of openness, trust, and equality (I am not claiming that everyone felt this exactly as I did). There was a strong norm of attentive listening and constructive responsiveness. I felt able (first in a chance one-on-one conversation⁹² and then in the wider group) to ask questions about teaching stories of animals' consent or sacrifice to provide food for humans. Once I felt able to voice long standing questions, I kept asking in other contexts, and I learned so much and changed my perspective. Trust allows risk, which allows learning and change. In the context of a vibrant equality, I also learned that I could receive both honour and help. For me, that was an important, and complex, learning about the nature of equality. As a group, we were not charged with the responsibility to make laws, or even many rules,

sure that those skills can be useful to some aspects of re-envisioning constitutions. Somehow, I felt more connected when I attended (this time in person) the same conference in 2024.

92 Many thanks to Cheryl Simon's generosity and openness.

for one another or for others. But I think we did feel the responsibility to foster each other's contribution to the shared project of advancing care and respect for our more-than-human kin, and to connect that project to law. I do not want to claim that no one felt any stress (as organizer or presenter), but I think a sense of shared enjoyment (in beautiful nature, delicious vegan food, making new connections) let the stress recede. For me, this collective experience of equality in diversity, of supporting each other in ambitious and sometimes untried projects, brought joy and excitement to my piece of this joint undertaking. Of course, thanks are due to Lindsay Borrows and Jess Eisen for setting up the framework in all the many choices they made.