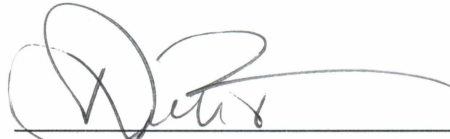


CONFRONTING 'KYMICKA'S DILEMMA': SETTLER VOTING RIGHTS, INDIGENOUS
REPRESENTATION AND THE 1998-99 ELECTORAL REAPPORTIONMENT IN
CANADA'S NORTHWEST TERRITORIES

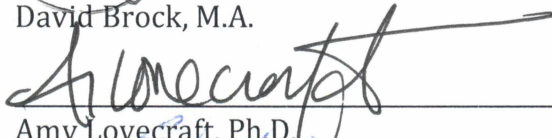
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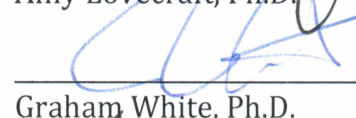
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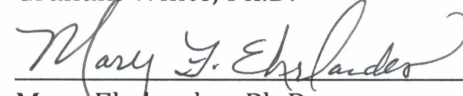
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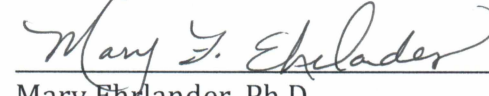


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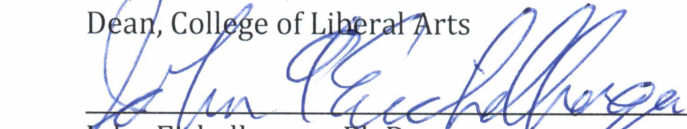
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A
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Abstract

“Settler colonialism” presents a vexing challenge to voting rights theory and praxis in liberal-democratic states. I call this challenge “Kymlicka’s dilemma,” after Will Kymlicka, the political theorist who has led contemporary discourse on “minority nation” rights. As Kymlicka observed, members of a state’s dominant cultural nation, or *staatsvolk*, may, by exercising universal mobility rights, numerically “swamp,” and then, by using universal voting rights, democratically dominate, an Indigenous minority nation in its homeland. To prevent this, an Indigenous minority nation may seek to exercise group-based voting protections, such as guaranteed representation. Where “Kymlicka’s dilemma” arises – i.e., where minority group-differentiated voting protections challenge the voting powers of individual *staatsvolk* and vice versa – a constitutional conflict seems certain. In Canada’s Northwest Territories, from at least the 1970s until the separation of Nunavut in 1999, the specter of “Kymlicka’s dilemma” (mis)shaped the constitutional evolution of the territorial government. There, in what was long Canada’s last Indigenous-majority jurisdiction, decades of Indigenous political resistance to settler control hinged on the permissibility of Indigenous overrepresentation in the territorial legislature. In the 1990s, three developments portended changes to Indigenous overrepresentation in that legislature: Charter of Rights-inspired limits on electoral-district malapportionment, constitutional recognition of Indigenous group-based protections, and the amplified danger of settler “swamping” that would result from Nunavut’s separation. As if in a natural experiment, these developments created conditions for a potentially volatile constitutional conflict. This thesis analyzes the results of that experiment. It shows that a constitutional conflict did ensue, catalyzed by the territorial electoral reapportionment of 1998-99. This conflict involved a yearlong political clash over Indigenous versus individual rights. This thesis further shows that a controversial court ruling, and equally controversial political decisions, resolved this conflict, deciding “Kymlicka’s dilemma” by rejecting Indigenous group-differentiated voting protections in the territorial legislature.

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Chapter 1: Introduction

According to Kymlicka, in liberal-democratic multinational states, settlers belonging to the majority-nation *staatsvolk* may, by exercising their universal mobility and voting rights, “swamp” and democratically dominate homelands of Indigenous national minorities – or, conversely, those minorities, by exercising collective rights, may abridge the universal rights of settlers.¹ This tension between individual and group rights poses a constitutional quandary I call “Kymlicka’s dilemma.” Owing to unique demographic and historical factors, “Kymlicka’s dilemma” for decades influenced constitutional evolution in Canada’s Northwest Territories (the NWT). In the 1990s, a confluence of events exacerbated tensions between individual and group rights in the NWT. Finally, precipitated by the NWT’s electoral-boundaries reapportionment exercise of 1998-99, “Kymlicka’s dilemma” erupted into a full-blown constitutional crisis, compelling a political and legal resolution.

Because of the NWT’s distinctive political challenges, including those that contribute to “Kymlicka’s dilemma,” Canadian political scientist Gurston Dacks has called the territory “a laboratory for students of political representation.”² As Dacks observed thirty years ago, “of all jurisdictions in Canada, only in the NWT does the question still remain open as to which political philosophy – liberalism based on the individual, nationalism based on ethnic identity, or consociationalism³ which attempts to integrate the two – will ultimately guide the political process.”⁴ For years, the NWT’s Indigenous⁵ and *staatsvolk* peoples, championing nationalism and

¹ Will Kymlicka, “Human Rights and Ethnocultural Justice,” *Review of Constitutional Studies* 4, no. 2 (1998).

² Gurston Dacks, “Political Representation in the Northwest Territories,” in *Representation and Electoral Systems*, eds. J. Paul Johnston and Harvey E. Pasis (Scarborough, Ontario: Prentice-Hall, 1990), 138.

³ “Consociation” is a governance system based on *de jure* power-sharing between two or more intra-state polities. The best-known contemporary example is Belgium, where French-speaking Walloons and Dutch-speaking Flemish share power in a highly elaborated constitutional arrangement. For more see Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, (New Haven: Yale University Press, 1977), 44.

⁴ Gurston Dacks, “Politics on the Last Frontier: Consociationalism in the Northwest Territories,” *Canadian Journal of Political Science* 19, no. 2 (1986): 354.

⁵ In this thesis, “Aboriginal,” “Indigenous” and “Native” are used interchangeably in reference to the autochthonous inhabitants of various world regions. Among these terms, “Aboriginal” is most commonly used in Canada, where it refers inclusively to three constitutionally recognized peoples, the Inuit, Métis and First Nations (i.e., “Indians”).

liberalism respectively, jockeyed for control over the territory's constitutional evolution. The former sought Indigenous self-determination, either by shaping the NWT into an Indigenous-nationalist jurisdiction or by establishing consociational guarantees within it. The latter, meanwhile, sought to shape the NWT into a liberal-universalist federal subunit in the mold of Canada's Anglophone provinces and territories. For each opposing camp, success would hinge on the rules of representation: whether Aboriginals would enjoy exceptional overrepresentation (perhaps even guaranteed majority representation), or whether, instead, representation would be apportioned relatively equally among individuals, permitting possible settler domination.

In the 1990s, three developments brought this conflict to a boil: First, the Inuit-dominated territory of Nunavut separated from the NWT, leaving the "rump" NWT equipopulous between Indigenous and *staatsvolk* residents and dramatically amplifying the threat of settler "swamping." Second, Canadian court interpretations of section 3 of the Charter of Rights and Freedoms placed heightened emphasis on the principle of voter parity, amplifying the threat of settler majoritarianism. Third, and countervailingly, Canadian Prime Minister Jean Chrétien's government affirmed the right of Indigenous self-determination and suggested that in the NWT, uniquely, this right could be realized through special protections in public government – protections that might obviate settler majoritarianism, even in the event of demographic "swamping." These three developments thus set the stage for an inflammatory constitutional struggle over reapportionment.

Though scholars predicted such a struggle might erupt, they did not examine the eruption. I aim to correct that, analyzing the events surrounding the NWT's reapportionment exercise of 1998-99, which was held to establish the territory's distribution of representation following Nunavut's separation. My analysis employs the lenses of liberal theory, voting-rights jurisprudence and NWT constitutional history. I show that at the cusp of division, reapportionment in the NWT ran headlong into "Kymlicka's dilemma," erupting into a constitutional crisis. The crisis featured a yearlong political conflict in which settlers and Indigenous residents each advanced the philosophy of representation – liberal-universalism versus

nationalism/consociationalism – that would further their collective interests. A controversial court ruling, and equally controversial political decisions, resulted in individual voting rights trumping the group-differentiated rights claimed by Aboriginals in the NWT legislature, thus deciding “Kymlicka’s dilemma” in favor of the NWT’s settlers.

Chapter 2: Literature review and methods

This thesis explores the intersection of three areas of scholarship: liberal theory as it pertains to individual and collective rights, electoral apportionment law, and the constitutional evolution of Canada's Northwest Territories up to and including Nunavut's separation in 1999. This chapter examines the academic literature in these three realms. It also explains the methods that will be used to analyze how the aforementioned theory, law and history intersect.

2.1 Individual and collective rights

Though the ancient Greeks expressed ideals that could be called liberal, scholars frequently trace liberalism's origins as a political philosophy to English thinker Thomas Hobbes. In his 1651 *Leviathan*,¹ Hobbes posited that people are inherently free and equal and are the source of all legitimate authority – but that, to achieve security, they would rationally bequeath their authority to an all-powerful sovereign. Once people entered this “social contract,” Hobbes argued, the sovereign could not be held to account. For this reason, Hobbes is not himself considered a liberal. The title of “first liberal” goes instead to John Locke, who amended Hobbes' theory with a radical idea. In his 1691 *Two Treatises of Government*,² Locke argued that even after citizens empower rulers, they retain their natural rights. He held that, if rulers break their contract, their authority may be revoked, if necessary by force.

Locke inspired other champions of liberty, including philosopher Jean-Jacques Rousseau, celebrated by the French revolutionaries, and agitators in the American colonies, who cited Lockean justifications for splitting from England.³ Proclaiming in the 1776 Declaration of Independence that “life, liberty and the pursuit of happiness” are unalienable rights, Thomas Jefferson almost directly quoted Locke. Thirteen years later, the Bill of Rights enumerated individual

¹ Thomas Hobbes, *Leviathan: The Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (The Floating Press, 1651 [2009]).

² Richard Ashcraft, *Locke's Two Treatises on Government* (New York: Routledge, 1987).

³ William Uzgalis, “John Locke,” *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), ed. Edward N. Zalta. <http://plato.stanford.edu/archives/win2014/entries/locke/> (accessed February 28, 2015).

freedoms that liberals felt no government, however powerful or popular, could abridge. And as James Madison, Alexander Hamilton and John Jay demonstrated in the *Federalist Papers*,⁴ the U.S. Constitution was a blueprint for liberal government, where the threat of tyranny would be thwarted through devices such as federalism, bicameralism, judicial review and separation of powers.

After the American founding, the English philosopher John Stuart Mill emerged as the next great liberal thinker. Mill's 1859 *On Liberty*⁵ explored "the nature and limits of the power that can be legitimately exercised by society over the individual." Mill mounted a robust defense of individualism, freedom of expression and freedom of choice, maintaining that all persons may act as they please unless their actions deny others the same right. It is no surprise that Mill's work coincided with an era of liberationist movements such as the abolition of slavery and the expansion of women's rights, both of which he championed.

Mill may be seen as a proponent of classical, or "negative," liberalism, which emphasized the right to be free from interference. But by the end of the nineteenth century, a new liberal view was gaining traction. It addressed substantive rather than merely formal equality, and took steps to make freedom of choice more "meaningful."⁶ The Keynesian economic practices of the Great Depression, the "welfare-state" social policies of the postwar era, and the views of philosopher John Rawls exemplified this "positive" liberalism. In his 1971 *A Theory of Justice*,⁷ Rawls proposed a new kind of social contract, by which individuals might design a society that was not merely free but just. The rules of this contract would be arranged behind a "veil of ignorance," preventing citizens from knowing whether, when the veil fell, they would be rich or poor, weak or strong, smart or feeble-minded. For this reason, Rawls argued, citizens would devise a situation maximally fair to all.

