Pluralizing the Subject and Object of Democratic Legitimation

by

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Graduate Department of Political Science
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Abstract

States are the traditional focal point of democratic legitimation. In the standard model, the institution of the state is normatively privileged: it is the primary object of democratic legitimation, and the national political community is the primary subject. How, I ask, should the standard, state-centric model of democratic legitimation be transformed in light of the presence of substantive jurisdictional conflict and plural political identity? Substantive jurisdictional conflict describes a challenge to the state’s authority from non-state institutions that represent a territory which overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, and do not seek to form states themselves. Plural political identity describes the attachment of individuals to multiple political communities. Under these circumstances, I argue that non-state institutions can be important supplementary objects of democratic legitimation alongside states. The normative rationale for this transformation to the standard model is that adding non-state institutions as additional objects of democratic legitimation will enhance the ability of individuals and political communities to rule
themselves. The basic shape of the model I develop is that the strength of competing jurisdictional claims can be assessed by comparing the primary roles of institutions. An account of an institution’s primary role describes its contribution to the production of democratic legitimation on behalf of a particular political community or political communities. The primary role of the state, for example, is to enable a project of democratic constitutionalism on behalf of the national political community. I then develop a criterion to guide state citizenries when considering how to respond to the claims of non-state institutions: they should distribute the jurisdiction necessary for non-state institutions to play their primary roles, subject to the qualification that their state’s primary role of enabling democratic constitutionalism is not negatively impacted. This approach pluralizes the meaning of democratic legitimation away from a strict association with the state towards multiple institutional locations.
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Chapter 1. Democratic Legitimation

Through institutions, political power is exercised over individuals and political communities. Theories of democratic legitimacy show how those exercises of power can be justified. In what I will call the standard model of democratic legitimation, the institution of the state is normatively privileged. The state is the primary object of democratic legitimation, and the national political community is the primary subject. This overlap between subject and object was historically defensible, because the state was the primary institutional location for the exercise of power.

Two circumstances, I argue, problematize this overlap: substantive jurisdictional conflict and plural political identity. Substantive jurisdictional conflict describes the circumstance where non-state institutions represent a territory which overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, and do not seek to form states themselves. Plural political identity describes the attachment of individuals to multiple political communities. Both of these circumstances problematize the overlap between subject and object in the standard model. With substantive jurisdictional conflict, it is not only that citizens could be affected by decisions they have no influence over, but also that the exclusive authority of their state is called into question by non-state institutions whose claims are independently grounded. With plural political identity, the standard model fails to recognize the significant attachments individuals have to non-national political communities.

Given these circumstances, my research question is: How should the standard, state-centric model of democratic legitimation be transformed in light of the presence of substantive
jurisdictional conflict and plural political identity? My argument is that non-state institutions should be considered as important supplementary objects of democratic legitimation alongside states. The normative rationale for this transformation to the standard model is that adding non-state institutions as additional objects of democratic legitimation will enhance the ability of individuals and political communities to rule themselves. The standard model, as I argue in chapter 2, suppresses or controls the exercise of democratic legitimation through non-state institutions: the jurisdictional claims of non-state institutions are not recognized as having a grounding independent of the state. When combined with the boundary problem – the puzzle that the bounds of a democracy cannot be decided democratically – the exclusive way the standard model conceptualizes the state’s authority all but erases the possibility of having non-state institutions be truly independent objects of democratic legitimation.¹ Thus, transforming the standard model by considering non-state institutions as additional objects of legitimation is normatively important in order to recognize avenues for democratic control that are currently blocked. Unblocking these avenues will enhance the ability of individuals and political communities to rule themselves.

I adopt the idea that democratic legitimation is fundamentally about how justificatory discourses enable self-rule from Rawls and Habermas.² In their accounts, reaching reasonable agreement through publically accessible processes of justification is the core of democratic legitimation. Rawls offers a ‘liberal principle of legitimacy’ that reads: “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of

² Thanks to Nancy Bertoldi and Melissa Williams for helpful comments on this point.
which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”

Under this principle, reasonable agreement is the deep meaning of democratic legitimation. While procedural concerns such as voting are important, they are secondary to the constitutionalization of a public – i.e. freely available – justification for the exercise of political authority. Habermas provides a theory of how justificatory discourses, based on communicative rationality, can legitimate the exercise of power. In his description, he blends insights from the dominant liberal and republican models of democratic legitimation. On the liberal model, “the democratic process takes place exclusively in the form of compromises between competing interests.”

Grounded in a conception of individual rights, it “accomplishes the task of programming the state in the interest of society, where the state is conceived as an apparatus of public administration, and society is conceived as a system of market-structured interactions of private persons and their labor.”

In the republican view citizens’ political opinion- and will-formation forms the medium through which society constitutes itself as a political whole. Society is centered in the state; for in the citizens’ practice of political self-determination the polity becomes conscious of itself as a totality and acts on itself via the collective will of its citizens.

Habermas’s combination of these two traditions views the democratic process as comprised of a series of channels for legitimation between “institutionalized deliberations in


parliamentary bodies, on the one hand, and … informal networks of the public sphere, on the other.”

Again, reasonable and publically accessible agreement on the exercise of political authority is the core of democratic legitimation.

While I share Rawls’s view of the importance of reasonable agreement for democratic legitimation, I also depart from his account, because he circumscribes the object of democratic legitimation on the basis of two claims about the nature of “the political relationship in a constitutional regime.”

First, it “is a relationship of persons within the basic structure of society, a structure of basic institutions we enter only by birth and exit only by death.” Second, political power is always coercive power backed by the government’s use of sanctions, for government alone has the authority to use force in upholding its laws. In a constitutional regime the special feature of the political relation is that political power is ultimately the power of the public, that is, the power of free and equal citizens as a collective body.

These claims essentially reproduce the standard model, because they pick out the state as the single object of democratic legitimation and the citizenry of the state as the single subject of legitimation.

Habermas relies on the standard model to a lesser degree. He decenters the subject of democratic legitimation from the unitary people found in the standard model through his account of the interaction between formal democratic institutions and informal democratic actors. And, as I discuss in chapters 5 and 7, his approach to what he calls the postnational constellation

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12 “Popular Sovereignty as Procedure”, Appendix II in Between Facts and Norms.
explicitly envisions extending democratic legitimation beyond the state to transnational and regional institutions. However, the focus of his deliberative approach to democratic legitimation is a sociologically-informed analysis of how communicative power can counterbalance the exercise of administrative and economic power within the modern state.\textsuperscript{13}

In sum, while my approach employs the Rawlsian and Habermasian idea that democratic legitimation is fundamentally about how justificatory discourses enable self-rule, I depart from their accounts in order to focus on the challenges to the standard model of democratic legitimation that are thrown up by the circumstances of substantive jurisdictional conflict and plural political identity.

In addition to Rawls and Habermas, I also draw on the accounts of democratic legitimation provided by Held, Bohman, and Young. Held’s view directly attacks the congruence between subject and object in the standard model by endorsing the principle that any exercise of political authority that significantly affects individuals should be democratically legitimated.\textsuperscript{14} Bohman extends the idea that democratic legitimation is about how justificatory discourses enable self-rule by insisting that individuals must have the ability to form new democratic communities.\textsuperscript{15} Young analyzes the condition of settled political communities like indigenous peoples in terms of having the freedom to collectively determine their future without being dominated by the state.\textsuperscript{16} These approaches to democratic legitimation all offer accounts of the conditions under which justificatory discourses enable self-rule. When drawing on these

\begin{flushleft}
\textsuperscript{13} \textit{Between Facts and Norms}, chapters 7 and 8.
\textsuperscript{15} \textit{Democracy Across Borders} (Cambridge, Mass.: MIT Press, 2007).
\textsuperscript{16} \textit{Inclusion and Democracy} (Oxford: Oxford University Press, 2000).
\end{flushleft}
views, my central concern will be with the institutional assumptions that lie behind the standard model of democratic legitimation.

My presentation of the standard model focuses on three key claims. First, a principle of equal participation, often cashed out in terms of equal citizenship, marks off the standard model as a theory of democratic legitimation, as compared with other forms of legitimation. Second, there is a claim about the subject of legitimation: variously defined as a people, nation, or citizenry, the legitimating subject in the standard model is a political body that is unified by a shared history and culture that sets it apart from other peoples, nations, or citizenries outside the state’s territory and from other associations or minorities within the state’s territory. Third, there is a claim about the preeminence of the state as the institutional object of legitimation. The three claims are tightly woven together so that the meaning of democracy on the standard model is closely tied to the institution of the state: individuals are equal citizens of a unified democratic subject whose object is the state.

To break this link between the state and democracy, I pluralize both the subjects and objects of democratic legitimation. Clearly, this directly challenges the standard model’s view that democratic legitimation runs from a single subject to a single object. But it does not, I think, constitute a complete departure from the standard model because it retains the idea of a distinct grouping of individuals exercising democratic control over the institutional authority they are subject to.

As I survey in chapter 3, more radical transformations to the standard model have been proposed. Held, for example, argues that a version of the all-affected principle of democratic legitimation, in which individuals should have a say in making decisions that affect them, should replace the state-centric standard model. This principle, instead of having a pre-formed people legitimate the authority of the state, decenters the standard model by attempting to align decision-making authority with the individuals affected by that authority. I will argue that while alternative principles such as Held’s may be an appropriate response to the broader processes identified with globalization because they directly address the fact that power is exercised beyond traditional state institutions, they are not a suitable basis on which to address the circumstance of substantive jurisdictional conflict. The problem is that they are too fluid. The all-affected principle, for instance, does not directly represent settled political communities that attempt to democratically legitimate the authority they are subject to, but instead defines them with reference to the issue under examination. My strategy of transforming the standard model by pluralizing the subjects and objects of legitimation is less fluid. Individuals, in my account, belong to a political community or political communities defined in terms of the pursuit of some form of self-determination, a self-ascribed political identity, and mutual recognition of and by other political communities.18 These political communities can pursue their interests through both state and non-state institutions.

In chapter 4, I engage with the work of Young in an attempt to develop an account that both decenters the standard model of democratic legitimation and takes the interests of settled political communities seriously. I argue that while her principle of non-domination can provide a general guide for assessing the relationship between overlapping political communities, a more

18 See chapter 4, section 1.
specific accounting of how these communities can realize their interests and projects through institutions is required. To provide this account, I develop the idea that institutions play primary roles. A description of an institution’s primary role is a normative account of its role in fostering democratic legitimation. Under the standard model, all democratic states have uniform features, such as exclusive sovereignty, and are the primary object of legitimation. To respond to the circumstances of substantive jurisdictional conflict and plural political identity, however, I have argued that the standard model should be transformed to account for democratic legitimation at multiple institutional locations. It is important, I think, to not assume that democratic legitimation must take the same form at each institutional location: political communities may choose to rule themselves in different ways, and the institutional objects they are legitimating may have distinctive features. The way power is exercised through a particular institution, in other words, will depend on a number of factors, such as the characteristics of the institution, the composition of the political community that aims to justify that exercise of political authority, and the relationship between the institution and other institutions.

Where institutions co-exist on the same territory, I will argue, according priority to their primary roles will enhance the ability of individuals and political communities to democratically legitimate the authority they are subject to. But how do we know what the primary role of an institution is? Or, put another way: if different institutions make different contributions to the production of democratic legitimation, how can these contributions be compared? The key, I argue, is to look to the nature of the political community that aims to realize its interests through a particular institution: a role is primary for an institution when a particular political community depends on its performance as a constitutive element of its identity. The primary role of the state, for example, is to enable a project of democratic constitutionalism by its citizenry. National political communities with democratic traditions, I claim, require the institutionalization
of their democratic ideal in a project of democratic constitutionalism. In other words, their very identity as democratically organized, territorially limited political communities requires that their states play this primary role; jurisdiction over this role could not be distributed to non-state institutions without severe normative consequences.

In chapters 5–8, my application of the primary roles approach focuses on the responsibilities of state citizenries. Because of the way the standard model privileges their state, I argue they have an especially strong responsibility to consider how distributing jurisdiction to non-state institutions can enhance democratic legitimation overall. In chapter 5, I argue the primary role of the state is to enable a project of democratic constitutionalism. The core of such a project has two essential components: (i) to secure basic rights for all individuals in the state’s territory and (ii) to provide citizens and permanent residents with fair access to democratic voice. Each project of democratic constitutionalism will have these two components, but their institutionalization will vary among actual states. I then describe the characteristics or key attributes of states that enable them to play their primary role. First, their predominant jurisdiction attribute facilitates the enforcement of basic rights and fair access to democratic voice. Second, their open agenda attribute supplies the opportunity for citizens to debate and act on a wide range of issues within the state’s institutional structure. I conclude chapter 5 by discussing two other candidates for the state’s primary role: providing economic security and ensuring internal order. I argue that although certain aspects of these roles are essential for a successful project of democratic constitutionalism, other aspects can be shared with non-state institutions.

19 As I note below, I do not discuss non-democratic states because the citizenries of such states will not have the opportunity to consider the distribution of jurisdiction to non-state institutions in the same way as those in democratic states.
In chapters 6 and 7, I discuss the relationship between the state and two examples of non-state institutions that come into substantive jurisdictional conflict with it: indigenous political institutions and regional organizations. I have selected indigenous political institutions and regional organizations as examples of non-state institutions for three reasons. First, both exemplify the circumstances identified in the research question. That is, each (i) comes into substantive jurisdictional conflict with the state (each represents a territory which overlaps with a part of or extends beyond the state’s territory, makes jurisdictional claims that are grounded independently from the state, and does not seek to form a state itself) and (ii) represents a non-national political community (belonging in multiple, overlapping political communities defines the circumstance of plural political identity). Second, each has the potential to enhance democratic legitimation alongside states. In particular, they can each contribute to the production of democratic legitimation through the performance of distinctive primary roles. Third, although states have often resisted distributing jurisdiction to them – especially to indigenous political institutions – there are normatively compelling reasons to do so. With respect to indigenous peoples, these reasons are grounded in the need to (i) decolonize the relationship between the state and indigenous peoples, (ii) improve policy outcomes, and (iii) recognize the plural political identity of indigenous citizens. With regional organizations, the density of institutional meshing between the state and the regional level can outstrip the capacities of state-level legitimation; in this context, distributions of jurisdiction to the regional level have the potential to enhance, not limit, the ability of citizens to democratically control their future.

I focus my discussion of indigenous political institutions by examining the struggle of First Nations in British Columbia, Canada to control resource extraction on their territory. Indigenous political communities in BC make various jurisdictional claims. The structural
context of these claims is that indigenous communities are much smaller and less powerful than the national political community of the Canadian State. In this situation, I will argue that the primary role of their political institutions is to enable self-determination. This primary role describes the distinctive contribution of indigenous political institutions to the production of democratic legitimation. When indigenous political institutions lack the jurisdiction to play this primary role, the ability of individuals and political communities – in this case, indigenous individuals and indigenous political communities – to rule themselves will be lessened. In chapter 6, I explore the multiple pathways through which state citizenries could distribute jurisdiction to indigenous political institutions, including treaties, political grand bargains, and recognition of aboriginal rights and title.

I focus my discussion of regional organizations on the European Union’s (EU) struggle to contain its on-going sovereign debt crisis. Drawing on Habermas’s analysis of the relationship between states and regional organizations, I argue that an account of the EU’s role in enhancing democratic legitimation must address the input of both member-states and European citizens as a whole. Of course, many theorists have questioned the existence of a regional political community in Europe. Nonetheless, I will argue that the interdependence of the state and

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20 In chapter 4, I will defend a relational view of the identity of political communities. Under this view, a constitutive element of the identity of indigenous political communities is the ability to act through institutions that they themselves control. See Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) and Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003). I should also note that I do not understand self-determination as meaning the pursuit of a distinct, sovereign state. This may be an aim of particular indigenous political communities, but my focus is on those that aim to be self-determining alongside the state.

21 Worries about the EU are often grounded in the idea that giving it power damages existing channels of legitimation through national parliaments without compensatory changes at the regional level. The common claim that the economic goals of corporations are advanced at the expense of national interests, for example, has this form.
regional levels revealed by the sovereign debt crisis demands democratic legitimation that reaches beyond what can be provided through the member-states of the EU. The EU, I will argue, should be conceptualized as an institution that plays the primary role of enabling and regulating an effective and democratic regional policy. This role not only addresses both of the EU’s constituencies, but also attempts to strike a balance between the need for input and output legitimation.

In the concluding chapter, I develop a criterion of distribution to guide citizenries in assessing their collective responsibility to non-national political communities: they should distribute the jurisdiction necessary for the non-state institutions that represent these communities to play their primary roles, subject to the qualification that their state’s primary role of enabling democratic constitutionalism is not negatively impacted. Applied to the two examples I discuss, this criterion says that citizenries have a responsibility – subject to the qualification that they ensure their state retains the means to play its primary role – to (i) distribute the jurisdiction necessary for indigenous self-determination, and (ii) enhance the ability of the EU to create and regulate a regional policy that represents the interests of European citizens as a whole. On the first point, I contrast legal and political approaches to resolving the jurisdictional conflict between Canada and First Nations. A more pluralistic conception of the sources of Canadian law, I contend, coupled with political recognition of the independent grounding of indigenous claims, offer the opportunity for reconciliation. On the second point, I argue that European citizens should support shifting authority from institutions that primarily represent the member-states, such as the Council, towards institutions that primarily represent EU citizens as a whole, such as the Parliament or Commission. If they are to embrace belonging in the regional political community as an additional identity alongside attachment to their national political communities, citizens must see that regional integration enhances, not detracts
from, democratic legitimation. Shifting authority in the way I suggest could transform the EU into an institution that makes a distinctive contribution to the production of democratic legitimation.

In sum, my conclusion is that state citizenries have a responsibility to distribute jurisdiction to non-state institutions in ways that enhance their ability to play their primary role. This will facilitate the creation of supplementary institutional locations of legitimation, which will in turn enhance the production of democratic legitimation overall. Distributing jurisdiction to indigenous institutions will facilitate them in playing their primary role of enabling the self-determination of their political communities, which will enhance democratic legitimation at a supplementary institutional location. Strengthening the EU’s ability to create and regulate an effective and democratic regional policy will create an additional location of institutional legitimation alongside states – a location that represents the interests of European citizens as a whole. This normative model of institutions reconciling jurisdictional claims on the basis of primary roles is superior to the standard model of democratic legitimation. The exclusivity associated with the latter view – particularly the idea that the state is the source of jurisdictional authority – runs counter to the indigenous view that the settler state has imposed a colonial policy on their communities. It also favours national political communities in Europe over regional institutional reform that enhances democratic legitimation.

The argument is generalizable in the following three senses. First, although it focuses on two examples of jurisdictional conflict between the state and non-state institutions, it provides a model that can be applied to other examples. Second, although the discussion of indigenous political institutions and regional organizations focuses on the specific situations of First Nations in Canada and the EU, respectively, it is applicable to other instances of indigenous institutions
and regional organizations. Third, although I only discuss examples from Canada and Europe, the argument is applicable to all democratic states that meet the legitimation criteria associated with the standard model. I do not discuss states that fall short of these criteria, because the citizenries of such states will not have the opportunity to consider the distribution of jurisdiction to non-state institutions in the same way as those in democratic states.
Chapter 2. The Standard Model

Recall that substantive jurisdictional conflict describes the circumstance where non-state institutions represent a territory that overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, and do not seek to form states themselves. In this chapter, I argue that the standard model of democratic legitimation cannot be adapted to the circumstance of substantive jurisdictional conflict because of the way it conceptualizes the state. Under the influence of the modern view of the state, it ascribes normative features to states such as exclusive sovereignty. The effect is that the jurisdictional claims of non-state institutions will not be recognized as having a grounding independent of the state.

In section 1, I show how the modern view of the state undergirds the standard model of democratic legitimation. In particular, I show how it ascribes the normative feature of exclusive sovereignty to states. In section 2, I illustrate how the circumstance of substantive jurisdictional conflict challenges the modern view of the state, and by extension the standard model of democratic legitimation. I argue that even under an adapted version of the standard model that attempts to address the claims of non-state institutions by unbundling some of the state’s sovereignty, the state will retain its privileged position. To show the insufficiency of this conception of the state’s position in the face of substantive jurisdictional conflict, I then examine two lines of argument that defend the independent nature of the claims of non-state institutions. First, I examine how legal scholarship in Canada has begun to recognize the independently grounded claims of First Nations. Second, I contrast intergovernmentalism, an extension of the
modern view of the state to the role of regional organizations, with approaches that recognize the unique nature of the EU as a regional organization.

In section 3, I explore how to proceed in the face of the conclusion that the standard model of democratic legitimation cannot accommodate the circumstance of substantive jurisdictional conflict. The role of the state, I argue, must be decentered in order to consider non-state institutions as additional objects of democratic legitimation. This kind of transformation to the standard model will open avenues for democratic control that are currently blocked by the state, and thereby enhance the ability of individuals and political communities to rule themselves.

1 The Modern View of the State

What is the state? In the modern era, it has been conceptualized as the paradigm of political organization. In Skinner’s words, “with [the] analysis of the state as an omnipotent yet impersonal power, we may be said to enter the modern world…”1 The state is omnipotent under the modern view in several senses. First, it enjoys a monopoly of violence with respect to its population. In Weber’s famous definition, the state is “that human community that

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(successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory.⁴ This monopoly of violence extends not only to individuals but also to associations within the territory of the state. Non-national political communities, for instance, are associations that must bow to the power of the state as the preeminent institutional authority. Second, the state is omnipotent in the sense that it has no institutional challengers to its authority within its territory.⁵ All non-state institutions must either derive their power and legitimacy from the state, or if they exercise power and enjoy legitimacy independently from the state, they must not challenge it.

Regarding the impersonal power of the state, the most direct meaning of this part of Skinner’s claim is that modern state power is not vested in a single figure like a king. Another aspect of the impersonal power of the state is captured by Weber’s analysis of the rationalizing force of modern bureaucracy.⁴ But with respect to a theory of democratic legitimation, the most relevant sense of Skinner’s claim about the impersonal power of the state concerns its relationship with the people. In the standard model, the state is the primary object of democratic legitimation and the national political community is the primary subject. The state is an impersonal site of power because it embodies the people’s exercise of political authority: it is their ultimate political relationship. This point is related to the previous point on the state’s

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omnipotence: it is the ultimate institutionalized political relationship because its authority rises above all individual or associational concentrations of power.⁵

Kant provides a good historical example of how the modern view gives the state a privileged position with respect to other institutions. The purpose of a nation-state, Kant argues, is grounded in the duty of individuals to form themselves into law-governed communities; by channeling all coercive action, the law-governed community avoids the potential anarchic violence of the state of nature.⁶ Then, through an analogy with the moral personality of the individuals, Kant sets the state apart from other institutions.⁷ Nagel’s recent work is a contemporary example. He targets cosmopolitans and claims that they view states, along with all other institutions, as “instruments for the fulfillment” of our duties to individuals.⁸ By contrast, ‘political’ theorists like himself hold that “sovereign states are not merely instruments for realizing the pre-institutional value of justice … [but are] precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they

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do not have with the rest of humanity." This addresses the relation between the concepts of the individual, the political community, and the state by pointing to the latter as the site where the core of politics happens; the state is the justice-creating relationship for individuals, and is where the individual acts as part of a political community.\(^9\)

The modern view ascribes a variety of normative features to states that bolster its privileged position with respect to non-state institutions.\(^11\) Most importantly, states are sovereign. In his classic formulation, Hinsley defines sovereignty as “a final and absolute political authority in the political community… and no final and absolute authority exists elsewhere.”\(^12\) Onuf gives a broader definition that encompasses popular sovereignty, coercion, and majesty:

> Agents are responsible, even finally responsible, but always on behalf of the body politic, whose being defines their purpose. When agency such as this is combined with a large measure of majesty and an uncontested claim to rule within a certain territory, they fuse not just as the state’s shell but as its primary architecture. The state is the land, the people, the organization of coercion and a majestic idea, each supporting and even defining the other, so that they become indivisible.\(^13\)

\(^9\) *Ibid.*, pp. 119-120. Nagel uses the term ‘political’ because it exemplifies “Rawls’s view that justice should be understood as a specifically political value, rather than being derived from a comprehensive moral system, so that it is essentially a virtue – the first virtue – of social institutions” (p. 120).

\(^10\) Cohen and Sabel, in “Extra Rempublicam Nulla Justitia?” *Philosophy and Public Affairs* 34 (2), 2006: 147-75, embrace the challenge of accommodating substantive jurisdictional conflict: “whatever we may think of the victory of modern accounts of sovereignty and justice over a tradition of ‘associative justice’ (*Genossenschaftsrecht*), which rooted norms in a variety of forms of human association not confined to the state, it is now a mistake to assign the state so fundamental a role in political morality” (p. 149). They suggest instead that attention be paid “to the general class of justice-generating political relations of which the relation of co-citizen is one particular (and important) case” (*ibid.*).

\(^11\) Thanks to Nancy Bertoldi for helping me to formulate this point.


Other theorists have identified territoriality as a normative feature of the state. Rawls’s work, while it does not emphasize state features like sovereignty or territoriality, also normatively privileges the state. In his domestic theory, this occurs through the assumption that the state is the default mode of political organization that institutionalizes the achievement of a society’s key values. In his work on international affairs, the exclusivity associated with the modern view of the state is transferred onto the new concept of a people.

Because it possesses normative features like exclusive sovereignty, the state is considered the primary object of democratic legitimation on the standard model. Rabkin’s argument that states do not need to acknowledge the claims of other institutions within their territory is perhaps the most direct statement of the link between exclusive sovereignty and democratic legitimation. In Buchanan and Powell’s wording, Rabkin’s ‘exclusive accountability’ view

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15 Rawls writes that his focus on a closed society, while a “considerable abstraction”, is “justified […] because it enables us to focus on certain main questions free from distracting details” (Political Liberalism. New York: Columbia University Press, 1993, p. 12). Although he does leave considerable room for other spheres of society, such as universities and churches, the important choice of the state as the background form of political organization that will institutionalize the key prescriptions is largely assumed. Also see Justice as Fairness: A Restatement, ed. Erin Kelly (Cambridge, Mass.: Belknap Press, 2001), pp. 11-4, and Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (New York: Basic Books, 1983) and “The Moral Standing of States: A Response to Four Critics” Philosophy and Public Affairs 9 (3), 1980: 209-229.


emphasizes the democratic importance of sovereignty: “a state is non democratic if its citizens are subject to any political authority that is not exclusively accountable to them.” Rabkin, in other words, is centrally concerned with maintaining the link between the bounds of the state and the bounds of democratic legitimation. Nagel’s view is not stated as strongly as Rabkin’s, but it leaves little room for democratic legitimation beyond the state. Even Rawls, who limits the sovereignty of peoples by removing their right to wage war and insisting they must respect human rights, focuses on the democratic character of peoples, not the promotion of democratic processes at institutional levels above, below, or across them. For each of these thinkers, the claim that the state is the object of democratic legitimation is linked to the claim that it possesses normative features like exclusive sovereignty.

The claim that the state is the primary object of democratic legitimation supports a contrast between its internal affairs and external relations. Internally, sovereign states enforce the protection of basic rights, redistribute income, and have – at least conceptually – ultimate authority over the other institutions in society. They are seen as both the legitimate depository of

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20 See Law of Peoples, §§7-9 and my discussion in chapter 5, section 2.

21 See Martin Wight, “Why is There No International Theory?” International Relations 2 (1), 1960: 35-48, 62 and R.B.J. Walker, Inside/Outside: International Relations as Political Theory (Cambridge: Cambridge University Press, 1993). The contrast between inside and outside supports a simplified but illustrative contrast between the way the political theory and International Relations (IR) literatures have approached the state. The former has been concerned largely with issues of internal sovereignty, such as limiting the power of government over the lives of individuals, while the latter has been concerned with issues of external sovereignty, such as the causes of war. Political theory has been inward looking, then, treating the state as background rather than foreground, while IR has put lesser weight on what happens inside the state than on its comportment towards other states.
citizen input and the coercive authority that applies decisions. While accounts such as Hinsley’s emphasize that sovereignty conveys finality, accounts of external sovereignty emphasize contingency. States must struggle for both recognition from other states and to promote their interests in an environment defined by the fact that no entity possesses the final authority characteristic of the dominance sovereignty confers over internal affairs. The doctrine of non-intervention in the internal affairs of states and the international, not cosmopolitan, construction of law are prominent markers of the contrast between inside and outside.

In sum, the modern view of the state ascribes normative features to states, the most important of which is an exclusive conception of sovereignty. These normative features support the idea that – at least within its territory – the state is the paradigmatic form of an institutionalized political relationship. This view of the state’s position directly justifies its place as the primary object of democratic legitimation in the standard model. Of course, the legitimation of authority should in general be aimed at the institutions that have the most power. In the modern era, states have unquestionably been important sites of power. They continue to be so. The argument that follows does not question either the idea that states remain important sites of power or the idea that they are important objects of democratic legitimation. However, the circumstance of substantive jurisdictional conflict does challenge the position of the state in

22 Canonical IR texts that offer theories of the behaviour of states within an anarchical system include Kenneth Waltz, Theory of International Politics (New York: McGraw-Hill, 1979) and Robert Gilpin, War and Change in World Politics, (Cambridge: Cambridge University Press, 1983). Also see Alex Wendt, Social Theory of International Politics (Cambridge: Cambridge University Press, 1999), and Bull’s English School view of a society of states in The Anarchical Society.

23 Krasner argues that ‘Westphalian’ sovereignty was both normatively adhered to and continually violated in practice: “The exclusion of external actors from internal authority arrangements […] has been widely recognized but also frequently violated,” Sovereignty (Princeton: Princeton University Press, 1999), p. 8.
the standard model. In particular, it challenges its privileged position with respect to non-state institutions.

2 Distributing Sovereignty

Substantive jurisdictional conflict, as I noted above, describes the circumstance where non-state institutions represent a territory which overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, but do not seek to form states themselves. I argue in this section that substantive jurisdictional conflict presents a distinctive challenge to the standard model of democratic legitimation. Rather than focusing on developments that threaten state capacity, such as the growing authority and influence of multinational corporations on national decision-making, it names distinct institutions whose claims clash with those of the state, and which are independently grounded from it. I first give several examples of non-state institutions that come into substantive jurisdictional conflict with the state: national minorities that do not seek their own state, indigenous political institutions, regional organizations, a universal institution such as the United Nations, and cities. I then assess the prospects of addressing substantive jurisdictional conflict by unbundling the state’s sovereignty. Even under an adapted standard model that distributes some of the state’s sovereignty to non-state institutions, I will argue, the state will retain its privileged position.
2.1 Examples of Substantive Jurisdictional Conflict

A first example of substantive jurisdictional conflict is the case of national minorities that do not seek their own state: their institutions will create substantive jurisdictional conflict if they seek a range of autonomous authority that they ground independently of the state. The case of the Quebecois in Canada is an interesting example. Many Quebecers are sovereigntists, meaning they wish to separate from Canada and form their own state. But those who wish to remain a part of the Canadian state – currently the majority – conceptualize their jurisdictional claims in a way that meets the conditions I have set out for substantive jurisdictional conflict. That is, they claim the Quebec provincial government has authority over a part of the territory of the Canadian state, that the ground of this claim is independent of the Canadian state, and that the end of their claims is not a separate state but a cooperative relationship with Canada. Theorizing these claims under the rubric of substantive jurisdictional conflict, I suggest, will ameliorate several of the shortcomings of a federal model of accommodating the demands of a national minority. For example, a federal approach can suggest the dominance of the Canadian government over its provincial units. Such a suggestion, of course, is rejected by both sovereigntist and many non-sovereigntist Quebecers. If the suggestion of federal dominance is avoided by holding that the units are the dominant players in the system, or at least the equals of the federal level, then equivalence between Quebec and other Canadian provinces is implied. By contrast, conceptualizing the claims of Quebecers under the rubric of substantive jurisdictional conflict would acknowledge the territorial overlap between Canada and Quebec, the mutual desire of the

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two parties for a continuing relationship, and the independent grounding of the latter’s jurisdictional claims.

Indigenous political institutions are a second example of non-state institutions that come into substantive jurisdictional conflict with the state. As I will discuss further in chapter 6, First Nations in Canada live on the same territory and under the same laws as other Canadians, but demand the jurisdiction necessary for self-determination. While their struggle for self-determination is usually and correctly characterized as a struggle against colonialism, I believe that an exclusive conception of the state’s authority is an important factor in explaining why state citizenries continue to deny or misrecognize the independently grounded jurisdictional claims of indigenous peoples. Conceptualizing the struggle of indigenous peoples for self-determination under the rubric of substantive jurisdictional conflict does raise a host of challenging issues, but it has advantages over alternatives such as conceptualizing indigenous peoples as national minorities. I discuss how legal theorists have sought to recognize the independent nature of indigenous jurisdictional claims below in section 2.3.