⁴ Alexander Hamilton, John Jay and James Madison, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1966 [1787]).

⁵ John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green, 1869).

⁶ Gerald Gaus, Shane D. Courtland and David Schmitz, "Liberalism," *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), ed. Edward N. Zalta.
<http://plato.stanford.edu/archives/spr2015/entries/liberalism/> (accessed February 28, 2015).

⁷ John Rawls, *A Theory of Justice*, revised edition (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999).

Rawls' liberal theory was the most influential of the twentieth century, and most subsequent thinkers felt compelled to grapple with it. Among its early critics were the so-called communitarians, led by the likes of philosopher Charles Taylor.⁸ Rawls was wrong, they said, to suggest that abstracted, deracinated individuals could rationally craft an objectively "just" society. Contrary to the longstanding liberal view, they argued, people are not atomistic actors but are instead inescapably culturally imbedded. They do not build communities but are, almost unwittingly, built *by* them; their beliefs are not disinterested but preconditioned. For this reason, the communitarians maintained, Rawls' project, even as a thought experiment, was pointless.

On the heels of the communitarians came the multiculturalists, such as Iris Marion Young.⁹ As Young observed, despite liberalism's emancipatory history, oppressed groups in the post-Civil Rights Era had begun to encounter its limits. Liberal emphasis on formal equality was said to deny recognition, for instance, to women *as women*, instead treating them as neutral ciphers. According to multiculturalists, the very idea of individualism, as well as the qualities liberals expected individuals to embody, were particularisms of the dominant culture. Liberalism thus not only denied femaleness but also, *de facto*, privileged maleness. For this reason, liberalism offered not a route to equality but a new, insidious version of the old oppression.

Finally, out of both communitarianism and multiculturalism came the group-rights critique of liberalism. Perhaps its trailblazer was Vernon Van Dyke, who in the 1970s observed that Rawls' "just society" was by all indications culturally homogenous, unlike most real-world countries. How might Rawlsianism offer fairness to Québécois, Walloons, Tibetans or Aboriginals? In ignoring the plight of

⁸ Charles Taylor, "The Politics of Recognition," in *Philosophical Arguments*, ed. Charles Taylor (Cambridge, Mass.: Harvard University Press, 1997).

⁹ Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal Universal Citizenship," *Ethics* 99, no. 2 (1989).

minority nations, Van Dyke said, Rawls had sidestepped one of the most common sources of global injustice and conflict.¹⁰

And indeed, as intrastate turmoil flared in the former Soviet Union, Eastern Europe and even Canada in the late 1980s and '90s, Canadian philosopher Will Kymlicka took up where Van Dyke had left off, becoming the most influential interlocutor in a vigorous conversation about individual and group rights in multicultural democracy. Kymlicka's numerous articles and books – particularly *Liberalism, Community and Culture*¹¹ and *Multicultural Citizenship: A Liberal Theory of Minority Rights*¹² – challenged both individualist liberalism and group-focused communitarianism, charting a middle way that both defended and delimited group rights from a liberal perspective. His well-known “liberal theory of minority rights” sought to reconcile the undeniable power of liberalism as a political philosophy with the demands of countless minority nations seeking self-determination. His idea was based on three parts. First Kymlicka stated that, while liberalism is capable of exercising “benign neglect” with respect to interests such as religion, it is impossible for states to be neutral on culture, thus leaving subordinate cultures disadvantaged. Second, as individual autonomy (the ability to choose and revise one's life plan) is the core goal of liberalism, rootedness in a particular culture gives individuals a meaningful “context of choice.” Having established that states cannot be culturally neutral, and that individual flourishing requires cultural rootedness, Kymlicka progressed to his conclusion: That in order to be truly liberal, states must treat minority cultures in ways that allow them to enjoy equal rootedness. Kymlicka thus insisted that it is perfectly liberal for states to provide minorities with autonomy, guaranteed representation and other group-based protections.

¹⁰ Vernon Van Dyke, “Justice as Fairness: For Groups? A *Theory of Justice* by John Rawls, Review,” *The American Political Science Review* 69, No. 2 (1975).

¹¹ Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989).

¹² Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

Kymlicka's theory has been widely critiqued, by classical liberals,¹³ libertarians,¹⁴ "cosmopolitans,"¹⁵ and Indigenous nationalists.¹⁶ It has also been widely adopted and utilized to explain and attempt to reconcile various intrastate conflicts, including in Kymlicka's home country of Canada. Yet his work has not been tested against circumstances in Canada's North. This thesis aims to do so.

2.2 Voting rights and apportionment jurisprudence

Discussions of "representation" must begin by defining the term. For this, scholars commonly defer to Hanna Pitkin's 1967 work *The Concept of Representation*.¹⁷ Conducting a linguistic and historical analysis, Pitkin identified three perspectives on representation. First are formalistic understandings, which, she said, focus on how representation is made or unmade – how representatives are authorized and held to account. Second are approaches that gauge representatives by what they stand for, perhaps symbolizing a nation, as would a monarch, or mirroring it, as would a diverse assembly. Last are approaches exploring what representatives do, perhaps employing their personal judgment to discern the best course for their state, or, contrarily, following orders from, and serving the immediate interest of, their constituents. Having shone a light on representation's many facets, Pitkin does not choose sides. Scholars would do well, she concludes, to see representation as all of the above.

Pitkin's work is complemented by studies of the evolution of representation, of which there are many. A.H. Birch's slim *Representation*,¹⁸ and Robert Dixon's encyclopedic *Democratic Representation*,¹⁹ both include fine primers, especially regarding Western Europe. There, Birch says, authority was for centuries seen as

¹³ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001).

¹⁴ Chandran Kukathas, "Are There Any Cultural Rights?" *Political Theory* 20, no. 1 (1992).

¹⁵ Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," in *The Rights of Minority Cultures*, ed. Will Kymlicka (New York: Oxford University Press, 1995).

¹⁶ Robert Paine, "Aboriginality, Multiculturalism, and Liberal Rights Philosophy," *Ethnos* 64, no. 3 (1999).

¹⁷ Hanna Pitkin, *The Concept of Representation* (Cambridge: Cambridge University Press, 1967).

¹⁸ A.H. Birch, *Representation* (London: Pall Mall Press, 1970).

¹⁹ Robert G. Dixon, *Democratic Representation: Reapportionment in Law and Politics*, (Oxford: Oxford University Press, 1968).

descending from the heavens; only in late-Medieval times did “ascending” theories take hold. At first, royal courts were summoned merely to solemnize the edicts of monarchs, but over time courtiers evolved into parliamentarians. In 1215, England’s Magna Carta prohibited the king from levying taxes without the consent of noblemen, making it what Birch called “the first significant milestone on the road to representative government.”²⁰ By the end of the 1300s more than a dozen European states featured bodies of feudal representatives. With a few exceptions,²¹ however, truly representative governments did not arise until England’s Glorious Revolution in 1688, followed by the American Revolution a century later. It was in the latter country that representation became broadly democratic, with suffrage open to more than just a fraction of the population. And it was there, too, that leaders first wrestled with how representation should be apportioned.

The U.S. Constitution provided little direction. Per the Great Compromise, it assigned to each state two federal senators and one representative, with the remaining representatives divided among the states by population. As to how (indeed, whether) intrastate districts should be drawn, both for federal and state seats, this choice was reserved to the states. According to Dixon, in principle, state lawmakers sought to balance territorial and population-based representation. In fact, they also advantaged their own, and their parties’, fortunes. In the first half of the 1900s, as urbanization eroded America’s rural population base, state lawmakers declined to make appropriate boundary adjustments. The resulting “silent gerrymandering” was so egregious that critics charged it with abridging the Fourteenth Amendment’s guarantee of equal protection of the laws.

At first, however, American judges steered clear of the “political thicket” of electoral-boundary adjustment. Policing apportionment was outside the courts’ constitutional mandate – and, moreover, upon what objective standard could they adjudicate? When the U.S. Supreme Court finally intervened in 1962’s *Baker v. Carr*, it was to save democracy from the “stranglehold” of rural state lawmakers. A flurry

²⁰ Birch, *Representation*, 26.

²¹ Iceland’s Althing, dating from 930 A.D., is often seen as the world’s first parliamentary institution. Similar claims have been made about the Jamtamót, which governed Jämtland, in modern-day Sweden, beginning in the early 900s.

of further decisions followed, which Dixon deemed “kaleidoscopic.”²² When the smoke cleared, representation by territory in the U.S. was illegal. “One person, one vote” ruled the land.

In Canada, as has been shown by that country’s leading redistricting scholar, John C. Courtney,²³ the rules of apportionment evolved even more haphazardly. At the federal level, the principle of representation by population, much emphasized at the time of Canada’s founding, almost immediately succumbed to demands from both small, slow-growing provinces (which feared diminution of parliamentary power) and new provinces (which demanded overrepresentation as a condition of confederation). At the intra-provincial level, in the case of both federal and provincial seats, rural overrepresentation, fueled by “silent gerrymandering,” was so ubiquitous that it became what Norman Ward in *The Canadian House of Commons* called a “theory masquerading as a principle.”²⁴

Coincident with the American redistricting revolution, Canada had its own, very different, “reapportionment revolution.” Beginning in the late 1950s, provinces as well as Parliament began to remove themselves from mapmaking, relinquishing the task to independent electoral boundaries commissions. This all but eliminated gerrymandering (which remained widespread in the U.S.) and diminished, but did not eliminate, malapportionment. A standard of +/- 25 percent deviation from parity became widely accepted.²⁵ With the adoption of the Charter, and with the 1991 *Carter*²⁶ decision that flowed therefrom, malapportionment was further constrained. As will be further explored in this thesis, the Supreme Court of Canada ruled that, rather than the quantitative standard of “one person, one vote,” Canada would observe the more qualitative principle of “effective representation.” Scores of scholars examined the *Carter* decision, some deeming it hopelessly ambiguous²⁷ and

²² Dixon, *Democratic Representation*, 7.

²³ John C. Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (Montreal: McGill-Queens University Press, 2001).

²⁴ Norman Ward, *The Canadian House of Commons: Representation* (Toronto: University of Toronto Press, 1950).

²⁵ Courtney, *Commissioned Ridings*, 165.

²⁶ *Reference re Prov. Electoral Boundaries (Sask.)*. 1991. 2 S.C.R. 158.

²⁷ Mark Carter, “Reconsidering the Charter and Electoral Boundaries,” *Dalhousie Law Journal* 22, no. 1 (1999).

others lauding it as pragmatically Canadian.²⁸ Many predicted it would prompt a rash of further cases, brought by underrepresented ethnic voters,²⁹ critics of the deeply inegalitarian federal scheme, and so on. Yet with the exception of a handful of provincial-level rulings, and one noteworthy case upholding special protection of Francophones,³⁰ Canada has not seen the “kaleidoscopic” array of court cases experienced in the United States.