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26 The foremost of these advantages is the explicit acknowledgement of the temporality of the modern state form: recognizing the claims of indigenous political institutions as independently grounded is not something that could be countenanced by the modern view of the state. I also discuss the view that indigenous peoples should be conceptualized as national minorities in chapter 6. See Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), pp. 75-80, Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto, 2nd ed.* (Don Mills, Ont.: Oxford University Press, 2009), pp. 77-84, and Dale Turner, *This Is Not a Peace Pipe*, (Toronto: University of Toronto Press, 2006), p. 70.
Regional organizations are a third example of non-state institutions that can come into substantive jurisdictional conflict with the state. While all regional organizations claim jurisdiction over the territory of their member-states and do not seek statehood, only some ground their claim to authority in more than intergovernmental agreement among member states. For example, the EU explicitly claims to represent the interests of the citizenry of the region as a whole. I discuss this case further in section 2.4.

A fourth example of substantive jurisdictional conflict is a universal institution such as the United Nations, insofar as its claim to authority proceeds at least partially on the basis of the interests of all persons as human beings as opposed to solely on the basis of the interests of member-states. Of the many institutions of the UN, some do advance their jurisdictional claims on this basis. For example, the International Criminal Court, while acknowledging limits to its jurisdiction based on the continuing influence of powerful member-states, justifies its mission in terms that reach well beyond state-centrism.27

Cities are a final example of substantive jurisdictional conflict. Although few cities have or demand a level of autonomy that rises to the level of independence from states found in the other examples, further development in the intensity of local identification could change this. Sassen, notably, has argued that an emerging global organizing logic is breaking down the centripetal or state-centric pull of the national order and is instead centrifugal: it “disaggregates [the] master normativity [of the national] into multiple partial normative orders.”28 In the

28 Territory, Authority, Rights, pp. 10, 412.
centrifugal world order that Sassen describes, local identification could become increasingly important.\textsuperscript{29}

2.2 The Challenge to the Standard Model

The standard model of democratic legitimation names the state as the primary institutional object of legitimation and the national political community as the primary subject. The examples of substantive jurisdictional conflict given above threaten this link between the state and the national political community. In particular, they name situations where a non-state institution could act as an additional object of legitimation alongside the state. Importantly, the jurisdictional claims of these non-state institutions are grounded independently of the state. Also, the non-state institutions in the examples above do not seek statehood; rather, they acknowledge a continuing relationship with the state. This latter point makes it clear that the challenge posed by the circumstance of substantive jurisdictional conflict to the standard model does not concern sovereignty in the sense of statehood. Rather, what is directly targeted is the exclusive nature of the state’s sovereignty within its own territory. Put another way, the normative challenge that arises from the empirical circumstance of substantive jurisdictional conflict concerns the \textit{distribution} of sovereignty.

This description of the nature of the challenge posed by substantive jurisdictional conflict to the standard model raises the most direct way to adapt the latter to the facts described in the former: unbundle some of the state’s sovereignty and distribute it to non-state institutions. The literature on unbundling breaks the sovereignty of the unitary state into component parts. Slaughter, for instance, conceptualizes disaggregated sovereignty in terms of formalizing the practice of government regulators, judges, and legislators interacting with colleagues in other states and international organizations to solve collective problems. But how might the unbundling of sovereignty, a conceptualization aimed primarily at international regimes and organizations, and networks of government officials, be applied to the relationship between states and non-state institutions that make independently grounded jurisdictional claims?

Under the modern view of the state, and by extension the standard model of democratic legitimation, states can distribute jurisdiction to non-state institutions for their own, internal reasons. Such distributions could involve creating a shared area of authority or transferring the authority of the state over an issue area to a non-state institution. Potentially, such distribution could be extensive, such that the citizenry of a state could argue that non-state institutions have sufficient jurisdictional authority to achieve their interests and projects. Moreover, they could claim that distributing jurisdiction in this way enhances democratic legitimation by giving non-

state institutions some scope of independent action, while also retaining a role for the state in managing the actions of non-state institutions.

There are several problems, however, with accommodating the claims of non-state institutions in this way. First, there is the problem of recognizing their claims where there is a large power differential between the state and the non-state institution. In other words, if the challenge of non-state institutions to state authority is not strong enough, states can safely ignore their claims. As I note in chapter 6, such neglect characterized the situation of First Nations in Canada for much of the nineteenth and twentieth centuries – and arguably continues today. Second, the modern view’s ascription of exclusive sovereignty to states is normally understood to include the proviso that the state can withdraw from an agreement to share or transfer jurisdiction to a non-state institution. This proviso affects how the claims of non-state institutions are conceptualized by state decision-makers and citizenries. They are seen either an internal challenge – pressure from an indigenous group, for example, for self-government powers – or an external challenge of bargaining with other states – demands for trade liberalization, for example. With each kind of challenge, it may be in the interest of the state to respond by distributing jurisdiction. But a distribution of jurisdiction will be viewed as a solution to a particular state policy problem, not a reconciliation of conflicting, independently grounded jurisdictional claims between a state and a non-state institution. Again, the protection of indigenous rights by the state is an important example. Can an indigenous political institution be sure of its authority when the state retains the ability to change its mind on crucial matters of

policy, or at the limit, revise its own constitution? This right of exit, grounded in the traditional inability to bind a sovereign, can have a destabilizing effect on non-state institutions.

These two problems, in my view, arise from the way the modern view conceptualizes the state’s relationship with non-state institutions. There are two related aspects of this conceptualization. First, there is a claim about the jurisdictional authority of the state: it is exclusive of the claims of other, non-state institutions. The basic idea is that the state is independent of, and in some way superior to, non-state institutions. Second, non-state institutions are conceptualized as created by and serving the interests of the states. On analogy to international organizations, which are creatures of and serve the interests of states, all non-state institutions are conceptualized as responsive agents, with states as their controlling principals. These two points are buttressed in the standard model by its definition of the link between the national political community and the state as the ultimate relationship of legitimation. Giving the state this privileged position means that it will retain control over other institutional locations of legitimation, even when it distributes some of its sovereignty to non-state institutions.

To show the insufficiency of this conception of the state’s position in the face of substantive jurisdictional conflict, I next discuss aspects of the two cases explored later in the dissertation in chapters 6 and 7. First, I outline how legal theory in Canada is beginning to account for the independently grounded claims of First Nations. Second, I explore the weaknesses of the intergovernmentalist approach to European integration. In particular, I argue that it fails to explain why European states have distributed a significant amount of their sovereignty to the regional level.

2.3 The Independently Grounded Claims of First Nations in Canada

Are the jurisdictional claims of the state exclusive of other, non-state institutions? And are the latter agents of the former? Canadian legal scholars have developed a body of theory on the jurisdictional claims of First Nations that answers each of these questions in the negative. Henderson, for example, argues that the source of aboriginal rights is not found within the traditional Canadian legal order, but in distinct indigenous legal orders that exist alongside the Canadian constitution. According to Henderson, the Supreme Court could take further steps to recognize this reality: “Although the Court has acknowledged and established that Aboriginal rights are distinct from law and societies derived from the liberal enlightenment, it has not comprehended the complete significance of this holding” (p. 93).

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33 First Nations Jurisprudence and Aboriginal Rights (Saskatoon: Native Law Centre, University of Saskatchewan, 2006).

34 Ibid., p. 95. According to Henderson, the Supreme Court could take further steps to recognize this reality: “Although the Court has acknowledged and established that Aboriginal rights are distinct from law and societies derived from the liberal enlightenment, it has not comprehended the complete significance of this holding” (p. 93).
As much as possible, Henderson suggests that Canadian jurisprudence on Aboriginal and treaty rights should acknowledge and employ this other legal source. In fact, Henderson notes, the evolution of the Court’s interpretation of Sec. 35 of the Constitution Act, 1982, has moved in the direction of acknowledging the independent grounding of Aboriginal claims to jurisdiction.\(^\text{35}\)

For example, in the landmark 1997 *Delgamuukw* decision the Court stated that: “although the doctrine of Aboriginal rights is a common law doctrine, Aboriginal rights are truly *sui generis.*”\(^\text{36}\)

Macklem’s attempt to reconcile indigenous difference with the Canadian constitution is another example.\(^\text{37}\) He conceptualizes indigenous difference in terms of four interests: culture, sovereignty or self-government, territory, and treaty rights. On the basis of these four interests he builds a general case for the unique constitutional relationship between Aboriginal peoples and the Canadian State and the responsibilities this generates for the latter. The central constitutional value of equality, Macklem argues, demands accommodation of the interests generated by indigenous difference.\(^\text{38}\)


\(^\text{36}\) *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 82. At para. 114, the judgment states: “Aboriginal title arises from the prior occupation of Canada by aboriginal peoples … *before* the assertion of British sovereignty” (emphasis in original).


\(^\text{38}\) The Supreme Court, Macklem thinks, must ground Aboriginal and treaty rights in what he calls ‘complex social facts’. These facts are: “First, Aboriginal people belong to distinctive cultures that were and continue to be threatened by non-Aboriginal beliefs, philosophies, and ways of life. Second, prior to European contact, Aboriginal peoples lived in and occupied vast portions of North America. Third, before European contact, Aboriginal people not only occupied North America, they exercised sovereign authority over persons and territory. Fourth,
peoples as grounded independently from the traditional understanding of the Canadian legal order. The distribution of sovereignty within the Canadian State, as he says, is “heterogeneous in its forms and sources.”

However, the challenge of reconciling heterogeneous forms of sovereignty is displayed in Macklem’s subsequent analysis of specific Supreme Court of Canada decisions. In reference to the *Van der Peet* ruling, for example, he argues that it is inappropriate for the court to define what constitutes core and peripheral aspects of indigenous culture. Instead, the judiciary should affirm constitutional recognition of the aboriginal interest in sovereignty – understood here as comprising powers of self-government – so that First Nations can themselves steer the development of their culture. But, as he then notes, this recommendation would task the judiciary with settling disputes on the extent of aboriginal jurisdiction:

Even constitutional recognition of a right of self-government would not completely resolve this dilemma, given that the judiciary presumably would be

Aboriginal people participated and continue to participate in a treaty process with the Crown.” See *Indigenous Difference and the Constitution of Canada*, p. 4.

As Macklem acknowledges, more radical critics deny that the Canadian Constitution has any jurisdiction over First Nations. His response is that “the constitutional task is not to cede the responsibility to address [the injustice of relations between Canada and First Nations] to the international arena”, but to examine how to accommodate indigenous difference within the Canadian constitution. This will require “a non-absolute, pragmatic conception of sovereignty that contemplates a plurality of entities wielding sovereign authority within the Canadian constitutional order” (*Indigenous Difference and the Constitution of Canada*, p. 7).

Macklem, *Indigenous Difference and the Constitution of Canada*, p. 111. Aboriginal sovereignty “represents one strand in a larger web of entities that exercise some degree of sovereign authority over land and people” (*ibid.*).

*Van der Peet* [1996] 2 S.C.R. 507. This case concerned the aboriginal fishing rights of the Sto:lo Nation.
charged with the responsibility of policing the boundaries of Aboriginal jurisdiction.42

On the one hand, then, Macklem argues that it is inappropriate for the Court to decide what is a core indigenous cultural practice. On the other hand, he flags but does not pursue the similar problem that the Court will be faced with the challenge of deciding on the extent of aboriginal jurisdiction. The explanation is that the latter issue requires a political solution. While the Court can make limited steps towards recognizing and affirming the Aboriginal and treaty rights referred to but not defined in the Constitution Act, 1982, it should not pursue a wholesale program of defining the extent of Aboriginal jurisdiction.

What shape might a political solution to the jurisdictional conflict between states and indigenous political institutions take?43 For the modern view of state, the model solution is arguably the treaty.44 As I will discuss in chapter 6, in a treaty powers of self-government, such as control over resource development or educational policy, can be distributed to indigenous political institutions. However, if the reason for signing the treaty on the state’s part refers only to its own interests – that is, to its need to resolve an internal challenge to its authority – then I suggest that the problematic aspects of the way non-state institutions are conceptualized under

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43 It could be argued that a political solution will endanger protections that First Nations have gained through the Constitution Act, 1982, and other legal rulings such as Delgamuukw. I will discuss this danger further in chapter 6. For now, I simply note that while it is ultimately up to indigenous political communities to decide on the best strategy to pursue in defense of their rights and title, an advantage of advocating a political mode of reconciliation over a judicial one is that it places responsibility on the appropriate actors: state citizenries. Whether citizenries will take up their responsibilities will depend on factors such as public education about the treaty process.

44 Thanks to Nancy Bertoldi for helpful comments on this point.
the modern view of the state will remain.\textsuperscript{45} I will argue that a key to the success of a treaty, as with other approaches to reconciliation between the state and First Nations, will be the recognition on the part of the state that the jurisdictional claims of indigenous political institutions are independently grounded.

2.4 The European Union as an Agent of the Member-States: Intergovernmentalism

Do states control regional organizations like the European Union (EU)? Intergovernmentalism is an extension of the modern view of the state to the problem of explaining post-war European integration. Its strengths are an emphasis on the reality that major EU decisions are taken in intergovernmental conferences, the fact that the federal institutions of the Union, like the Parliament, are comparatively weaker than the member-state dominated institutions like the Council, and the fact that states retain the option to exit the Union (although such a move would be costly). Furthermore, intergovernmentalism offers an account of why member-states decided

\textsuperscript{45} Even the state’s characterization of its responsibilities towards indigenous peoples in terms of fiduciary duties can be seen as a product of the modern view of the state. Rather than conceptualizing indigenous political institutions as responsible for policy outcomes in areas under their jurisdiction, the state can take responsibility for negative outcomes by conceptualizing itself as the ultimate protector of the individual interests of indigenous persons. \textit{Guerin v. The Queen} [1984] 2 S.C.R. 335 is the key Supreme Court of Canada decision recognizing the state’s fiduciary duties towards indigenous peoples. The end of self-determination through institutions of their design, by contrast, describes the aims of an indigenous political community independently of a reference to the state.
to distribute jurisdiction to the regional level. Moravscik, for example, points to “patterns of commercial advantage” as a key explanation for regional integration.\(^{46}\)

But, as Anderson argues in a lengthy critique of Moravscik, why does the EU not look more like NAFTA? That is, would not a simple free trade area better meet Moravscik’s standard of advancing commercial interests than the dense bureaucracy that actually comprises the EU?\(^{47}\) Michael Zürn offers another critique of intergovernmentalism. It makes little sense, he argues, to conceptualize the legitimation of the EU on a “delegated, and therefore controlled” line of reasoning because institutions like the EU no longer only address states, but increasingly direct their attention toward societal actors as well.\(^{48}\) Also, they deal with ‘behind-the-border’ issues in addition to regulating cross-border transactions.\(^{49}\) These features of the ‘new’ international institutions mean that state-level accountability mechanisms are “losing their anchorage”.\(^{50}\) The


\(^{47}\) Anderson, *The New Old World* (London: Verso, 2009), p. 86. In Rosamond’s view, the direct challenge to intergovernmentalism is to provide an explanation for why European states have voluntarily given up some of their autonomy (*Theories of European Integration*, p. 151).


EU has acquired expanded authority alongside expanded influence, and this implies in turn that its legitimacy can no longer be solely derivative on that of its member-states.\textsuperscript{51}

Indeed, the persistent calls to improve the EU’s input legitimacy – its ‘democratic deficit’ – are further evidence of the insufficiency of intergovernmental accounts of its role. In intergovernmentalist analysis, the policy solutions reached at the regional level are conceived in largely non-political terms; output legitimacy is considered more important than input legitimacy. But the EU has moved beyond the point where output legitimacy is sufficient.\textsuperscript{52} The focus on democratic reform of EU institutions in recent negotiations over the Constitution and Lisbon Treaty, the widespread dissatisfaction with the results of these negotiations, and the fierce debate over the role of the EU in solving the current sovereign debt crisis, are evidence of the EU’s legitimacy crisis.\textsuperscript{53}

Indeed, from the very beginning of European integration through the European Coal and Steel Community (ECSC), academic and public conceptualizations of purpose of integration


\textsuperscript{53} In chapter 6 I contrast the current plan for resolving the sovereign debt crisis, which emphasizes the intergovernmental mechanisms of EU governance, with an alternative that would see the EU take on a more prominent role in creating and regulating regional policy.
have challenged intergovernmentalism. Proponents of federalism envisioned the eventual creation of a European superstate. Neofunctionalists argued that traditional state sovereignty is eclipsed by the interdependence of overlapping state and regional institutions. Supranationalists, heirs to both federalism and neofunctionalism, emphasize the ways in which EU institutions directly challenge traditional understandings of exclusive state authority. They note, for example, the EU’s legal superiority over member-states in a variety of areas and the fact that individuals hold citizenship in both their state and the EU. Others argue that much of the EU’s authority is regulatory, and describe a complicated overlap between member-state and regional interests.


55 Rosamond, *Theories of European Integration*, ch. 2.


58 The doctrine of direct effect requires that member states implement laws made at the European level. See Weiler, “The Transformation of Europe” in *The Constitution of Europe*.

In chapter 7, I explore the nature of the EU at greater length. As I note there, major EU decisions are made in intergovernmental conferences, in response to the interests of the most powerful member-states. I will argue, however, that the EU should be conceptualized as an institution that plays a distinctive primary role. The reason is that the density of institutional meshing that regional cooperation involves demands democratic legitimation that reaches beyond what can be provided by the member-states.

3 Unbundling versus Decentering

The modern view of the state, I have argued, ascribes normative features to the state that non-state institutions lack, such as exclusive sovereignty. The influence on the standard model of democratic legitimation is that the independent grounding of the claims of non-state institutions will be disregarded, or unreasonably reduced in importance. This can happen in two ways. First, because the state has the feature of exclusive sovereignty it is conceptualized as superior to non-state institutions. Second, states view themselves as controlling principals and non-state institutions as responsive agents. The activities of the latter depend on the license of the former; a certain latitude in activity may be allowed, but only when the state finds it in its interests to allow the activity, or at least not prohibit it. Often, these two aspects of the way states conceptualize their relationship with non-state institutions are not even brought to the surface. They are a default view, with the state as the institution that is taken-for-granted. In fact, as I noted in the previous chapter, the very meaning of democracy on the standard model is closely tied to the state as the primary institutional object of legitimation. This tight link between the
state and the meaning of democracy delegitimizes the potential role played by non-state institutions.

Even attempts to unbundle the state’s sovereignty in response to the claims of non-state institutions, I have suggested, must be carefully evaluated. Does the state remain the dominant partner in the relationship with a non-state institution? Can the distribution be retracted at the state’s wish? Is the distribution aimed at fulfilling state interests or the interests of the non-state institution? Where the state remains the dominant partner, is able to withdraw if it wants, and does so out of self-interest, I suggest that there is good reason to question whether the substantive nature of the jurisdictional conflict between the state and the non-state institution has been recognized.

If the standard model must be rejected, what shape will a replacement take? One clear advantage of the standard model is that it has unambiguous institutional implications for the possibility of democratic legitimacy: state boundaries delimit the legitimate polity and non-state institutions refer back to the state for their authority. A key challenge in defending my argument that non-state institutions can provide important supplementary locations of democratic legitimation alongside states will be to show how citizenries can distribute some of the jurisdiction of their state while maintaining their constitutional democracy. In the following chapter I discuss the decentering theorists David Held and James Bohman, each of whom decenter the state from its position as the paradigmatic object of democratic legitimation. Their theories go beyond unbundling the state’s sovereignty towards conceiving of non-state institutions as important sites of democratic legitimation in their own right.
Chapter 3. Decentering the State

I argued in the previous chapter that the standard model of democratic legitimation cannot be adapted to recognize the circumstance of substantive jurisdictional conflict. The problem is the influence of the modern view of the state, which ascribes normative features to states such as exclusive sovereignty. The state will retain its privileged position with respect to non-state institutions, I argued, even when some of its sovereignty is unbundled. Only decentering the state, I suggested, will provide a basis for recognizing the independently grounded claims of non-state institutions. In this chapter, I discuss the work of two decentering theorists, Held and Bohman. Each decenters the state from its position in the standard model as the primary object of democratic legitimation. This opens avenues for democratic legitimation currently blocked by the state and thereby enhances the ability of individuals and political communities to rule themselves.

In section 1, I show how Held decenters the standard model with the principle that people should have a say in decisions that affect them. As globalization opens up the state, he argues, the congruence between a citizenry as the subject of democratic legitimation and the state as the object is breaking down. As an alternative, he proposes that a multilevel institutional system, guided by cosmopolitan law, can match those making decisions with those affected by them. Held’s approach provides a powerful resource for non-state institutions to advance their claims vis-à-vis states: when a non-state institution lacks the jurisdictional authority to advance its own interests and projects, it can present its claim in terms of an incongruence between the authority of the state and those affected by its decisions. But while Held’s approach provides this
important resource, it has several weaknesses. First, it is unclear how affectedness will be measured. Second, cosmopolitan law seems unlikely to have the ability to back up its decisions.

In section 2, I reconstruct Bohman’s decentering approach as centrally concerned with the individual’s ability to shape his or her political world. To ensure this ability, Bohman argues, each individual must have the ‘democratic minimum’, a package of statuses secured at a variety of institutional locations. Importantly, these institutional locations are legitimated by multiple and overlapping démoi. As was the case with Held, this decentering of the state provides an important normative resource: individuals have a minimum status that allows them to attempt to shape their political relations in a way that avoids domination by others. I argue, however, that a weakness of Bohman’s account is that it does not explain how the normative status of the democratic minimum will be secured by actual institutions.

In section 3, I note that while Held and Bohman make important contributions to the project of decentering the state, they do not directly address how non-national political communities will pursue their interests through non-state institutions. Held emphasizes the realignment of authority and affect under a top level of cosmopolitan law over attention to the identity and interests of political communities. Bohman’s account of how individuals can possess the resources with which to form multiple, overlapping démoi pluralizes the subject and object of democratic legitimation on the standard model, but it also neglects to address the identities and interests of settled political communities. While the decentering approaches of Held and Bohman open avenues for democratic legitimation currently blocked by the standard model of democratic legitimation, I will conclude, a less fluid accounting of the identity and interests of political communities is required in order to address the particular circumstance of substantive jurisdictional conflict.
1 Held on Congruence

Held’s decentering of the modern view of the state is grounded in the claim that autonomy, understood in a structural as opposed to an individualistic sense, lies at the core of the liberal and democratic traditions of political thought:

For persons to be free and equal in the determination of the conditions of their association requires, in brief, a common structure of political action which specifies the rights and obligations which are necessary to empower them as autonomous agents. The principle of autonomy, entrenched in democratic public law, ought to be regarded [...] not as an individualistic principle of self-determination, where ‘the self’ is the isolated individual acting alone in his or her interests, but rather, as a structural principle of self-determination where ‘the self’ is part of the collectivity or ‘the majority’ enabled and constrained by the rules and procedures of democratic life.¹

Until recently, Held thinks, the democratic constitutional state has provided the ‘common structure of political action’ for enabling and constraining autonomy. But the increasing entanglement of individuals in webs of interdependence that are normatively significant calls into question whether the state can still play this role. In a globalizing world, Held writes, “shifting patterns of powers and constraints [...] are redefining the architecture of political power associated with the nation-state.”² In response to this already-occurring redefinition of political power, Held proposes to disperse the authority once grounded in the nation-state over a

multilayered system, anchored in a top level of cosmopolitan law. The levels of this multilayered system include a strengthened United Nations (UN), regional organizations like the European Union (EU), and issue-specific organizations for important global policy areas such as trade or the environment. Dispersing authority in this way attempts to realign the interests of those making decisions with the interests of those affected by them.

How exactly will authority be dispersed to non-state institutions? Held offers three principles, which together constitute a form of the all-affected principle of democratic legitimacy. The first two are extensity of influence, or scope, and intensity of affectedness, or degree of impact. A third principle of subsidiarity says that decisions should be made at the lowest possible level. For those issues like climate change, for example, which have widespread effects across the globe, on poorer countries perhaps more than richer ones, a global institution will be required to coordinate a policy response and block the evasion of responsibility by the more powerful. Local issues, by contrast, require vesting decision-making authority and the responsibilities that come with that authority in local institutions. To resolve disputes about the authority to make decisions, Held turns to the principles and rules of a top level of cosmopolitan law. Thus, after decentering the state, Held partially recenters political authority in cosmopolitan law. Acting as the new common structure of political action, this law is the control mechanism that will entrench and promote democratic voice. It includes principles and rules for deciding which institutions will tackle which policy issues over which territories, and can arbitrate jurisdictional conflicts between different institutional units.

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The all-affected principle provides a powerful resource with which non-state institutions can advance their claims against states: they can argue that there is an incongruence between the authority of the state and those affected by its decisions. While Held’s approach has this advantage, it is somewhat unclear how affectedness will be measured. This is partly a problem of identifying the affected parties and partly a problem of judging the intensity of affect across diverse national and non-national political communities. The difficulty in answering these questions is compounded by the boundary problem: the puzzle that a democratic determination of institutional boundaries appears to be blocked by the prior need to define a demos.⁴ Held’s tests of extensity, intensity, and subsidiarity are designed to solve this problem, but as some commentators have argued, using the principle of all-affected interests to solve the boundary problem is not straightforward.⁵ For example, Saward argues that Held jumps the gun by proposing new and permanent, territorially-based institutions as the solution to misalignment of decision-makers and decision-takers. There are other democratic mechanisms, he suggests, that can deal with cases of temporary mutual affectedness where the affected parties may not map


easily onto an existing territorial unit. As examples of alternative democratic mechanisms that might lessen the urgency of Held’s reforms, Saward lists cross-border referenda and deliberative forums, among others. Such proposals are valuable because they make room for what Saward calls ‘subjective’ determinations of mutual affectedness, where interested individuals and groups themselves push for alternative democratic mechanisms to tackle the issues that concern them. Such subjective determinations will be more organic, and less controversial, than objective determinations that depend only on the theorist, or a court, deploying Held’s three principles. And, subjective determinations of mutual affectedness will be the product not only of individuals, but also of the diverse political communities individuals belong to.

An additional weakness of Held’s approach is that cosmopolitan law must have the ability to back up its decisions in order to effectively and fairly guide the dispersal of authority to different institutions. States, under the modern view, form a common structure of political action because they enjoy clear formal political authority within a delimited territory, and have the means to back up this authority. But how cosmopolitan law replicates the mode of state power is unclear. In order to maintain congruence between those making decisions and those affected by them, the layering of institutions under cosmopolitan law must be continually open to adjustment. The necessary adjustments could involve territory or jurisdiction. For example, depending on how the system is conceived, all institutions could have determinate territories and

7 Ibid., p. 43.
8 Courts and arbitration bodies rely on the legitimacy of the institutional contexts they inhabit, meaning that they cannot rule on jurisdictional issues without having their own legitimacy potentially called into question. For a form of this objection, see Saward, “A Critique of Held”, pp. 36-7.
be nested within each other, or some institutions could have global or regional jurisdiction over particular policy areas without having a determinate territory. In either case, the system cannot be static; cosmopolitan law must be able to guide the restructuring of the multilayered system so that institutions match the scope of policy issues. This could require lessening formal political authority over particular issues for some institutions, or revising the borders of others. Given the potentially controversial nature of such changes, the fact that cosmopolitan law will lack the clear political authority of states, including the ability to back up decisions with force, casts doubt on its ability to form a common structure of political action. It also seems unlikely that cosmopolitan law will be able to rely on states to enforce its decisions, since states are a likely subject of its decisions.

Despite these weaknesses, Held’s account provides an important principle for legitimating power exercised beyond traditional state institutions. As the idea that the state enjoys exclusive sovereignty becomes outdated, such an approach will become an increasingly important check on both the idea that state-centric democratic legitimation will be sufficient and the idea that technocratic, non-democratic concentrations of power are an acceptable alternative.

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10 One indication that cosmopolitan law will lack clear formal political authority and the ability to back up this authority is Held’s plural redescription of sovereignty as ‘malleable space-time clusters’ that can attach to different institutional levels. See *Democracy and the Global Order*, p. 234 and “The Transformation of Political Community” in *Democracy’s Edges*, eds. I. Shapiro and C. Hacker-Cordón (Cambridge: Cambridge University Press, 1999), pp. 104-8.

11 Held says that states will be “‘relocated’ within, and articulated with, an overarching global democratic law” (*Democracy and the Global Order*, p. 233). What this means is somewhat unclear, but Held does say that while states will still exist, they will ‘wither away’ in importance.


2 Bohman on the Democratic Minimum

Bohman calls the standard model of democratic legitimation the self-legislation ideal, after the way it aligns the authors of laws with the subjects of laws within a bounded territory. At first blush, Bohman’s rejection of the standard model seems to run along similar lines to Held’s. For example, he writes that globalization “fundamentally challenges [institutions associated with the state] and their assumptions of congruence between decision-takers and decision-makers, or the ruled and the rulers, in a territorially bounded political community.” Rather than simply lost congruence, however, Bohman conceives the imperative to decenter in a more radical way.

The current ‘circumstances of politics’, he contends, rule out adapting the self-legislation ideal. Attempts at adaptation will fail not only because of the complexity of problems and the proliferation of institutions with decision-making authority. In addition, the interdependence that is characteristic of a globalizing world produces what Bohman calls ‘indefinite affect’. To put it simply, different people experience globalization differently. Given this situation, we must rethink our democratic presuppositions and not simply adapt the idea of a unitary people creating the laws they are subject to. And in addition to lacking the theoretical heft to respond to interdependence, Bohman contends, the self-legislation ideal is actually a significant cause of

\[\text{\footnotesize \[13\] Bohman, Democracy Across Borders, pp. 4-5.}
\[\text{\footnotesize \[14\] Ibid., p. 23.}
\[\text{\footnotesize \[15\] Ibid., p. 24.}\]
domination. This argument reprises republican insights about the dangers of imperialism, including on the domestic political culture. For example, he claims that the fiction of sovereignty, and the related democratic ideal of popular sovereignty, can provide normative cover for the coercion or domination of non-citizens.\footnote{Ibid., pp. 33-5. Also see Bohman, “A Response to My Critics: Democracy Across Borders” \textit{Ethics and Global Politics} 3 (1), 2010, p. 75.}

In response to these circumstances, Bohman aims to decenter not only the state, but also the idea that a single, unified \textit{dêmos} is the key unit for democratic theory. One way of putting this point is to say that Bohman attempts to move beyond the boundary problem – the idea that democracy cannot aid the revision or creation of institutional boundaries – via a theory of democratic reflexivity. Another way of putting the point is to say that he explicitly addresses the pluralization of both democratic subjects and institutional objects of legitimation through a theory of the formation of multiple, overlapping \textit{dêmôi}. A new ideal of ‘transnational democracy’, based on the principle of non-domination, is “a response to the increasing potential for political domination that cannot be addressed by traditional interpretations of the democratic ideal.”\footnote{Democracy Across Borders, p. 6.}

What justifies the shift from the singular \textit{dêmos} to the plural \textit{dêmôi}? How are the latter formed? As the root of our understanding of democracy, Bohman contends, is the idea of self-rule. The ideal of non-domination measures the individual’s capacity for self-rule.\footnote{Ibid., p. 2.} Domination, conversely, is “rule by another, one who is able to prescribe the terms of
cooperation.”\textsuperscript{19} But as Warren points out, Bohman’s adaptation of the ideal of non-domination has a complex relationship to the interdependencies that imply the rejection of the self-legislation ideal.\textsuperscript{20} Many interdependencies, such as social ties, actually support self-determination. Bohman’s ideal of non-domination, he argues, is designed to allow individuals to choose which threats to domination they want to respond to:

What ‘democracy’ requires is that individuals are able to influence those interdependencies that are problematic – those that damage or undermine self-determination through domination, or which involve undecided or indeterminate or conflicted future decisions.\textsuperscript{21}

When free of domination, Bohman thinks, individuals have the capacity to alter the conditions of political association. In Warren’s words, “The democratic response, in Bohman’s language, should be to design institutions to support powers individuals can deploy to identify, resist, and alter interdependencies.”\textsuperscript{22} It must be noted that such powers will make possible, not ensure, political reform. Bohman’s new democratic ideal, then, equips individuals with the deliberative capacity to pursue non-domination.

To operationalize the ideal of non-domination, Bohman argues for what he calls the ‘democratic minimum’. Rather than having citizenship rights tied to one particular state, or human rights that lack an agent to enforce them (although Bohman is careful not to abandon either of these sets of rights entirely), the democratic minimum describes a set of basic capacities

\textsuperscript{19} Ibid., p. 9. “Political domination is the arbitrary use of normative powers to impose duties and obligations, and it can operate even against the democratic background of normative expectations” (Ibid). Worse than domination is tyranny, where basic rights are not respected and coercion is involved.