A sole case has applied apportionment law to Northern Canada – *Friends of Democracy v. Northwest Territories*, examined in this thesis. Nor has there been substantial research on this subject. The key exception was a prescient study by political scientist Graham White, examining how voting-rights provisions in the then-recently adopted Charter had impacted the 1989 apportionment of the NWT.³¹ White concluded that the Charter had constrained, and seemed likely to further constrain, “Northern distinctiveness,” foreclosing representational arrangements responding to the NWT’s unique historical and demographic challenges. This thesis aims to test White’s hypothesis.

2.3 Political and constitutional evolution of the Northwest Territories

The Northwest Territories for years attracted disproportionate political scholarship. And no wonder: Prior to the separation of Nunavut it was North America’s only Aboriginal-majority federal jurisdiction, uniquely splintered by pluralism and grappling with foundational questions that elsewhere were settled long ago. Politically it was (indeed, remains) in an evolutionary stage. In the NWT, state-making has been not history but current events.

Starting in the 1970s, when NWT Aboriginals rose up and challenged the authority of both faraway federal authorities and local settlers, a host of scholars

²⁸ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter,” *Osgoode Hall Law Journal* 51, no. 1 (2013).

²⁹ Katherine Swinton, “Federalism, Representation and Rights,” in *Drawing Boundaries: Legislatures, Courts, and Electoral Values*, ed. John. C. Courtney *et al.* (Saskatoon: Fifth House, 1992).

³⁰ Kim Poffenroth, “*Raïche v Canada*: A New Direction in Drawing Electoral Boundaries?” *Commonwealth Law Bulletin* 31, no. 2 (2005).

³¹ Graham White, “Northern Distinctiveness, Representation by Population and the Charter: The Politics of Redistribution in the Northwest Territories,” *Journal of Canadian Studies* 28, no. 3 (1993).

and commentators turned their eyes north. Over the next quarter-century they generated dozens of articles and at least a half-dozen books analyzing the territory's ongoing constitutional troubles and prescribing solutions. These thinkers approached the NWT's challenges from a variety of angles. For researcher/activists such as Wilf Bean and Peter Puxley, "the primary characteristic of social relationships in the territories . . . is their colonial nature."³² They saw Aboriginals as engaged in a liberationist struggle akin to those being waged at the time by subaltern peoples all over the developing world. Like Zimbabweans or Angolans, NWT Natives sought to free themselves from the yoke of European imperialism.

Meanwhile, Gurston Dacks³³ and Michael Asch,³⁴ both separately and together, studied the conflict in the NWT and saw in it a divided-state rivalry akin to that between Belgium's Flemish and Walloon populations and, indeed, between Canada's French and English. To bridge the schisms in those regions, Dacks and Asch noted, the opposing cultural communities had arranged to share power. "Consociation," albeit messy, had enhanced stability while guarding group rights. Why not try the same, Dacks and Asch suggested, in the NWT?

Mark O. Dickerson proposed a different route to stability and rights-protection in the NWT. He maintained that what Indigenous Northerners desired was not so much ethnic control as *local* control – a diffusion of authority that consociation could not provide. He argued, "For many residents of the NWT, political legitimacy will come only after devolution or some form of decentralization has occurred."³⁵ Rather than sharing power at the political core, Dickerson argued, power should be radically dispersed to individual regions and communities.

³² Richard Laing, Peter Puxley, C. Gerald Sutton, and Wilf Bean, "Political Development in the Northwest Territories," in *Northern Transitions Volume 2: Second National Workshop on People, Resources and the Environment North of 60°*, eds. Robert F. Keith and Janet B. Wright (Ottawa: Canadian Arctic Resources Committee, 1978), 315.

³³ Gurston Dacks, "Politics on the Last Frontier: Consociationalism in the Northwest Territories," *Canadian Journal of Political Science* 19, no. 2 (1986).

³⁴ Michael Asch, "Consociation and the Resolution of Aboriginal Political Rights: The Example of the Northwest Territories, Canada." *Culture X*, no. 1 (1990).

³⁵ Mark Dickerson, *Whose North? Political Change, Political Development and Self-Government in the Northwest Territories* (Vancouver: UBC Press, 1992), 189.

Finally, White focused on the institutional adaptations the NWT government had made in response to its peculiar difficulties. In articles addressing “Westminster in the Arctic,” he showed that the territory had in ways innovatively intertwined the political traditions of its two founding peoples – a form of consociation not by power sharing but by cultural merger. Yet, in his 1995 *Northern Governments in Transition*, co-authored with Kirk Cameron, White made clear that none of the above-mentioned strategies had been a panacea. With Nunavut’s division looming, and with the scramble for dominance of the rump NWT intensifying, he stated, “Perhaps the only safe prediction about the future of government . . . is that dramatic changes are in store.”³⁶

They were indeed. But when separation came in 1999, most scholars turned their eyes to east, to Nunavut. This was an oversight. Though the new Inuit territory was rife with developmental challenges, these for the most part were not constitutional. In Nunavut, a homogenous polity had deliberately formed a new government; the challenge was about how to enact it. The NWT, conversely, entered division while heterogeneous, reactive and primordial. As if in a natural experiment, Nunavut’s departure changed a key variable in the NWT, demographics. Scholars had long hypothesized that the outcome of this change might be tumultuous, yet they did linger to confirm their suspicions. This thesis strives to fill that gap.

2.4 Methods

To explore the intersection of liberal theory, apportionment law and the constitutional evolution of the Northwest Territories, and to determine the relevance of the clash-of-rights phenomenon that I term “Kymlicka’s dilemma” to governance in the NWT at the time of Nunavut’s separation, I have examined the NWT’s first post-division reapportionment exercise, which took place in 1998-99. To do this, I have relied almost exclusively on public documents. These include documents related to the 1998 NWT electoral boundaries commission (including

³⁶ Kirk Cameron and Graham White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: The Institute for Research on Public Policy, 1995), 41.

public submissions to the commission and the commission's report), local and national media reports (articles, editorials, commentaries and letters to the editor), legal documents (including submissions to, and rulings by, the NWT Supreme Court and the NWT Court of Appeals), press releases (from Indigenous and "settler" organizations and interest groups) and legislative documents (including NWT Legislative Assembly acts, transcripts, committee reports and tabled documents).

Chapter 3: Individual rights, group rights and 'Kymlicka's dilemma'

This chapter explores the challenges of reconciling multinational statehood with the principles of liberal democracy. It identifies at least six reasons why sub-state nations, particularly Indigenous peoples, might possess and deserve recognition of rights to national self-determination. This chapter then discusses consociational political arrangements aimed at accommodating these rights within the constitutional framework of multinational states, including through limited autonomy in "national" federal subunits. This chapter then explores threats to Indigenous self-determination and autonomy posed by settler colonialism. Finally, this chapter identifies a phenomenon, "Kymlicka's dilemma," whereby "universal" rights exercised by settlers threaten Indigenous self-determination and autonomy and vice versa.

3.1 Multinationalism, liberalism and democracy

Almost all Western liberal democratic states are "multicultural." Thus, their political regimes face the challenge of accommodating cultural pluralism. This is especially so in states that are not merely multicultural but multinational, meaning they comprise multiple "nations." Here, "nations" are cultural communities that occupy a specific territory or homeland and share a distinct language and history.¹ In many multinational states, one cultural nation dominates. Political scientist John McGarry calls this dominant nation the *staatsvolk*.² Subsidiary nations are often termed "national minorities." National minorities may be either "stateless nations" or "Indigenous peoples."³ Stateless nations have, or once had, the capability and/or desire to form sovereign states. They include the Catalans of Spain, the Walloons of Belgium and North America's archetypal stateless nation, Canada's Québécois.

¹ Will Kymlicka, "Citizenship, Communities, and Identity in Canada," in *Canadian Politics*, eds. James Bickerton and Alain-G. Gagnon (Toronto: University of Toronto Press, 2009), 24.

² John McGarry, "Asymmetry in Federations, Federacies and Unitary States," *Ethnopolitics* 6, no. 1 (2007): 106. Throughout this thesis I use *staatsvolk* rather than the more common term "national majority." This is to avoid confusion when discussing federal subunits such as the Northwest Territories where *staatsvolk*, though ethnoculturally dominant, are a numeric minority.

³ Will Kymlicka, "Federalism and Secession: East and West," in *Democracy, Nationalism and Multiculturalism*, eds. Ramon Maiz and Ferran Requejo (Hoboken, New Jersey: Taylor and Francis, 2004), 109.

Stateless nations may have joined multination states voluntarily (e.g., through confederation) or involuntarily (via annexation, etc.). Indigenous peoples, meanwhile, were excluded from the process of modern state formation. They became national minorities involuntarily, through conquest, colonization, imperial cession and the like. Prior to colonization they were independent and self-governing, and in recent decades they have reasserted their rights to self-determination and autonomy. Some Indigenous peoples, such as the Inuit of Greenland, aspire to full independence. In Canada and the United States, Indigenous peoples typically seek more limited sub-state autonomy.⁴ Accommodating Indigenous demands for increased self-governance and limited autonomy has significantly challenged liberal democracies.

Liberalism is a political philosophy holding that people inherently possess certain rights. Liberal theorist Chandran Kukathas identifies three core liberal principles: individualism, egalitarianism and universalism.⁵ Individualism identifies the individual as the irreducible rights-bearing unit. Egalitarianism holds that all individuals are political and moral equals. Universalism, according to political philosopher John Gray, is the liberal principle “affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms.”⁶ Universalism holds that except for humankind indivisibly, collectivities do not have moral standing – that no group bears rights *qua* group.

Democracy, of course, is a form of governance involving rule by “the people,” also known as the demos. In *liberal* democracies, rule by the people must respect the rights of individuals. Majorities may not infringe personal freedoms. In most liberal democracies, personal freedoms include mobility and voting – i.e., the right to live where one wants and to vote where one lives.

⁴ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 64.

⁵ Chandran Kukathas, “Are There Any Cultural Rights?” *Political Theory* 20, no. 1 (1992): 108.

⁶ John Gray, *Liberalism (Concepts in Social Thought)* (Minneapolis: University of Minnesota Press, 1992), 108.

3.1.1 Liberal democracy, statehood and (non)universalism

As noted above, liberal democracy involves both rule by and protection of the individual rights of “the people.” Thus, constituting a liberal democracy requires first defining the demos – who composes it and, more controversially, who does not. As also noted, universalism posits that all humanity is politically and morally indivisible. Thus, in a fully liberal democracy, the demos would encompass all humanity. Either the liberal democracy would have porous boundaries,⁷ making it universally “open,” or there would exist a single worldwide democratic state.⁸

In practice, however, liberal democracies are constituted by, posit the political equality of, and guarantee rights to, only “the people” who form a given subset of humanity. Each of these demoi asserts a positive power to chart its own course, i.e. to engage in self-determination. Doing so requires delimiting itself, usually geographically, by drawing boundaries. As political theorist Frederick Whelan puts it, “a boundary has two sides, and the inclusion of some means the exclusion of others.”⁹ Hence, a self-determining liberal-democratic demos also exercises a negative power, to reject everyone outside its favored subset, even if the rejected are themselves liberal democrats.¹⁰ This is why, in liberal democracies, full political equality and individual rights do not extend beyond state borders or to foreign nationals. “The people” who are equal and rights-bearing, who owe loyalty to the state and expect from it the benefits of citizenship, are not humankind at large, but only the “in-group” of members of the relevant, boundary-circumscribed state.