\textsuperscript{21} Ibid., p. 51.

\textsuperscript{22} Ibid., p. 51.
for individuals. The word ‘minimum’ should not mislead; Bohman intends this not in the sense of least, or bare acceptability, but in the sense that the minimum allows the individual to then choose how to go forward. Drawing on Arendt, he argues that the right to initiate deliberation is the most fundamental component of the democratic minimum. The democratic minimum also includes other rights, enabling conditions, and statuses such that individuals will be able to have a say in ruling themselves. With the minimum package, that is, each individual will be equipped to choose which threats of domination to address, and to actually go about the task of addressing these threats. “To have robust non-domination is to have a particular kind of normative status, a status allowing one to create and regulate obligations with others.”

Because the democratic minimum is fundamentally about the right to initiate, everything will be on the table, so to speak, or could be put on the table at any time. Importantly, this confers a reflexive character to democratic theory that is lacking, Bohman thinks, in the self-legislation ideal. Although constitutions can be amended on the self-legislation ideal, the reflexivity of the non-domination ideal emphasizes that the bounds of democracy can also be revised. Indeed, the meaning of democracy as self-rule can only be fully realized when the idea that there is a single self-legislating dēmos is decentered:

Democracy is that set of institutions by which individuals are empowered as free and equal citizens to form and change the terms of their common life together, including democracy itself. In this sense, democracy is reflexive and consists of procedures by which its rules and practices are made subject to the deliberation of citizens themselves.

\[23\] Democracy Across Borders, p. 52.
\[24\] Ibid., p. 9.
\[25\] Ibid., p. 2.
The need to build reflexivity into democratic theory shows why it is necessary to change democracy’s political subject from the self-legislating démos to overlapping démoi. Democratic theory, Bohman says, must transition from conceiving of democratic legitimacy as a product of the voice of a bounded political community authoring laws to which they are in turn subject, to a more fluid conception of democratic legitimacy as the ‘vigorous interaction’ between many démoi. In this fluid democratic world, the democratic minimum ensures that individuals as members of démoi are protected from domination.

The obvious challenge for this theory is to explain how actual institutions will secure the normative status of the democratic minimum. Bohman does consider his reworking of democratic theory as expressly institutional. Indeed, he contrasts his account with approaches such as Dryzek’s that are, he charges, insufficiently institutional. But the way in which his theory is expressly institutional is somewhat unclear. A key example for Bohman is the European Union. But it is not the EU Parliament as a direct representative of the citizens of the continent that Bohman is drawn to. Rather, the EU is an example of distributed institutional authority interacting with multiple publics, or démoi, because of its inner institutional workings. Also, the fact that individual citizens can appeal directly to the European Court of Justice (ECJ) is important.


27 Dryzek, like Bohman, is fundamentally concerned with how globalization has widely varying impacts on individuals and political communities. See Deliberative Democracy and Beyond: Liberals, Critics, Contestations (Oxford: Oxford University Press, 2000).

28 These institutions have received attention for their novelty and democratic potential. See Bohman, Democracy Across Borders, ch. 4 and McCormick’s analysis of the EU as a Sektoralstaat in Weber, Habermas, and Transformations of the European State: Constitutional, Social, and Supranational Democracy (Cambridge: Cambridge University Press, 2007).
But which EU institutions will secure the important normative resource of the democratic minimum? Is it the fluid, innovative decision-making institutions of the EU, its courts, its supranational institutions like the Parliament, or its intergovernmental institutions like the Council? A tension in Bohman’s account, I argue, arises at this point: is it satisfactory to say that the democratic minimum is distributed among different institutions – that is, no one institution has final responsibility over these essential normative statuses – or is a more definite statement of which institutions do what and for whom required? Bohman would argue, I think, that the most important point is that in his approach individuals are able to choose, or at least initiate deliberation about, the terms of membership in overlapping institutions. Through reiteration and dispersal to multiple, overlapping institutions, the democratic minimum will be secured: “Functions and processes,” he writes, “become more accessible by being repeated at different levels.”29

But this fluid connection between deliberation and institutional design seems to leave the roles particular institutions will play unclear. Consider, for example, his criticism of Held’s proposal for a top-level of cosmopolitan law. What Bohman rejects in Held’s approach is the idea that sovereignty, once attached to the state, is now anchored in a top level of cosmopolitan law and dispersed hierarchically from there.30 Some institutions, he allows, will be global in scope because this is what non-domination requires. But political theorists, Bohman thinks, should not “determine some special institutional design of an ideal cosmopolitan democracy in

29 Democracy Across Borders, p. 146. Indeed, rather than centered authority anchored in a particular territory, Bohman notes that the democratic minimum is “not specific to particular domains or institutions” (p. 48).

30 Or to put the point another way, Held remains in the thrall of the self-legislation ideal because top-level, democratic cosmopolitan law relies on the idea of a global démos (Ibid., p. 41).
which a global *dēmos* could be formed."\(^{31}\) His ideal is of “a nonunitary form of popular control that employs the normative powers that accrue to citizens and members of publics across borders.”\(^{32}\) This republican position avoids the ‘inflated’ notion of sovereignty present in Held’s theory: it places institutional design in the hands of individuals, not the hands of the theorist.

Bohman’s republican alternative, as I noted above, not only avoids inflating the importance of sovereignty but also argues that such centralized power is a primary cause of political domination. To avoid such domination, power is dispersed to the multiple nodes of a transnational federal system where neither distinct peoples nor sovereign states are the “fundamental units.”\(^{33}\) These multiple publics, as we saw above, Bohman describes as the new ‘political subject’ of democracy.\(^{34}\) By saying that *dēmoi* are publics Bohman could mean that they influence decisions made in associated institutions. But *dēmoi* are not directly attached to institutions, such that they form the weak public for the strong public of the decision-making authority held by the institution in question. In fact, Bohman denies the applicability of the


\(^{33}\) *Ibid.*, p. 12. Bohman appeals to a tradition of federalism he thinks has been neglected: “For many republicans (including Price, Diderot, and Turgot, among many others) federalism had the suitable dispersion of power necessary to overcome the increasingly coercive domination of colonies by the [centralized empire]” (*Democracy Across Borders*, p. 35). Also see Levy, “Federalism, Liberalism, and the Separation of Loyalties” *American Political Science Review* 101 (3), 2007: 459-77. As De Schutter argues, most recent accounts of federalism have emphasized its advantages in allowing subnational groups, such as the Quebecois in Canada, a significant degree of autonomy. Federalism of this type is an accommodation to subnational groups when the ideal of a more unitary state is unattainable. See Helder De Schutter, “Federalism as Fairness” *Journal of Political Philosophy* 19 (2), 2011: 167-89.

\(^{34}\) *Democracy Across Borders*, p. 21. In a ‘*dēmoi*-cracy’, Bohman says, individual normative statuses are multiply realized, ensuring non-domination. In other words, since individuals should be able to choose which threats of domination to address, the reflexive formation of new *dēmoi* will be an essential part of democratic practice.
concept of a weak public sphere to his new, ‘distributed’ public spheres. Instead, his publics take on a “qualitatively new form.”

Could *dêmoi* possibly stand in for the concept of political community, thus giving them solidity that is otherwise lacking? This avenue also seems to not quite match up with Bohman’s intentions. The problem is the potential stickiness of belonging in political community. In many cases belonging in political communities is unchosen. But even when one can choose, it can be an undesirable course of action to leave a political community, or doing so could impose significant costs. The idea of *dêmoi* is meant to be more fluid, more open to revision. In fact, Bohman contends the only firm, settled *dêmos* is the political community of humanity. But this idea is even more abstract than the cosmopolitan institutionalization of human rights in a world organization. This is clear from Bohman’s own linkage between the idea of a political community of humanity and the idea of the second-person, generalized other as the interlocutor to whom basic normative statuses and their accompanying human rights must be justified. Whatever merit the idea of a political community of humanity has, it reinforces the idea that the institutional side of Bohman’s project is underspecified.

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35 *Democracy Across Borders*, pp. 31-2, 83. In a recent article, however, Bohman outlines the important role that civil society groups play in fostering publics that in turn may influence actual institutions. See “Democratising the Global Order: From Communicative Freedom to Communicative Power” *Review of International Studies* 36, 2010: 431-47.

36 Bohman says that his purpose in introducing the idea of a political community of humanity is to “see the place of democracy as constitutive of and instrumental to” the realization of human rights. He understands human rights as “basic freedoms, including against tyranny and domination.” “These basic freedoms,” he contends, “are justified negatively and positively as necessary conditions for avoiding great harms such as domination and destitution, on the one hand, and for living a worthwhile human life on the other. For both, membership in humanity is basic, understood as the right to have rights and thus the most basic of the basic human freedoms.” See *Democracy Across Borders*, pp. 102-3.

37 *Democracy Across Borders*, p. 120.
A weakness of Bohman’s account, I conclude, is that it does not explain how the normative status of the democratic minimum will be secured by actual institutions. In spite of this, Bohman’s pluralization of the subjects and objects of democratic legitimation makes the important point that after the state is decentered any description of a minimum normative status for individuals must ensure their right to attempt to change the terms of their democratic associations.

3 Fluidity, Decentering, and Political Community

Recall that substantive jurisdictional conflict is the circumstance where non-state institutions represent a territory which overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, and do not seek to form states themselves. At the end of chapter 2, I argued that unbundling some of the state’s sovereignty is an insufficient response to this circumstance. Unbundling will leave the state in its privileged position, and will not recognize the independent grounding of the claims of non-state institutions. Instead, I argued that the role of the state must be decentered. Held and Bohman, as we have seen, make important contributions to the project of transforming the standard model of democratic legitimation by decentering the state. However, they also do not directly address the circumstance of substantive jurisdictional conflict. The problem, I argue, is that they do not pay sufficient attention to the settled nature of the claims made by non-state institutions that come into substantive jurisdictional conflict with the state. These claims, importantly, may directly represent the identity and interests of a non-national political community. Held and Bohman emphasize the fluid formation of institutional objects of
legitimation and issue-specific subjects of legitimation over attention to the identity and interests of such communities.

Held’s all-affected principle, for instance, depends on the continual realignment of authority and affect under a top level of cosmopolitan law. This will not directly represent political communities that attempt to democratically legitimate the authority they are subject to, but instead defines them with reference to the issue under examination. Bohman’s approach to decentering suffers from a related deficiency. Like Held, he provides an account that pluralizes the subjects and objects of democratic legitimation, and makes the important point that after the state is decentered any description of a minimum normative status for individuals must ensure their right to attempt to change the terms of their democratic associations. But he does not spell out how démoi are formed, or how multiple and overlapping sites of institutional authority will interact. While a capacity to begin – to put the reform of the institutional order on the agenda – seems ineluctably an essential normative status of the individual, it does not itself say something substantive about the roles particular institutions will play. Conceiving of democratic legitimacy as the ‘vigorous interaction’ of multiple, overlapping démoi does not pay sufficient attention to the identity and interests of non-national political communities.

Both Held and Bohman decenter the state as a critical step in transforming the standard model of democratic legitimation. However, they prioritize the realignment of institutional authority with the way individuals are affected by particular issues, and neglect to develop an account of how more settled political communities will pursue their interests through non-state institutions after the state is decentered. In the next chapter, I provide such an account in dialogue with another decentering theorist, Iris Young.
Chapter 4. Political Communities and the Primary Roles of Institutions

In chapter 1, I introduced the circumstances of substantive jurisdictional conflict and plural political identity as empirical descriptions of sets of facts that problematize the overlap between the state and the national political community in the standard model of democratic legitimation. To this point, my discussion has focused on how substantive jurisdictional conflict demands decentering the state. But as I concluded in the previous chapter, extant approaches to decentering the state fail to address how settled, non-national political communities will pursue their interests through both state and non-state institutions. This conclusion recalls the circumstance of plural political identity – the fact that individuals have attachments to multiple, possibly overlapping political communities. In this chapter, I bring these points together by conceptualizing non-national political communities as additional legitimating subjects in a transformed model of democratic legitimation. I develop my argument in dialogue with Iris Young. Young’s approach has points in common with Held and Bohman, but pays more direct attention to the interests of settled political communities.

In section 1, I argue that the circumstance of plural political identity heightens the importance of relational recognition between political communities. To support this claim, I define non-national political communities in terms of the pursuit of some form of self-determination, a self-ascribed political identity, and mutual recognition of and by other political communities. In section 2, I consider how to evaluate the claims of political communities. I draw on the work of Young, who deploys a principle of non-domination to arbitrate
jurisdictional disputes between political communities. I then present Levy’s argument that a principle of non-domination will be unable to effectively and fairly arbitrate such disputes because it does not distinguish between the degree of control each party will have over a particular policy area and the scope of their control.

In section 3, I argue that a more specific account of how political communities can realize their interests and projects through institutions is needed in order to respond to Levy’s objection to Young. A first step towards such an account is to distinguish political communities from the institutions that represent them. Although a form of this distinction is assumed by the two circumstances introduced in chapter 1 as the occasion for transforming the standard model of democratic legitimation – the first describes the claims of non-state institutions and the second addresses attachment to political communities – it takes on a new importance at this stage in the argument because of the focus on how political communities can realize their interests and projects through institutions. I argue that a balance must be struck between identifying political communities through the institutions that represent them and defining them by other characteristics. I again engage with Young’s work, and also consider case law that addresses how to recognize indigenous political communities in British Columbia, Canada.

In section 4, I bring several strands of the argument together with my claim that institutions play what I call primary roles. A description of an institution’s primary role is a normative account of how it fosters democratic legitimation for a particular political community or communities. To realize their interests and projects, settled political communities require institutions with particular characteristics. The key to determining what these characteristics are is to look to the nature of the subject political community in question: a role is primary for an institution when a particular political community depends on its performance as a constitutive
element of its identity. The primary role of the state, for example, is to enable a project of
democratic constitutionalism by its citizenry. In societies with democratic traditions, the identity
of the nation as a democratic political community is linked to the performance of this role by the
state.

I conclude the chapter by outlining how attaching primary roles to institutions can be the
basis for a transformation of the standard model of democratic legitimation under circumstances
of substantive jurisdictional conflict and plural political identity. Where non-state institutions
are allocated the jurisdictional space to play their primary role, I will argue, they can serve as
important supplementary sites of democratic legitimation alongside states. This will enhance the
ability of individuals and political communities to rule themselves.

1 Attachment to Political Community

The standard model of democratic legitimation clearly accords priority to the interests of the
national political community over non-national political communities.¹ Whether the legitimating
subject of the state’s authority is defined in terms of a nation, a people, or a citizenry, its bounds
are conceptualized as coextensive with those of the state: attachment to the state is defined as the
essential political relationship, above any associative attachments to non-national political

¹ Gianfranco Poggi, The Development of the Modern State: A Sociological Introduction
Blackwell, 1983), David Miller, On Nationality (New York: Oxford University Press, 1995) and
National Responsibility and Global Justice (Oxford: Oxford University Press, 2007), and Rogers
Smith, Stories of Peoplehood: The Politics and Morals of Political Membership (New York:
communities. Against this still-influential model of democratic legitimation, how should the role of non-national political communities be understood? In particular, how can they supplement the national political community as additional legitimating subjects of political authority?

The circumstance of plural political identity describes the attachment of individuals to multiple political communities. To a greater extent than used to be the case, the political identity of individuals need not be understood as primarily grounded in a nation-state. Although many citizens do identify a nation as their primary attachment, there are many other possibilities. Examples of non-national communities that individuals have significant attachments to include political communities that do not seek the institutional representation of a separate state, religious communities with explicitly political aims, indigenous political communities, and local or regional political communities. Importantly, individuals can belong to more than one of these political communities at the same time. And, both the memberships and territorial base of these political communities can overlap. For example, an individual could belong to a national political community represented by a state, and to an indigenous political community represented


by an indigenous political institution. The territorial base of these political communities could overlap, just as the extension of territory their institutions claim jurisdiction over could. Or that individual could be a member of a political community that does not overlap with a formal institution such as a state or regional organization. This wide range of possibilities is unsurprising, given the variety of political communities, the range of reasons individuals may have for identifying with a political community or communities, and the array of criteria political communities might employ to decide who belongs and who doesn’t.

To capture the wide range of possibilities raised by the circumstance of plural political identity, I suggest an inclusionary approach to the identification of non-national political communities via three broad criteria. The first is a desire for some form of self-determination. The basic principle of self-determination is that a people should be able to control its own affairs. There is a direct link, I think, between the idea that a political community aims at self-determination, and the idea that it can act as a legitimating subject of the institutional authorities through which it pursues its interests and projects. In the standard model of democratic legitimation, the legitimating subject of the national political community neatly overlaps with a state that has sufficient authority to advance its interests and projects. For non-national political communities, self-determination may require acting through and legitimating both state and non-state institutions.

\[\text{\footnotesize{4 This could be because a political community lacks effective institutional representation. The Gastarbeiter in Germany, for example, live in an indeterminate state with respect to their membership in the German polity. Germany’s citizenship and naturalization laws, as Benhabib notes, only changed from a \textit{jus sanguinis} basis to \textit{jus soli} in 1999 (\textit{The Rights of Others} (Cambridge: Cambridge University Press, 2004), p. 156). With this change, some of the issues facing the Gastarbeiter have been resolved. But a sense of belonging in the national political community remains a challenge.}}\]
The second criterion that defines a non-national political community is a self-ascribed political identity. This isolates political communities from a larger class that includes non-political communities. Many forms of religious community, for example, are not political communities in my sense, while others are expressly political. An additional point is that a self-ascribed political identity may emerge before or after the formation of the institutional authority that it aims to legitimate. Europe is an example of the latter situation, where a nascent political community may be emerging to legitimate the already-existing power of the EU. By contrast, First Nations in Canada assert the continuity of their political identity from before contact up to the present day. From their perspective, complications to self-ascription as a political community include factors such as the fact that Indian status has been formally administered by the settler state, the existence of a clash between traditional governance structures and the band system outlined in the Indian Act, and the divide between those living on reserve and those living in urban areas.

The third criterion that defines a non-national political community is mutual recognition. That is, in addition to the pursuit of self-determination and a self-ascribed political identity, a non-national political community must recognize and be recognized by other political communities, including other non-national political communities and national political communities. There is a tension, of course, between the idea that political community is defined by a self-ascribed political identity and the idea that it is defined by mutual recognition. Such a tension is unavoidable, however. What it means to express a desire for collective self-
determination must include a freedom to shape the political identity of the community. But the identity of a political grouping also necessarily involves relations with other political groupings.⁵

Beyond these three broad criteria, I think it is best to leave the identity of political communities to contextual factors as much as possible. More specifically defining what counts as a political community and what doesn’t runs the risk of excluding political communities who lack the means to assert their claims against more powerful states. Also, advancing an inclusionary understanding of the concept aims to capture the range of challenges facing state citizenries. For example, consider the case of Canada. First, indigenous political communities in Canada must grapple with the institution of sovereignty in their negotiations with the Canadian government, assert their own political identity as a political community, and find appropriate and authoritative institutions through which to pursue their interests. Second, many Canadians hold dual citizenship, especially recent immigrants. This case is not unique to Canada, but approaches being developed in the literature apply to it.⁶ The attachment of dual citizens to their country of origin, and its political community, may in some cases meet the criteria for defining a political community given above. Third, Canadian citizens have often debated questions of political identity concerning the place of Quebec in Canada. The federal government recently recognized the Québécois as a ‘nation’ within Canada.⁷ A plausible interpretation of this act is

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⁵ In the next section I discuss Young’s relational view of political community. In chapter 5 I discuss Tim Schouls’s relational account of indigenous political community, which he develops in *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003).


⁷ The text of the motion reads: “That this House recognize that the Québécois form a nation within a united Canada.” Hansard; 39th Parliament, 1st Session; No. 087; November 27, 2006.
that the Quebecois are being recognized as a political community; the membership of this political community partially overlaps with the membership of the larger Canadian political community or nation.

Examples such as these show that the significant attachments individuals have to diverse forms of political community problematize the exclusive motivation from national attachment they are supposed to draw upon to control and legitimate the actions of their state under the standard model. While some individuals will continue to identify solely with the nation, others may have significant attachments to non-national political communities.

The multiple attachments individuals have to political communities, and the possibility that non-national political communities may function as additional legitimating subjects alongside the nation, highlight the importance of relational recognition between political communities. Such recognition is a normative imperative, I argue, if non-state institutions are to successfully supplement the state as additional sites of democratic legitimation.\(^8\) Relational recognition by the state of non-national political communities is particularly important, given the strength of the resources it can draw on, and the fact that an effect of the traditional overlap between the nation as legitimating subject of political authority and the state as the object of legitimation is to conceal the claims of non-national political communities. In the following section, I draw on the work of Young to develop an account of how relational recognition between political communities, and in particular between national and non-national political

\(^8\) In the context of non-national political communities seeking increased institutional means, one might worry that if given a measure of independence from states they could impose internal restrictions on the conduct of their members. See Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995). My argument that the primary role of the state is to enable democratic constitutionalism (chapter 5) lessens this concern because states will continue to secure the basic rights of citizens.
communities, can replace the mutually exclusive treatment of attachment to political community under the standard model.

2  Young, Political Community, and Non-domination

The basic premises of Young’s work are that inclusion means giving those who are affected by a decision a say in making it, that inclusion furthers democracy, and that democracy furthers justice. This commitment to inclusive practice issues in two basic positions on democratic legitimation. First, she shares Held’s concern to align the authority to make decisions with those affected by them.\(^9\) We should attempt, she argues, to match the scope of institutions with the actual interdependencies that exist between individuals and groups. What Young calls ‘social connection’ – the fact that A’s actions have B’s actions as a background condition, and vice-versa – means that A and B have obligations of justice to each other. That social connection creates obligations of justice leads Young to ask: “what is the proper scope of the democratic polity, and how are exclusions enacted by restricting that scope?”\(^{10}\) She answers that:

\(^9\) Drawing on Held, Young endorses the creation of transnational regulatory regimes and argues for a principle of subsidiarity based on the conviction that decisions are best made at the local level. At the same time, she is alert to the potential downside of cosmopolitanism. In *Inclusion and Democracy*, for example, she voices common cause with those who are skeptical of cosmopolitanism as potentially dominating and culturally homogenizing if its principles are applied in such a way as to cover over difference (pp. 236-7).

\(^{10}\) *Inclusion and Democracy*, p. 6.
The scope of a polity … ought to include all those who dwell together within structural relations generated by processes of interaction, exchange, and movement that create unavoidable conditions of action for all of them.\(^{11}\)

Her account is to apply both below and above the level of the state. Below the state Young criticizes how municipal boundaries are used to allow wealthier citizens to escape obligations to an interdependent region.\(^{12}\) Above the state, the current international system is heavily weighted towards the interests of nation-states, especially those in the North to the detriment of the South, and to corporations. Her proposals to match webs of interdependence with the necessary institutions include democratic reform of the UN and its institutions, and “a global system of regulatory regimes to which locales and regions relate in a federated system.”\(^{13}\) These regimes will cover issue areas such as the environment, trade, human rights, and so on, and will “provide[] a thin set of general rules that specify ways that individuals, organizations, and governments are obliged to take account of the interests and circumstances of one another.”\(^{14}\) Further, on her account the state’s “uniformity, centrality, and final authority … would be seriously altered.”\(^{15}\) Like Held, Young develops a blueprint for recasting institutional political authority. Unlike Held, however, she does not emphasize the role of cosmopolitan law, and in fact continually notes that her model can perhaps best be applied at the local level.

\(^{11}\) Ibid., p. 197. For example, Young has demonstrated a deep concern for the status of the individual by theorizing the structural injustice tying consumers to producers through sweatshop labour. See “Responsibility and Global Labor Justice” Journal of Political Philosophy 12 (4), 2004: 365-88.

\(^{12}\) Inclusion and Democracy, ch. 6.

\(^{13}\) Ibid., p. 267.

\(^{14}\) Ibid., p. 267.

Young’s second basic position concerns her resolve to address the “equal right of peoples to self-determination.”\textsuperscript{16} This right, she thinks, is impossible to fully realize under the modern view of the state. The latter conceives of sovereignty as granting states the right to non-interference in their domestic affairs and conceives of political community as equivalent to state citizenship. Further, it protects the idea that a people has the sole jurisdiction over a particular territory, with no obligation to engage with or come to the aid of other peoples, be they minorities within the territory or peoples in other territories. Understanding self-determination on this ‘noninterference’ model, Young claims, is itself responsible for many of the exclusions that borders enact.\textsuperscript{17} Her alternative model of political community is a relational view. Peoples cannot be differentiated according to substantive criteria, she argues, but only by degree: “If we abandon the either/or conception of nation then the distinctiveness of peoples emerges as a matter of degree.”\textsuperscript{18} This directly decenters the standard model of democratic legitimation: because peoples are differentiated by degree and not by kind, there will be multiple, overlapping subjects of democratic legitimation. Sharp distinctions such as those of the noninterference model will be detrimental to the self-determination of many peoples, and will not capture how peoples mix and interact with one another.

\textsuperscript{16} Ibid., pp. 6-7. One of Young’s key sources of inspiration is the claim of indigenous peoples against their state: while they seek self-determination, they often do so without calling for their own sovereign, territorial state. See Inclusion and Democracy, pp. 255-6 and “Hybrid Democracy: Iroquois Federalism and the Postcolonial Project” in Global Challenges.

\textsuperscript{17} Global Challenges, p. 44. One of the roots of Young’s view here is her concern with social differentiation and structural inequality. She attempts to include marginalized groups by making room for their voices as a window on and resource for negotiating the needs of inclusion in contexts where some interests have more of an effect on decisions than others. Structural inequalities attend gender, race, and class, for example, in domestic society, and similarly, structural inequality attends the bordering of more powerful states into sovereign territories in relation to less powerful states. See Inclusion and Democracy, ch. 3 and Justice and the Politics of Difference (Princeton: Princeton University Press, 1990).

\textsuperscript{18} Inclusion and Democracy, p. 253.
Young’s two positions on democratic legitimation are tailored to the particular contexts of social connection and self-determination.\(^\text{19}\) Where they come together is the ideal of non-domination. To develop her account, she draws on Philip Pettit’s theory of freedom as non-domination and feminist accounts of relational autonomy.\(^\text{20}\) Pettit argues that the traditional understanding of individual freedom as non-interference is misconceived; it is not interference per se that is objectionable, but the capacity for arbitrary interference that does not consider the interests of those who are potentially interfered with. Institutional arrangements within the state should be designed so as to reduce this capacity for domination. Young describes her extension of Pettit’s view from the individual case to that of peoples in these terms:

Pettit argues that states can legitimately interfere with the actions of individuals in order to foster institutions that minimize domination. A similar argument applies to actions and relations of collectivities. In a densely interdependent world, peoples require political institutions that lay down procedures for co-ordinating the actions of all of them, resolving conflicts and negotiating relationships.\(^\text{21}\)

Notably, this extension of the ideal of non-domination goes beyond blocking the capacity for arbitrary interference.\(^\text{22}\) It also makes the positive claim that the right of self-determination includes an obligation to listen to the concerns of other peoples and come to jointly acceptable resolutions of difficulties. In a densely interdependent world, where peoples are intertwined to a significant degree, political institutions and other procedural mechanisms must be designed to channel and regulate interactions. And because a wide range of groups will count as peoples

\(^{19}\) The claim that group identities are a matter of degree has affinities with the thesis that social connection is the ground for obligations of justice: “social group identities emerge from the encounter and interaction among people who experience some differences in their ways of life and forms of association” (Inclusion and Democracy, p. 253).


\(^{21}\) Inclusion and Democracy, p. 260.

\(^{22}\) Thanks to Nancy Bertoldi for pointing this out to me.
deserving of political self-determination, individuals can more readily conceive of themselves as members of multiple peoples at once. In particular, Young’s approach shows a deep concern for recognizing the claims to self-determination on the part of political communities such as indigenous peoples. For example, her approach seems well suited to capture the complex identities of indigenous individuals who are both state citizens and members of indigenous communities.

Because of this deep concern for defending the self-determination claims of indigenous political communities, Young’s approach serves as an important model of how to decenter of the standard model of democratic legitimation. Compared with the approaches of Held and Bohman, for instance, it more directly addresses the interests of settled non-national political communities. However, Levy has questioned whether Young’s principle of non-domination can effectively balance the interests of overlapping political communities when designing shared institutions. In fact, he suggests, there is a possibility that Young’s proposal will actually worsen domination:

A conception of self-determination such as Young’s that lacks […] legal rigidity and clarity, one that emphasizes negotiation over the question ‘who holds the rights?’ rather than negotiation over how rights holders exercise their rights, unavoidably tends to multiply initial power imbalances.23

Indigenous political communities, he argues, will need some jurisdiction in which they have non-interference rights in order to ensure that they are not dominated by larger and more powerful interests, like the state. In other words, they need the right to exclude on certain issues.

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Exclusion need not preclude negotiation: one group has the right to make a decision, and then the other can negotiate with the first in an attempt to persuade it to act differently.  

To support this argument, Levy develops a distinction between the scope and degree of authority when making a decision.  ‘Scope’ denotes the range of issues over which a particular jurisdiction has authority.  ‘Degree’ denotes the level of independence the jurisdiction has in making the decision.  Levy accuses Young of mischaracterizing the non-interference view as “all-or-nothing.” If it was it would be implausible, but in fact there are many examples of jurisdictions, including those limited jurisdictions under the control of indigenous groups, which have a high degree of independence to make decisions over a narrow range of issues.  Without some non-interference rights, Levy thinks Young underestimates how her two positions are in tension, to the potential detriment of the self-determination of indigenous groups:

“Non-interference, whether in today’s international sphere or domestically within a federation, is always a constrained and limited rule.  An actor has rights of non-interference within certain domains or subject to certain constraints.”

Levy is right to argue that the principle of non-domination can only be a general guide for evaluating the relationship between peoples.  While it attempts to balance the interests of political communities that share the same territory, it does not in itself provide a specific account of how political communities can realize their interests and projects through institutions.

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24 Ibid.
25 Ibid., p. 69.
26 Ibid., p. 68.
27 Ibid., p. 68, italics in original.
28 As Levy notes, Young argued that her analysis “should not be construed as a proposal for concrete institutional design, but rather as a set of principles that social movements and policy makers should keep in mind in their work” (Global Challenges, p. 32).
3 Distinguishing Political Communities from Institutions

An account of how institutions facilitate political communities in achieving their interests and projects would include both an accounting of normative rightness such as the principle of non-domination and an accounting of the characteristics of particular institutions that enable political communities represented by them to achieve their interests. A first step in this direction is to clearly distinguish between political communities as legitimating subjects of political authority and institutions as objects of legitimation.

Young grapples with this distinction in an instructive way. She is especially concerned with cases where political communities lack the institutional means to achieve self-determination. But she identifies political communities through their institutional actions:

Insofar as a collective has a set of institutions through which that people make decisions and implement them, then the group sometimes expresses unity in the sense of agency. Whatever conflicts and disagreements may have led up to that point, once decisions have been made and action taken through collective institutions, the group itself can be said to act.

In this formulation, Young addresses the epistemological question of when groups have expressed ‘unity in the sense of agency’. The advantage of an epistemological perspective is that it is silent on what constitutes the political community in question, beyond the fact that it has acted through a particular institution. Ethnic, national, or religious identities are obvious but

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29 Young discussed the situation of American indigenous peoples at length, and also applied her theory to the conflict between Israel and the Palestinians. See Inclusion and Democracy and Global Challenges.

30 “Two Concepts of Self-Determination” in Global Challenges, p. 50.
controversial candidates for the basis of political community. Because Young’s view avoids direct reference to them, it is able to account for a wide diversity of political communities.

But an epistemological perspective, I think, makes the most sense when there is a single institution that a political community acts through. Adapting it to the case where political communities act through multiple institutions would require saying which actions a political community takes are more important than others. But how can this be done without falling back into a substantive approach? This difficulty, I think, suggests that a balance must be struck between an epistemological emphasis on identifying political communities through their institutional actions and the ontological question of what makes up a political community. Striking this balance is especially important in situations where a political community lacks the institutional means to achieve its interests. For example, in their pursuit of self-government institutions, First Nations in Canada confront the strictures of the Indian Act on the one hand,

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32 For example, indigenous political communities in settler states could act through the legal framework of the state, appeal to the universal framework enacted through the Declaration on the Rights of Indigenous Peoples, or design institutions of their own – from local bands to regional, national, or supranational indigenous institutions. See United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295 on 13 September 2007.

and a skeptical public on the other.\textsuperscript{34} For First Nations in British Columbia, where treaties have not been signed with most communities, the situation is even murkier.

As an example of how both epistemological and ontological elements are at play in the identification of political communities, I introduce the case of the Tsilhqot’in indigenous political community and their fight to gain control over resource developments on their traditional territory near Williams Lake, BC. A legal challenge launched by the Tsilhqot’in highlights the need to recognize the existence of political community beyond formal institutional bounds. In \textit{Tsilhqot’in Nation v. British Columbia}, trial judge Justice Vickers of the BC Supreme Court ruled on a range of issues, including Tsilhqot’in claims to Aboriginal title and rights.\textsuperscript{35} But in order to decide those issues, Justice Vickers faced the prior issue of deciding which political community was the proper holder of both title and rights.\textsuperscript{36} The Tsilhqot’in are comprised of six official bands, five of which are represented by the Tsilhqot’in National Government.\textsuperscript{37} The Province of BC argued that the Xeni Gwet’in, the Tsilhqot’in Nation that launched the original legal action, was the proper rights holder. The Canadian federal government and the Tsilhqot’in themselves argued that the proper rights holder was the


\textsuperscript{37}Although there are six official bands, Justice Vickers identifies seven Tsilhqot’in political communities. “The Tsilhqot’in National Government, a federally incorporated legal entity, only represents five of the seven Tsilhqot’in communities.” \textit{Tsilhqot’in Nation v. British Columbia}, para. 456.
Tsilhqot’in Nation, not an individual band as defined by the Indian Act. In essence, the members of political communities such as the Tsilhqot’in are arguing for the use of different criteria than are currently employed to relate institutions to their political communities.

In his decision, Justice Vickers noted that “there is no legal entity that represents all Tsilhqot’in people.”\(^{38}\) Despite this, he argued that

British Columbia places too much emphasis on the notion of a single decision-making body at the time reserves were established. The use of a small decision-making body for one particular purpose is not necessarily the hallmark of a community.\(^{39}\)

Aboriginal rights and title, Justice Vickers concluded, are held by the Tsilhqot’in Nation.\(^{40}\) The proper rights holder, in other words, is a political community, despite the fact that it lacks an institution to represent it. To support his argument, Justice Vickers mentions ontological elements of Tsilhqot’in identity:

The creation of bands did not alter the true identity of the people. Their true identity lies in their Tsilhqot’in lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot’in people.\(^{41}\)

While Justice Vickers’s ruling identifies the Tsilhqot’in political community independently of the institutions that represent it, his reliance on the ‘true identity’ of this community seems to shade into the substantive approach to political community that Young rejects. Also, the judicial identification of the Tsilhqot’in raises many interesting questions.

\(^{38}\) Tsilhqot’in Nation v. British Columbia, para. 456.


\(^{40}\) “I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot’in people.” Tsilhqot’in Nation v. British Columbia, para. 470.

\(^{41}\) Tsilhqot’in Nation v. British Columbia, para. 469.
What if the Canadian federal government had taken the position of the BC government, and failed to recognize the Tsilhqot’in community as a whole? What if the court had ruled differently? The Tsilhqot’in would, in light of the power differential between themselves and the federal and provincial governments, face a situation where relational recognition of their own, self-ascribed political community would be lacking.

Identifying diverse forms of political communities, I conclude, requires striking a balance between an epistemological focus on their institutional means and an ontological focus on what makes them a distinct community. Striking this balance acknowledges that political communities are at least partly defined by the institutional means available to them. But it also enables a demarcation between a political community and the institution or institutions that represent it. This kind of demarcation, I argue, is necessary for developing a more specific account of how political communities can realize their interests and projects through institutions.

4 The Primary Role of Institutions

In this section, I develop my account of how the characteristics of institutions enable political communities to achieve their interests and projects. This will connect two strands in my argument by linking non-national political communities as legitimating subjects of political authority to non-state institutions as objects of legitimation.

42 Thanks to Nancy Bertoldi for raising this objection.
My argument aims to bring together two insights about the role of institutions. The first is that it is up to political communities themselves to decide what their institutions do. I have argued that the normative rationale for transforming the standard model of democratic legitimation is to enhance the ability of individuals and political communities to rule themselves. Surely a key part of a democratic approach to such a transformation is to entrust political communities with the responsibility of deciding how best to pursue their interests and projects through institutions. The second insight is that the historically evolved features of the institutions available to political communities must also be a factor in an account of what they do.\(^{43}\) The coercive nature of state power, for example, would seem to call for a particularly comprehensive mode of legitimation.

But neither of these two insights, I argue, is sufficient as an account of why distinct institutions should play particular roles. The problem with the first – that it is up to political communities themselves to decide what their institutions do – is that the existence of other, overlapping state and non-state institutions, which themselves represent distinct political communities, must be taken into account. Young would make this point by saying that self-determination is a right that involves the corresponding responsibility to consider the interests of other political communities and to design institutions to structure these relationships. The upshot is that a transformed model of democratic legitimation (i) must be based on relational recognition between political communities, and (ii) such recognition must attempt to reconcile jurisdictional claims that are independently grounded. The problem with the second insight is that the roles played by institutions are not fixed by their historically evolved features. While any approach must be attentive to how such features constrain the possibilities for transforming the standard

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\(^{43}\) Thanks to Nancy Bertoldi for making this suggestion.
model of democratic legitimation, decentering approaches such as those of Held, Bohman, and Young are explicitly normative accounts of how democratic legitimation can be enhanced at multiple institutions locations. The historically evolved features of institutions influence such accounts but do not determine their content.

As I said above, the normative rationale for transforming the standard model is that adding non-state institutions as additional objects of democratic legitimation will enhance the ability of individuals and political communities to rule themselves. Giving free rein to political communities to decide what their institutions do, or accepting the extant roles played by institutions based on their current characteristics, would not be consistent with this rationale. An approach that brings these two insights about the role of institutions together will acknowledge that there will be a back-and-forth process between (i) recognizing that the interests and projects of a political community requires particular institutional means, (ii) making these means compatible with the interests and projects of other political communities, and (iii) accommodating the historically evolved features of institutions, including states and non-state institutions.

The key to an account that balances these variables, I argue, is to link the performance of a particular role by an institution to the democratic identity of a political community. This is the idea that institutions play primary roles. An institution’s primary role, in my approach, describes its contribution to the production of democratic legitimation on behalf of a particular political community or political communities. The nature of the latter will determine what kind of characteristics the institution must have: a role is primary for an institution when a particular political community (or communities) depends on its performance as a constitutive element of its identity. The primary role of the state, for example, is to enable a project of democratic
constitutionalism by its citizenry. This is because national political communities with
democratic traditions require the institutionalization of their ideals in a project of democratic
constitutionalism.44 Their identity as democratically organized, territorially limited political
communities requires that their states play this primary role; jurisdiction over it could not be
distributed to non-state institutions without severe normative consequences.

In one sense, this argument is similar to the republican view that links political
legitimation to the constitution of society.45 But while the primary roles approach is republican
in the sense that institutionalized democratic legitimation is at least partly constitutive of the
identity of political communities, it does not idealize the political realm as the site where
individuals realize their collective natures. Indeed, because individuals have plural political
identities, the primary roles approach rejects a strong link between society, state, and the political
expression of citizens. In this way, it is closer to Bohman’s decentering of the standard model
and pluralization of both the institutional sites of legitimation and the subjects of legitimation, or
what he calls démoi. I aim, however, to augment neorepublican theories such as Bohman’s by
showing how the characteristics of institutions enable political communities to achieve their
interests and projects.

The distinctive characteristics of institutions that enable them to play their primary role I
call their attributes. For example, I will argue in the following chapter that states have the

44 As I noted in chapter 1, I do not discuss cases where states are non-democratic because the
citizenries of such states will not have the opportunity to consider the distribution of jurisdiction
to non-state institutions in the same way as those in democratic states.

45 See my discussion in chapter 1 of Habermas’s distinction between liberal, republican, and
deliberative models of democracy and Habermas, “Three Normative Models of Democracy”, in
The Inclusion of the Other, eds. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: MIT
attributes of predominant jurisdiction, which facilitates the enforcement of basic rights and fair access to democratic voice, and open agenda, which supplies the opportunity for citizens to debate and act on a wide range of issues within its institutional structure. Each actual state will share the primary role of enabling democratic constitutionalism and the key attributes of predominant jurisdiction and open agenda, but differ according to its unique history, location, and so on. For example, both France and Canada, as instances of the institution of the state, enable projects of democratic constitutionalism and share the attributes of predominant jurisdiction and open agenda, but differ in other respects. As an example of how they might differ, consider the relationship between the institution of the state in each case and its relationship to a national political community. A multinational state like Canada will have a different conception of its national political community that France, which defends a more unitary, republican conception of national identity.

An institution’s primary role, to review, describes its contribution to the production of democratic legitimation. Its attributes describe the distinctive characteristics that allow it to play this role. How can this approach transform the standard model of democratic legitimation? All institutions with primary roles, I posit, stand on an initial equal footing in relation to each other with respect to their claims to jurisdictional authority. The reason to place institutions on an initial equal footing is to directly address the existence of substantive jurisdictional conflict between the state and non-state institutions. This circumstance, as defined in chapter 1, describes how states face claims from non-state institutions that share its territory, make jurisdictional claims that are independently grounded, and do not seek to form their own state. As I argued in chapter 2, the standard model of democratic legitimation, drawing on the modern view of the state, conceptualizes the state’s authority in an exclusive way: the jurisdictional claims of non-state institutions are not recognized as having an independent grounding. In my
approach, by contrast, both states and certain non-state institutions have primary roles. By placing the state on an initial equal footing with non-state institutions, the strength of its claims can be assessed on the basis of its primary role, not on the basis of an assumption about its exclusivity.

Under the primary roles approach, then, the state becomes one kind of institution that plays a particular role alongside other kinds of institutions that play other roles. Of course, an assertion of an initial equal footing between institutions should not be taken as a wishing away of the power differential between states and, for example, indigenous political institutions. Indeed, part of the motivation for introducing the concept in the first place is to provide a platform for addressing such power differentials. But the challenge of balancing a theoretical focus with the pressing need to address the practical consequences of state power remains. In chapter 6, for example, I explore the Tsilhqot’in Nation’s struggle to resist construction of a mine on their traditional territory.

Before applying the primary roles approach to actual institutions, I discuss an important constraint on the process I described above of balancing the competing variables of the institutional means a political community requires to achieve its interests, the compatibility of these means with those of other non-state institutions that represent other political communities, and the historically evolved features of institutions. This constraint is that any description of the primary roles of institutions must explain why its mode of legitimation is democratic. Under the standard model, as I noted in chapter 1, an essential condition of legitimation being democratic is that individuals are able to make an equal contribution to decisions taken by the national political community. One iteration of this ideal of equal participation, for example, asserts that each citizen of a state has one vote and that each vote is weighted equally. The principle of equal
participation, though, need not be wedded to the standard model. Although my approach pluralizes the subjects and objects of democratic legitimation, it retains the idea from the standard model of a distinct grouping of individuals that forms a political community exercising democratic control over the institutional authority they are subject to. Where the institutions that political communities utilize to pursue their interests take different forms from the paradigmatic state form under the standard model, they may also have different primary roles – that is, they may make different contributions to the production of democratic legitimation. The principle of equal participation can ensure that the primary roles of such institutions will be a democratic mode of legitimation.

5 The Responsibility of State Citizenries

The argument that institutions play primary roles provides the more specific account of how political communities can realize their interests and projects that was lacking in Young. Where non-state institutions are allocated the jurisdictional space to play their primary role, I argue, they can serve as important supplementary sites of democratic legitimation alongside states. The basic shape of my model, in other words, is that the strength of competing jurisdictional claims can be assessed by comparing the primary roles of institutions, to the end of determining how sharing or redistributing jurisdiction can enhance democratic legitimation. This will enhance the ability of individuals and political communities to rule themselves.

But states, as I argued in chapter 2, have a special position among institutions: the modern view conceptualizes their jurisdictional claims in exclusive terms, on the basis of their
possession of normative features such as sovereignty. Consequently, they are a significant barrier to the distribution of jurisdiction to non-state institutions. But, as I noted in chapter 1, the circumstances of substantive jurisdicltional conflict and plural political identity pose important challenges to the modern view of the state and the standard model of democratic legitimation. Substantive jurisdicltional conflict problematizes the link in the standard model between the national political community and the state because it notes that non-state institutions make competing, independently grounded claims. Plural political identity also problematizes this link by introducing the possibility that non-national political communities could be additional legitimating subjects of political authority. The primary roles approach transforms the standard model in response to these challenges. By removing the traditional assumption of state dominance over non-state institutions, it functions a device for representing the challenge facing state citizenries from the jurisdictional claims of non-state institutions.

In the following chapters, I apply the primary roles approach to three institutions: the state, indigenous political institutions, and regional organizations. My focus in these chapters is on the responsibility of citizenries to consider how distributing the jurisdiction of their state can enhance democratic legitimation overall. Focusing on the perspective of state citizenries addresses the possibility of democratic legitimation from a contextual location. That is, the universal nature of the standard model of democratic legitimation is replaced by a contextual claim about how the citizenries of one kind of institution – the state – should approach the problem of democratic legitimation under the conditions of substantive jurisdicltional conflict and plural political identity. From this contextual location, the critical issue I examine is how state

46 The normative model of democratic legitimation underlying the modern conception of the state is universal in the sense that it applies to all states, and only states, the globe over: the state
citizenries can respond to the jurisdictional claims of non-state institutions in a way that enhances democratic legitimation. The first step in constructing this response is to define the primary role of the state. In the following chapter I argue that the primary role of the state is to enable democratic constitutionalism.

is defined as the institution whose power needs democratic legitimation, and all non-democratic states are expected to democratize.
Chapter 5. Democratic Constitutionalism

As I noted in the previous chapter, an account of an institution’s primary role describes its contribution to the production of democratic legitimation on behalf of a particular political community or communities. The primary role of the state, I argue in this chapter, is to enable a project of democratic constitutionalism. For national political communities with democratic traditions, the fact that their state enables democratic constitutionalism is a constitutive part of their identity.

In sections 1 and 2, in dialogue with Rawls and Habermas, I argue that secure basic rights and fair access to democratic voice are the two essential components of a state project of democratic constitutionalism. Political control by a citizenry over the basic structure of their society, for Rawls, demands a set of basic liberties and a guarantee that the political liberties will be of equal value to each citizen. For Habermas, basic rights and democratic voice are co-original elements in a state project of democratic constitutionalism. In section 3, I describe two attributes of the state that facilitate the performance of its primary role. First, predominant jurisdiction describes the state’s authority over basic rights and democratic voice; for the fundamental task of securing these goods for its citizens, states can call on all necessary resources, including coercive force. Second, open agenda denotes the scope of policy that can come before the citizenry of a state. Subject only to the confines of the constitution, citizens can attempt to address any issue through the state’s decision-making structure. In section 4, I describe the value of a state project of democratic constitutionalism in general terms for individuals and political communities. I also comment on the conditions under which such a
project can be successful. In section 5, I address the objection that my account of the role played by the state is too limited. In response, I show that two roles traditionally attributed to states – ensuring internal order and providing economic security – are in fact better conceived of as shared between states and non-state institutions.

1 Secure Basic Rights

Secure basic rights are the first essential component of a state project of democratic constitutionalism. Within the state’s space of political authority, rules about basic rights can be made, interpreted, and enforced. The content of rights in any particular state will depend on its constitutional tradition and many other historical and contextual factors. But each successful state project of democratic constitutionalism, I argue, must include a core set of basic rights. Following T.H. Marshall’s distinction, this core of basic rights should include civil, political, and social rights.¹ Both Rawls and Habermas emphasize the importance of a citizenry achieving these rights through a state project of democratic constitutionalism.

Rawls’s two principles of justice govern the design of the state constitution and can guide judicial and legislative debate. The first principle of justice provides for civil and political liberties:

Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.\textsuperscript{2}

His list of these rights includes:

…freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law.\textsuperscript{3}

The second principle of justice ensures equality of opportunity and that societal inequalities will be to the benefit of the worst off. To institutionalize the prescriptions of the second principle, various social rights are required. Although Rawls argues that the basic rights of the first principle of justice have lexical priority over the rights of second principle, this does not mean that the latter should be excluded from a list of core basic rights. The meaning of lexical priority is that the basic rights of the first principle must be secured first, before the redistributive implications of the second principle are considered. In fact, the rights of the second principle can be essential for realizing the basic liberties of the first principle, and should thus be included within the core of basic rights secured by a state project of democratic constitutionalism. Societies that institutionalize Rawls’s two principles of justice provide their citizens with the basic rights of citizenship, from the civil and political rights of the first principle to the social rights contained within the equality of opportunity and difference principles.

Basic rights are also a key component of Habermas’s account of democratic constitutionalism within the state. Private rights, such as rights to liberty, opinion, expression, and property, are “conditions for the legal form of a horizontal association of free and equal


\textsuperscript{3} \textit{Ibid.}, §13, p. 44.
persons.” These are similar to the basic ‘negative’ rights prominent in accounts such as Berlin’s. Political participation rights refer to the role of citizens as authors of the constitutional order. These include rights to vote and to stand for office, among others. Private and political rights can be justified absolutely, Habermas argues, as necessary components of the system of rights. Social and ecological rights are the third type of basic rights. They can only be justified in “relative terms” because they depend on whether “current circumstances” require them in order to equally realize private and political participation rights.

Private and political rights, in Habermas’s typology, are obvious candidates for core rights. In fact, the structure of Habermas’s argument in Between Facts and Norms could be used to justify a distinction between private and political rights as core rights and social and ecological rights as non-core rights. But, as we saw with Rawls, social rights can be essential

6 Between Facts and Norms, pp. 122-3.
7 Ibid., p. 123. For Habermas, basic rights emerge together with popular sovereignty in a co-original moment of mutual recognition by citizens. They are not, therefore, ‘grants’ of the state to citizens. Matthew Specter describes the tradition of German statism Habermas has argued against as follows: “law which treats rights as ‘possessions’ granted by the state, rather than as something that emerges from citizens’ recognition of each other as equals under the law, is the signature of the German statist approach to law” (“Habermas’s Political Thought, 1984-1996: A Historical Interpretation” Modern Intellectual History 6 (1), 2009: 91-119, at pp. 111-2). For Habermas, the horizontal association of citizens that grant each other basic rights must be complemented by vertical state power. “The state becomes necessary as a sanctioning, organizing, and executive power because rights must be enforced, because the legal community has need of both a collective self-maintenance and an organized judiciary, and because political will-formation issues in programs that must be implemented” (Between Facts and Norms, p. 134).
8 Ingram concisely describes the three levels of justification that correspond to the three types of rights: “the first level involves a philosophical deduction of basic categories of rights derived
for the effective realization of civil and political rights. The fact that they are conceptualized as relative to the circumstances of particular societies, in other words, does not mean that they should not be included within the core of basic rights that must be secured by a project of democratic constitutionalism.

In addition to broad agreement on a set of core basic rights, Rawls and Habermas both distinguish these rights from human rights, which they conceptualize as moral claims about a minimum standard of treatment due to all individuals as persons. As I discuss in chapter 7, Habermas has criticized political conceptions of human rights, such as Cohen’s, on the grounds that they conceive of human rights as international norms and not as natural rights that all

from the functional concept of modern law and the normative idea of rational justification. The second level involves the political process of realizing (or interpreting) these abstract principles of right in terms of constitutional rights – the site where liberal and political rights first make their appearance. The third level involves the process of statutory legislation, adjudication, and executive enforcement – the site where liberal and political rights are statutorily defined and their opportunity for equal exercise made possible through the provision of social rights.” See “Of Sweatshops and Subsistence: Habermas on Human Rights” Ethics and Global Politics 2 (3), 2009: 193-217, at p. 200.

A social right to a guaranteed annual income, for example, might be required to put citizens on an equal footing. Without the provision of a basic income, the ability of citizens to exercise their political rights could be compromised. Relatedly, Ingram criticizes Habermas for what he sees as the secondary billing given to the right to subsistence in the third level of justification. See “Of Sweatshops and Subsistence”, p. 203.

Arguments that destabilize the distinction between positive and negative rights make a similar point. For example, see Charles Taylor, “What’s Wrong with Negative Liberty” in Philosophy and the Human Sciences: Philosophical Papers 2 (Cambridge: Cambridge University Press, 1985).

individuals have because of their common humanity. This will not do justice, Habermas claims, to the progressive nature of human rights. Instead, human rights should be protected under the jurisdiction of a world organization. For Rawls, human rights are part of the criteria liberal peoples use when assessing how to relate to non-liberal peoples. ‘Decent’ peoples respect human rights, and this fact is part of the reason liberal peoples should refrain from interfering in their internal affairs. Both Rawls and Habermas, then, distinguish basic rights of citizenship from human rights on the basis that the former are political rights achieved within a project of democratic constitutionalism, and the latter are moral rights.

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14 Some critics have argued that Rawls makes human rights into international norms in a similar fashion to Joshua Cohen’s political approach. Beitz, for example, argues that human rights play the functional role within Rawls’s theory of saying when intervention is justified. See his “Human Rights” in A Companion to Contemporary Political Philosophy, 2nd ed., eds. Goodin et. al. (Malden, MA.: Blackwell, 2007). I think that a cosmopolitan reading of Rawls on human rights is possible, but I do not have space to discuss this point here.

15 Moyn argues that the ‘rights of man’ approach arising out of the French and American revolutionary period is distinct from the human rights approach that began to emerge in the 1940s. The former links rights to the power to create sovereignty; it is against the state that persons have rights to found a new state. This always issues in a bounded sense of rights, and fundamentally involves exclusion. Its chief form, as he notes, was liberal nationalism. Human rights, by contrast, typically involve consideration of the suffering of distant others who lie beyond the bounds of citizenship. Drawing on Arendt, Moyn argues that these situations refer to the ‘last chance of ‘humans’.” See The Last Utopia: Human Rights in History (Cambridge: Belknap Press, 2010), p. 12.
The advantage of distinguishing basic rights from human rights is twofold. First, emphasis is placed on the role played by a particular state project of democratic constitutionalism in securing basic rights. As Benhabib argues, “through institutions of self-government alone can the citizens and residents of a polity articulate justifiable distinctions between human rights, and then civil and political rights, and then judge the range of their legitimate variation.” Basic rights, in contrast to human rights, are secured for the citizens of particular states, not for all humans. Second, human rights remain as an external constraint, apart from any particular institutionalization within a state. When human rights function as an external constraint, it clears space for the possibility that non-state institutions will also, outside of the core secured by states, take over rights-protecting roles. In chapter 6, for instance, I argue that the state’s role in enabling democratic constitutionalism is compatible with indigenous jurisdiction over Aboriginal rights and title. And, in chapter 7, I note two unique aspects of rights-protection in the European Union. First, the EU bureaucracy and courts secure a variety of rights – mostly economic – related to the goal of promoting regional cooperation. Second, the EU has taken on the project

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17 This does not mean, however, that it is always easy to draw a line between basic and human rights. For example, recent accounts of belonging as presence have unsettled the distinction between private rights that are secured for all individuals in the state territory and political participation rights that are provided only to citizens. The intuition that visitors should not be able to participate in making decisions that primarily affect citizens of the state is behind the worry that the extension of political rights to all present within a territory is too broad. This claim does not, however, deny that current restrictions on paths to permanent residency or citizenship are too onerous. Who counts as a permanent resident, and whether permanent residents should enjoy political participation rights, remains a matter of debate. See Linda Bosniak, “Being Here: Ethical Territoriality and the Rights of Immigrants” Theoretical Inquiries in Law 8 (2), 2007: 389-410, Seyla Benhabib, The Rights of Others: Aliens, Residents, and Citizens (Cambridge: Cambridge University Press, 2004), the essays collected in Identities, Affiliations, and Allegiances, eds. Benhabib et. al. (Cambridge: Cambridge University Press, 2007), and Joseph Carens, Immigrants and the Right to Stay (Cambridge, Mass.: MIT Press, 2010).
of securing human rights in a regional area. I will argue that such innovations are consistent with the state’s role in securing a core of basic rights.

In sum, the first component of the state’s primary role in enabling democratic constitutionalism is to secure a core set of basic rights. These rights must include, at a minimum, civil and political rights, and the social rights necessary to make civil and political rights effectual.

2 Fair Access to Democratic Voice

The second essential component of a state project of democratic constitutionalism is the provision of fair access to democratic voice. Rawls and Habermas again provide useful accounts.

As I noted in the introduction, Rawls’s approach to democratic legitimation asks how individuals holding divergent comprehensive views can agree on a shared conception of justice. The “practicable aim” of an overlapping consensus on political values, he holds, is “to narrow disagreement at least regarding the more divisive controversies, and in particular those that involve the constitutional essentials.”

Accordingly, his ‘liberal principle of legitimacy’ states that “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to

18 Justice as Fairness, p. 28.
endorse in the light of principles and ideals acceptable to their common human reason.” Fair access to democratic voice will be an essential component of any project of democratic constitutionalism.

In fact, Rawls argues that the political liberties require special treatment to ensure that access to democratic voice is not merely formal:

...justice as fairness treats the political liberties in a special way. We include in the first principle of justice a proviso that the equal political liberties, and only these liberties, are to be guaranteed their fair value [...] This guarantee means that the worth of the political liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to hold public office and to affect the outcome of elections, and the like."20

Dryzek offers a forceful version of the objection that fair access to democratic voice will offer only formal equality with his argument that state institutions of democracy will be radically insufficient in a globalizing world.21 Factors such as the force of global capital, he says, effectively void the formal equality democratic citizens possess within the state.

If we think that Rawls’s special treatment of the political liberties is insufficient as a response to Dryzek, Bohman offers an additional response. Dryzek’s shift of emphasis from state-oriented citizenship to the democratic potentials of transnational democracy seems even less likely, he thinks, to successfully resist the force of global capital than the formal equality of access provided by states. In Dryzek’s model, Bohman claims, individuals will not have concrete institutional pathways for realizing democratic voice: “Lacking any clear account … of

19 Political Liberalism, p. 137.
how the powerless are able to entrench their claims institutionally, contestation is not what the dominated require. Interestingly, in the previous chapter I provided a similar critique of Bohman’s own reflexive theory of democratization. His emphasis on a minimum status for individuals, I claimed, fails to provide a plausible account of what roles particular institutions will play. Fair access to democratic voice within a state, contra both Dryzek and Bohman, is a tangible good for individuals.

In Habermas there are both abstract and concrete senses in which states facilitate access to democratic voice. Abstractly, popular sovereignty is one of the co-original elements, along with basic rights, of a state project of democratic constitutionalism:

“Rights of equal participation for each person […] result from a symmetrical juridification of the communicative freedom of all citizens. And this freedom in turn requires forms of discursive opinion- and will-formation that enable an exercise of political autonomy in accordance with political rights.”

More concretely, Habermas employs critical democratic theory to investigate the ways in which administrative and economic power can negatively impact communicative power.

Importantly, both Rawls and Habermas differentiate the democratic character of the state from the democratic character of international or transnational institutions. In Rawls’s *Law of Peoples*, fair access to democratic voice becomes a part of the criteria that divide liberal peoples from non-liberal but decent peoples. For a liberal people, fair access to democratic voice is operationalized through the political liberties and political system, and guided by the give and take of public reason. A decent people will lack full democratic voice, but may have a related

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23 *Between Facts and Norms*, p. 127, emphasis in original.
24 See *Between Facts and Norms*, chapter 8.
decision-making structure Rawls calls a ‘consultation hierarchy’. In Habermas’s late work he distinguishes between fair access to democratic voice within the state and the application of democratic principles to the postnational constellation. As I discuss in chapter 7, he calls for the democratization of the EU, but does not directly transpose the state project of constitutional democracy to the regional level. Instead, he proposes reforms to legitimate the elite-led integration that has occurred to date.

Fair access to democratic voice, in sum, describes the provision of concrete political liberties that allow citizens to influence the direction of policy in their state. This is an essential component of the state’s role in enabling democratic constitutionalism. Of course, there is great variation in the kinds of policy that come before a citizenry, and great variation in how a citizenry chooses to respond. As with the basic rights component of democratic constitutionalism, the institutionalization of fair access to democratic voice will not and need not be identical in all states. Just as distinct constitutional traditions will interpret basic rights differently, they will interpret what fair access to democratic voice requires differently as well. But this should be expected, because a project of democratic constitutionalism is a cultural and historical project, not a static statement of a democratic process that is defined the same way in

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25 Notably, Rawls’s explanation of how a consultation hierarchy for a decent people can be acceptable to liberal peoples argues for the universal importance of democratic participation, albeit to a lesser standard than would be acceptable in a liberal society. A political society, he argues, is a space in which collective control of shared political ends is possible. Without the basics of a consultation hierarchy or an equivalent arrangement, which will represent all individuals, even if unequally, a society will not meet the required standard of decency because it cannot be though of as a political society in the society of societies that the law of peoples regulates. That is to say, if a government acts for a political community in such a way that it disregards the input of the wider society, we should question its acceptability in mutual relations between political communities. See Law of Peoples (Cambridge, Mass.: Harvard University Press 1999), §§7-9. For a critical view of Rawls’s deployment of the concept, see Kok-Chor Tan “The Problem of Decent Peoples” in Rawls’s Law of Peoples: A Realistic Utopia?, eds. Rex Martin and David Reidy (Oxford: Blackwell, 2006).
each state. The collective ability to shape the direction of one’s society, in other words, is an achievement of a particular state project of democratic constitutionalism.

Under circumstances of substantive jurisdictional conflict and plural political identity, this point takes on a heightened importance. First, citizenries face claims to their state’s jurisdiction from non-state institutions that meet the conditions of substantive jurisdictional conflict outlined in chapter 2: they represent a territory which overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, and do not seek to form states themselves. Fair access to the state’s decision-making structure is an essential prerequisite for consideration of these claims. Second, state citizens themselves may have a plural political identity: they may have significant attachments to non-national political communities. Again, fair access to democratic voice will be an essential prerequisite of trying to balance these attachments.

3 The Attributes of the State

In this section, I argue that two attributes facilitate the performance of the state’s primary role in enabling democratic constitutionalism. The attribute of predominant jurisdiction facilitates the enforcement of basic rights and the institutional provision of fair access to democratic voice. The attribute of open agenda supplies the opportunity for citizens to democratically debate and act upon a wide range of issues within the institutional structure of the state.

Historically, the extent of the state’s jurisdiction has varied widely along multiple dimensions; some states have carefully guarded an exclusive jurisdiction over their citizens,
while others have accepted a lessening of control by tolerating interference from a variety of actors. The normative demands states make on citizens have also varied. These demands run the gamut from military conscription – perhaps the most demanding claim the state can make on its citizens – to paying taxes and filling out census forms.\footnote{26} In a globalizing world, both the extent of the state’s jurisdiction and the normative claims it makes on citizens are being called into question.\footnote{27} In this dissertation, I have focused on how the specific circumstances of substantive jurisdictional conflict and plural political identity challenge the standard model of democratic legitimation.

The first attribute of the state that allows it to play its primary role I call ‘predominant jurisdiction’. This attribute describes the authority and ability of states to secure basic rights and provide the institutional structure necessary for fair access to democratic voice: in order to provide these goods, states can call on all necessary resources, including coercive force. In this


\footnote{27} Saskia Sassen argues this is true to a degree not seen since the transition from a feudal to a state-centric system. See *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006). In addition to the cases I discuss at length in chapters 6 and 7 – indigenous self-determination and the legitimation of regional organizations – the affiliation of individuals with institutions is expanding in other, non-traditional ways. Keck and Sikkink discuss the tremendous growth in international non-governmental organizations in *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998). The challenges of dual citizenship are discussed in Thomas Faist and Peter Kivisto, eds., *Dual Citizenship in Global Perspective* (Basingstoke: Palgrave Macmillan, 2007) and Rainer Bauböck, *Transnational Citizenship: Membership and Rights in International Migration* (Aldershot: Edward Elgar, 1994). Also see Melissa Williams, “Nonterritorial Boundaries of Citizenship” in *Identities, Affiliations, and Allegiances*, eds. Benhabib et al. (Cambridge: Cambridge University Press, 2007).
rendering, predominant jurisdiction appears closely related to the concept of sovereignty as discussed in chapter 2, or to Weber’s definition of the state as “that human community that (successfully) lays claim to the \textit{monopoly of legitimate physical violence} within a certain territory.”\footnote{Weber, “The Profession and Vocation of Politics” in \textit{Political Writings}, eds. Lassman and Spears (Cambridge: Cambridge University Press, 1994), pp. 310-1, emphasis in original.} Under the modern view of the state, the resource of coercive force is conceptualized as having a wide scope of application. My conceptualization of the predominant jurisdiction attribute limits its use to the narrower role of what is necessary to enable democratic constitutionalism. In other words, the ultimacy and finality of traditional conceptualizations of sovereignty is filtered through the lens of the key question of what the state’s primary role is. The contrast between an exclusive and a predominant jurisdiction for states, then, turns not on the question of which resources are available to states, but in which areas states can deploy them. With the predominant jurisdiction attribute, states can deploy coercive force for the purpose of securing the basic rights of their citizens and providing fair access to democratic voice. Predominant jurisdiction is thereby closely linked to the issue of when state action is legitimate: certain facets of state power will be limited to that which is necessary to fulfill its primary role.