How can this be morally justified? Theories of liberal democracy and statehood are difficult to reconcile. This difficulty is known as the “boundary problem.” Democracy provides no rationale for state formation, as people excluded

⁷ Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” *The Review of Politics* 49, no. 2 (1987).

⁸ Charles R. Beitz, “International Liberalism and Distributive Justice: A Survey of Thought,” *World Politics* 51 (1999).

⁹ Frederick Whelan, “Prologue: Democratic Theory and the Boundary Problem,” in *Nomos XXV: Liberal Democracy*, eds. James R. Pennock and John W. Chapman (New York: New York University Press, 1983), 22.

¹⁰ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), 124.

from the “in-group” have no democratic say in their exclusion. (Whelan observes that “[d]emocracy can be practiced for making collective decisions once the collectivity has been defined, but democratic methods themselves are inadequate to establish the bounds of the collectivity, whose existence democratic theory simply presupposes.”¹¹) Liberalism, similarly, is challenged by the boundary problem. As Kymlicka observes, while liberalism is premised on the universal equality of individuals, the concept of citizenship is inherently group-differentiated and thus non-universal.¹²

In lieu of either a liberal or democratic defense of the non-universalism of delimited statehood, liberal democrats typically fall back on an alternate justification, nationalism. Nationalism, in the words of philosopher Ernest Gellner, is “a political principle which holds that the political and the national unit should be congruent.”¹³ In this view, each ethnocultural nation has a natural right to form its own demos. When an ethnocultural nation acts on this right, it exercises national self-determination. Nation-based statehood was celebrated by thinkers such as Alexis de Tocqueville¹⁴ and John Stuart Mill,¹⁵ who maintained that the boundaries of democratic states should dovetail with those of ethnocultural nations. According to Kymlicka, this mono-national “idealized model of the polis”¹⁶ remains predominant in political theory today. Thus, though nationalism is antithetical to true liberal universalism, liberal democrats see it as logical, perhaps even proper, that the world’s existing states are the product of nations having detached themselves from the universal human whole.

¹¹ Whelan, “Democratic Theory and the Boundary Problem,” 22.

¹² Kymlicka, *Multicultural Citizenship*, 124.

¹³ Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983), 1.

¹⁴ Marvin Zetterbaum, *Tocqueville and the Problem of Democracy* (Stanford: Stanford University Press, 1967), 150. Zetterbaum quotes de Tocqueville as stating, “The interests of the human race are better served by giving every man a particular fatherland than by trying to inflame his passions for the whole of humanity.”

¹⁵ John Stuart Mill, “Considerations on Representative Government,” in *Utilitarianism, Liberty, Representative Government*, ed. H. Acton (London: J.M. Dent, 1972), 233.

¹⁶ Kymlicka, *Multicultural Citizenship*, 2.

3.1.2 Universalism and internal nationalism in multination states

If liberal democratic statehood subordinates universalism to national self-determination, is the same justifiable at the substate level? On this question, liberals are divided. They are torn between the ideal of universal citizenship and “particularist” notions of differentiated citizenship.¹⁷

On one hand, as noted previously, liberal universalism rests on the indivisibility of peoples. Hence liberal democracies frequently treat their citizens as belonging to a single, unified demos. If, per the views of de Tocqueville and Mill, states and nations are coextensive, this is uncontroversial. But as already noted, few states are mononational. Multination states are by definition demographically non-universal,¹⁸ harboring Gray’s “specific historic associations and cultural forms.” Such states encompass one or more national minorities who form *demos* separate from that of the *staatsvolk*. They see the authority of the larger state as derivative and that of their own *demos* as primary.¹⁹ Thus, such national minorities often insist on a positive right to self-determination. Says Will Kymlicka: “If democracy is the rule of ‘the people,’ national minorities claim that there is more than one people, each with the right to rule themselves.”²⁰ Likewise, such national minorities may claim group-based negative rights protecting their autonomy from the state’s more numerous, more powerful, potentially expansionist *staatsvolk* – Québécois from Anglo-Canadians, Catalans from Spaniards. In such instances, official universalism is at odds with *de facto* multinational non-universalism.

Rightly so, says political scientist Vernon Van Dyke: “[In] a multinational state, it is as inappropriate to think of majority rule as it would be in the world as a

¹⁷ Richard Sigurdson, “First Peoples, New Peoples and Citizenship in Canada,” *International Journal of Canadian Studies* 14 (1996), 55. Sigurdson reminds us of former prime minister John Diefenbaker’s memorable call by for “unhyphenated Canadianism,” which economically captures the discordant liberal view of citizenship: That it should be externally particular (“Canadianism,” as opposed to, say, “humanism”) yet internally universal (“unhyphenated”).

¹⁸ Jan Erk, “The Sociology of Constitutional Politics: Demos, Legitimacy and Constitutional Courts in Canada and Germany,” *Regional & Federal Studies* 21, no. 4-5 (2011).

¹⁹ Will Kymlicka, “Group Representation in Canadian Politics,” in *Equity and Community: The Charter, Interest Advocacy, and Representation*, ed. Leslie Seidle (Institute for Research on Public Policy, Montreal, 1993), 81.

²⁰ Kymlicka, *Multicultural Citizenship*, 182.

whole.”²¹ In addition to substate nationalism, there are at least five more reasons (democratic, liberal, legal, moral and pragmatic) why this would be so.

As James Madison recognized, true democracy does not exist where majorities and minorities are fixed. In such instances, the larger faction is a permanent winner and the smaller is vulnerable to “tyranny of the majority.”²² A divided state by definition comprises multiple polities with potentially starkly divergent interests. To suggest that citizens in a divided state should attempt to realize their interests and reconcile their differences through winner-take-all majoritarianism would be to grant “tyranny” to the more populous polity. It was in part to avoid this eventuality that Madison pressed for the U.S. to adopt a non-universal, federal system, whereby polities (i.e., the states) would reserve certain authority to themselves, facilitating democracy by constraining majority power.²³

The second justification for internal non-universalism, most famously articulated by Kymlicka, is that of “liberal nationalism.” Here, nationalism is of instrumental rather than intrinsic value. Kymlicka argues that for individuals, being grounded in one’s “societal culture” (i.e., one’s nation) is a prerequisite for enjoying the meaningful autonomy that is liberalism’s *raison d’être*. In this view, liberalism rightly sacrifices the broader freedom of universalism to achieve the circumscribed but richer freedom of culturally rooted individual autonomy. Kymlicka argues that this is why liberal *staatsvolk* find national self-determination at the state level so appealing:

[F]ew people favour a system of open borders, where people could freely cross borders and settle, work, and vote in whatever country they desired. Such a system would dramatically increase the domain within which people would be treated as free and equal citizens. Yet open borders would also make it more likely that people’s own national community would be overrun by settlers from other cultures, and that they would be unable to ensure their survival as a distinct national culture.²⁴

²¹ Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport, Connecticut: Greenwood Press, 1985), 172.

²² Lani Guinier, “[E]racing Democracy: The Voting Rights Cases,” *Harvard Law Review* 108 (1995).

²³ John McGarry and Brendan O’Leary, “Federation and Managing Nations,” in *Multinational Federations*, eds. Michael Burgess and John Pinder (London: Routledge, 2007), 186.

²⁴ Kymlicka, *Multicultural Citizenship*, 93.

If, according to liberal nationalists, the “boundary problem” does not in fact pose a problem for liberal ideals, and if it is thus perfectly liberal to establish international borders to prevent one’s “national community [from being] overrun by settlers,” then the same would logically hold true at the substate level. Hence, Kymlicka urges liberal democrats to reject internal universalism, instead providing self-determination and sub-state autonomy to distinct internal peoples. This, he argues, is true liberalism.²⁵

Third, internal non-universalism may be justified on legal grounds. Treaties and conventions may enshrine internal political differentiation into constitutional law. For example, national minorities may claim rights to self-determination that flow from historical pacts, preconditions of confederation, or stipulations in international law. Even in the absence of existing legal agreements, domestic or international courts may affirm that national minorities possess “inherent rights” of political differentiation that were extant before, and not extinguished by, colonization, conquest and the like.

A fourth, moral, justification for internal non-universalism is based on appeals to justice. Philosopher John Rawls deemed justice “the first virtue of social institutions.”²⁶ According to Rawls’ conception of “justice as fairness,” liberal justice requires eliminating, or compensating citizens for, “morally arbitrary” disadvantages. Rawls was concerned especially with social class – for instance, with the unfair hardships faced by people born poor. Yet thinkers such as Van Dyke²⁷ and Kymlicka²⁸ have extended Rawls’ logic to cases of cultural disadvantage. As states are never culturally neutral, but instead privilege *staatsvolk* languages, economic systems, governance arrangements, etc., internal minorities are thereby arbitrarily shortchanged. Thus, Rawlsian justice compels states to treat national minorities in a non-universal manner, compensating their members by according them special rights that put them on a so-called “level playing field” with the majority.

²⁵ Kymlicka, *Multicultural Citizenship*, 125.

²⁶ John Rawls, *A Theory of Justice*, revised edition (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) 3.

²⁷ Van Dyke, *Human Rights, Ethnicity and Discrimination*.

²⁸ Kymlicka, *Multicultural Citizenship*, 109.

Finally, in multination states, non-universal political and legal arrangements, such as power-sharing agreements, are commonly seen as necessary to facilitate legitimacy, stability or even peace. As political scientist Andrew Reynolds observes, in deeply divided societies, treating restive minorities in a non-universal fashion, such as by overrepresenting them in central legislatures, can reduce their sense of alienation, promoting inter-ethnic collaboration and building trust.²⁹ In this manner, granting group-differentiated rights to internal nations may benefit not just minorities but also *staatsvolk*, by enhancing the viability of the state at large.

3.1.3 'External' and 'internal' national-minority protections

If liberal democratic states should eschew internal universalism and grant special rights to internal minorities for nationalistic, democratic, liberal, legal, moral and pragmatic reasons, it must be asked which special rights are warranted and which are not. Kymlicka divides non-universal national minority rights into two categories. The first, "internal restrictions," would allow minority cultures to violate basic liberties of their own members.³⁰ Infamous examples include female circumcision and so-called honor killings. Internal restrictions, Kymlicka states, are correctly prohibited in liberal democracies.

The second, more acceptable, category of national minority rights are "external protections," which guard national minorities from assimilation into, or domination by, the *staatsvolk*, putting the minority and the majority on an equal footing.³¹ Says Kymlicka, "a liberal view requires *freedom within* the minority group, and *equality between* the minority and majority."³²

Yet "external protections" are not all of a kind. They can be separated into two sub-categories based on their effects. The first involves protections that, while clearly group-differentiated, are victimless. Following constitutional law scholar Richard Pildes and political scientist Richard Niemi, one might say these protections

²⁹ Andrew Reynolds, "Reserved Seats in National Legislatures: A Research Note," *Legislative Studies Quarterly* 30, no. 2 (2005): 302.

³⁰ Kymlicka, *Multicultural Citizenship*, 152.

³¹ *Ibid.*, 152.

³² *Ibid.*, 152.

cause, at worst, “expressive harms.”³³ While “expressing” values contrary to liberal universalism, this class of external protections does not injure the material rights of individuals. For example, New Brunswick, uniquely among Canada’s provinces, grants the French language equal billing with English – a practice that, in the minds of many Anglophones, could be seen as “expressively” non-universal, as it breaks from the Canadian norm. Yet clearly, New Brunswick’s official bilingualism does not diminish any specific rights of the province’s non-Francophones.