One important implication of restricting the state’s ability to deploy resources like coercive force should be noted. Under the predominant jurisdiction attribute, the state’s authority is defined territorially, and is mutually exclusive with other states.\footnote{States will be able claim an external right of non-intervention in affairs relating to their predominant jurisdiction, and if this right is violated, exercise a right to self-defense. The scope of my argument, though, focuses on how states contribute to the production of democratic legitimation, not on relations between states that raise claims of a right to non-intervention.} Basic rights are secured for citizens on a particular territory, and access to the state’s decision-making structure is restricted to citizens and permanent residents. The circumstance of substantive jurisdictional...
conflict, however, asserts that the jurisdiction of non-state institutions already overlaps with the jurisdiction of states. If we want to acknowledge this circumstance, then we must hold that territorial mutual exclusivity between states does not imply jurisdictional exclusivity in relation to non-state institutions.  

The examples discussed in the following chapters support this point. The European Union has jurisdiction over a definite territory that overlaps with the jurisdiction of its member-states. Also, the jurisdiction of indigenous political institutions in Canada, as I will discuss in the following chapter, overlaps with the jurisdiction of the state.

The state attribute of predominant jurisdiction, in sum, allows states to draw on all necessary resources to secure the basic rights of citizens and provide them with fair access to democratic voice. In contrast to its predominant jurisdiction attribute, which describes the character of the state’s jurisdiction over basic rights and democratic voice – the state can call on all necessary resources, including coercive force, to provide these goods – its open agenda attribute describes the scope of policy that citizens can address through the state’s decision-making structure. With the open agenda attribute, state citizens can attempt to address any issue, subject only to the confines of the constitution. In certain key periods, even constitutional

30 Rainer Bauböck, “Political Boundaries in a Multilevel Democracy” in Identities, Affiliations, and Allegiances. Also see Sassen, Territory, Authority, Rights, John Ruggie, “Territoriality and Beyond” International Organization 47 (1), 1993: 139-74, and Charles S. Maier “‘Being There’: Place, Territory, and Identity” in Identities, Affiliations, and Allegiances.

31 This distinction between the character of the state’s authority and its scope is similar to Levy’s distinction, discussed in chapter 4, between the degree and scope of control enjoyed by indigenous peoples over particular issues. The differences are as follows: predominant jurisdiction describes the resources the state can draw on to perform its primary role of enabling democratic constitutionalism, and open agenda describes the extensive range of issues that can be addressed through its decision-making structure.
matters can be put on the agenda. Because of its open agenda attribute, the citizenry of a state has access to a decision-making structure with an indefinite range.

Under the circumstances of substantive jurisdicitional conflict and plural political identity, the open agenda attribute takes on a new importance. It defines a citizenry as the key actor in a decision about sharing or dividing the state’s jurisdiction with non-state institutions. To respond to the normative challenges posed by non-state institutions, I have argued, a citizenry needs to decide whether to retain, share, or divide its jurisdiction with non-state institutions. Particular non-state institutions may provide compelling reasons to share or divide jurisdiction. For example, they may integrate states into a regional organization that can respond to the challenges of economic globalization more effectively than one state could on its own. As I discuss in chapter 7, when European citizens decide whether to support further integration, the issue of whether and how to share or divide state jurisdiction with the EU is directly at issue. A further example of a reason to share or divide state jurisdiction arises from the jurisdictional claims of indigenous political institutions. As I argued in chapter 2, these claims are grounded independently of the state. The open agenda attribute of states makes it possible for citizenries to address these difficult challenges.

4 The Value of Democratic Constitutionalism

In this section I first describe the value of a state project of democratic constitutionalism in general terms for individuals and for political communities. I then comment on the conditions under which such a project can be successful.

For individuals, the value of a state project of democratic constitutionalism is direct: their citizenship provides them with secure basic rights and fair access to democratic voice. Secure basic rights provide standing within the institution of the state, in addition to the specific goods of each of the core basic rights described above. Fair access to democratic voice provides citizens with the ability to address a wide range of issues that affect them. For a national political community with democratic traditions, the value of a state project of democratic constitutionalism is also direct. The state is the national political community’s institutional means of pursuing its interests and projects: in this sense, it is a constitutive part of the community’s identity. For non-national political communities, the value of a state project of democratic constitutionalism is contingent on the recognition of their community by state citizenries. Of course, states have often directly frustrated the aims of non-state political communities. For example, as I will discuss in chapter 6, indigenous political communities have had basic aspects of their communal lives governed by the settler state for centuries. If, however, non-national political communities are recognized by the state, the fact that it enables a project of democratic constitutionalism can provide them with a framework in which to pursue their interests and projects through state channels. They may also, I will argue, pursue these goals through non-state institutions that play primary roles.

In sum, the value of a state project of democratic constitutionalism is twofold: citizenship in the state provides important goods for individuals, and political communities have an institutional object through which to pursue their interests and projects. For the national political community, the primary role of the state in enabling a project of democratic constitutionalism is a constitutive part of its identity. For non-national political communities, they can pursue their interests and projects through state channels or via non-state institutions.

Importantly, the state’s primary role need not restrict the role(s) played by non-state institutions: it is not an exclusive conception of political authority. In other words, the thesis that the primary role of the state is to enable a project of democratic constitutionalism does not set predetermined limits to the content of the jurisdictional claims of non-state institutions. In particular, the state’s provision of a democratic, constitutional framework need not rule out institutionalized rights- or democracy-based practices on the part of non-state institutions. For example, as I will argue in the following chapter, non-state political institutions representing indigenous communities can claim significant areas of jurisdiction from states, such as Aboriginal rights and title, and pursue other rights- or democracy-based practices with no connection to the state, at the same time as states continue to form an important part of the institutional landscape for indigenous political communities.

Of course, the benefits of a state project of democratic constitutionalism must be achieved in practice. In other words, the presence of a state will not be a sufficient condition for its citizens to enjoy secure basic rights and fair access to democratic voice or for a non-national political community to be able to pursue its interests and projects through non-state institutions as well as through state channels. The success of any project of democratic constitutionalism depends on the circumstances, history, and organization of the state, its government, external
influences, and many other factors. In normative terms, the state might fall short of the standard of democratic constitutionalism. For example, a state project of democratic constitutionalism might fail to meet Rawls’s justice as fairness standard or Habermas’s ideal of a deliberative democracy. There are many possible reasons why this might be the case. A state might fail to secure basic rights and fair access to democratic voice for its citizens because a minority has captured control of key state apparatuses. The political communities that exist within and across the borders of the state might be unable to agree to share power. Or, controversially, democratic constitutionalism could be incompatible with the political culture of the state. Externally, other more powerful states might dominate the affairs of a state to such an extent that it is unable to enable democratic constitutionalism. There are undoubtedly other possibilities as well.

Finally, note that when a state project of democratic constitutionalism is achieved in practice, this need not exhaust the roles played by states. As I argue in the following section, states play other roles as well, such as ensuring internal order and providing economic security.

5 Non-primary Roles

The thesis that the primary role of the state is to enable democratic constitutionalism obviously falls short of a full accounting of what states do. One could object to my approach, then, on

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34 For example, my argument does not address the role of the state in broad historical perspective: I do not claim that the state is the most efficient way to organize a society, either in the sense that it is the most efficient organizational unit for facilitating economic growth, or in the sense that it is the most efficient organizational unit for consolidating military power. On the European state’s efficiency in facilitating economic growth through the protection of property
the grounds that it is too limited. What, for example, of traditional state roles such as providing economic security and ensuring internal order? I argue in this section that these two state roles, while in certain respects essential for the success of a state project of democratic constitutionalism, are not primary roles of the state. They are better conceptualized as shared roles of states and non-state institutions.

5.1 Economic Security

The provision of economic security is not a primary role of the state, I contend, because it does not directly describe the state’s contribution to the production of democratic legitimation. To be sure, certain facets of economic security are intrinsically connected to a successful state project of democratic constitutionalism. Without a certain level of economic security, citizens will not be able to fully participate in democratically legitimating state authority. Modern states, at least since Hobbes, have been conceived of as essential to economic security or ‘commodious living’.


35 “The Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them.” Hobbes, *Leviathan*, ed. C.B. Macpherson (Harmondsworth: Penguin, 1968). I thank Nancy Bertoldi for discussion on this point.
system, including a stable currency, states clearly have had and will continue to have a large role in ensuring economic security. However, there is a broader sense of economic security that is not gainfully conceptualized as a primary role of the state. This broader sense of the concept is evident when the interdependence of the world economy is brought into focus. Globalization theorists, for example, have noted how economic security now has many transnational dimensions. Held theorizes economic insecurity as a threat to autonomy, and proposes a multilayered institutional system to counter this threat.  

On this line of argument, the case for states and non-state institutions sharing the role of providing economic security is straightforward: economic interdependence means that states alone cannot hope to provide economic security for their citizens. Acknowledging the empirical reality of economic interdependence means conceptualizing economic security as the product of many forces, including transnational and global forces. The ability of any one state to control transnational and global forces that impact economic security will be limited. Even powerful states are influenced by policy decisions taken in other capitals and international institutions; non-state institutions are needed to coordinate and enforce policies that produce economic security for individuals. 

An additional point is that global interdependence does not mean that all countries will be impacted equally. The most direct way to improve economic security will vary according to

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38 Thomas Pogge argues forcefully that the international system is a significant cause of poverty. See his *World Poverty and Human Rights* (Oxford: Polity, 2002) and *Politics as Usual: What*
the circumstances of particular countries. In some countries, the capabilities of states might be what need the most strengthening, and integration into international economic institutions would seem to be a secondary concern. In other cases, notably in Europe, the integration of economies under a regional umbrella is arguably the best way to increase economic security. Just as the conditions for realizing economic security vary from country to country, the meaning of economic security itself will also vary. The role of the state in the economy, as well as the role of non-state institutions, will be conceptualized differently in different states. Democratic constitutional states, for example, allow a citizenry some measure of collective freedom to decide on the direction economic policy should take.

The argument that economic security is best conceptualized as a shared role between the state and non-state institutions can draw additional support from the cases of substantive jurisdictional conflict I examine in the following chapters. For First Nations in Canada, arguments for self-determination have often been couched in terms of economic security. As I will suggest in the following chapter, there are multiple pathways for achieving the broad goal of indigenous self-determination. One of these is recognition of Aboriginal title to land, which would offer indigenous political institutions a substantial resource with which to improve economic security for their communities. Similarly, with a regional organization like the EU, the provision of economic security is shared between member-states and regional institutions. As I

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show in chapter 7, the current sovereign debt crisis has driven home this point by demonstrating that monetary integration without political integration can have significant negative effects on some Eurozone economies.

In sum, although a certain level of economic security is essential for a successful project of democratic constitutionalism, the provision of economic security is not a primary role of the state, but is a joint product of states and non-state institutions.

5.2 Internal Order

In Weber’s well-known definition, the state is “that human community that (successfully) lays claim to the monopoly of legitimate physical violence within a certain territory.”40 This identification of the state with coercive force seems to suggest that the maintenance of internal order is a primary role of the state. But I have argued that states should be conceptualized as having the attribute of predominant jurisdiction, which limits the application of coercive force to the tasks of securing basic rights and providing an institutional structure for fair access to democratic voice.41 In this limited application, the ability to ensure internal order is essential to a successful state project of democratic constitutionalism; without means up to and including

40 “The Profession and Vocation of Politics”, pp. 310-1, emphasis in original.
41 I intend the legitimate exercise of state power to be understood in a normative sense, unlike Weber, who was concerned with legitimacy in the sense that individuals actually act as if the state does have a monopoly of violence. See David Beetham, Max Weber and the Theory of Modern Politics, 2nd ed. (Cambridge: Polity Press, 1985) and John P. McCormick, Weber, Habermas, and Transformations of the European State: Constitutional, Social, and Supranational Democracy (Cambridge: Cambridge University Press, 2007). I thank Simone Chambers for discussion on this point.
coercive force, states will be unable to play their primary role. But there is a further aspect of the maintenance of internal order that looks beyond the state. These are situations that require action on the part of both states and non-state institutions.

An example concerns the threats present in a globalizing world. As Habermas remarks, physical security “can no longer be assured without international cooperation in combating the cross-border risks of large-scale technology, the global spread of epidemics, worldwide organized crime, and the new decentralized terrorist networks.” Cooperation of this kind will need to involve non-state institutions. A further example of how the provision of internal order can be shared between states and non-state institutions arises from the claims of indigenous political communities to self-determination. One possibility is that indigenous political institutions take over responsibility for policing tasks from states. The European Union provides another example. EU cooperation on regulatory issues, policing, border control, and immigration policy are all examples of how the provision of order has been shifted from member-states to regional institutions. There is also a more direct sense in which the regional level contributes to the provision of internal order. As Weiler argues, the legal doctrines of direct effect and supremacy differentiate the EU from other regional organizations under


international law because they are key parts of a process of constitutionalization. The relationship between the EU level and the member states is cashed out in many different ways, and the process of constitutionalization is on-going, but the result is that the provision of order is effectively shared between states and the EU in Europe.

These examples demonstrate how the important, continuing role states have in maintaining some aspects of internal order is complemented by the shared provision of other aspects. That the maintenance of internal order seems like a primary role of the state, I think, results from continuing to assume the validity of the modern view of the state. But as I argued in chapter 2, the latter cannot adequately recognize the circumstance of substantive jurisdictional conflict. This is partly because it elevates the individual-state relationship – particularly the monopoly of force the state holds over any one individual or group of individuals – over the jurisdictional claims of non-state institutions. My approach, by contrast, focuses on the contribution of the state to the production of democratic legitimation. This concerns the kind of political space carved out by the state – and the justification for this space – not the fact that states have a monopoly of force. In sum, my argument that the provision of internal order is not a primary role of the state acknowledges that states will need certain means, such as the attribute of predominant jurisdiction, in order to enable a successful project of democratic


46 Another possibility worth noting is the EU membership binds governments to particular policies. Arguably this had a stabilizing effect on countries that had, prior to joining, authoritarian governments. See Mary Kaldor and Ivan Vejvoda, eds. Democratization in Central and Eastern Europe (London: Pinter, 1999) and Geoffrey Pridham, “EU Enlargement and Consolidating Democracy in Post-Communist States – Formality and Reality” Journal of Common Market Studies 40 (3), 2002: 953-73.
conventional constitutionalism. But other aspects of the maintenance of internal order are better conceptualized as shared between states and non-state institutions.

6 The Role of the State

In this chapter I have argued that the primary role of the state is to enable democratic constitutionalism. In sections 1 and 2, I argued that secure basic rights and fair access to democratic voice are the two essential components of a state project of democratic constitutionalism. In section 3, I described the attributes of states that facilitate a project of democratic constitutionalism. Predominant jurisdiction facilitates the provision of secure basic rights and fair access to democratic voice, while open agenda supplies the opportunity for citizens to democratically debate and act upon a wide range of issues within the institutional structure of the state. In section 4, I argued that the value of democratic constitutionalism is grounded in the benefits it provides to individuals and political communities. For individuals, the state provides its citizens with secure basic rights and fair access to democratic voice. For political communities, the state is a stable institutional framework in which to pursue its interests and projects, both through traditional state channels for the national political community and through state channels and non-state institutions for non-national political communities. Finally, in section 5, I responded to the objection that my account of the state’s role is too limited by arguing that roles such as providing internal order and economic security, which were previously the exclusive purview of states, are now better thought of as shared between states and non-state institutions. While states must retain the necessary means to secure basic rights and provide fair
access to democratic voice for their citizens, including the ability to resort to coercive force, possession of these means does not define its primary role.

The result of this argument is a clearer picture of what is normatively important about the state. My claim about the state’s primary role describes its contribution to the production of democratic legitimation. Unlike other state roles that traditionally defined states, such as the provision of economic security or the maintenance of internal order, the role of enabling a project of democratic constitutionalism cannot be distributed to non-state institutions without severe normative consequences. In the following chapters, I deploy the account of the state’s primary role developed here to address the strength of its jurisdictional claims under circumstances of substantive jurisdictional conflict and plural political identity. That is, I will compare its primary roles to the primary roles played by other, non-state institutions, to the end of evaluating the responsibilities of citizenries to enhance democratic legitimation by distributing some of their state’s jurisdiction to non-state institutions.
Chapter 6. States and Indigenous Political Institutions

In this chapter, I explore the nature of the jurisdictional conflict between states and indigenous political institutions. I argue that the key to the success of any of the multiple pathways available for the resolution of conflict is to conceptualize the parties appropriately. In particular, indigenous political institutions should be conceptualized as having the primary role of enabling the self-determination of their communities. Employing this approach addresses the conflict between the state and indigenous political institutions by attempting to reconcile their respective primary roles. By contrast, the standard model asserts that the fundamental relationship of democratic legitimation is between the national political community and the state.

In section 1, I give three reasons for considering the claims of indigenous political institutions. First, states have routinely blocked indigenous self-determination; given this historical context, there is a need to decolonize the relationship. Second, distributing jurisdiction to indigenous political institutions has the potential to improve policy outcomes. Third, distributing jurisdiction can aid in the recognition of the plural political identity of indigenous citizens. In section 2, I discuss the fight over the attempt to develop a mine on Tsilhqot’in Nation traditional territory near Williams Lake, BC. I argue that shared jurisdiction over resource development is a feasible alternative to the current process, which gives government too much discretion. I then discuss complicating factors such as Aboriginal title and rights, self-government, and the BC treaty process. In section 3, I comment on the ability of treaties, more limited, temporary agreements, and grand bargains between government and First Nations to express state responsibilities to indigenous peoples. In section 4, I argue that the primary role of
indigenous political institutions is to enable the self-determination of the political communities they represent. State citizenries, I conclude, have a responsibility to distribute jurisdiction to indigenous institutions in order to facilitate their attainment of this primary role. Doing so will enhance democratic legitimation at a supplementary institutional location.

### 1 Reasons for Distributing Jurisdiction

There are three normatively compelling reasons for state citizenries to attempt to reconcile the authority of their state with the jurisdictional claims of indigenous political institutions. States should consider distributing jurisdiction to indigenous political institutions in order to: (i) decolonize their relationship with indigenous peoples, (ii) improve policy outcomes, and (iii) recognize the plural political identity of indigenous citizens.

First, indigenous political communities have directly experienced the colonizing effects of state-centered political theory. In the nineteenth century Canada turned away from an earlier, more cooperative ground of the relationship in the nation-to-nation approach and began to assert the exclusivity of its jurisdiction. The Indian Act, first introduced in 1876, was an explicitly

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2 Miller divides the history of relations between European settlers and Aboriginal peoples in Canada into three broad eras. A series of agreements grounded in cooperation for mutual advantage characterized the first period. There were treaties of peace and friendship,
colonial, assimilative policy that governed many aspects of Native life. It is still in force today. The negative effects on the social, cultural, and political life of First Nations have been well documented. While recognizing this history, several scholars have made the case for rebalancing the relationship between the state and indigenous peoples. Taiaiake Alfred endorses “nation-to-nation relations with the state” but stresses that nationhood must not be linked with the culturally inappropriate concept of sovereignty or with other colonial assumptions.

Patrick commercial treaties, and treaties to cede land in exchange for benefits. The British and French empires, for a variety of reasons, acknowledged a nation-to-nation approach as the foundation of relations with indigenous peoples. In this period, the independent jurisdiction of First Nations was acknowledged, in both shared territory and territories exclusively occupied by First Nations. The Royal Proclamation of 1763 is the key document of this period. The second period exemplified the exclusivity approach to jurisdiction on the part of the Canadian State. For the nineteenth and much of the twentieth century, Canada ignored or actively suppressed First Nations’ claims to jurisdiction over both territory and social, cultural, and political practices. In British Columbia, for example, even though Aboriginal title was never ceded through treaty in much of the province, and the federal government recognized the need to conclude treaties with First Nations, the provincial Crown refused to participate in the treaty process until the early 1990s. The third period marks a new era of cooperation and a partial return to the nation-to-nation ground of the relationship. The retraction of the 1969 White Paper, which proposed ending Indian status, the closing of residential schools, and a series of important court cases that acknowledged Aboriginal rights are important markers of the third period. See J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989) and Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada (Toronto: University of Toronto Press, 2009), Christopher McKee, Treaty Talks in British Columbia: Building a New Relationship, 3rd ed. (Vancouver: UBC Press, 2009), and Patrick Macklem, Indigenous Difference and the Constitution of Canada. Toronto: University of Toronto Press) p. 104.


4 Peace, Power, Righteousness, p. 172. He objects to the application of categories like rights to indigenous struggles when they emanate from the state, preferring to develop concepts within indigenous traditions instead. “‘Aboriginal rights’ are in fact the benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state” (p. 176).
Macklem argues that the fundamental value of equality demands recognition of indigenous difference in the Canadian constitution.\(^5\) James Tully emphasizes the multivocal nature of politics in an age of diversity, where there are multiple sources for jurisdictional authority, but also the problem of living together. What he calls ‘modern constitutionalism’ – a version of the modern view of the state rejected in chapter 2 – relies on a univocal justification that is no longer available, if it ever was.\(^6\)

The second reason to consider the claims of indigenous political institutions is to improve policy outcomes. In Canada, First Nations have often expressed their frustration at the way their affairs are micromanaged by the Indian Affairs bureaucracy in Ottawa. And, as the history of aboriginal policy in Canada demonstrates, the effective management of issues that affect indigenous political communities has been the exception rather than the rule. But this should not be surprising. Structurally, the state seems to be the wrong place to lodge jurisdiction over many issues that affect indigenous peoples. The state’s primary role, as described in the previous chapter, is to enable democratic constitutionalism. This is a broad role. The state’s attributes, predominant jurisdiction and open agenda, facilitate the pursuit of this broad role. Indigenous political institutions, by contrast, can focus on policy areas where they have a specialized

\(^5\) Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2001). In chapter 2, section 2.3, I discussed Macklem’s argument that it is inappropriate for the Supreme Court of Canada to rule on what constitutes a core cultural practice of indigenous peoples.

knowledge of local circumstances.\(^7\) Examples of areas where indigenous control could improve outcomes are education, where knowledge of culture and language lies with the local community, and resource management decisions, where the community can take into account the effect of development proposals on their use of the land.\(^8\) This emphasis on local knowledge should not be taken to limit the kinds of jurisdiction that states can distribute to indigenous political institutions. As I discuss in section 3, the Nisga’a Final Agreement is an example of a modern treaty that transfers other jurisdictional authority such as control over citizenship.

The third reason to consider the claims of indigenous political institutions is to recognize the plural political identity of individuals. Indigenous persons must reconcile state citizenship, affiliation to indigenous political institutions, a perhaps tenuous relationship to the national political community, and belonging in their indigenous political community. In this context, state recognition of the plural political identity of its citizens may be facilitated by distributing jurisdiction to indigenous political institutions. Such distributions would strengthen indigenous

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\(^7\) In chapter 3, section 2, I discussed how Iris Young applied this line of reasoning to the circumstances of indigenous peoples. In general, the literature on subsidiarity argues that local, non-state institutions may be more able to effectively address particular problems of governance than states. The logic of subsidiarity, though, also implies that some decisions should be made at a higher level than the state. In the following chapter I discuss the role of the European Union. See Andreas Follesdal, “Survey Article: Subsidiarity” \textit{The Journal of Political Philosophy} 6 (2), 2006: 190-218 and Stefan Gosepath, “The Principle of Subsidiarity” in \textit{Real World Justice}, eds. A Follesdal and T. Pogge (Dordrecht: Springer, 2005).

political institutions, which would enhance the ability of indigenous political communities to pursue their interests and projects through institutions that they control.  

These three justifications for considering the claims of indigenous political institutions and distributing jurisdiction to them where required are likely to be complementary. Decolonizing the relationship between the state and indigenous political communities, for example, will improve policy outcomes with respect to indigenous persons, which will aid in the recognition of the plural political identity of indigenous citizens. But which specific distributions of jurisdiction from states to indigenous political institutions will have this effect? Schematically, non-state political communities like indigenous peoples have several institutional pathways through which to realize their interests and projects: (i) through participation in state institutions, (ii) through sharing jurisdiction with the state, and (iii) through indigenous political institutions that are independent of the state. The latter pathway should not be understood narrowly. States can transfer jurisdiction to an indigenous institution, leaving it the space to act independently, but indigenous political institutions can also claim jurisdictional authority without an explicit grant from the state. The three pathways overlap with the ways that states can facilitate indigenous self-determination: (i) they can include indigenous voices in state decision-making, (ii) they can share jurisdiction with indigenous political institutions, and (iii) they can

9 Schouls writes that the relationship between the state and indigenous political institutions should be “seen as the outcome of a process in which Canadian governments recognize their federal obligation to create political space for Aboriginal communities so that they can develop and express their communal identities in freedom.” See his Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government (Vancouver: UBC Press, 2003), pp. 129-30.

10 While I focus on how state citizenries can distribute jurisdiction to non-state institutions, it is important to raise the possibility of new jurisdictional authority that is created independently of the state. To deny this possibility would be to fall back on the modern view of the state, where states have control over the creation of jurisdiction.
transfer jurisdiction to indigenous political institutions. In the following section I take up the specific issue of mining governance in British Columbia in order to provide a practical context for my evaluation of these various pathways.

2 Sharing Jurisdiction over Resource Development: The Prosperity Mine

In this section, I argue that the Canadian and BC governments, together with First Nations, should construct a structure for sharing jurisdiction over resource development approvals. The major flaw in the current process is that too much discretion is lodged with government, leaving First Nations with few options other than pleading their case in front of environmental assessment panels or pursuing court action. I consider a proposal by Taseko Mines Ltd. to develop a copper-gold mine, called Prosperity, on Tsilhqot’in Nation territory near Williams Lake, BC. This particular resource development application is significant because it raises a series of related issues such as the jurisdiction of the provincial government, case law on Aboriginal title, and the BC treaty process.

Although widely supported in the non-aboriginal community, Taseko’s application was rejected by the federal government on Nov. 2, 2010. In support of his decision, Environment Minister Jim Prentice cited environmental concerns and the impact on First Nations. The

government’s environmental assessment had stressed that the proposed destruction of Fish Lake, deemed by the company to be the only economically feasible site for the mine’s tailings pond, would negatively impact aboriginal rights. Taseko had proposed construction of a new lake nearby to compensate for the loss of Fish Lake, known to the Tsilhqot’in as Teztan Biny. The Tsilhqot’in, however, argued that the new lake would not be sufficient compensation for the loss of Teztan Biny, and that their aboriginal right to fish would be infringed by the development of the mine. Chief Marilyn Baptiste of the Xeni Gwet’in, the Tsilhqot’in nation most affected by the mine, said that “No amount of money could compensate for what this mine would do to our people and the land we treasure.”

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13 Several legal actions have been launched by the Tsilhqot’in in defense of their rights. The most significant decision, which I discuss below, is Tsilhqot’in Nation v. British Columbia, 2007 BCSC 1700. This BC Supreme Court decision recognizes aboriginal title, aboriginal rights to hunt and trap and to capture wild horses, but not an aboriginal right to fish. The Xeni Gwet’in, one of the Tsilhqot’in Nations, have launched a separate court challenge claiming that the Prosperity mine will infringe their aboriginal right to fish in Teztan Biny. See Baptiste et. al. v. Taseko Mines Ltd., HMTW BC and AGC, pending court case. Also see Justine Hunter, “Native band seeks to halt proposed mine” The Globe and Mail Jan. 6, 2009, http://www.theglobeandmail.com/news/national/british-columbia/native-band-seeks-to-halt-proposed-mine/article963711/, accessed Aug. 13, 2011.

14 Marilyn Baptiste, “Ottawa must not sell out Tsilhqot’in”, The Globe and Mail Sept. 20, 2010, http://www.theglobeandmail.com/news/opinions/ottawa-must-not-sell-out-tsilhqotin/article1715503/, accessed Aug. 13, 2011. The Tsilhqot’in make a strong claim to jurisdiction over their lands: “The Tsilhqot’in Nation affirms, asserts, and strives to exercise full control over our traditional territories and over the government within our lands. Our jurisdiction to govern our territory and our people is conferred upon us by the Creator, to govern and maintain and protect the traditional territory in accordance with natural law for the benefit of all living things existing on our land, for this generation and for those yet unborn. We have been
Taseko’s defense of its application downplayed the impact on the Tsilhqot’in. In front of the federal environmental assessment panel, Taseko argued that “whatever right to fish that may exist would not be of such a nature as to prevent the Project from proceeding.” Further, “any infringement would be justified in the circumstances as a result of the process, including consultation.” In response to claims that it should put the project on hold pending resolution of treaty negotiations with other affected First Nations, Taseko maintained that “the process of consultation and ongoing treaty negotiations [do] not give First Nations a veto right over whether or not the Project should proceed.” On the basis of Taseko’s arguments, the federal government could have ruled that the economic benefits of developing the mine outweighed environmental concerns and the infringement of aboriginal rights. Indeed, the provincial government’s own environmental assessment, although criticized by environmental groups, had concluded the project should go ahead.

The victims of colonization by Britain, Canada and the Province of British Columbia. We insist upon our right to decolonize and drive those governments from our land.” Yet, the Tsilhqot’in are willing to negotiate a treaty: “We have often declared our willingness to negotiate terms of union with Canada. We repeat that offer now. We make only one condition: the process for negotiation and the final settlement must carry the consent of the Tsilhqot’in Nations.”


16 Ibid.
17 Ibid., p. 212.
The recent rise in gold prices has improved the economics of the project, leading Taseko to revise its earlier position that Fish Lake was the only viable site for the tailings pond. The company has submitted a new application that proposes sparing Fish Lake and moving the tailings pond further away from the mine site.\textsuperscript{19} The Tsilhqot’in now face the prospect of pleading their case in front of a new environmental assessment panel.\textsuperscript{20} In addition to Taseko’s attempt to address the primary environmental concern in the original environmental assessment – the destruction of Fish Lake, other factors point in the direction of approval for the new mine proposal. For example, the mine is strongly supported by BC Premier Christy Clark.\textsuperscript{21} The affected First Nations, particularly the Tsilhqot’in, remain adamantly opposed to the project.\textsuperscript{22}

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\textsuperscript{19} Taseko’s description of the ‘New Prosperity’ mine can be found at \url{http://www.newprosperityproject.ca/}, accessed Aug. 13, 2011.

\textsuperscript{20} First Nations face many challenges in resisting development proposals on their land. See Bonnie Docherty, \textit{Bearing the Burden: The Effects of Mining on First Nations in British Columbia} (Harvard Law School: International Human Rights Clinic, 2010).


\textsuperscript{22} Tsilhqot’in National Government, “Tsilhqot’in Nation call on Governments to reject Re-Submitted ‘New Prosperity’ Mine”, Jun. 8, 2011, \url{http://www.newswire.ca/en/releases/archive/June2011/08/c4121.html}, accessed Aug. 13, 2011. The Tsilhqot’in, along with other interested parties, have noted that the new proposal was originally judged by Taseko to have a more damaging impact on the environment than the proposal that has already been rejected.
Although it resulted in the rejection of the original mine proposal, the federal environmental assessment process that reviewed it did not include the Tsilhqot’in as a full partner. Instead, the Tsilhqot’in were left to air their concerns in front of a process that was already underway, and which ultimately left the decision on approval in the hands of a federal minister. The likely approval of the revised Prosperity application demonstrates the challenges facing First Nations in resisting resource development applications on their traditional territories.

The flaw with the current process for governing the approval of mines like Prosperity is that too much discretion is left to the federal government. An alternative would meaningfully share jurisdiction over mine approvals between government and First Nations. One way to achieve this would be to reform the environmental assessment process. Another possibility is a new institution where each partner has a real say over the outcome, including a veto over approvals. The design of the BC Treaty Commission could perhaps serve as a model for a new institution with jurisdiction over resource development applications. On the Treaty Commission, First Nations and government are equally represented. These options recall Levy’s distinction between the scope and degree of authority an indigenous political institution can have over a particular policy area. A new institution that gave First Nations veto power would confer a high degree of authority over a specific area.