The second sub-category of external protections is more problematic. Such protections guard the cultural integrity of a vulnerable national minority by limiting the rights of non-minority individuals. This is injurious not merely to an expressed “idea” but to the real freedoms of specific people. For example, unlike New Brunswick, Quebec has in the past not merely elevated the status of the French language but also limited the use of English, leading individual Anglophone Quebecers to suffer specific harms. Francophone Québécois argue these “external protections” are necessary to prevent their assimilation into, and domination by, the Canadian *staatsvolk*. As will also be shown, in adjudicating disputes such as this, involving injurious external protections, the key challenge is weighing the individual rights of injured *staatsvolk* against the group rights of the national minority.

3.2 Divided states and non-universalism

Where states are divided³⁴ by internal multinationalism, and thus are ethnoculturally non-universal, comparative-politics scholar Arend Lijphart says national minorities face three possibilities: assimilation, separation or

³³ Richard H. Pildes and Richard G. Niemi, “Expressive Harms, ‘Bizarre Districts’ and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*,” *Michigan Law Review* 92, no. 3 (1993): 507.

³⁴ Not all pluralistic states are divided states. As Sujit Choudhry notes, in plural states with “crosscutting cleavages,” the effect of race, class and other divisions may be moderated, with electoral losers maintaining hope of eventual victory and winners restrained by the prospect of eventual loss. But where divisions do not crosscut – where lines between internal ethnocultural nations are stark and apparently permanent – internal pluralism can have an immoderating effect on political behavior; see his *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008), 17. Where “divided state” voting takes place along ethnic lines, Donald Horowitz pithily observes, “This is not an election at all, but a census”; see his “Ethnic Conflict Management for Policymakers,” in *Conflict and Peacemaking in Multiethnic Societies*, ed. Joseph V. Montville. (Lexington Books, 1990), 116.

consociation.³⁵ Assimilation is seldom palatable, for reasons that, as noted above, may be nationalistic, democratic, liberal, legal, moral or pragmatic. In such instances, some national minorities seek Lijphart's second option, separation. Often, however, outright independence is impractical. Then, Lijphart says, it is only through consociation that internal nations can be accommodated.³⁶ Consociation accepts ethnocultural groups as the "basic building blocks" of stable government and seeks to accommodate those groups through power sharing.³⁷ This is an external cultural protection, as described above. It is also inherently non-universal. This non-universalism may be either direct or indirect.

3.2.1 Direct non-universalism: direct consociation

Direct consociation explicitly recognizes minority cultural communities and provides them with external cultural protections.³⁸ Though doing so contravenes liberal universalism, it is nonetheless common in liberal democratic states. It may be conceptually akin to "intrastate federalism," where collectivities are represented and accorded power directly in central political institutions, such as in the "grand coalition" power-sharing arrangement of Lebanon, where the president must be a Maronite Christian, the prime minister a Sunni Muslim, the speaker a Shi'a. Limited forms of direct consociation are more common. Canada's constitution uniquely favors the languages and traditional religions of its two founding peoples (French and English, Catholic and Protestant). Canadian Aboriginals also enjoy direct consociational protections, most obviously through historic treaties and modern land-claim and self-government agreements, but also via certain asymmetric accommodations in public government, such as Aboriginal-only schools created in several off-reserve communities to advance Indigenous educational prospects, and

³⁵ Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977), 44.

³⁶ Arend Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15, no. 2 (2004): 96.

³⁷ Lijphart, *Democracy in Plural Societies*, 45.

³⁸ Reynolds, "Reserved Seats," 301.

distinct sentencing guidelines meant to take into account the oppressive cultural conditions faced by Aboriginal offenders.³⁹

Elsewhere, consociation is similarly common. Finland's Swedish-majority Åland Islands require that mainland Finns live in the islands for five years and learn to speak Swedish before voting or standing for office.⁴⁰ Italy's province of South Tyrol provides its indigenous ethnic Germans with veto power over provincial laws that threaten their minority-language rights.⁴¹ In American Samoa, U.S. citizens of non-Samoan ancestry are prohibited from buying land, thus protecting the traditional land base from alienation.⁴² In the United Kingdom, the national-minority Scots and Welsh enjoy significant overrepresentation in Parliament.⁴³ In New Zealand, Maori are guaranteed permanent representation in the House of Representatives. The list, of course, goes on.

3.2.2 Indirect non-universalism: federalism

Either instead of direct consociation or in addition to it (depending on one's stance on the so-called "West Lothian problem"⁴⁴), states may practice indirect consociation, a power-sharing method that is, on its face, universal.⁴⁵ Because it tacitly rather than explicitly recognizes cultural communities, liberal democracies

³⁹ Sigurdson, "First Peoples, New Peoples," 68.

⁴⁰ Shahnawaz Gul, "Kashmir and Åland Autonomy Models: A Comparative Study" (master's thesis, University of Kashmir, 2013), 44.

⁴¹ Andrea Carla, "Living Apart in the Same Room: Analysis of the Management of Linguistic Diversity in Bolzano," *Ethnopolitics* 6, no. 2 (2007): 296.

⁴² Michael W. Weaver, "The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa," *Pacific Rim Law and Policy Journal* 17, no. 2 (2008): 325.

⁴³ T.H. Qualter, "Representation by Population: A Comparative Study," *Canadian Journal of Economics and Political Science* 33, no. 2 (1967): 258.

⁴⁴ The question of whether direct consociation is required by, or conversely prohibited by, indirect consociation is sometimes called the West Lothian Problem, after a Scottish MP for the constituency of West Lothian who questioned whether he should vote on Parliamentary matters only affecting England. According to Kymlicka, the "yes" argument goes like this: "A minority's right to self-government would be severely weakened if some external body could unilaterally revise or revoke its powers. . . . Hence it would seem to be a corollary of self-government that the national minority be guaranteed representation on any body which can interpret or modify its powers of self-government." Yet, Kymlicka notes, a subunit that has "drawn down" asymmetrical powers from the central government could arguably be entitled to *less* representation in the central assembly, as it would be unfair for it to have input into legislation from which it is exempt. For more see Kymlicka, *Multicultural Citizenship*, 32.

often prefer indirect consociation.⁴⁶ Where cultural communities are territorially defined, federalism offers one method of indirect consociation. Federalism is among the world's most common governance arrangements. According to political scientist Daniel Elazar, federalism involves "self-rule and shared rule,"⁴⁷ assigning inalienable powers to both central and subunit governments and thus protecting each from the other. The degree of shared versus self-rule varies, with some federations more decentralized than others. Decentralized federations may exhibit "interstate federalism," where power is brokered not primarily within central institutions but between the central and subunit governments in an almost ambassadorial relationship.

Whatever its degree of centralization, two very different forms of federalism exist, constituted to achieve different ends: multinational and region-based federalism. In what political theorist Phillip Resnick calls "multinational federations,"⁴⁸ borders are drawn and powers granted so federal subunits encompass and provide limited autonomy to national minorities. Under this arrangement, a national minority enjoys an external protection against assimilation, and may pursue self-determination, by exercising liberal-democratic political control over its semi-autonomous region.⁴⁹ In Belgium the boundaries and powers of Wallonia provide self-determination and sub-state autonomy for the Walloon minority, while in Spain, the "autonomous community" of Catalonia accommodates

⁴⁵ Michael Asch and Gurston Dacks, "The Relevance of Consociation to the Western Northwest Territories," in *Partners for the Future: A Collection of Papers Related to Constitutional Development in the Western Northwest Territories*, ed. Western Constitutional Forum (Yellowknife: Government of the Northwest Territories, 1985), 39.

⁴⁶ Nicholas O. Stephanopolous, "Our Electoral Exceptionalism," *University of Chicago Law Review* 80 (2013): 842.

⁴⁷ Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, Alabama: The University of Alabama Press, 1987), 5-6.

⁴⁸ Phillip Resnick, "Toward a Multination Federalism," in *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, ed. Leslie Seidle (Montreal: Institute for Research on Public Policy, 1994), 71.

⁴⁹ At the same time that federalism allows nationalist minorities to enjoy segmental autonomy without resorting to secession, it also provides security to minorities-within-the-minority (such as Anglos in Quebec), as their rights are protected by the subunit's inclusion in the federal regime. Helder de Schutter calls this "federalism as fairness": Unlike either secession or assimilation, federalism is fair to both minorities and minorities-within-the-minority. For more on this, see his "Federalism as Fairness," *Journal of Political Philosophy* 19, no. 2 (2011): 167-189.

the Catalans. In Canada, Quebec functions as a semi-autonomous nation-based subunit, providing an “overtly universal” external protection to the stateless Québécois.

However, federalism is not inherently, or even most commonly, a tool of consociation. According to Kymlicka, in the brand of federalism dubbed “region-based federalism,” federal arrangements provide a way for a political community to divide and diffuse power.⁵⁰ Rather than concentrating authority in the hands of a unitary government, region-based federalism disperses control, reducing the danger of tyranny and safeguarding individual rights. The United States, which political scientists Patrick Malcolmson and Richard Myers deem “the blueprint of the first great modern federal regime,”⁵¹ showcases region-based federalism, with power strategically divided between the federal government and the states. American federalism does not aim to provide self-determination to national minorities.⁵² The federal regimes of Australia, Brazil and Germany are similarly “region-based.”

In certain circumstances, region-based federalism may not merely fail to provide consociational power-sharing to national minorities but may achieve the opposite, serving to disempower and assimilate them. This may occur in at least two ways. Borrowing from the parlance of voting-rights jurisprudence, these ways can be called “cracking” and “stacking.”⁵³

Cracking involves constituting subunits so their boundaries split national minorities, denying them the opportunity to become majorities in any subunit. According to Kymlicka, this technique was utilized historically against both the Basques and Catalans.⁵⁴ Stacking, meanwhile, involves overwhelming national minorities with a preponderance of *staatsvolk*. This may be achieved through two different means. First, minorities may be “stacked” by drawing subunit boundaries

⁵⁰ Will Kymlicka, “Is Federalism a Viable Alternative to Secession?” in *Theories of Secession*, ed. Percy B. Lehning (Hoboken, New Jersey: Taylor and Francis, 2005), 124.

⁵¹ Patrick Malcolmson and Richard Myers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada* (Toronto: University of Toronto Press, 2009), 58.

⁵² Kymlicka, “Is Federalism a Viable Alternative?” 122.

⁵³ James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven: Yale University Press, 1995), 118.

⁵⁴ Will Kymlicka, “Human Rights and Ethnocultural Justice,” *Review of Constitutional Studies* 4, no. 2 (1998), 221.

so their homeland is marooned in a larger, majority-dominated jurisdiction, as was the intent when Upper Canada, with its fast-growing Anglophone population, sought to merge with Francophone Lower Canada to form the greater Province of Canada.⁵⁵ Stacking can also be engineered by “swamping” a minority homeland with majority-nation settlers. This technique was utilized against Canada’s Métis in the 1870s: Prime Minister John A. Macdonald, determined to prevent the new province of Manitoba from remaining Métis-dominated, stated, “these impulsive halfbreeds . . . must be kept down by a strong hand until they are swamped by the influx of settlers.”⁵⁶ Similarly, McGarry notes that in the American west and southwest, statehood was held in abeyance until Anglo settlers swamped local Hispanic populations.⁵⁷ In the case of New Mexico, for example, Congress for more than half a century denied the pleas of *Nuevomexicanos* for statehood, often on explicitly racist grounds.⁵⁸ Only when Hispanics became a minority was statehood granted.⁵⁹

After national minorities have been cracked or stacked through the creation of region-based federal subunits, their nationalist ambitions can be quashed through simple democratic majoritarianism.⁶⁰ This may render them worse off than they would have been without federalism. McGarry cites the case of African-Americans, who in the United States were “subjugated by particularly authoritarian

⁵⁵ Kymlicka, “Federalism and Secession,” 110.

⁵⁶ F. G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961), 95.

⁵⁷ McGarry, “Asymmetry in Federations,” 106.

⁵⁸ John Nieto-Phillips, “Citizenship and Empire: Race, Language, and Self-Government in New Mexico and Puerto Rico, 1898-1917,” *Centro* 11, no. 1 (1999).

⁵⁹ From 1848, when it joined the United States, until 1900, the territory of New Mexico was at least 60 percent Hispanic. By 1910 the Hispanic proportion had dropped to 38 percent. Two years later statehood was granted. For more see Jens Manuel Krogstad and Mark Hugo Lopez, “For Three States, Share of Hispanic Population Returns to the Past,” Pew Research Centre, <http://www.pewresearch.org/fact-tank/2014/06/10/for-three-states-share-of-hispanic-population-returns-to-the-past/> (accessed Jan. 16, 2015).

⁶⁰ Richard Laing, Peter Puxley, C. Gerald Sutton, and Wilf Bean, “Political Development in the Northwest Territories,” in *Northern Transitions Volume 2: Second National Workshop on People, Resources and the Environment North of 60°*, eds. Robert F. Keith and Janet B. Wright (Ottawa: Canadian Arctic Resources Committee, 1978), 318.

regional majorities” in the post-Civil War South,⁶¹ and were forced to appeal to the federal government for help. Other scholars have argued that the same is true in Canada, where provincial resistance to Indigenous nationalism has served to suppress, not accommodate, Native self-determination.⁶²

When a national minority finds itself “cracked” or “stacked” into a region-based federal subunit, it once more faces Lijphart’s three options: assimilation, separation and consociation. Again, national minorities seldom desire assimilation into the dominant *staatsvolk* culture. Separation, in the form of subunit partition, may be sought, as was the case when a small but vocal faction of Francophones moved to split French-speaking Acadia from New Brunswick in the 1970s.⁶³ The final option is consociation, with the subunit governed through a power-sharing arrangement.⁶⁴ Intra-subunit consociational arrangements exist in such jurisdictions as Northern Ireland, South Tyrol and Brussels.⁶⁵ Rudimentary forms of intra-subunit consociation also exist in North America. In the above-mentioned case of New Brunswick, partitionist sentiment was quelled by the introduction of consociational accommodations that included entrenchment of dual official languages and establishment of parallel English/French education systems.⁶⁶ As part of Canadian Confederation, the *British North America Act* required that Quebec retain twelve traditionally Anglo-dominated provincial electoral districts, called *comtés protégés*, or “protected counties.”⁶⁷ Nova Scotia once featured two-member

⁶¹ McGarry, “Asymmetry in Federations,” 106. This is not to suggest that segmental autonomy offered by federalism is a panacea for threatened national minorities. As Kymlicka notes, the asymmetric powers required for national-minority self-determination may be more agreeable to *staatsvolk* when accorded “extra-federally.” He observes, “It is much easier to negotiate new self-government provisions for the Navajo or Puerto Ricans than to modify the powers of individual states.” See *Multicultural Citizenship*, 29.

⁶² J. Anthony Long, “Federalism and Ethnic Self-Determination: Native Indians in Canada,” *Journal of Commonwealth and Comparative Politics* 29, no. 2 (1991): 193.

⁶³ Emery M. Fanjoy, “Language and Politics in New Brunswick,” *Canadian Parliamentary Review* summer (1990): 7.

⁶⁴ Arend Lijphart, “The Power-Sharing Approach,” in *Conflict and Peacemaking in Multiethnic Societies*, ed. Joseph V. Montville (New York: Lexington Books, 1990), 503.

⁶⁵ Stefan Wolff, “The Institutional Structure of Regional Consociations in Brussels, Northern Ireland and South Tyrol,” *Nationalism and Ethnic Politics* 10, no. 3 (2004).

⁶⁶ Fanjoy, “Language and Politics in New Brunswick,” 7.

⁶⁷ John C. Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (Montreal: McGill-Queens University Press, 2001), 47-48.

electoral constituencies, to provide both dual Catholic/Protestant and dual Anglo/Acadian representation.⁶⁸ In Maine, delegates from several of the state's Indigenous nations serve as non-voting members of the state house of representatives. And in culturally divided Hawaii, the Hawaiian language has been granted official status, politics have been described as inter-ethnically consociational,⁶⁹ and apportionment exhibits a degree of non-universalism, with the state constitution requiring that the different islands be considered separate units for purposes of redistricting.

3.2.3 Non-universalism in Canada

Canada is a multination state. It is thus, *de facto*, non-universal. *De jure*, it features an array of direct and indirect consociational arrangements. For example, as noted previously, Canada is directly consociational in its recognition of dual official languages. It is indirectly consociational through its federal scheme, which is partly region-based (*a la* the U.S.) and partly nation-based. Of Canada's ten provinces, eight do not function as enclaves for protecting and empowering discrete national minorities. Only Quebec is a "national" province, serving as a homeland for the stateless Québécois, providing them limited autonomy and self-governance.⁷⁰ New Brunswick, meanwhile, is a consociational province, where power is shared between Francophone Acadians and Anglophone *staatsvolk*.

Canada also has three territories. While these are not fully empowered federal subunits (they are not strictly "constitutionally entrenched," as their authority is for the most part delegated through Parliamentary legislation), they are sometimes called "provinces in waiting" and wield "province-like" powers more

⁶⁸ Government of Canada Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report, Vol. 1* (Ottawa: Minister of Supply and Services Canada, 1991), 179.

⁶⁹ Michael Haas, "Politics," in *Multicultural Hawai'i: The Fabric of a Multiethnic Society*, ed. Michael Haas (New York: Garland Publishing, 1998), 163.

⁷⁰ This is of course no accident. Before Canadian confederation, British North America consisted of a number of colonies, including the Province of Canada, comprising both modern-day Ontario and Quebec. At confederation, Ontarians pressed for the new Canadian state to adopt a unitary government, but Francophones insisted on a federal system that would provide them segmental autonomy. For more see Malcolmson and Myers, *The Canadian Regime*, 61.

formidable than those of federal subunits in many other federations.⁷¹ Of Canada's territories, the Yukon has long been a region-based subunit. Nunavut, formed through the signing of the Nunavut Land Claims Agreement, became a nation-based federal subunit, providing a semi-autonomous homeland to the Inuit of the eastern Arctic.⁷² Finally, the pre-division NWT featured forms of consociational power-sharing – an uneasy, *ad hoc* middle ground between region-based and nation-based federal status. The territory was for decades pulled between these two modes of federalism, in part because of the differing visions of, and a conflict of rights between, its *staatsvolk* and Indigenous peoples.

Conflicts between individual and group rights are not new to Canada. Only recently, however, have such questions become commonly adjudicated. For Canada's first 115 years the country had no equivalent of the American Bill of Rights. Parliamentary power was sovereign.⁷³ Legislative moderation, not legal action, was the primary defense against abuse of civil liberties. Only after 1982, with the adoption of the Charter of Rights and Freedoms, did questions of rights begin to frequently come before the courts.

Quebec opposed adoption of the Charter, fearing it would compromise the province's use of external protections to defend its distinct "national" status. Many of Canada's *staatsvolk*, meanwhile, desired that the Charter would bring Quebec into line. Anglo-Canadians have generally opposed the "asymmetrical" federal demands made by Quebec.⁷⁴ According to constitutional scholars Rainer Knopff and F.L. Morton, *staatsvolk* hoped the Charter would moderate "centrifugal territorialism" and promote national unity by adopting a set of universal individual rights to which

⁷¹ Doug McArthur, "The Changing Architecture of Governance in Yukon and the Northwest Territories," in *Northern Exposure Volume 4: Peoples, Powers and Prospects in Canada's North*, eds. Frances Abele, Thomas J. Courchene, F. Leslie Seidle, and France St-Hilaire (Montreal: Institute for Research on Public Policy, 2009), 207.

⁷² Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press Canada), 144.

⁷³ Shannon Ishiyama Smitley, "The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada," *Publius: The Journal of Federalism* 26, no. 2 (1996): 84.

⁷⁴ Yash Pal Ghai, "Constitutional Asymmetries: Communal Representation, Federalism and Cultural Autonomy," in *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), 160.

Quebec would be compelled to adhere.⁷⁵ Indeed, the Charter's greatest champion, Prime Minister Pierre Trudeau, saw the entrenchment of individual Charter rights as a nation-building exercise. But as will be seen, one person's nation building is another's colonialism. It is no wonder that, within years of the Charter's adoption, Quebec was embroiled in a clash involving individual versus group rights.

Under section 2 of the Charter, all Canadians enjoy freedom of expression. Yet Quebec's Bill 101, which pre-dated the Charter, required commercial signage in the province to be in French only. In 1988, the Supreme Court of Canada found Bill 101 to abridge the free-expression rights of non-Francophones. Nationalist Québécois were outraged. In their view, the Charter, by preventing them from advantaging French in their own province, impaired their viability as a separate culture.⁷⁶ Quebec invoked the Charter's section 33 "notwithstanding clause,"⁷⁷ temporarily overriding the court's decision. Anglophone Canadians, in turn, were outraged at the Québécois, whose insistence on utilizing "external protections" such as Bill 101 seemed to insult the principles of both individual egalitarianism and universal citizenship.⁷⁸

The resulting schism catalyzed Québécois resentment toward Canada and was a prime contributor to the separatism crisis of the mid-1990s, the closest modern Canada has come to breaking up.⁷⁹ Hence, political scientist Shannon Smithey argues that "[t]he Supreme Court's interpretation of the Charter has contributed greatly to the failure to achieve greater unity. The impact of the Court's evenhanded approach to the Charter's language rights has been exactly the opposite of what was intended in 1982. A document designed to pull the nation closer

⁷⁵ Rainer Knopff and F. L. Morton, "Nation Building and the Canadian Charter of Rights and Freedoms," in *Constitutionalism, Citizenship and Society in Canada*, eds. Alan Cairns and Cynthia Williams (Toronto: University of Toronto Press, 1985), 133.

⁷⁶ Smithey, "The Effects of the Canadian Supreme Court's Charter Interpretation," 89.

⁷⁷ The most controversial provision of the Charter of Rights and Freedoms, the "notwithstanding clause" permits Parliament or the provinces to override certain Charter provisions. (Section 3, the voting-rights provision, is not among them.) "Notwithstanding" declarations expire after five years, though in theory governments could re-enact them in perpetuity.

⁷⁸ Ronald L Watts, "Canadian Federalism in the 1990s: Once More in Question," *Publius: The Journal of Federalism* 21, no. 3 (1991): 184.