A new structure for sharing jurisdiction over resource development approvals would lessen the need for First Nations to pursue legal action, as the Tsilhqot’in have done. Arguably, though, the ability of BC First Nations to influence the approval process for new mines has never

23 McKee describes the mandate of the Commission in Treaty Talks in British Columbia, p. 33.  
24 See chapter 3, section 2.
been greater because of successes in the courts. The Supreme Court of Canada Delgamuukw decision of 1997, discussed further below, capped a string of decisions that strengthened the claims of First Nations. The long-running and on-going Tsilhqot’in Nation case may strengthen their claims further. Although originally aimed at preventing logging in Tsilhqot’in territory, the case has implications for the Prosperity Mine.

In a 2007 BC Supreme Court decision, trial judge Mr. Justice Vickers stated that, in his opinion, the Tsilhqot’in had proven Aboriginal title to a large area of their traditional territory, some 2,000 square kilometers. In addition, he ruled the Tsilhqot’in had aboriginal rights, such as hunting and trapping rights, in an even larger area. The Prosperity Mine site itself sits outside

25 Tennant argues that the shift in the early 1990s from outright denial of Aboriginal title by the BC government towards the negotiation of treaties was the product of successes in the courts in the 1970s and 1980s. See his Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 (Vancouver: University of British Columbia Press, 1989).

26 Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010. The inclusion of section 35 in the Constitution Act, 1982, was also important. It not only entrenched existing aboriginal and treaty rights, but also provided a platform for rebalancing the relationship between the state and First Nations through the signing of additional treaties, particularly in the north and in British Columbia, where treaties have never been signed.


the area where the court accepted that the Tsilhqot’in had proven Aboriginal title, but inside the area where the court ruled the Tsilhqot’in had aboriginal rights to hunt and trap. But in a move that has puzzled some legal scholars, Justice Vickers argued that because of the way the case was presented he could not make a legally binding declaration of Aboriginal title. The Tsilhqot’in had presented their claim as all-or-nothing, he said, and he could not make a declaration of title to the entire claimed area. He did feel compelled, however, to state how he would have ruled, had the plaintiffs pleaded their case differently. Accordingly, Justice Vickers’ ruling has been criticized on the basis that it consists largely of obiter dicta. But the importance of the Tsilhqot’in Nation case cannot be denied – it is the first to recognize Aboriginal title to specific lands.

The basis for Vickers’ interpretation of Aboriginal title is the Supreme Court’s Delgamuukw ruling:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of

29 To further complicate matters, the Tsilhqot’in claim of an Aboriginal right to fish in the area was not part of the case, and is instead part of another legal action. See notes 11 and 12 above.


practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do no constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.32

Pre-*Delgamuukw*, McNeil argues that courts held a discriminatory, ‘frozen rights’ approach to Aboriginal title by linking the use of title lands to narrowly defined Aboriginal rights.33 In the passage above, the frozen rights approach is rejected, but the Court introduces the concept of an ‘inherent limit’. In an effort to show that the concepts of exclusive use and inherent limit are not contradictory, McNeil compares Aboriginal title to the restrictions municipal zoning laws place on fee simple owners: “While the limit may restrict the uses which Aboriginal nations can make of their lands, their right of use and occupation is nonetheless exclusive.”34 This reading coheres with the opinion of one law firm on the implications of a legally binding declaration of Aboriginal title in the appeal of *Tsilhqot’in Nation*. “The Tsilhqot’in Nation,” the legal brief argues, “will have the exclusive right to use and occupy those lands”,35 but does not grant

...unlimited rights on the land; aboriginal title brings the right to use the land for a variety of purposes, but does not allow a First Nation to use the land for mining, forestry, or other developments that are inconsistent with its attachment to the

32 *Delgamuukw*, 1080-81, para 111.


land; if the Tsilhqot’in Nation wants to develop land held under aboriginal title for an inconsistent purpose, it will have to surrender its aboriginal title to the federal government – for example, through a negotiated treaty.\textsuperscript{36}

If Aboriginal title to the Prosperity Mine site were proven in a further court proceeding, the Tsilhqot’in would have exclusive use of the land, and would be able to veto resource development proposals.\textsuperscript{37} However, the Tsilhqot’in would need the federal government’s approval if they did want a project to proceed. We can imagine, for example, that another First Nation, finding itself in a position similar to that of the Tsilhqot’in, might desire the economic benefits that flow from the development of a large mine like the Prosperity project. While holding Aboriginal title to their traditional lands, the First Nation in question would not be able to proceed if, for example, the federal government resisted development on the grounds that the environmental costs were too high.

As the Prosperity Mine example shows, an array of contentious issues arises when assessing whether to proceed with a new mine. As I have suggested, one pathway of reform is to construct a structure for sharing jurisdiction over resource development approvals with First Nations. Another pathway is suggested by the Tsilhqot’in Nation case: legal recognition of Aboriginal title by the courts, and then political recognition of such title by government. Of course, the pursuit of these pathways must consider whether the resulting agreements improve the position and circumstances of First Nations in comparison to the status quo.\textsuperscript{38} While

\begin{footnotes}
\footnote{Lawson Lundell LLP, “The Tsilhqot’in Nation v. British Columbia Case”, p. 2.}
\footnote{Importantly, aboriginal rights and title are held collectively, independently of the state. See Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” Osgoode Hall Law Journal vol. 34, 1996: 101-12. As I noted in chapter 2, section 2.3, theorists have been moving to recognize the independent but complementary grounding of the Canadian constitution in aboriginal and non-aboriginal sources.}
\footnote{Thanks to Nancy Bertoldi for raising this objection.}
\end{footnotes}
transfers of jurisdiction from states to indigenous political institutions might seem to increase the authority of the latter at the expense of the former, if the end result is a diffusion of indigenous authority, states may be able to leverage their power in such a way that indigenous peoples actually have less control than they previously had. The historical record of treaty compliance in Canada, for example, does not suggest a strong motivation on the part of Canadian citizens and politicians to move towards sharing jurisdiction with First Nations over economically valuable areas like mining.

Clearly, the legal arena has been and will continue to be an important venue for the Tsilhqot’in to pursue recognition of their claims. In the following section, I discuss other pathways for the resolution of jurisdictional conflict, such as treaties, temporary agreements, and grand bargains between government and First Nations.

3 Treaties and Other Pathways for Reconciliation

Arguably, treaties are the paradigmatic case of an agreement struck under the modern view of the state, because each party to the treaty must give its sovereign approval to an agreement. I offer a different interpretation. Treaties, I argue, are one way to codify distributions of jurisdiction from states to First Nations under a transformed model of democratic legitimation, where both the state and the indigenous political institution are conceptualized as institutions with primary roles.

39 Thanks to Nancy Bertoldi for discussion on this point.
Consider the example of the Nisga’a, a First Nation in northwestern BC. In 1998 a comprehensive agreement was signed that recognizes the Nisga’a right to self-determination, but carefully sets out the remaining role of the Canadian state, the areas in which jurisdiction will be shared with Canada, and the areas in which jurisdiction is transferred from Canada to the Nisga’a. Whether the Nisga’a experiment is successful remains to be seen, but their treaty has given them a degree of control over resource development approvals, in addition to other jurisdiction, such as self-government, control over citizenship, education, and other areas. The Nisga’a government can also pursue its own initiatives in policy areas not directly addressed by the Final Agreement.

Clearly, this is a different path to self-determination than the Tsilhqot’in have pursued. For example, the Nisga’a Final Agreement created several classes of lands. On treaty settlement lands, some 1992 square kilometers – 8% of what the Nisga’a claim are their traditional lands – the Nisga’a own the mineral resources. Federal and provincial laws of general application continue to apply to these lands, meaning that processes like environmental assessments are still required for large mining projects. But Nisga’a ownership of the land means that they have effective control over resource development projects like mines. Beyond the core treaty settlement lands, a much larger area of the Nass Valley will be under shared jurisdiction with the

40 The Nisga’a Final Agreement stems from the 1973 Calder decision, and was completed outside of the BC Treaty Process. Initially, the Nisga’a negotiated only with the federal government. After 1992 the provincial government also participated. The treaty came into full effect on May 11, 2000, and can be found at: http://www.aice-inac.gc.ca/al/lde/ccl/fagr/nisga/nis-eng.pdf (accessed Aug. 16, 2011).


42 McKee, Treaty Talks in British Columbia, p. 99 and Nisga’a Final Agreement, p. 31-4.
provincial and federal governments. On these lands, the Nisga’a will still have input into mining developments and receive benefits such as resource sharing.  

Reaction to the Nisga’a Final Agreement has been mixed. Alfred argues that the treaty process perpetuates colonial assumptions, such as the idea that “Canada owns the land it is situated on.” More recently, he has questioned the viability and cultural appropriateness of fee-simple ownership for the Nisga’a. And, while not directly critical of the Nisga’a, other BC First Nations have followed a quite different course. Many interior BC First Nations, for example, have refused to even participate in the BC Treaty Process. The decision in the Tsilhqot’in Nation case, these First Nations feel, vindicates their decision. Grand Chief Stewart Phillip, president of the Union of BC Indian Chiefs, a group generally opposed to the treaty process currently underway in BC, stated:

Why would any First Nation be foolish enough to ratify any [treaty] settlement for less than five per cent of their territory when the Xeni Gwet’in [have] achieved recognition of their title to 50 percent of their territory? Clearly the treaty process is dead.

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44 *Peace, Power, Righteousness*, p. 144.


46 Schouls summarizes the objections of some BC First Nations to the Nisga’a treaty in *Shifting Boundaries*, pp. 142-3.

47 Admittedly, a lengthy negotiating period has brought few results for the First Nations involved. See J.R. Miller, *Compact, Contract, Covenant* and McKee, *Treaty Talks in British Columbia*.

A declaration of Aboriginal title from the Supreme Court of Canada would undoubtedly strengthen the hand of the Tsilhqot’in and other BC First Nations, and greatly reduce the discretion the government has to approve resource development projects that infringe Aboriginal rights and title. But such an outcome is not assured. And, the particular circumstances of the Xeni Gwet’in may limit the applicability of lessons from both the Tsilhqot’in court proceedings and their negotiating position towards government. The Xeni Gwet’in have had relatively less interaction with non-aboriginal Canada than most other BC First Nations, due largely to the isolation of the Nemiah Valley. Indeed, those First Nations pursuing court action instead of participating in the treaty process are generally from the less populated interior regions of the province (the Nisga’a are a prominent exception). First Nations located in urban areas have pursued different strategies out of necessity. The 2007 Tsawwassen Final Agreement, for example, includes monetary compensation because of the lack of available crown land.

As the Nisga’a, Tsilhqot’in, and Tsawwassen examples demonstrate, control over land is front and center in both treaty negotiations and litigation over Aboriginal title. But the issue of self-government is also fundamental to indigenous self-determination. In his study of indigenous-state relations in British Columbia, Tennant argued that land claims have a dual nature:


An aboriginal land claim is a demand by Indians upon governments. A claim has two parts, each equally essential and equally important: the demand that governments acknowledge the claimant group held title to its land before contact and that the title has not yet been extinguished; the demand that governments negotiate with the group to reach a “settlement” or “agreement” similar to those which have been reached in most of the rest of Canada.  

Self-government, while in one sense functioning as a catch-all term for jurisdiction over policy areas such as education, economic development, and membership, is in another sense essentially linked to jurisdiction over land. To meet the demands of indigenous political communities, treaties must address at least the two fundamental issues of land and self-government.

To do so, as I argued in chapter 4, relational recognition between the national political community and indigenous political communities is essential. As the Royal Commission on Aboriginal Peoples argued, in its endorsement of a renewed treaty process, “By entering into treaties, the parties can clarify how [Aboriginal and non-Aboriginal rights] should interact with one another.” Such interaction should acknowledge interdependence:

The central feature of almost all the treaties is to provide for the orderly and peaceful sharing of a land and the establishment of relations of peace and even kinship. Once this has been acted upon, it cannot be reversed. Parties that have made such promises cannot go back to the beginning and annul the agreement,

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51 Tennant, *Aboriginal Peoples and Politics*, p. 13. Tennant notes that the goals of First Nations – signing treaties to provide a baseline for the relationship with the state – have been remarkably consistent over the long period he surveys.

52 As Kent McNeil has argued, the doctrine of Aboriginal title, as outlined by the Supreme Court in *Delgamuukw*, implies a right of self-government. See his “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty” *Tulsa Journal of Comparative and International Law* 5, 1998: 253-98, at p. 286.

because the treaty has made them interdependent in a way that precludes starting over again as strangers.\footnote{Ibid., p. 19. Following the Supreme Court’s \textit{Simon} ruling, the Commission argues that treaties with First Nations are not international treaties, and not simple contracts, but have \textit{sui generis} features.}

This reconciliation of interdependence, as McKee notes, was contemplated in section 35 of the Constitution Act, 1982. In that text, he argues, treaties were understood as a vehicle for “reconcil[ing] Crown sovereignty with Aboriginal rights”.\footnote{McKee, \textit{Treaty Talks in British Columbia}, p. 101. The parties to the Nisga’a Final Agreement arguably pursued just this kind of a reconciliation. For a critical view, see Gordon Gibson, “Comments on the Draft Nisga’a Treaty” \textit{BC Studies} 120, Winter 1998/99: 55-71. Also, note that in their Final Report, the Royal Commission on Aboriginal Peoples warned against attempting to reconcile competing visions of sovereignty: “The Commission has considered the various views of sovereignty expressed to us and has found no rational way to bridge the gap between those who assert and those who deny the continuing sovereignty of Aboriginal nations” (Canada, \textit{Royal Commission on Aboriginal Peoples} (Ottawa: The Commission, 1996), vol. 2, part 1, p. 20). Instead, the Commission suggested revitalizing the treaty process, which would not require settling divisive issues such as the nature of sovereignty.}

This reconciliation makes demands on both parties. Canada recognizes the independent nature of Aboriginal claims,\footnote{Importantly, modern treaties no longer contemplate the blanket extinguishment of Aboriginal rights or land claims as a condition of signing: governments have acknowledged the continuing importance of Aboriginal rights as protected by section 35 of the Constitution Act, 1982. Beyond Aboriginal title, treaties could also potentially recognize indigenous systems of law alongside Canadian law, as Henderson or Slattery might wish. See my discussion of Henderson, Slattery, and Macklem in chapter 2, section 2.3.} and for First Nations:

The treaty nations maintain that their national identities, their sovereignty and their title were recognized and affirmed by their making of treaties with the Crown. However, they did give up \textit{exclusive} dominion over their territories by consenting to some form of sharing of their territory.\footnote{\textit{Royal Commission on Aboriginal Peoples: Final Report}, vol. 2, part 1, p. 19, emphasis in original.}
The historical basis for this kind of a relationship between Canada and First Nations, the Royal Commission argues, can be found in the ‘nation-to-nation’ approach, which characterized relations in the period following contact up to the Royal Proclamation of 1763.  

However, what renewing the nation-to-nation approach means in practice is contested. Some theorists, such as Kymlicka, have argued that if indigenous political communities are conceptualized as national minorities, state jurisdiction could be internally divided in order to give those communities, through their political institutions, sufficient scope for self-determination. Some indigenous theorists forcefully reject the categorization of indigenous peoples as national minorities. Alfred, for example, sees a link between the culturally

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58 Ibid., p. 18. The Royal Commission on Aboriginal Peoples argues that treaties “are by their nature agreements made by nations.” Royal Commission on Aboriginal Peoples: Final Report, vol. 2, part 1, p. 10. “Treaty-making represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future.” Ibid., p. 18. Arguably, this is what the Nisga’a Final Agreement did through transferring control over membership in their political community to the Nisga’a. While controversial, this provision seems necessary in order to give the political institutions of the Nisga’a the ability to represent their political community. See Charles Taylor, “On the Nisga’a Treaty”, p. 38.

59 Kymlicka, Multicultural Citizenship (Oxford: Oxford University Press, 1995), pp. 75-80. Although Kymlicka argues that a modified nationalism is compatible with both liberalism and with the variety of political communities that exist within and across the borders of states, his analysis of belonging in political community still essentially involves state-centric categories. It is not only the sharpness of Kymlicka’s distinctions that is the problem (see Young, “A Multicultural Continuum: A Critique of Will Kymlicka’s Ethnic-Nation Dichotomy” Constellations 4 (1), 1997: 48-53), but also that all types of political communities involve a reference to the state. For example, the distinction between immigrants to a country and national minorities involves a reference to a majority political community that putatively controls the levers of power within the state. After all, a key insight of Kymlicka’s work is that state policy always involves nation-building projects that benefit the majority group – for example, in language policy. See Kymlicka, Multicultural Citizenship and Politics in the Vernacular (New York: Oxford University Press, 2001).
inappropriate concept of sovereignty and the offer of self-government for indigenous peoples. Others are more willing to entertain the idea. Dale Turner, for example, questions Kymlicka’s categorization of Canadian First Nations as national minorities on the grounds that it sidesteps Aboriginal understandings of their political sovereignty: “The minority rights view does not require the participation of Aboriginal voices when the meaning and content of their rights are being deliberated.” Although Turner criticizes Kymlicka’s inclusion of indigenous political communities under the national minority category, he also holds out the possibility that the concept could be rehabilitated if Aboriginal voices are listened to on the issue of their political sovereignty:

We can retain the idea that Aboriginal communities are national minorities; but then we ought to focus on the problem of Aboriginal incorporation [into the Canadian state] … Aboriginal sovereignty does not have to dissipate after the formation of the Canadian state.

It seems clear that in practice states treat indigenous peoples quite differently than national minorities. In Canada, the Quebecois pursue self-determination through demands for the jurisdiction of the state. This call for sovereignty retains essentially state-centric categories, and the recent recognition of the Quebecois as a nation within a united Canada reinforces this point. But for First Nations, special legislation such as Canada’s Indian Act governs matters from the shape of indigenous land reserves to who counts as an indigenous person. Also, the

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60 *Peace, Power, Righteousness*, p. 77-84. “To argue on behalf of indigenous nationhood within the dominant Western paradigm is self-defeating. To frame the struggle to achieve justice in terms of indigenous ‘claims’ against the state is implicitly to accept the fiction of state sovereignty” (p. 82).

61 *This Is Not a Peace Pipe*, (Toronto: University of Toronto Press, 2006), p. 70.

62 Ibid., p. 66.

63 Thanks to Joe Carens for discussion on this point.
treaty process and the legal concepts of Aboriginal title and rights have no or limited applicability to national minorities.

In the following section, I argue that the primary role of indigenous political institutions is to enable the self-determination of their political communities. If citizenries recognize this primary role when considering their responsibilities towards indigenous political communities, I will suggest, treaties can be an appropriate pathway for reconciliation.

Comprehensive treaties, however, are often out of reach to the parties. For example, the treaty process in BC is currently stalled, partly because of on-going litigation over Aboriginal rights and title. A lack of political will to complete treaty negotiations may also be an important factor. To fill the void, temporary agreements focusing on economic development have proliferated.64 The advantage of such ‘Interim Measures Agreements’ – in addition to providing a more certain footing for resource development projects – is that they leave contentious issues to the side, in recognition of the fact that the more comprehensive treaty process is either moving too slowly or has even failed to attract First Nations like the Tsilhqot’in to the negotiating table.65 A recent interim agreement between the province and the Tsilhqot’in National Government acknowledges the many issues to be worked out:

The Province acknowledges and enters into this Agreement on the basis that the Tsilhqot’in Nation has Aboriginal Interests within the Agreement Area and

64 The idea of moving forward on areas of shared interest has produced results. McKee reports that in 2004, over 300 agreements had been concluded on a wide range of issues. See Treaty Talks in British Columbia, p. 134.

further the specific nature, scope or geographic extent of those Aboriginal Interests of the Tsilhqot’in Nation have not yet been determined. Broader processes engaged in to bring about reconciliation will result in a common understanding of the nature, scope and geographic extent of those Aboriginal Interests or the treaty interests of the Tsilhqot’in Nation.  

Could temporary agreements set negative precedents for First Nations? This is a possibility, but because they fail to resolve the most difficult issues, including how the parties are represented, such an outcome seems unlikely. Temporary agreements are at best a stop-gap measure.

There is more promise in a so-called ‘grand bargain’ between First Nations and government, outside of the courts and the treaty process. For example, a recent BC provincial government initiative to reset the relationship with First Nations, called the “New Relationship”, promised to conceptualize the relationship between BC and First Nations as “government to government”:

We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.


67 Thanks to Nancy Bertoldi for raising this objection.

Most major organizations representing First Nations in BC signed on, including the Union of BC Indian Chiefs.\textsuperscript{69} The document describes the economic goals of First Nations in terms of capitalizing on their aboriginal title:

To achieve First Nations self-determination through the exercise of their aboriginal title including realizing the economic component of aboriginal title, and exercising their jurisdiction over the use of the land and resources through their own structures\textsuperscript{70}

And, the document contemplates structures of shared jurisdiction over resource development approvals:

[The parties aim to] develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing\textsuperscript{71}

A further effort at reconciliation was introduced by the provincial government in 2009. The Recognition and Reconciliation Act proposed to take steps towards creating structures of shared jurisdiction on the basis of recognition of aboriginal title.\textsuperscript{72} For example, a discussion paper described a commitment on the part of government and First Nations to “enable and guide the establishment of mechanisms for shared decision-making in regard to planning, management

\textsuperscript{69} Besides the Union of BC Indian Chiefs, the BC Assembly of First Nations and the First Nations Summit also endorsed the document.

\textsuperscript{70} “The New Relationship”, p. 2.

\textsuperscript{71} Ibid., p. 4.

and tenuring decisions over lands and resources."\textsuperscript{73} This would be achieved by recognizing Aboriginal title and reconciling it with Crown title. The relevant recognition principles are:

- That Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder. The Crown recognizes and affirms this without requirement of proof or strength of claim;
- That Crown title exists with Aboriginal title throughout British Columbia;
- That both Aboriginal and Crown title come with obligations and responsibilities;
- That Aboriginal title is a pre-existing interest in land, is held collectively and includes a jurisdictional and economic component;\textsuperscript{74}

The New Relationship and Recognition and Reconciliation Act appeared to provide a pathway to resolving the jurisdictional conflict between the BC government and First Nations. It also appeared to conceptualize the parties in a promising way.\textsuperscript{75} But after an initial flurry of activity, it has floundered. Since Christy Clark became Premier in 2011, the BC government has shown little interest in it. Rather than recognizing the normative demands indigenous claims to jurisdiction place on it, the BC government has effectively retreated into an exclusive conception of its authority. Like the other pathways for resolution of jurisdictional conflict discussed above, political will is a necessary ingredient for the successful conclusion of negotiations.

\textsuperscript{73} Ministry of Aboriginal Relations and Reconciliation, “Discussion Paper on Instructions for Implementing the New Relationship”, p. 1.

\textsuperscript{74} Ministry of Aboriginal Relations and Reconciliation, “Discussion Paper on Instructions for Implementing the New Relationship”, p. 2.

\textsuperscript{75} The Act even committed to recognizing indigenous political communities as they define themselves: “In the Tsilhqot’in decision, the Court identified the proper title and rights holder by reference to the four common threads of language, customs, traditions and shared history. In that case, the proper title and rights holder was the Tsilhqot’in Nation and not an Indian Band. Where the proper title and rights holders of an Indigenous Nation are represented by one political structure with a mandate to enter into shared decision-making and revenue and benefit sharing agreements with the Crown, the Indigenous Nation will be considered to be reconstituted for the purposes of this Act.” Ministry of Aboriginal Relations and Reconciliation, “Discussion Paper on Instructions for Implementing the New Relationship”, p. 2.
4 Self-Determination

In the previous sections I have reviewed several pathways for rebalancing the relationship between Canada and First Nations: new structures for sharing jurisdiction over resource development applications, legal recognition of Aboriginal rights and title, comprehensive treaties, temporary agreements, and political grand bargains. These pathways, as we have seen, have produced only limited results to date. If citizenries recognize indigenous political institutions as playing a primary role on behalf of their political communities, I now argue, this will enhance the chances that the pathways for reconciliation reviewed above are successful.

In chapter 4, I noted that settled political communities require institutions with particular characteristics in order to pursue their interests and projects. And, I argued that the nature of the subject political community will determine what kind of characteristics the institution must have: a role is primary for an institution when a particular political community depends on its performance as a constitutive element of its identity. Indigenous political communities are represented by indigenous political institutions, which make a variety of jurisdictional claims on their behalf. The structural context of these claims is that their communities are much smaller and less powerful than the national political community or the Canadian State. In this context, I argue that the primary role of their political institutions is to enable self-determination: their identity as indigenous political communities itself depends on being able to act through institutions that they control.

Conceptualizing indigenous political institutions as having this primary role will begin to address the reasons I reviewed in section 1 for citizenries to consider distributing jurisdiction to indigenous political institutions. That is, it will potentially: (i) decolonize the relationship
between the state and indigenous peoples, (ii) improve policy outcomes, and (iii) recognize the plural political identity of indigenous citizens. To see why, consider Schouls’s relational view of the project of indigenous self-government.\textsuperscript{76} A relational pluralist approach, he contends, understands self-government as the expression of “the collective Aboriginal desire to have the political, social, and economic instruments to guarantee the development of their communities.”\textsuperscript{77} On this conception, self-government is not necessarily about the preservation of culture, but aims to foster the ability to act collectively as an indigenous political community through indigenous political institutions. As Schouls observes, the witnesses who testified in front of the Royal Commission on Aboriginal Peoples “want[ed] to strengthen sources of communal power to ameliorate conditions of social and economic disadvantage and to shatter stigmatizing images and stereotypes that have rendered their own community-generated experiences and identities as inferior.”\textsuperscript{78}

These statements give voice to a political project aimed at representing indigenous political communities through institutions controlled by indigenous peoples. Of course, asserting that the primary role of indigenous political institutions is to enable the self-determination of their political communities acknowledges a continuing relationship with the

\textsuperscript{76} Schouls’s account builds on Iris Young’s relational account of political community discussed in chapter 2. He contrasts his relational pluralist approach with the communitarian pluralist approaches of Taylor, Kymlicka, and Tully: “Communitarian scholarship in Canada seeks to expand the horizons of liberal theorizing by creating a vision of justice in which ethnic groups are allowed free cultural development on the premise that not doing so will hinder the self-development of their members. The result is a form of communitarian pluralism” (\textit{Shifting Boundaries}, p. 23). Relational pluralism, by contrast, “avoids associating the Aboriginal right to jurisdiction over its own collective life with the qualification of cultural uniqueness or political competitiveness” (\textit{ibid.}, p. 129).

\textsuperscript{77} \textit{Shifting Boundaries}, p. 130.

\textsuperscript{78} \textit{Ibid.}, p. 123.
state. My thesis on the primary role of indigenous political institutions should not constrain those indigenous political communities that may decide to pursue self-determination in terms of full separation from the state. My focus, however, is on those indigenous political communities that aim to be self-determining alongside the state.

For such communities, their political institutions will require attributes that enable them to play their primary role. The pathways surveyed in the previous sections could each facilitate self-determination for First Nations alongside a Canadian state that continues to play its primary role of enabling democratic constitutionalism. For example, jurisdiction over Aboriginal rights and title could facilitate indigenous political institutions in enabling the self-determination of indigenous political communities.

If citizenries conceptualize indigenous political institutions appropriately, I conclude, jurisdictional conflict between those institutions and their state can potentially be resolved on the basis of a reconciliation of their respective primary roles, rather than on the basis of an assumption about the state’s superiority. But if citizenries hold onto an exclusive conception of their state’s authority, indigenous political institutions will lack the jurisdiction to play their primary role, and the ability of indigenous individuals and political communities to rule themselves will be lessened. I explore these issues further in the concluding chapter.
Chapter 7. Sharing Jurisdiction in Europe

Perhaps the most striking difference between the role of regional organizations and indigenous political institutions concerns the nature of the political communities they represent. In the case of indigenous political institutions, as I noted in the previous chapter, the communities they represent existed prior to the creation of states. Further, the structural context of their claims is that they face a much larger and more powerful state. For regional organizations, the political communities they represent have a much more ambiguous existence prior to the creation of the regional organization itself. Nonetheless, I argue in this chapter that regional organizations should, in certain circumstances, be conceptualized as institutions that play primary roles. The reason is that the density of institutional meshing that regional cooperation involves demands democratic legitimation that reaches beyond what can be provided by the state.

In the following, I focus my discussion on the European Union (EU) and its response to the sovereign debt crisis that continues to affect Europe. In section 1, I contrast German Chancellor Merkel’s intergovernmental approach to resolving the sovereign debt crisis with Habermas’s call for strengthening and democratizing the EU. In section 2, I place Habermas’s public commentary on the crisis in the context of his theoretical work. The former issues dire warnings against further distancing the European public from EU institutions through elite-led decisions. The latter envisions a tri-level institutional ‘cosmopolitan condition’ comprised of states, regional organizations, and the world organization (a reformed United Nations). In section 3, I argue that conceptualizing the EU as an institution with a primary role can address the tension in Habermas’s account between the need for expanded regionalism and the need for
democratic legitimation. To support this claim, I argue that the primary role of the EU is to create and regulate an effective and democratic regional policy. This conception of the EU’s role emphasizes the input of both of its constituencies: European citizens and national political communities.

Even before the sovereign debt crisis, of course, the extensive debate in both popular and academic circles over the EU’s democratic deficit suggested the worry that distributing state jurisdiction to the regional level damages existing channels of legitimation through national parliaments without compensatory changes at the regional level. The argument that the EU should play the primary role of enabling and regulating an effective and democratic regional policy aims to address this worry. It is also, I will conclude, an essential condition for the construction of a regional political community with a stronger identity. If European citizens are to embrace belonging in the regional political community as an additional identity alongside attachment to their national political communities, they must see that regional integration enhances, not detracts from, democratic legitimation.

1 The Sovereign Debt Crisis

The sovereign debt crisis that troubled European economies in the fall of 2011 and remains unresolved in 2013 has called the existence of both the Euro currency and the European Union itself into question. Merkel’s plan for responding to the crisis emphasizes the intergovernmental structure of the EU by reserving decision-making authority to the member-states. This reinforces
the power of the largest creditor states like Germany, and limits supranational solutions, such as having the European Central Bank (ECB) buy the bonds of troubled governments. In this respect, it reproduces key aspects of the modern view of the state. In the region where the move away from traditional conceptions of state sovereignty is often thought to have advanced the farthest, an economic and political crisis seems to be reversing the supranational trend.

Given the way the crisis has unfolded thus far, it is hard to deny that the result has been more power for the stronger states of the Union and a weakened role for supranational institutions like the Commission or Parliament. Can Europe coordinate a solution to the sovereign debt crisis through existing EU institutions? Or will the crisis reveal that power largely lies with the member-states, making a mockery of the supranational pretensions of EU integration? The EU would seem to have many tools available to it with which to coordinate a regional response to the crisis. It has a complex institutional structure, including courts whose jurisdiction overrides that of national courts. It has many common economic policies that govern its single market, including a currency union and a central bank. Yet when faced with the current crisis, most of the attention has been on the demands of Germany, as the most powerful creditor state, that troubled governments slash their deficits.

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1 Some steps have been taken that move in the direction of intervention by the ECB. See Stephen Castle and Melissa Eddy, “Bond Plan Lowers Debt Costs, but Germany Grumbles” New York Times Sept. 7, 2012.

The focus on the actions of troubled governments rather than regional solutions reflects a common diagnosis of the causes of the crisis. Merkel, and much media commentary in Germany, have portrayed the peoples and governments of Southern Europe as irresponsible spendthrifts. From this perspective, austerity and intergovernmental backstops of troubled governments, not the advancement of the EU integration project, are in order. For Habermas, it is unclear whether this turn towards austerity and intergovernmentalism will succeed in stabilizing the government debt burdens and economies of countries like Greece and Portugal. And even if it does, it lacks a commitment to democratic legitimation. Habermas’s alternative is to distribute jurisdiction from member-states to the EU level. The existence of a currency union, he claims in concert with many other critics of Merkel, requires the complement of a robust fiscal union. Currently, “the EU does not have the necessary remit to harmonise national economies, which are marked by drastic divergences in their capacity to compete.” An expanded role for the EU is an “overdue reform” needed to “relativise the budgetary prerogative of national parliaments.”

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4 See my discussion of intergovernmental approaches to EU integration in chapter 2, section 2.4.
6 “Democracy is at Stake.”
7 Ibid.
A fundamental change of this kind, Habermas continues, reprising an argument he advanced before the current crisis, requires a democratized EU able to speak for both the continent’s citizens as a whole and its member-states. Initially, EU integration emphasized negative integration, or coordination of policy, whereas in recent years it has shifted towards positive integration, or cooperation on policy. But in this shift economic integration outstripped political integration. The monetary union agreed to at Maastricht is only the most obvious sign of this focus on the economic at the expense of the political. Fundamentally, the EU is unable

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9 The Single European Act (1986) is emblematic of the negative integration that created the common market.

10 At Maastricht, leaders agreed to a monetary union, to the end of further economic integration, and expected that further political integration would follow. See Enderlein’s comments on p. 5 of Calliess et. al., “Europe and the ‘New German Question’.” While governance reforms were made in the Amsterdam, Nice, and Lisbon treaties, these did not rise to the level of the fiscal union that Habermas, economists, and other commentators have argued is required to counterbalance the monetary union (Habermas, Crisis of the European Union, p. 50). In response to the current crisis, the citizenries of EU member-states could counterbalance monetary with fiscal union by distributing jurisdiction to the regional level. Such a union would involve positive cooperation through regional institutions. But note Anderson’s argument that the EU integration has often had consequences that were far from those intended by the principal heads of state that signed a particular treaty. See The New Old World (London: Verso, 2009), pp. 27ff and p. 88.

11 Whereas Merkel blames the ineffectiveness of the fiscal controls embedded in Maastricht for letting things get out of control, Habermas argues it was folly to agree to economic integration without political integration: “the EU can only stand up to financial speculation if it obtains the
to respond effectively to the current crisis because political integration is lacking. It is no wonder that solidarity between member-states for regional action is hard to come by: national citizens do not see EU institutions addressing the collective regional interest in a stable financial system in a democratically responsive way.

As an immediate response to the crisis, Merkel has written off the kind of reforms contemplated by Habermas as impractical because revising EU treaties would take too long.\textsuperscript{12} A more important deficiency would seem to be that the will to pursue a more supranational solution to the sovereign debt crisis is lacking. While Habermas places the blame for Germany’s current policy partly on Merkel’s leadership, her insistence that troubled southern European economies must do their part through austerity measures reflects not only a thesis on the causes of the crisis, but also, it seems, an implicit resistance on the part of the German citizenry to viewing Europe as a community of shared fate, where sacrifices on the part of richer regions may be necessary to stabilize heavily indebted poorer regions.\textsuperscript{13} This resistance goes some way towards explaining the focus on intergovernmental policy solutions to the crisis. While the most important step in stemming the growth of the crisis has arguably been taken by the ECB – a supranational institution – political and media attention has been focused on how coupling limited bailouts

\textsuperscript{12} Merkel does speak of the need, over the long term, to increase the power of the EU. See Nicholas Kulish, “Merkel, Seeing Worst Crisis Since World War II, Calls for More Political Integration” \textit{New York Times} Nov 15, 2011.

with austerity can save heavily-indebted member-states such as Greece, Portugal, and Cyprus.\textsuperscript{14} For example, a plan agreed to by leaders of Euro zone countries on Dec 9, 2011 attempts to provide the enforceable controls on member-state budgets that were lacking in Maastricht.\textsuperscript{15}

In the face of this turn to intergovernmentalism, Habermas blames political elites, and also the media, for failing to explain and defend the European project.\textsuperscript{16} Politicians, he writes, have been too willing to go along with the “dangerous asymmetry” of leading national publics to believe that they are pursuing a \textit{win} in Brussels for their own state without accounting for or even mentioning the consequence of decisions taken at the European level.\textsuperscript{17} “As national populations become aware of the degree to which EU decisions exert an influence on their daily lives,” Habermas writes, “and as this awareness is relayed by the media, they will also become aware of their interest in exercising their democratic rights as citizens of the EU.”\textsuperscript{18} But the realization on the part of European citizens that important matters are decided in Brussels is not all that is needed. For one, European citizens need to see that EU institutions can produce collective financial stability. They also need to see that significant decisions are taken in the EU’s supranational institutions like the Parliament or Commission, and not merely in

\textsuperscript{14} Castle and Eddy, “Bond Plan Lowers Debt Costs, but Germany Grumbles”.
\textsuperscript{15} Steven Erlanger and Stephen Castle, “German Vision Prevails As European Leaders Agree on Fiscal Treaty” \textit{New York Times} Dec 10, 2011. The text of the “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” can be found at \url{http://www.european-council.europa.eu/media/579087/treaty.pdf}
\textsuperscript{16} In addition to criticizing European leaders, Habermas also calls on citizens to exercise their responsibility to reform the EU. “The citizens of each individual country, who until now have had to accept how responsibilities have been reassigned across sovereign borders, could as European citizens bring their democratic influence to bear on the governments that are currently acting within a constitutional gray area.” Habermas, quoted in Georg Diez, “Habermas, Last European: A Philosopher’s Mission to Save the EU.”
\textsuperscript{17} “Europe’s Post-democratic Era.”
\textsuperscript{18} “Democracy is at Stake.”
intergovernmental forums like the European Council. An intergovernmental structure may have been acceptable for negative integration, but when decisions are taken that move the EU towards positive integration, issues of distributive justice arise: “national citizens, who have to accept the redistribution of burdens across national borders, would also want to exercise democratic influence in their role as European citizens over what their heads of government negotiate or agree upon in a legal grey area.”\(^{19}\)

The Merkel plan, Habermas laments, actually moves the EU backwards, lessening its already weak democratic features. Nothing beyond member-state agreement to an intergovernmental treaty is proposed to legitimate the new era of austerity and member-state budget supervision. Merkel and former French President Sarkozy, Habermas contends, “want to extend the executive federalism of the Lisbon treaty into an outright intergovernmental rule by the European Council.”\(^{20}\) This would “…allow for the projection of market imperatives onto national budgets without any specific democratic legitimation.”\(^{21}\) The result is that “…the first democratically legalised supranational community will be transformed into an effective arrangement that results in non-transparent post-democratic domination.”\(^{22}\) Europe would no

\(^{19}\) Habermas, “Europe’s Post-democratic Era.” Habermas doesn’t flinch from insisting that further integration be matched – at a difficult political time – with democratization. The positive integration of a fiscal union clearly demands input legitimation, not the output legitimation that European integration has long depended on: “…with the transition from ‘negative’ to ‘positive’ integration, the balance shifts from output to input legitimation” (ibid., emphasis in original).

\(^{20}\) “Europe’s Post-democratic Era.” Such an outcome would be especially unfortunate because Habermas argues that it was an “anomaly” in the process of European integration that the Lisbon treaty gave the European Council so much power. See Georg Diez, “Habermas, Last European: A Philosopher’s Mission to Save the EU.”

\(^{21}\) “Democracy is at Stake.”

\(^{22}\) *Ibid.*
longer be a transnational democracy, but instead would fall under “a kind of post-democratic rule.”  

But in a characteristic moment of seemingly misplaced optimism, Habermas argues that the sovereign debt crisis actually offers a chance to expand European solidarity: “the supranational expansion of civic solidarity depends on learning processes that can be stimulated by the perception of economic and political necessities.”  Such expanded European solidarity can be the basis for further integration, but national public spheres must “open themselves to each other.”  To facilitate this opening of public spheres, Habermas suggests a “new narrative for European unity”: “self-assertion, constructive participation in enabling the creation of a common global policy, and maintaining the diversity of the cultural spheres in which we live.”  

This proposed narrative turns us towards Habermas’s larger vision of the purpose of the EU. The goal of political union is not only a response to the sovereign debt crisis but a longer-term necessity for achieving the “real usefulness of the European project, that is to say from a

23 “Europe’s Post-democratic Era”. Joschka Fischer questions whether there is any alternative in the face of the sovereign debt crisis: “Even if Jürgen Habermas rightly points to the need for a pan-European process of political interest-formation, I can’t at the moment see any alternative to the intergovernmental method, because there is no chance of any remotely ambitious change to the Lisbon treaty even being passed.” Fischer, in Christian Calliess et. al., “Europe and the ‘New German Question’”, p. 4.

24 “Europe’s Post-democratic Era.” Of course, it could also produce the opposite: “…there is a circular, either mutually reinforcing or mutually inhibiting interaction between political processes and constitutional norms, on the one side, and the networking of shared political and cultural attitudes and convictions, on the other side.”

25 “Europe’s Post-democratic Era.” Habermas continues: “An extended, though also more abstract and hence comparatively less resilient, civic solidarity will have to include the members of each of the European nations.”

historical perspective.”  By historical perspective, Habermas has in mind one of the original motives underlying the construction of the European Coal and Steel Community: preventing war. He also has in mind the forward-looking imperative of taming globalizing market forces. In the following, I focus on the latter issue. The key reason that regional organizations can respond to some of the transnational challenges thrown up by global capitalism, Habermas argues, is because they increase the size of the units and thereby create a fairer platform for negotiation. In this argument, we see a further reason for Habermas to be dismayed at the political response to the sovereign debt crisis. Rather than joining forces to adjust the terms of global trade and investment in a cosmopolitan direction, Europe risks returning to a landscape where even its largest states will be middle powers on the global stage.

2  The Three Levels of Habermas’s Cosmopolitan Condition

In this section, I place Habermas’s public commentary on the sovereign debt crisis in the context of his theoretical account of how the democratic constitutional state can co-exist with regional organizations. The key to his account is the claim that there is no structural analogy between the justification of the democratic constitutional state and the justification of constitutionalized international law. There is no analogy because of the distinct ways in which states and regional institutions facilitate democratic legitimation: the state is a constitutive unity of citizens, whereas regional institutions constrain the actions of states on the basis of representing both state interests

27 “Democracy is at Stake.”
and the interests of citizens of Europe as a whole. This claim opens up the possibility that the citizenries of EU member-states can both maintain their constitutional democracies and enhance the jurisdictional competences of the EU.

Habermas conceives of his project as following Kant’s aim of achieving the ‘cosmopolitan condition’ of law-governed freedom. This condition has three institutional elements: (i) a strengthened ‘world organization’ that would secure peace and human rights, (ii) regional organizations that address transnational global issues such as the environment and trade, and (iii) democratic constitutional states. There are multiple interactions between the three levels. The world organization will embody the constitutionalized international law, including

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29 Habermas contrasts classical international law with his proposal for a cosmopolitan condition of constitutionalized international law: “Classical international law is already a kind of constitution in the sense that it creates a legal community among parties with formally equal rights.” For this ‘proto-constitution’ to transform into a more substantive constitutionalized international law it must enact ‘reciprocal legal obligations’. Most importantly, “only voluntary restrictions on sovereignty – above all, the renunciation of its core component, the right to go to war – can transform parties to treaties into members of a politically ‘constituted’ community” (“Does the Constitutionalization of International Law Still Have a Chance?”, p. 133). Although states restrict their sovereignty, they remain formally equal, as in classical international law. For Habermas’s extended discussion of the progress made during the twentieth century toward the constitutionalization of international law see “Does the Constitutionalization of International Law Still Have a Chance?”, pp. 147-79.
(some level of) jurisdiction over transnational negotiation between regional interests.\(^\text{30}\) Regional organizations will eventually need the ability to enforce policies they set.\(^\text{31}\) And for individual citizens, there will be cosmopolitan and national channels of legitimation. On the one hand, citizens will lend their support to the world organization’s peace and human rights work, and its structuring of transnational negotiations between regions. On the other hand, they will display solidarity with the interests of their state and their regional organization.\(^\text{32}\) In sum, each kind of solidarity – cosmopolitan and national – has two objects.\(^\text{33}\) Regional organizations will be an object of both: cosmopolitan solidarity will guide the structuring of transnational negotiation, and national solidarity will support the formation of the bargaining positions of particular regional organizations.

This structure begins to carve out a distinct space for regional organizations vis-à-vis the other two levels. On the one side, Habermas rules out the dominance of the world organization as a world republic. As in Kant, all individuals have human rights as a moral entitlement, and

\(^{30}\) The world organization “would be responsible for the interpretation and further development of the political constitution of world society, and hence for the normative parameters of both peace and human rights policy and global domestic politics” (“The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society”, p. 448).

\(^{31}\) Regional organizations would need to be “equipped with a sufficiently representative mandate to negotiate for whole continents and to wield the necessary powers of implementation for large territories” (“A Political Constitution for the Pluralist World Society”, p. 324).


\(^{33}\) Although Habermas argues that solidarity can reference constitutional principles rather than national belonging, his analysis of political community seems not to extend very far beyond state affiliation or its extension to regional organizations like the EU. Notably, he does not discuss the claims of indigenous political communities to self-determination, except in passing. See “Equal Treatment of Cultures and the Limits of Postmodern Liberalism” *Journal of Political Philosophy* 13 (1), 2005: 1-28, at pp. 23-4.
further constitutionalization of international law is required in order to secure them. But Kant, Habermas argues, needlessly vacillated between the idea that only a world republic could secure human rights and the idea that a ‘surrogate’ league of nations was the best to be hoped for. It is his model of the constitutional state, Habermas argues, that misleads him:

Kant takes the French Republic as his model and is forced into an unnecessary conceptual bind by the dogma of the indivisibility of state sovereignty. Although ‘all authority proceeds from the people,’ this authority is already split at source in the constitutional state with its division of powers.

If Kant had instead taken the American Revolution as his model, and seen that sovereignty can be ‘split at source’ in the constitutional state, he could have moved beyond the possibility that it would be necessary to subsume states into a world republic on analogy to the emergence of ‘law-governed freedom’ out of the state of nature for individuals. The lesson, Habermas thinks, is that the constitutionalization of international law can complement the political achievement of the state. The world organization’s role, for example, has “carefully

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34 By contrast, what Habermas calls political rights and what I call basic rights are secured by particular states. For Habermas’s account of human rights, see “The Concept of Human Dignity and the Realistic Utopia of Human Rights”, “Kant’s Idea of Perpetual Peace” in Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal, eds. J. Bohman and M. Lutz-Bachmann (Cambridge, Mass.: MIT Press, 1997), and “Does the Constitutionalization of International Law Still Have a Chance?”.

35 Kant, Habermas notes, “never actually renounced the idea of a complete constitutionalization of international law in the form of a world republic”, “Does the Constitutionalization of International Law Still Have a Chance?”, p. 124. He traces Kant’s vacillation to his ‘ethical-political’ treatment of states as ‘national communities’ (ibid., p. 127). Requiring a legitimate law-governed community to incorporate itself into a world state is not analogous to the transition for individuals out of anarchy in the state of nature in that such an incorporation would combine entities that are already self-sufficient into a relation of legislator (the world state) and subject (the member-state), thereby destroying the latter’s autonomy. See Kant, “Perpetual Peace” in Practical Philosophy, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 8:344, and “The Metaphysics of Morals”, ibid., 6:343.

36 “Does the Constitutionalization of International Law Still Have a Chance?”, p. 128.

37 During the course of the twentieth century, as Habermas notes, the meaning of state sovereignty has changed: “The classical meaning of sovereignty has already shifted … Today the
circumscribed functions” that range from protecting human rights to structuring transnational negotiations.\textsuperscript{38} This narrow role is critical to its legitimacy. To maintain the balance between states as autonomous collective actors and the strengthening of the world organization to constrain these same actors, a circumscribed role for the world organization is meant to ease the difficulties citizens will have dividing their allegiances appropriately.

The idea that sovereignty can be split at source is also important for understanding how citizenries can distribute state jurisdiction to regional organizations. The reason to distribute jurisdiction, Habermas argues, is to tackle problems of ‘global domestic politics’. Examples of these kinds of policy problems include the regulation of global trade, transnational labour standards, and climate change policy. In transnational negotiation, Habermas writes, basic

sovereign state is supposed to function as a fallible agent of the world community; under the threat of legal sanctions, it performs the role of guaranteeing human rights in the form of basic legal rights to all citizens equally within its national borders” (“The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society”, p. 453). Compare to “A Political Constitution for the Pluralist World Society”, where Habermas writes “The nation-state continues to be equipped with strong competences, but it now operates as the fallible agent of the international community. The sovereign state remains responsible for guaranteeing the human rights enshrined in constitutional basic principles within national borders; the constitutional state fulfills this function on behalf of its democratically united citizenry. However, in their role as subjects of international law – as cosmopolitan citizens – these citizens have also issued the world organization a kind of indemnity that authorizes the Security Council to act on their behalf as a stand-in in cases of emergency when the primary agent, their own government, is no longer able or willing to protect their rights” (p. 340).

\textsuperscript{38} “Does the Constitutionalization of International Law Still Have a Chance?”, p. 134. On human rights, Habermas argues they are not international norms that specify when the international community can override state sovereignty, as in Cohen’s political approach to human rights. Their moral – as opposed to political – content means they have a universal reference and fall squarely under the jurisdiction of the world organization. See “The Concept of Human Dignity and the Realistic Utopia of Human Rights”, p. 478 and Joshua Cohen, “Minimalism About Human Rights: The Most We Can Hope For?” Journal of Political Philosophy 12 (2), 2004: 190-213.
fairness is an issue because “genuinely ‘political’ issues” are on the table involving “issues of equitable distribution”. Solutions to these kinds of policy problems require more than coordination through international organizations. If more of the world were organized into regional units, Habermas thinks, bargaining over policy issues where there are profound conflicts of interest, not just problems of coordination, would be more likely to produce fair outcomes. Of course, extant regional organizations like the EU would have to have their powers expanded in order to make this vision workable, and other regional organizations would need to be created or expanded to provide counterweights to continental powers like the US and China.

This conception of regional organizations negotiating solutions to policy issues where there are conflicts of interest, not just problems of coordination, has obvious similarities to the situation of member-states within the EU negotiating the terms of integration or a solution to a particular issue like the sovereign debt crisis. In the case of negotiations between regional organizations, citizens extend their national solidarity to encompass the interests of the regional organization to which their state belongs. In addition to this preference for their region’s interests in transnational negotiation, however, citizens must also legitimate, with ‘cosmopolitan’ solidarity, the structuring of transnational negotiation by international law. In the case of

40 The latter Habermas characterizes as ‘technical issues’, like “the standardization of measures, the regulation of telecommunications, disaster prevention, containing epidemics, or combating organized crime” (“A Political Constitution for the Pluralist World Society”, pp. 323-4). Also see “The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society”, p. 446.
41 “Only regionally extensive regimes that are simultaneously representative and capable of implementing decisions and policies could make [negotiations] workable” (“The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society”, p. 446). “International relations as we know them,” he writes, “would continue to exist in the transnational arena in a modified form” – modified because resort to war is barred (“A Political Constitution for the Pluralist World Society”, p. 325).
negotiation between states on integration or a solution to the sovereign debt crisis both national and cosmopolitan solidarity are again important. Citizens will display national solidarity with the interests of their state, but also cosmopolitan solidarity with the interests of the region as a whole.

As we have seen, however, the dominant response to the sovereign debt crisis has emphasized control by member-states rather than supranational decision-making, seemingly demonstrating the dominance of national over cosmopolitan solidarity. One explanation for this outcome, also raised above, is that citizens are unlikely to extend their solidarity to the transnational level in the absence of the belief that EU institutions are democratically responsive. If regional institutions are distant and technocratic, state citizenries will be unlikely to extend their national solidarity into a cosmopolitan solidarity with the regional authority, and therefore hesitate in relinquishing their state’s jurisdiction. Habermas’s insistence on democratically legitimating the EU in the face of the sovereign debt crisis is grounded in this practical interest in fostering a cosmopolitan solidarity among European citizens that can fairly structure regional institutions.

In the face of the apparent difficulty of extending solidarity to regional organizations, some theorists assert the continuing purchase of the modern view of the state. For example,

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42 Relatedly, the question of whether it is plausible to think that citizens can display both regional preference and cosmopolitan solidarity to structure transnational negotiation will depend on the character of the world organization.

43 The tripartite structure of the cosmopolitan condition depends, as I said above, on the argument that there is no structural analogy between the standard justification of the state in the social contract tradition and the creation of a constitutionalized international law. “Does the Constitutionalization of International Law Still Have a Chance?”, p. 129-39. If there were a structural analogy, then Habermas’s attempt to balance roles for states, regional organizations, and the world organization would founder because it would fail to recognize the fundamental
Nagel reasserts the idea that the incorporation of individuals into a state creates the conditions of justice.\textsuperscript{44} This view rejects the idea that globalization enmeshes individuals in webs of interdependence that create obligations of justice.\textsuperscript{45} Using the example of international trade, Nagel argues that even the dense supply chains and legal frameworks that enable trade don’t “rise to the level of collective action needed to trigger demands for justice.”\textsuperscript{46} A crucial element in meeting this standard is whether or not there is an “active engagement of the will” of citizens.\textsuperscript{47} For example, for the issue of international trade agreements, Nagel thinks that there is no active engagement; legitimation runs indirectly through the citizen’s state: “I believe that the newer forms of international governance share with the old a markedly indirect relation to individual citizens and that this is morally significant.”\textsuperscript{48} Citizens are not merely profoundly affected by their state, as they are by the interdependencies of international trade, but are

\begin{quote}
\text{nature of the citizen-state relationship, as strong versions of the modern view of the state assert, and weak versions implicitly appeal to in their presumption in favour of the state over other, non-state institutions.}\textsuperscript{44}
\end{quote}

\text{Thomas Nagel, “The Problem of Global Justice” Philosophy and Public Affairs 33 (2), 2005: 113-47. Members of a state, Nagel contends, are subject to the coercive authority of their state but also authors of its actions. The individual does not face a comparable sphere of coercion either above the state or internal to his or her domestic society, and especially does not face such a sphere that he or she also has a hand in legitimating. See my discussion in chapter 2.}\textsuperscript{45}

\begin{quote}
\text{As Cohen and Sabel make clear, Nagel’s thesis is strong: not only is the state the justice-creating relationship for its citizens, but any other relationships of individuals cannot give rise to similar demands for either socio-economic justice or political process norms; any other institutional arrangements or cooperative practices across borders that might raise the issue of justice are blocked. For Nagel, Cohen and Sabel contend, “the state is the unique normative trigger,” and no other relations are justice-creating. See “Extra Rempublicam Nulla Justitia?”, Philosophy and Public Affairs 34 (2), 2006: 147-75, at p. 155.}\textsuperscript{46}
\end{quote}

\begin{quote}
\text{“The Problem of Global Justice”, p. 141.}\textsuperscript{47}
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\begin{quote}
\textbf{Ibid.}, p. 129.}\textsuperscript{48}
\end{quote}
participants in its legitimation. This allows Nagel to make the distinction between “a form of organization that claims political legitimacy and the right to impose decisions by force” and “a voluntary association or contract among independent parties concerned to advance their common interests.” The EU, despite its institutional heft in support of the common market, looks more like a voluntary association where the member-states remain firmly in control.

Under the logic of Nagel’s version of the modern view of the state, Merkel’s plan to solve the sovereign debt crisis should be see for what it is: an attempt to respond to the exigencies of the current crisis through an intergovernmental agreement that lacks any region-wide collective legitimation. Output legitimation, in other words, rather than democratization, is the appropriate goal of policy. To rebut Nagel’s view, Habermas returns to the idea of a divided understanding of state sovereignty, as he did in his response to Kant. The political relationship between citizens of a state, he argues, should be understood in terms of a horizontal system of rights and a vertical political authority to secure and complement these rights:

The rights that citizens at first reciprocally accord each other only in the horizontal dimension of citizen-citizen interactions must now, once an executive branch has been formed, also extend to the vertical dimension of citizen-state relationships.

In its vertical dimension, the state is

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49 Ibid., p. 140.
50 See my discussion of intergovernmental approaches to EU integration in chapter 2, section 2.4.
51 Citizens, Nagel says, must legitimate the coercion they face from the state both philosophically and practically, by working to reform coercive institutional structures they find themselves subject to that do not meet appropriate standards of legitimacy. See Nagel, “The Problem of Global Justice” p. 145, where he suggests that historically “sovereignty usually precedes legitimacy.” Any expansion in the scope of justice beyond the state, he thinks, will likely be achieved, if at all, by the imposition of new institutions, which after time might be reformed to become legitimate. The contrast with Habermas is striking. Also see Nagel, Equality and Partiality, ch. 15 (New York: Oxford University Press, 1991).
52 Between Facts and Norms, p. 174.
...a sanctioning, organizing, and executive power because rights must be enforced, because the legal community has need of both a collective self-maintenance and an organized judiciary, and because political will-formation issues in programs that must be implemented.53

But regional organizations are organized differently: they group together the horizontal equality of their member states, and the vertical complement of being able to enforce their decisions – if achieved by further distributions of jurisdiction from member-states – must complement rather than override the political achievement of the state:

The curriculum that states and their citizens must undergo in the transition from classical international law to a cosmopolitan condition is complementary, rather than analogous, to the curriculum in which citizens of constitutional states have already graduated in the course of the juridification of an initially unconstrained state power.54

Nagel, of course, would question the idea that the fundamental relationship between citizens of a state can be complemented by a regional overlay. Indeed, he explicitly rejects any intermediate position between the state as the exclusive site of the political relationship and cosmopolitanism.55 He labels the possibility that a continuum of relationships might count as

53 Ibid., p. 134. This account of the democratic, constitutional state as first a horizontal moment and second a vertical moment reverses the historical record of the gradual taming of the vertical apparatus of the absolutist state by liberal rights and then by the republican – and horizontal – idea of popular sovereignty. In chapter 5, I discussed Habermas’s philosophical justification of secure basic rights and fair access to democratic voice in his co-originality thesis. Both basic rights and democratic voice are essential: the normative force of the state’s factual claim to legitimate power cannot be redeemed apart from the linked presence of each. Basic rights and democratic voice are thus a political achievement of a particular polity; its constitutional project gives meaning to and will sustain these rights over time. For the ongoing nature of a constitutional project, see Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” in Time of Transitions, ed. and trans. C. Cronin and M. Pensky (Cambridge: Polity, 2006).

54 “Does the Constitutionalization of International Law Still Have a Chance?”, p. 130. Citizens “have already undergone a long process of political formation and socialization” and “possess the political good of legally-secured freedoms” (ibid., p. 129).

55 Cosmopolitan theorists, Nagel says, may not privilege the interests of institutions like states; all institutions, on the cosmopolitan view, “are instruments for the fulfillment” of our duties to individuals (“The Problem of Global Justice”, p. 119). He prefers the two-place ‘political’
justice-creating the ‘sliding-scale’ or ‘continuous’ view, where “there is a sliding scale of
degrees of co-membership in a nested or sometimes overlapping set of government institutions,
of which the state is only the most salient.”56 On the one hand, Habermas’s cosmopolitan
condition includes three levels, and is thus similar to a sliding-scale view. On the other hand,
states, together with individuals, are a key starting point:

Today any conceptualization of a juridification of world politics must take as its
starting-point individuals and states as the two categories of founding subjects of
a world constitution.57

It is states, representative of the graduation from unconstrained to juridified state power,
that now join together into regional organizations to address problems of global domestic
politics.

approach to the one-place ‘cosmopolitan’ approach: “sovereign states are not merely instruments
for realizing the pre-institutional value of justice … [but are] precisely what gives the value of
justice its application, by putting the fellow citizens of a sovereign state into a relation that they
do not have with the rest of humanity” (ibid., pp. 119-120).

56 “The Problem of Global Justice”, p. 140. Nagel thinks the continuous view is “a natural
suggestion, in light of the general theory that morality is multilayered”, but rejects it as overly
complex when compared with either the one-place cosmopolitan view or the two-place exclusive
view (ibid., p. 141-2). The one-place cosmopolitan position, to be consistent, would require
global sovereignty; without a world government, the coercive backstop of sovereign power
needed to solve the assurance problem would be lacking (ibid., p. 122). In chapter 3 I raised a
related objection against Held. His proposal for a new common structure of political action, I
argued, suffers from the fact that cosmopolitan law will lack the clear political authority of
states, including the ability to back up its decisions with force. Where a theorist like Held should
be placed in Nagel’s categories – as a cosmopolitan or as a defender of the continuous view – is
unclear. Although he endorses a top level of cosmopolitan law, his use of the all-affected
principle suggests the view that morality is, in Nagel’s terms, ‘multilayered’. It is, I think,
Nagel’s insistence on the simplicity of either a one- or two-place view that creates the difficulty
in categorizing Held’s approach.

57 Habermas, “The Constitutionalization of International Law and the Legitimation Problems of a
Constitution for World Society”, p. 449, italics in original. See also Seyla Benhabib “Claiming
Rights across Borders: International Human Rights and Democratic Sovereignty” American
But if regional organizations complement the achievement of states, how do they do so, and on what basis? Habermas’s answer pulls apart elements that were once bound tightly together: statehood, constitutionalization, and civic solidarity. Statehood refers to the ultimate ability of states to back up their decisions with the monopoly of force. In the future cosmopolitan condition, states would retain this ability:

Whereas the political constitution and the solidarity-fostering membership in an association of free and equal legal subjects can also extend across national borders, the substance of the state – the decision-making and administrative power of a hierarchically organized authority enjoying a monopoly of violence – is ultimately dependent on a state infrastructure.

It is the concept of constitutionalization that explains how regional organizations can implement their decisions without being states. In the republican justification of the democratic constitutional state, citizens found or constitute the state in the mutual recognition of each other as “free and equal consociates under law.” The contrasting liberal model views the constitution as constraining rather than constituting political power. Habermas argues that the constitutionalization of international law should be conceptualized as a primarily liberal, constraining moment:

A political constitution primarily geared to setting limits to power founds a “rule of law” that can normatively shape existing power relations, regardless of their democratic origins, and direct the exercise of political power into legal channels.

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59 Ibid., p. 445.
60 “Does the Constitutionalization of International Law Still Have a Chance?”, p. 132.
61 “In the liberal tradition, the constitution does not have the function of constituting authority but only that of constraining power” (“A Political Constitution for the Pluralist World Society”, pp. 315-6).
In the domestic social contract, it is the central authority of the state government that the liberal model aims to constrain (constraining ‘above’ by ‘below’). In international affairs, it is the otherwise autonomous functioning of states that the liberal model aims to constrain (constraining ‘below’ by ‘above’). The mode of constraint is twofold: on the one hand, state autonomy is dependent on the protection of human rights, and on the other, regional organizations like the EU tackle problems of global domestic politics in an integrated fashion for their member-states. Regional organizations gain a constitutional structure and the ability to implement decisions without having to take on the powers of the state or the normative task of enabling democratic constitutionalism:

By rejecting the identity of the rulers with the ruled, a constitution of this type ensures the conceptual independence of three elements, namely, the constitution, the powers of the state, and citizenship. Thus, here there is no fundamental conceptual obstacle to separating the elements that are so tightly intermeshed in the democratic state.63

In sum, Habermas wants to resist the strong constitutive and republican moment for regional organizations: the constitution of a regional organization will not include the co-original moment of the institutionalization of human rights as basic rights and popular sovereignty.64 To make this move, he adds collective actors – states – as fundamental units of international law, and then applies a vertical moment of liberal constraint through regional organizations to their actions.65

63 Ibid., p. 316.
64 “The nation-states also retain their place in a European Union that is moving closer together. They should by no means be absorbed into a European federal state but remain the guarantors of the level of democratic freedom that we have been fortunate enough to attain in Europe.” See Habermas, “Bringing the Integration of Citizens into line with the Integration of States” in Reset: Dialogues on Civilizations, trans. Ciarin Cronin, March 12, 2012.
65 In Crisis of the European Union, Habermas shifts to speak of peoples rather than states: “Citizens are involved in a twofold manner in constituting the higher-level political community –
3 The EU and Democratic Legitimation

Habermas’s argument that there is no structural analogy between the justification of the democratic constitutional state and the justification of constitutionalized international law, I have argued, opens up the possibility that states and regional organizations can play distinct roles alongside one another. But there is a tension in Habermas’s account. On the one hand, his call for further integration in the Eurozone, canvassed in section 1, can rest on the claim that truly regional cooperation is needed to solve the crisis. For example, through the pooled economic strength of the Eurozone (led by Germany, but reaching beyond it as well) the yields on bonds from troubled governments like Italy and Spain could be brought down to manageable levels. On the other hand, the democratic legitimation that he rightly insists should match a fiscal union of member-states seems out of reach because of intense skepticism about the nature of European integration. Most significantly, there is strong popular resistance to transferring jurisdiction to the EU level. During the sovereign debt crisis the impression that key decisions are taken behind closed doors at intergovernmental conferences has only been heightened. On this basis, citizens
directly in their role as future EU citizens and indirectly in their role as members of one of the national peoples. This is why the EU constitution, like all modern legal systems, has a strictly individualistic character, in spite of the fact that one of the two supporting pillars is composed directly of collectivities. It rests in the final analysis on the subjective rights of citizens. It is therefore more consistent to recognize not the member states themselves but their peoples as the other constitution-founding subject” (p. 35, emphasis in original). Diez writes that Habermas “doesn’t see the EU as a commonwealth of states or as a federation but, rather, as something new. It is a legal construct that the peoples of Europe have agreed upon in concert with the citizens of Europe – we with ourselves, in other words – in a dual form and respecting each respective government” (“Habermas, Last European: A Philosopher’s Mission to Save the EU”).
question the wisdom of transferring jurisdiction away from their state, where they have relatively more input.