⁷⁹ Smithey, "The Effects of the Canadian Supreme Court's Charter Interpretation," 83.

together has been interpreted in ways that have added to the centrifugal forces at work in Canada.”⁸⁰

3.2.4 Rights and settler colonialism

“Settler colonialism” in multination states presents an especially thorny challenge to liberal democrats. As noted previously, Indigenous nations were incorporated into multination states against their will. Indigenous nations are culturally distinct from “the people” comprising the national majority, were self-determining prior to the majority’s arrival, and did not consent to the political regime that the majority established. They thus assert inherent moral rights to continued self-governance and autonomy. As also noted previously, these rights may be defended on nationalistic, democratic, liberal, legal,⁸¹ moral and pragmatic grounds. Settler colonialism threatens these rights.

Colonialism is a phenomenon whereby one nation politically, economically and/or culturally dominates or incorporates another nation and exploits its inhabitants. Scholars distinguish colonialism from “settler colonialism,” where the original inhabitants are not merely exploited but, in effect, replaced.⁸² In settler colonialism, hegemony is achieved when exogenous peoples occupy a territory, eliminate or marginalize its inhabitants, and, in the words of colonial historian Patrick Wolfe, “erect[] a new colonial society on the expropriated land base.”⁸³ This process may be driven by the settlers themselves or in collaboration with the colonial metropole. The latter case is sometimes called nation building. Others describe it less charitably. According to Kymlicka, “State governments, controlled by colonizing settlers, have often seen national minorities as obstacles to settlement

⁸⁰ Smithey, “The Effects of the Canadian Supreme Court’s Charter Interpretation,” 100.

⁸¹ As Canadian political scientist Avigail Eisenberg notes, many Canadian treaties express or imply that Indigenous society will be permitted to co-exist with, and be protected from, *staatsvolk* society. For more see her chapter “Domination and Political Representation in Canada,” in *Painting the Maple: Essays on Race, Gender and the Construction of Canada*, eds. Veronica Strong-Boag, Sherrill Grace, Joan Anderson and Avigail Eisenberg (Vancouver: UBC Press, 1998), 48.

⁸² Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010), 8.

⁸³ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006): 388.

and resource development, and so have pushed to strip minorities of their traditional political institutions, undermine their treaty rights, and dispossess them of their historic homelands.”⁸⁴

In recent decades, settler colonialism has earned widespread scorn. Wolfe, among others, deems it a form of genocide.⁸⁵ At least theoretically, many liberal democrats agree that settler colonialism is a grievous wrong. Courts have affirmed the right of internal Indigenous nations to both self-determination and cultural survival, and settler states have issued apologies for certain colonial actions.⁸⁶

Yet in modern multinational liberal democracies, Indigenous rights to self-determination and cultural preservation may still be imperiled where *staatsvolk* exercise individual rights to mobility and voting. As Kymlicka explains, these rights may not merely permit but *protect* ongoing settler colonialism. Often, liberal principles guard the freedom of *staatsvolk* to relocate to, and cast ballots in, Indigenous homelands, overwhelming and politically dominating them. According to Eisenberg, in such instances the imposition of liberal principles upon these homelands should not be justified as “liberalization” but condemned as colonialism. Likewise, she says the liberal rights themselves should not be seen as beneficently universal but the opposite – as a particularistic tool “aimed at advancing the collective cultural dominance of the majority.”⁸⁷ Examples are numerous, including in Bangladesh, Israel, Tibet, Indonesia and Brazil.⁸⁸ Kymlicka calls settler colonialism “the most common origin of violent conflict in the world.”⁸⁹

In such instances, Indigenous nations unsurprisingly seek to utilize external protections to block *staatsvolk* in-migration and voting. As Canada’s Royal Commission on Electoral Reform observed, Aboriginal peoples “entered treaties to

⁸⁴ Kymlicka, *Finding Our Way*, 137.

⁸⁵ Wolfe, “Settler colonialism,” 387-409.

⁸⁶ For example, in the so-called Apology Resolution of 1993, Congress admitted U.S. culpability in, and expressed contrition for, the overthrow of the Kingdom of Hawaii a century before. See Jess Bravin and Louise Radnofsky, “Regrets Only? Native Hawaiians Insist U.S. Apology has a Price,” *Wall Street Journal*, March 12, 2009, www.wsj.com/articles/SB123682336964803763 (accessed January 27, 2015).

⁸⁷ Eisenberg, “Domination and Political,” 39.

⁸⁸ Kymlicka, “Human Rights and Ethnocultural Justice,” 218.

⁸⁹ *Ibid.*, 219.

protect their traditional lifestyle against the influx of immigration. . . . Aboriginal peoples have always viewed segregation as an essential means of defending their cultural heritage.”⁹⁰ External protections barring settler in-migration and voting help guard Indigenous cultural integrity, but they simultaneously harm settlers – not just in an “expressive” manner, but also in ways that are materially injurious. In such circumstances, decisions must be made as to whether such external protections are nonetheless permissible. Such decisions may determine the political and cultural fate of Indigenous nations.

3.3 ‘Kymlicka’s dilemma’

Whether *staatsvolk* swamping and political domination of Indigenous homelands is orchestrated or apparently accidental, and whether it is seen as “liberalization” and “nation-building” or as overt colonialism, Kymlicka deems it a “grave injustice.” He also identifies it as a difficult liberal-theory paradox, which demonstrates “that respect for human rights is not sufficient to ensure ethnocultural justice, and that where ethnocultural justice is absent, the rhetoric and practice of human rights may actually worsen the situation.”⁹¹ This confounding circumstance, in which the self-determination of Indigenous minorities is threatened by settlers’ individual mobility and voting rights, while, conversely, settlers’ mobility and voting rights are threatened by non-universal Indigenous external protections, is what I dub “Kymlicka’s dilemma.” As will be demonstrated, “Kymlicka’s dilemma” presented significant challenges to liberal democracy in Canada’s pre-division and division-era Northwest Territories.

3.4 Summary

As this chapter has shown, for an array of reasons – nationalistic, democratic, liberal, legal, moral and pragmatic – liberal democratic multinational states may owe to minority nations the right to use “external protections” to guard their collective self-determination and internal autonomy from infringement by majority-nation

⁹⁰ Royal Commission on Electoral Reform, *Reforming Electoral Democracy*, 180-81.

⁹¹ Kymlicka, “Human Rights and Ethnocultural Justice,” 214.

staatsvolk. Such protections may be facilitated through consociational power-sharing: either direct, such as via “intrastate” arrangements, or indirect, such as via federalism. Yet while federalism may empower national minorities, it may alternatively be arranged to disempower them, such as through “cracking” or “stacking.” One form of stacking, which poses a particular threat in settler-colonial states, is “swamping.” There, *staatsvolk* settlers, by exercising their individual rights of movement and voting, may succeed in occupying and democratically dominating a national-minority homeland. Where the national minority exercises “external protections” to prevent such settler actions, a clash of rights arises, presenting a constitutional quandary. I call this quandary “Kymlicka’s dilemma.”

Chapter 4: Apportionment theory and case law

This chapter addresses the challenge of reconciling electoral apportionment with the principles of liberal democracy. It identifies three categories of such challenges, involving individualism, egalitarianism and universalism. It examines how internal multinationalism may conflict with universal apportionment, and explores such conflicts as they relate to Aboriginal rights in Canada. This chapter then examines case law in Canada and the U.S., including cases where national-minority rights and universal apportionment conflict. It concludes by suggesting that in such cases, courts must proceed with caution, and proposes a procedure for identifying and properly adjudicating such conflicts.

4.1 Voting rights and apportionment

In a liberal democracy the right to vote is sacrosanct. According to section 3 of Canada's Charter of Rights and Freedoms, "Every citizen has a right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." This right is essential because, as constitutional law scholar Katherine Swinton observes, "The hallmark of democracy is the ability of individuals to participate in the institutions that govern them."¹ Yet discerning the meaning of "the right to vote" is complex. Even in an Athenian-style direct democracy, "the right to vote" would present challenges. Who has the right to vote – all residents, or only citizens? How old must they be? What term of residency must they meet? Representative democracy, in which individuals "participate in the institutions that govern them" largely through elected representatives, raises even thornier questions. How should representation be apportioned to voters? By fixed geographic boroughs, as in the pre-reformed British Parliament? By an at-large proportional system, as in Israel? By clan, as in Somalia? In North America, representation is typically apportioned through single-member territorially-based districts. These districts are periodically reshaped and their population thereby adjusted so as to respect individual rights while at the same time facilitating

¹ Katherine Swinton, "Federalism, Representation and Rights," in *Drawing Boundaries: Legislatures, Courts, and Electoral Values*, ed. John. C. Courtney *et al.* (Saskatoon: Fifth House, 1992), 18.

democracy. After all, as John Courtney observes, courts have made it clear that the right to vote includes protection from “discriminatory treatment of voters under a particular set of electoral boundaries.”²

4.2 Three axes of (il)liberal apportionment

Of course, the twin goals of facilitating democracy and protecting voters’ rights are often in tension. Such conflicts are the subject of constitutional law, which seeks to discern at what point an apportionment scheme becomes impermissibly illiberal.

As guarding individual rights from majoritarian abuse is liberalism’s *raison d’être*, liberal theory provides a useful lens through which to explore apportionment controversies. As mentioned previously, Chandran Kukathas identifies three key liberal principles: individualism, egalitarianism and universalism. The violation of any of these principles may thus be seen as illiberal. I suggest that apportionment questions can be usefully explored as they relate to each of these three principles, and, more specifically, that apportionment’s degree of (il)liberalism can be gauged along three sliding scales framed by these principles. Individualism informs the first axis. It is the principle that the state must treat citizens as individuals rather than as members of groups. This axis gauges the degree to which an apportionment scheme is “blind” to group difference versus the degree to which (and the way in which) it recognizes groups. Egalitarianism forms the second axis, embodying the principle that all citizens be treated as political equals. This axis assesses how closely a scheme adheres to “parity” versus how much it overrepresents some individuals and underrepresents others.

Disputes along these two axes will be familiar to students of voting rights. In the U.S. and Canada, most disagreements over apportionment involve one or the other of them. However, I contend that apportionment must also be considered along a “third axis,” informed by universalism. This is necessary where states are not universal. As noted above, “universal” states consider their citizens to be a single, unified polity. Asch calls this “the true ‘one person-one vote’ orientation to

² John C. Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (Montreal: McGill-Queens University Press, 2001), 153.

democracy.”³ But states that exhibit multinational pluralism, and which are governed through direct or indirect consociation, relate to citizens as members of preexisting, distinct polities. These polities form the building blocks of non-universal power sharing. Clearly, apportionment must be conducted differently in consociational states. The “universalism” axis takes note of preexisting polities and the representational challenges that attend them. It explores whether, and how, representation is apportioned among multiple demoi.

4.2.1 The first axis: individualism

As liberalism rests in part on the rejection of *de jure* group differentiation, it might be thought that a maximally liberal representational scheme would be blind to voters’ group affiliations. Yet this is seldom the case, for at least three reasons.⁴ First, as legal scholar Pamela Karlan observes, “The instrumental purpose of voting – having one’s preferences taken into account in choosing public officials – necessarily involves aggregating the votes of individuals to achieve a collective outcome.”⁵ Second, group expression is incoherent if aggregation is random (for example, if representation is apportioned by drawing lots) or senseless (for instance, apportioned alphabetically). For voting to have meaning, apportionment must group together not just any electors but electors who share politically salient interests. Only then will they, as individuals, enjoy the possibility of combining their votes and electing representatives of their choice.⁶ Third, because representation is enhanced when voters are aggregated into meaningful groups, it may be thwarted

³ Michael Asch, “Consociation and the Resolution of Aboriginal Political Rights: The Example of the Northwest Territories, Canada.” *Culture X*, no. 1 (1990): 94.