The way to resolve this tension, I argue, is to conceptualize the EU as an institution that plays a primary role in fostering democratic legitimation. The identification of an institution’s primary role, I argued in chapter 4, should be based on how the performance of that role enables a particular political community to achieve its interests and projects. The nature of the subject political community will determine what kind of characteristics the institution must have: a role is primary for an institution when a particular political community depends on its performance as a constitutive element of its identity. But in the case of the EU, the regional political community takes a much more limited, ambiguous form than other examples I have discussed. Nevertheless, I think that this political community has interests that can be facilitated by the distribution of jurisdiction to the regional level. These interests are properly identified as belonging to the citizens of Europe as a whole: the density of institutional meshing involved in regional cooperation that can resolve the sovereign debt crisis outstrips the ability of any national political community to legitimate it.

In sum, institutional capacity outstrips attachment to political community. To respond to this fact, I proceed by examining the unique characteristics or attributes of the EU as an institution and on this basis, develop an account of its primary role. The first characteristic of the EU that differentiates it from its member-states is the attribute of suprastate jurisdiction. Suprastate jurisdiction is defined chiefly by the scope of its application, in contrast with the state attribute of predominant jurisdiction, which gives it a high degree of authority over the means to ensure the essential components of its primary role, namely secure basic rights and fair access to
democratic voice. With the EU, its suprastate jurisdiction allows it to address the class of policy issues that are too big to be resolved – and resolved fairly – by states alone. This class includes both intra-regional and global policy issues. Solutions to the sovereign debt crisis such as those proposed by Habermas are primarily an intra-regional issue. Global policy issues, by contrast, demand negotiation between regional blocs. As participants in a particular negotiation – on a trade treaty, for example – regional organizations would claim suprastate jurisdiction over the policy area in question for their geographic area.

The EU’s second attribute is that it has two equal constituencies: the member-states and the citizenry of the region as a whole. By contrast, the other institutions I have examined, states and indigenous political institutions, have one primary constituency: the national political community and an indigenous political community, respectively. The EU must take its two constituencies into account both when acquiring and when asserting jurisdiction over a particular policy area. That is, attention to the interests of each constituency is important both for the creation and regulation of regional policy. A model that explicitly recognizes the two constituencies of the Union – both citizens and member-states, is found in Article 10 of the Lisbon Treaty:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

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66 See chapter 4, section 2 for Levy’s distinction between the scope and degree of authority indigenous communities have over particular issue-areas.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.\textsuperscript{67}

EU legitimation, then, is supposed to run through two channels. The first channel draws on the input of state citizenries and national interests. The key institution here is the Council. The second runs through institutions that are oriented towards regional policy goals. The key institution for this channel is the EU Parliament. But the Parliament, which possesses jurisdictional authority on paper, has not been able to translate its formal powers into actual influence.\textsuperscript{68}

On the basis of these attributes, I argue that the primary role of the EU is to create and regulate an effective and democratic regional policy. This role focuses on regional policy of a general nature, in response to its suprastate jurisdiction attribute. It also encompasses both the creation of new policy and the administration or regulation of existing policy. Finally, it balances the need for both input and output legitimation. On the output side, the creation of policy that can respond to regional disruptions like the sovereign debt crisis, or avoid them in the first place, will be critical. On the input side, further democratic reforms that legitimize the EU’s policies to both of its constituencies are required. These reforms should restrict the reach of the

\textsuperscript{67} “Consolidated Version of the Treaty on European Union” (Luxembourg: Publications Office of the European Union, 2010). Calliess describes the basis of the democratic model of dual legitimacy in the Lisbon Treaty: “…at the European level the democratic principle has been specifically shaped by a model of dual legitimacy, which is also explicitly anchored in article 10, paragraph 2 EUV of the Lisbon treaty, but not pursued further by the German Constitutional Court [in its ruling on the constitutionality of the Treaty]. In this model, the representatives of the national governments provide democratic legitimacy in the European Council, and are monitored by their respective national governments. This nationally endowed strain of legitimacy is supplemented by the European Parliament, which is directly elected by us, the citizens of the EU, and which carries the same weight of decision-making power” (“Europe and the “New German Question” www.eurozine.com, April 6, 2011, pp. 8-9).

\textsuperscript{68} Thanks to Simone Chambers for discussing this point with me.
regional level’s authority such that the member-states’ primary role in enabling democratic constitutionalism is not negatively impacted.

Under this conception of the EU’s primary role, distributing jurisdiction to the regional level is a normative response on the part of state citizenries to the challenge of creating and regulating a regional policy that enhances, not limits, their ability to democratically control their future. The EU’s role in creating and regulating regional policy must, of course, be responsive to member-state interests. But regional policy addresses issues that, because of their supranational scope, outstrip the capacities of states. This approach, in spite of the currently toxic environment created by the sovereign debt crisis, has the potential to addresses the unwillingness of citizens to extend their solidarity to the regional level. In doing so, it could strengthen Habermas’s rebuttal of the Merkel plan. If the EU plays the primary role of creating and regulating an effective and democratic regional policy, I conclude, it will provide a supplementary institutional location of democratic legitimation that can complement the role of the member-states in enabling democratic constitutionalism. The production of democratic legitimation at the regional level, in turn, can support the strengthening of the identity of the regional political community. In the following chapter, I propose specific reforms that can achieve these ends.
Chapter 8. Distributing State Jurisdiction

My dissertation has evaluated how the standard, state-centric model of democratic legitimation should be transformed in light of the presence of substantive jurisdictional conflict and plural political identity. Substantive jurisdictional conflict describes the circumstance where non-state institutions represent a territory which overlaps with a part of or extends beyond the state’s territory, make jurisdictional claims that are grounded independently from the state, and do not seek to form states themselves. Plural political identity describes the attachment of individuals to multiple political communities. In chapter 1, in light of these circumstances, I proposed that the standard model should be transformed by considering non-state institutions as supplementary objects of democratic legitimation alongside states. In chapter 2, I showed how the standard model, under the influence of the modern view of the state, ascribes normative features to states such as exclusive sovereignty. An effect of the state having these features is that the jurisdictional claims of non-state institutions are not recognized as having a grounding independent of the state. I also argued that unbundling the sovereignty of the state will be insufficient as a response to the circumstance of substantive jurisdictional conflict. Even as its sovereignty is unbundled, the state retains its privileged place. I concluded that a more thorough decentering of the position of the state is required.

In chapter 3, I evaluated the decentering approaches of Held and Bohman. Each makes a convincing case for decentering the state but does not develop an account of how more settled political communities will pursue their interests through non-state institutions. In chapter 4, I evaluated the decentering approach of Young, who directly aims to ensure that indigenous
political communities can achieve self-determination. Her use of the non-domination principle for evaluating the relationship between states and non-state institutions, I argued, must be supplemented with a more specific account of how the characteristics of a particular institution enable the political community represented by it to achieve its interests. To provide this account, I first argued that a balance must be struck between identifying political communities through the institutions that represent them and defining them by other characteristics. I then introduced the idea that institutions play primary roles. An institution’s primary role describes its contribution to the production of democratic legitimation on behalf of a particular political community or political communities. To realize their interests and projects, settled political communities require institutions with particular characteristics. The nature of the subject political community, I argued, will determine what kind of characteristics the institution must have: a role is primary for an institution when a particular political community depends on its performance as a constitutive element of its identity.

In chapters 5 – 7, I sketched the primary roles of states, indigenous political institutions, and regional organizations in order to describe the contribution of these institutions to democratic legitimation on behalf of the political community or communities they represent. The primary role of the state is to enable a project of democratic constitutionalism. While it will continue to play other important roles such as ensuring internal order and providing economic security, it should not have a monopoly over their provision; other non-state institutions may make important contributions. Enabling a project of democratic constitutionalism, by contrast, directly represents – and in part constitutes the identity of – the national political community. The primary role of indigenous political institutions – in the structural context of their relationship with a larger, more powerful state – is to enable the self-determination of their political communities. The primary role of regional organizations like the EU is to create and
regulate an effective and democratic regional policy. This role responds to the two constituencies of the EU: member-states and the regional political community. It also blends the need for democratic input from these two constituencies with the need for output legitimation.

The reason to compare the primary roles of institutions is to determine how sharing or redistributing jurisdiction can enhance democratic legitimation overall. But because of the power differential between states and non-state institutions, the question of what responsibilities state citizenries have to non-national political communities is especially pressing. In section 1 of this concluding chapter, I introduce a criterion of distribution that can guide citizenries: they should distribute the jurisdiction necessary for non-state institutions to play their primary roles, subject to the qualification that their state retains the means to play its primary role of enabling democratic constitutionalism. In section 2, I consider the implications of the criterion for the relationship between Canada and indigenous political institutions. In section 3, I consider the implications of the criterion for the relationship between the EU and its member-states. I conclude with reflections on the nature of the individual’s relationship to political community.

1 A Criterion for Distributing State Jurisdiction

Under the standard model of democratic legitimation, citizenries may respond to the jurisdictional claims of non-state institutions by unbundling some of their state’s sovereignty. I argued in chapter 2, however, that this approach will be insufficient as a response to the circumstance of substantive jurisdictional conflict. First, there is the problem of recognizing the claims of non-state institutions where there is a large power differential between the state and the
non-state institution: if the challenge of non-state institutions is not strong enough, states can simply ignore their claims. Second, the modern view of the state normally includes the proviso that the state can withdraw from an agreement to share or transfer jurisdiction to a non-state institution. These two problems, I argued, arose from the way the standard model conceptualizes the state’s relationship with non-state institutions. First, the jurisdictional authority of the state is seen as exclusive of the claims of other, non-state institutions; the state is independent of, and in some way superior to, non-state institutions. Second, non-state institutions are conceptualized as created by and serving the interests of the states; states are controlling principals and non-state institutions are dependent agents. As I noted, these two points combine in the standard model to define the link between the national political community and the state as the ultimate relationship of legitimation.

The primary roles approach I have developed, including the criterion I propose to guide state citizenries when considering the jurisdictional claims of non-state institutions, challenges the idea that the link between the national political community and the state is the ultimate relationship of legitimation. Citizenries, I argue, should distribute the jurisdiction that non-state institutions require to play their primary roles, subject to the qualification that their state retains the means to play its own primary role of enabling democratic constitutionalism. This criterion transforms the standard model by conceiving of the roles institutions play as directly connected to how they facilitate democratic legitimation for a particular political community or political communities. In this way, the question of which institutions should do what in an environment where there are multiple locations of legitimation is directly connected to their democratic character. It also means that there is no one ultimate relationship of legitimation that is in control of the others, as there is on the standard model. Instead, states and non-state institutions stand on an initial equal footing as potential objects of democratic legitimation. Citizenries must justify
the jurisdiction their state possesses in terms of its contribution to the production of democratic legitimation. The account offered in chapter 5 of the state’s primary role in enabling a project of democratic constitutionalism is a form of this kind of justification.

Importantly, the fact that a state plays the primary role of enabling democratic constitutionalism does not give its citizenry a reason to block avenues for democratic legitimation through non-state institutions. Those avenues, if defined in terms of a primary role – that is, a description of how an institution contributes to the production of democratic legitimation on behalf of a particular political community or communities – are institutional locations where the legitimation channeled through the state can be supplemented. Under the criterion I propose, citizenries should distribute the jurisdiction non-state institutions require to play their primary roles, subject only to the qualification that the state’s role in enabling democratic constitutionalism should not be negatively impacted. This aims to structure the relationship between institutions on the basis of their contributions to democratic legitimation, not on the basis of the state’s exclusivity.

In sum, the strength of competing jurisdictional claims made by states and non-state institutions are assessed by comparing their primary roles, with the end of determining how sharing or distributing jurisdiction can enhance democratic legitimation. This pluralizes a basic understanding of democracy as self-rule to multiple legitimating subjects and multiple institutional locations. The contextual perspective of citizenries addressing both the contribution of their state to democratic legitimation and the contribution of additional, supplementary institutional sites replaces the universal model of democratic legitimation associated with the standard model.
But how can state citizenries ensure that the jurisdiction they distribute to non-state institutions will result in a supplementary site of democratic legitimation, rather than a non-democratic concentration of power? This is an important concern. On the one hand, the principle of equal participation, which is often understood in terms of equal state citizenship, need not be wedded to the standard model; it can continue to be used to assess the democratic character of non-state institutions. The criterion I have introduced in this chapter only proposes that states distribute jurisdiction to non-state institutions where the latter play a primary role that produces democratic legitimation at a supplementary institutional location. It does not mean that citizenries must distribute jurisdiction to non-state institutions with clearly undemocratic structures of authority. On the other hand, under a pluralized conception of democracy as self-rule at multiple institutional locations, the political communities represented by these non-state institutional locations must have the ability to control their own affairs, including their conception of what counts as democratic legitimation. This means that what counts as democratic legitimation at diverse institutional locations, while subject to evaluation under the principle of equal participation, must also remain a site of contestation.

This is to be expected, I think, under the circumstances that frame the problem I address: substantive jurisdictional conflict and plural political identity introduce complications to the legitimation of political authority that fatally affect the presumption that the meaning and scope of democracy can be unproblematically matched with the state’s boundaries. As I argued in chapter 2, the modern view of the state ascribes normative features such as exclusive sovereignty to states that elevate them above other, non-state institutions. These normative features are conceptualized in such a way as to block out opportunities for non-state institutions. By comparison, the criterion I defend asserts that citizenries have a responsibility to respond to the jurisdictional claims of non-state institutions that play primary roles on behalf of a particular
political community or communities, subject to the qualification that their state maintains the ability to enable a project of democratic constitutionalism. This decenters the position of the state vis-à-vis non-state institutions on the standard model.

2 Core Indigenous Jurisdiction

In chapter 6, I reviewed multiple pathways for the reconciliation of jurisdictional conflict between the Canadian government and First Nations. The key to the success of these pathways, I argued, is to conceptualize the parties appropriately. In particular, indigenous political institutions should be conceptualized as having the primary role of enabling the self-determination of their political communities.

According to the criterion of distribution introduced in the previous section, citizenries should distribute jurisdiction to indigenous political institutions in areas that facilitate them in playing their primary role, subject to the qualification that their state’s ability to play its primary role is not negatively impacted. Specific policy areas in which states could distribute jurisdiction to indigenous political institutions could include control over land, education, policing, and resource management. In addition, political recognition of Aboriginal rights and title could be extended. There are undoubtedly other possibilities where distributions of jurisdiction from states to indigenous political institutions would not negatively impact the former’s ability to play its primary role of enabling democratic constitutionalism.

What, though, of cases where there is debate as to whether this criterion is satisfied? From the perspective of a state citizenry, the jurisdiction claimed by indigenous political
institutions may appear to conflict with the state’s primary role in enabling democratic constitutionalism. From the perspective of indigenous political institutions, the state’s reluctance to share or transfer jurisdiction may appear to restrict their community’s ability to be self-determining. In such cases, the importance of a particular area of jurisdiction to indigenous self-determination will have to be carefully weighed against its importance for the state’s ability to play its primary role.

One area where this issue has been confronted concerns the applicability of the Charter of Rights and Freedoms to indigenous political communities and institutions. Hogg and Turpel describe Aboriginal concerns about the application of the Charter to their political institutions in these terms:

Although there is no consensus on the issue, many Aboriginal people see the application of the Charter as simply inappropriate, because it does not reflect Aboriginal values or approaches to resolving disputes. This is not to say that Aboriginal peoples have no concern for individual rights and individual security under Aboriginal governments. The concern rests more with the Charter's elevation of the guaranteed legal rights over unguaranteed social and economic

1 §25 of the Charter reads: “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.” See http://laws.justice.gc.ca/en/charter/. Also see Kent McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” Osgoode Hall Law Journal vol. 34 (1), 1996: 61-99. The applicability of the Charter to Aboriginal peoples has arguably not been a central issue of concern in at least some treaty negotiations. For example, the Nisga’a Treaty, discussed in chapter 6, not only does not question the applicability of the Charter to the Nisga’a, but also allows that federal and provincial laws of general application apply. This feature of the treaty coexists with the fact that Nisga’a laws in certain areas have paramountcy, meaning that in a case of conflict, the Nisga’a law prevails. See Christopher McKee, Treaty Talks in British Columbia: Building a New Relationship, 3rd ed. (Vancouver: UBC Press, 2009), p. 99, and Schouls, Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government (Vancouver: UBC Press, 2003), p. 138.
rights, the emphasis on rights rather than responsibilities, the failure to emphasize collective rights, and the litigation model of enforcement.  

I think that the concern expressed in this passage would be partially alleviated if the criterion of distribution I introduced above was employed. The ability of indigenous political institutions to enable the self-determination of the political communities they represent would be enhanced, and with increased means, they could choose a path that prioritizes social and economic goals over legal rights. A further consideration is that a more pluralistic conception of the sources of Canadian law could soothe conflict over the applicability of the Charter to indigenous political institutions. As I noted in chapter 2, legal scholars like Henderson, Slattery, and Macklem have argued that the Canadian constitution can draw on indigenous legal traditions. If legal recognition of the distinct source of indigenous law expands – and there is some evidence that recent Supreme Court decisions are moving in this direction – this could advance the resolution of conflicts between the state and indigenous peoples.

In spite of these reasons to think that jurisdictional conflict can be alleviated between the state and indigenous political institutions, there is still the issue of whether the primary role of indigenous political institutions in enabling the self-determination of the political communities they represent will conflict with the state’s primary role in enabling a project of democratic constitutionalism. Here, the Royal Commission on Aboriginal Peoples’ distinction between core and peripheral areas of indigenous jurisdiction is helpful:

The core of Aboriginal jurisdiction includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; that do not have a major impact on adjacent jurisdictions; and that otherwise are not the object of transcendent federal or provincial concern. With respect to these

matters, an Aboriginal group has the right to exercise authority and legislate at its own initiative, without the need to conclude federal or provincial agreements.

The periphery comprises the remainder of the sphere of inherent Aboriginal jurisdiction. It includes, among other things, subject-matters that have a major impact on adjacent jurisdictions or attract transcendent federal or provincial concern…

In defining core and periphery, the Royal Commission focuses on the relationship between indigenous and state jurisdiction. Peripheral areas, although still making up a part of the sphere of ‘inherent’ Aboriginal jurisdiction, have a ‘major impact’ on state jurisdiction. The criterion I suggest defines major impact in terms of the state’s primary role in enabling democratic constitutionalism. This will, I think, make possible more substantial distributions of jurisdiction to indigenous political institutions than under the Royal Commission’s definition.

Under my primary roles approach, the simple fact of major impact under the Royal Commission’s definition is filtered to include only cases where the state’s primary role in enabling democratic constitutionalism is impacted.

In any case, the Commission’s definition of core Aboriginal jurisdiction leaves much to be decided at a later stage through legal challenges or political negotiations between Canada and First Nations. Notably, the Royal Commission shares Macklem’s worry, discussed in chapter 2, that the judicial system is not the proper venue for making what are essentially political decisions. To recall, Macklem worried that the Supreme Court of Canada will be forced to rule on what constitutes the core and what constitutes the periphery of indigenous jurisdiction. I also share this worry; the argument that states should distribute the jurisdiction necessary for

\[\text{\textsuperscript{3}}\text{ Canada, Royal Commission on Aboriginal Peoples: Final Report (Ottawa: The Commission, 1996) vol. 2, pp. 223-4. Schouls makes the point in this way: “Core areas refer to those legislative responsibilities of government in which Aboriginal communities should have jurisdiction if they are to be self-defining” (Shifting Boundaries, p. 127).}\]
indigenous self-determination is aimed primarily at the political process, not the judicial arena. Accordingly, the criterion I proposed in the previous section describes a collective responsibility on the part of state citizenries, not judges, to consider how democratic legitimation can be enhanced at supplementary institutional locations.

Arguing for a political rather than judicial resolution of jurisdictional conflicts between the state and indigenous political institutions, however, invites the objection that some of the gains indigenous peoples have achieved through the courts may be lost. What guarantee is there, in other words, that the outcome of a political process will be to the benefit of much smaller, historically marginalized indigenous communities? There is no such guarantee. At least since the Calder decision, appeal to the courts has been an effective way for indigenous peoples to assert their claims against the Canadian state. But having the courts rule directly on the scope of indigenous jurisdiction is problematic, not least because it takes the power to determine the scope of the authority indigenous political institutions have out of the hands of indigenous political communities. And, as the Royal Commission and Macklem show, at some point there is a limit to what can be achieved through the courts.

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4 Even a conflict of laws approach to resolving jurisdictional disputes, which seems promising because it recognizes the independent status of indigenous political institutions, will only be successful if it integrates indigenous perspectives. But a hybrid conflict of laws approach that draws on both statist and indigenous traditions, like the political and legal pathways already mentioned, is itself an uncertain prospect. Prominent works on reconciling Canadian with First Nations law are John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010) and James Youngblood Henderson, First Nations Jurisprudence and Aboriginal Rights (Saskatoon: Native Law Centre, University of Saskatchewan, 2006). Also see James Fawcett and Janeen Carruthers, Cheshire, North and Fawcett: Private International Law, 14th ed. (Oxford: Oxford University Press, 2008).

In sum, both legal and political pathways for reconciliation are an uncertain prospect. The diversity of indigenous political communities in Canada, however, coupled with the different historical relationships that exist between these communities and the state, suggest that in some cases a resolution to jurisdictional conflict can be facilitated through attention to local requirements. As Schouls argues, flexibility must be maintained: “There need be no rigid list of jurisdictions and powers that Aboriginal governments must exercise if they are to function as communities of self-definition for their members.” In other words, what indigenous political communities need for self-determination will vary. Such attention to context may show that in many areas, what indigenous political communities seek does not directly conflict with the resources the state must call on to play its primary role in enabling democratic constitutionalism. For example, recognition of Aboriginal title to land could enhance the self-determination of indigenous political communities without affecting the state’s ability to play its primary role.

I make this argument, I should stress, from the contextual perspective of state citizenries. I have not attempted, beyond a certain minimum characterization, to describe how indigenous political communities will themselves conceptualize the scope of policy areas over which their political institutions will have responsibility. Instead, I have argued that citizenries have a responsibility to consider how their state’s role in enabling democratic constitutionalism can be made compatible with the primary role of indigenous political institutions in enabling self-determination for their communities.

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3 Regionalism and Political Community

In chapter 7, I argued that an alternative to Merkel’s intergovernmental approach to managing the sovereign debt crisis should begin by conceptualizing the EU as playing the primary role of creating and regulating an effective and democratic regional policy. I now apply the criterion of distribution introduced in section 1 of this chapter to consider how citizenries might enhance democratic legitimation by distributing jurisdiction from their states to the regional level. I argue that shifting authority from EU institutions that primarily represent the member-states, such as the Council, towards institutions that primarily represent EU citizens as a whole, such as the Parliament or Commission, would transform the regional organization into an institution that makes a distinctive contribution to the production of democratic legitimation.

This argument again draws on Habermas’s analysis:

The main challenge at the institutional level […] is to recover the equal standing and symmetric relation in the distribution of functions and legislative competences which we ascribe reconstructively to the European peoples and EU citizens as constitution-founding subjects. A balance between the competences of the Council and the Parliament must be achieved in all fields of policy.

The aim of striking such a balance is to facilitate the EU in achieving its primary role of creating and regulating an effective and democratic regional policy. By enhancing the supranational capacities of the EU, European citizens would have more input into the exercise of regional power. If they are to embrace belonging in the regional political community as an additional identity alongside attachment to their national political communities, they must see that regional integration enhances, not detracts from, democratic legitimation.

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In some respects, Europe is moving in this direction. The Lisbon Treaty, for example, announced a shift of power from state-centric to supranational institutions. And, as one official account asserts, the rationale for the shift directly appeals to the two constituencies of member-states and regional citizens:

Co-decision is the term for the European Parliament’s power to make laws jointly on an equal footing with the Council of Ministers. The Lisbon Treaty brings co-decision into general use. Through the Lisbon Treaty the procedure by which the European Parliament co-decides with the Council will become the ‘ordinary legislative procedure’. This means that the decision-making of the European Union will be based on the double legitimacy of the people (as represented by their MEPs in the European Parliament) and the Member States (as represented by the Ministers in the Council).

In spite of this acknowledgement of the need for the European citizens as a whole to legitimate regional decision-making authority, however, the power of the Parliament in the co-decision procedure of the Lisbon Treaty remains quite limited. For example, it will still lack the ability to initiate legislation, except in special cases where citizens gather enough signatures on a petition.

What would be the effect of further expansion of the EU Parliament’s power of legislative initiative? A prominent concern is that with an expanded mandate the EU Parliament

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8 Anderson has disparaged Habermas’s optimism by noting that he has now embraced what he once sharply criticized: the Lisbon Treaty. “Habermas has now discovered that, far from cementing any chasm between elites and citizens, it is no less than the charter of an unprecedented step forward in human liberty, its duplication of the foundations of European sovereignty in at once citizens and peoples—not states—of the Union, a luminous template for a parliament of the world to come” (“After the Event” New Left Review 73, 2012: 49-61, at p. 50). Anderson’s critique leaves to the side Habermas’s continued criticism of the anti-democratic elements of the Lisbon Treaty.


will become more like the legislatures of the member-states, which could negatively impact the ability of member-states to play their primary role of enabling democratic constitutionalism. But under my primary roles approach, states and regional organizations have distinct primary roles and distinct characteristics or attributes that facilitate the performance of these roles. For states, their attributes of predominant jurisdiction and open agenda facilitate the performance of their primary role in enabling a project of democratic constitutionalism. For the EU, its primary role of enabling and regulating an effective and democratic regional policy is facilitated by its two attributes of suprastate jurisdiction and dual constituency. I think that at least a limited power of legislative initiative seems like an essential power for a European Parliament tasked with representing the interests of citizens – one of the Union’s two constituencies – directly. This kind of reform will come closer to meeting the demands of the dual legitimacy model than the current situation, where innovations like co-decision are heralded, but most major decisions are still made in intergovernmental conferences.

How far can such reforms go? For example, one option for resolving the sovereign debt crisis is a degree of fiscal union. This could affect state-level policies such as tax rates, retirement ages, and minimum wages levels. As I argued in chapter 5, however, there are areas of policy, such as the provision of economic security and the maintenance of internal order, where what appears to be an essential role of states can be parsed into components that are necessary for the state to play its primary role of enabling democratic constitutionalism, and components that can be shared with non-state institutions. National control over budgets is another of these cases. While some measure of control is surely needed for a successful state project of democratic constitutionalism, other parts of this authority can be distributed to a regional organization with the aim of harmonizing national economies. As the criterion of distribution introduced above asserts, the primary role of the state in enabling democratic
constitutionalism must not be negatively impacted. This means that states must retain the ability to secure basic rights and provide fair access to democratic voice: citizens will continue to look to their state for the institutionalization of these important goods. I think that even if regional integration extends to some level of fiscal union, the EU will still be a long way from overriding the ability of member-states to play their primary role of enabling democratic constitutionalism.

These considerations, of course, will not efface conflict between member-states and the EU. But the prospect of further conflict – if the supranational institutions of the EU are strengthened – could actually be healthy for democracy in Europe. This is because giving the differences between regional and national interests an airing in the public sphere is arguably preferable to the current situation where citizens are skeptical of the intergovernmental bargaining that determines the outcome of policy. Indeed, if the Euro does dissolve under the pressures of the crisis, one could argue that this would strip away one of the more undemocratic aspects of European integration – a monetary straightjacket without a compensatory political union.\textsuperscript{11} This consideration demonstrates the importance of both the argument I have advanced that the EU should be conceptualized as an institution with a primary role, and the argument that citizenries should distribute jurisdiction to the regional level with the aim of strengthening the EU’s supranational institutions. Without these transformations, member-state citizenries should question the effects of a monetary union that lacks sufficient democratic legitimation. By contrast, distributing jurisdiction with the aim of facilitating the EU in creating and regulating an

\textsuperscript{11} Of course, worse outcomes are also possible, such as the splintering of European integration and the rise of destructive nationalist movements. For Habermas, as I argued in chapter 7, the current crisis offers an opening to complete a further round of European integration. This would be a substantial achievement, he argues, along multiple dimensions: inside the Union, it would create a peaceful and integrated regional economy that also respects the cultural diversity of the member-states, and in foreign affairs it would create a regional unit that could negotiate solutions to global problems with continental powers like the US and China.
effective and democratic regional policy can enhance democratic legitimation at an important, supplementary institutional location. In particular, shifting power from intergovernmental to supranational institutions could positively reform the democratic character of the EU level such that the advantages of fiscal union would outweigh the disadvantages.

Democratic reform that strengthens the supranational institutions of the EU such as the Parliament, I conclude, would begin the process of reconciling the primary roles of the EU and its member-states. On the one hand, such reform would aim to bolster the ability of the EU to create an effective regional policy. The disparities between European economies uncovered by the crisis arguably points to the need for a regional policy that can rebalance macroeconomic variables such as labour costs, current account balances, and sovereign bond yields. If further jurisdiction were distributed by member-states to the regional level, regional institutions would increase their ability to create policy and enforce regulations that aim at the prosperity of the region as a whole, as opposed to particular member-states. On the other hand, reform that is directed towards strengthening the EU’s supranational institutions would create a supplementary site of democratic legitimation alongside the member-states. This would address the tension I identified in Habermas’s account between the need for expanded regionalism and the need for democratic legitimation.

4 The Individual and Political Community

A theory of democratic legitimation addresses how the exercise of institutional political authority over individuals and political communities can be justified. I conclude with reflections on the
important role that political communities play in channeling the justification of political authority for individuals.

Attachment to a political community is obviously an important component of individual identity. From the perspective of a theory of democratic legitimation, its importance is centered on the link between the political community as a legitimating subject of political authority and institutions as objects of legitimation. The primary roles of institutions, I have argued, can be identified by asking how the performance of the role is necessary for the constitution of the identity of the political community. A national political community with a democratic tradition, for example, needs a state that plays the primary role of enabling a project of democratic constitutionalism; the very identity of the political community is bound up with access to an institution that will play the necessary primary role. In chapters 6 and 7, I made similar cases with respect to indigenous political communities and regional political communities. For each of these examples, the identity of the political community is bound up with a particular form of institutional expression.

A requirement of being able to justify the exercise of political authority through a particular institution, then, will be an alignment between the role played by the institution and the identity of the political community. If the role played by the institution does not reflect the identity of the political community, it is unlikely to provide a suitable object for democratic legitimation. And, a misalignment between role and identity could be damaging to the identity of the political community. Each of the examples discussed in previous chapters demonstrates this point. Indigenous political communities face the difficulty of having insufficient institutional means to achieve their interests, and the effect of this could shape their identity. For regional political communities, the contours of the problem are different, but an alignment
between the identity of the community and the role of the institution remains important. The illegitimate exercise of power by regional bodies, as I have noted, is a persistent theme in analyses of the EU. A chief reason for this is that member-states have tended to monopolize decision-making authority through intergovernmental institutions. The extension of the scope of political authority to the regional level has proceeded without the appropriate alignment of the role of the new institutional authority with the identity of the regional political community it represents. The continued status quo exercise of power will continue to do damage to the prospects of a regional European political community.

The need for an alignment between institution and political community does not exist, of course, under the standard model of democratic legitimation. There, the definition of mutually exclusive boundaries via concepts such as sovereignty and territoriality concentrate the standard model’s account of democratic legitimation on the state. The intensity of the concentration on the state has been described by Ruggie as analogous to the innovation in painting of single-point perspective. Ruggie’s analogy, I think, can be extended to the connection between individual political identity and belonging in political community. In the decentered and contextualized model I have developed, belonging in political community is a conduit for the justification of the exercise of political power through institutions. An individual’s ability to express their political identity depends on an attachment to a particular political community, but the very identity of that political community is tied to the role played by the institutions that represent it. The transformed model of democratic legitimation I have argued for moves beyond the single point perspective of the standard model in the sense that individuals will be able to paint on multiple

canvasses at once. At each canvass, belonging in political community will provide part of the inspiration for the shape of the institutional means.

I conclude that transforming the standard model of democratic legitimation in the direction I suggest can potentially give better expression to these links between individual and collective political identity, and between collective political identity and the institutional realization of the interests of political communities. Future research could address how a pluralized model of democratic legitimation at multiple institutional locations provides a richer understanding of the texture of democratic legitimation as the product of interactions between individual political identities, belonging in political community, and the exercise of institutional authority.
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