⁴ There exist electoral systems that are overtly “group blind” and do not require voter aggregation; for instance, at-large systems. Yet, for precisely the reasons discussed above, such systems may still violate voting rights. In the U.S. Supreme Court case *Mobile v. Bolden* (1980), African-Americans maintained that Mobile, Alabama’s municipal at-large electoral scheme allowed the city’s white majority to uniformly defeat black candidates – a harm they felt could be rectified by dividing the municipality into territory-based single-member electoral districts.

⁵ Pamela Karlan, “All Over the Map: The Supreme Court’s Voting Rights Trilogy,” *The Supreme Court Review* (1993): 249.

⁶ Swinton, “Federalism, Representation, and Rights,” 19. This is why U.S. Supreme Court Justice Potter Stewart famously stated, in *Lucas v. Colorado General Assembly* (1964), that “[l]egislators do not represent faceless numbers. They represent people . . . people with identifiable needs and interests which require legislative representation.”

when meaningful aggregation is denied, such as when districts are crafted to diminish collective influence through “cracking” and “stacking.”

Aggregation, achieving meaningful aggregation, and policing against invidious aggregation all require deliberate departure from group-blindness, making apportionment one of the rare instances in which liberal democrats embrace overtly group-conscious lawmaking. Hence, few apportionment schemes are maximally liberal along the individualism axis. Indeed, some representational arrangements that *are* ostensibly individualistic, such as those that provide representation at-large, have been judged unconstitutional precisely *because* they fail to provide power to, and thus invidiously abridge the rights of, voters of certain groups.⁷

It bears noting, however, that the act of aggregating voters into groups for the purpose of districting is distinct from assigning rights to, or recognizing collective interests of, groups themselves.⁸ The U.S. Supreme Court emphatically denied in *Shaw v. Hunt* that the “right to an undiluted vote . . . belongs to the minority as a group and not to its individual members. It does not.”⁹ Aggregating voters by group is said to provide *each voter* with a meaningful vote. As will be seen in the next section, to deny such aggregation to some but not others, as through “cracking” and “stacking,” is to deny them a form of individual equality – what this thesis calls “interest” egalitarianism.

Though liberals permit group aggregation for purposes of representation, they may not accept certain *types* of aggregations. This acceptance will hinge on the kind of group being recognized and, sometimes, the overtness of that recognition. As noted above, the most common method of aggregating voters in North America is by geographic proximity, i.e., districting by territory. This requires eschewing “blindness” only so voters may be grouped based on the commonality of where they live. Liberals typically accept that voters who share a geographic region, and thus

⁷ Samuel Issacharoff, Pamela Karlan and Richard Pildes, *The Law of Democracy: Legal Structures of the Political Process*, 3rd ed. (New York: Foundation Press, 2007), 538-545.

⁸ Heather K. Gerken, “Understanding the Right to an Undiluted Vote,” *Harvard Law Review* 114, no. 6 (2001): 1663-1743.

⁹ *Shaw v. Hunt*, 517 U.S. 899 (1996), 917.

presumably the interests and concerns of that region, should also share a representative.¹⁰ Indeed, geographic representation has sometimes been considered the preeminent apportionment value: Until 1790 in Delaware, for example, three state senators and seven state representatives were elected from each county, regardless of population.¹¹ Today, traditional districting principles such as contiguity and compactness underscore the widespread acceptance of geographic aggregation.¹²

However, proximity need not be the sole method by which to meaningfully group voters. Representation may be apportioned to voters who, in addition to living near one another, form a “community of interest.” Liberals usually condone, and may even insist upon, grouping voters by community-of-interest-related factors that correspond easily with proximity, such as socio-economic level, cultural heritage, employment type, or municipal residence. Such aggregations lead to districts that are, for instance, predominantly blue collar, or Italian-American, or composed of military personnel, or limited to residents of a specific city or county. As well, in party-based political systems, it is generally seen as inevitable, and perhaps essential, that voters be aggregated with an eye toward their party affiliation. In the view of apportionment scholars such as Bernard Grofman, this practice is not illiberal if done in a neutral manner, such that the resulting share of representatives of each party accurately reflects the partisan breakdown of the electorate overall.¹³

Less palatable are groupings that hinge on immutable, politically divisive traits such as race.¹⁴ Such aggregations are of course illiberal when they dilute the power of underrepresented minorities, “cracking” or “swamping” them into racial-

¹⁰ Alan Stewart, “Community of Interest in Redistricting,” in *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform*, ed. David Small (Toronto: Dundurn Press, 1991), 188.

¹¹ Robert G. Dixon, *Democratic Representation: Reapportionment in Law and Politics*, (Oxford: Oxford University Press, 1968), 60.

¹² Issacharoff, Karlan and Pildes, *The Law of Democracy*, 634-636.

¹³ Bernard Grofman, “Criteria for Districting: A Social Science Perspective,” *UCLA Law Review* 33, no. 1 (1985).

¹⁴ Benjamin Forest, “Electoral Redistricting and Minority Political Representation in Canada and the United States,” *The Canadian Geographer* 56, no. 3 (2012).

majority-controlled districts. These are classic racial gerrymanders, violating both individualism (group blindness) and egalitarianism (individual equality). A more difficult problem arises with so-called affirmative racial gerrymanders, where race-conscious districting is used to *bolster* the voting power of underrepresented minorities. Over the years the U.S. Supreme Court has hotly debated this practice. Supporters argue that engineering African-American or Latino-majority districts is no different than creating districts whose dominant “communities of interest” are Italian-Americans or military personnel. Indeed, they suggest that to provide the latter groups with purpose-built districts, while denying blacks and Hispanics the same opportunity, is egregiously discriminatory. Critics, however, suggest that race-based lawmaking, even when ostensibly ameliorative, is always suspect.¹⁵ When used in redistricting, they say, it causes “expressive harms,”¹⁶ reifying racial divisions and communicating to lawmakers that they represent only one race or another. This is especially the case, they maintain, when affirmative gerrymanders defy geographic compactness, resulting in odd-shaped districts.¹⁷

4.2.2 The second axis: egalitarianism

As liberalism rests on the political equality of individuals, then a maximally liberal apportionment scheme would provide equal representation. But as political theorist Hanna Pitkin famously observed, representation is a concept that can be understood in various ways.¹⁸ How one understands representation will affect whether one feels it has been apportioned equally. I suggest there are many dimensions of representational egalitarianism, of which I will discuss six: Formal equality,

¹⁵ Why do liberals look askance at affirmative racial aggregation while permitting aggregation by dwelling-place, class or party? I suggest that the latter categories, being based on mutable factors, are the kinds of “communities of interest” that classical liberals like James Madison defended as essential to protecting individual rights in democracy. Madison famously imagined that American majorities would in reality be ever-shifting coalitions of minorities, and that no single group would ever be so dominant as to dare engage in tyranny. Aggregations based on immutable qualities, like race, are by that theory undesirable because they may reify divisions and thus encourage majoritarianism. For more, see Guinier, “[E]racing Democracy.”

¹⁶ Courtney, *Commissioned Ridings*, 152.

¹⁷ Bruce E. Cain, *The Reapportionment Puzzle* (Berkeley: University of California Press, 1984), 66.

¹⁸ Hanna Pitkin, *The Concept of Representation* (Cambridge: Cambridge University Press, 1967).

substantive equality, “community of interest” equality, “stakeholder” equality, partisan equality and voting-system equality.

Formal equality is sometimes said to result when apportionment adheres to the principle of representation by population, also known as “rep by pop” or “one person, one vote.” Under strict “rep by pop,” representatives are elected by and/or represent equal numbers – of people, or citizens, or registered voters, etc.¹⁹ This purportedly gives electors equal “power” to affect election outcomes or provides constituents with equal “weight” when their representatives cast votes. When districts are not equipopulous, they are said to be malapportioned. Voters in districts that have a greater population than average are said to be “underrepresented” and their voting power “diluted.” Voters in low-population districts are in turn “overrepresented.” If one district has just half as many voters as elsewhere, those voters’ formal voting power may be said to be double. Critics maintain this is no more acceptable than if each of those voters’ ballots were counted twice. Among liberal democracies, this view is most closely associated with the United States, where, within each state, formal numeric equality is required. Other liberal democracies show somewhat less concern for “rep by pop.” Australia permits ridings to deviate from parity by as much as plus or minus 10 percent. Most of Canada observes a rough plus or minus 25-percent limit. In the United Kingdom, the largest parliamentary constituencies have five-fold the population of the smallest.

Of course, formal equality is impossible to achieve. Censuses have margins of error, and moreover, certain groups (and thus electoral districts) are disproportionately prone to being undercounted. As well, as was noted by the Supreme Court of Canada in that country’s preeminent redistricting case, *Reference re Provincial Electoral Boundaries (Saskatchewan)*,²⁰ (better known as the *Carter*

¹⁹ For an intriguing discussion of democratic versus republican theories of representation as they relate to the question of how population should be measured for apportionment purposes, see Issacharoff, Karlan and Pildes, *The Law of Democracy*, 144-46.

²⁰ In Canada, federal or provincial/territorial governments may seek advisory opinions from the court about the constitutionality of legislation. Decisions rendered by the court on these “reference questions” are often called “reference cases.”

case) “voters die, voters move.”²¹ This reality makes parity a moving target. Indeed, whereas the U.S. requires that “rep by pop” be based on the latest census data, Australia conducts reapportionment using *projected* populations – a method felt to be more egalitarian. Finally, strict adherence to formal equality may be criticized for favoring just one understanding of representation: Pitkin’s “liberal” concept, whereby representatives compete to advance the subjective interests of their district vis-à-vis other districts. As Pitkin notes, the liberal concept augurs in favor of representation by population.²² As she also notes, this concept is quite different from “Burkean” representation, wherein representatives collaborate to discern the objectively optimal path for the jurisdiction at large.²³ For the purposes of this thesis it bears noting that “consensus”-based governments, including ostensibly that of the NWT, are premised on the Burkean model, where formal egalitarianism should be of little import.

Even if precise numeric parity was achievable, it is not the only way in which apportionment might be considered “equal.” Substantive equality, i.e. equality of outcome, is another way. It was U.S. Supreme Court Chief Justice Earl Warren who, in his majority ruling in *Reynolds v. Sims*, famously identified the goal of apportionment as being “fair and effective representation.”²⁴ Though Warren’s ruling enshrined “one person, one vote” as the law of the land, scholars have noted that there are many facets of “effective representation,” of which equal-sized districting is but one.²⁵

In Canada, “effective representation” carries with it the implication that all individuals should have an equal opportunity to receive quality representation. In *Dixon v. British Columbia (Attorney General)*, 1989, Canada’s now-chief justice, Beverley McLachlin, identified the two essential functions of representation as the “legislative role,” performed when legislators cast votes, and the “ombudsperson

²¹ *Reference re Prov. Electoral Boundaries (Sask.)*, 1991, 2 S.C.R. 158.

²² Pitkin, *The Concept of Representation*, 190.

²³ *Ibid.*, 188.

²⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964), 565-66.

²⁵ Voting-rights scholar Robert Dixon blasted Warren’s ruling as “a good debater’s trick,” in which the judge conflated an objective concept (“one person, one vote”) with a subjective, speculative outcome (“effective representation”). For more, see Dixon’s *Democratic Representation*, 269.

role,” where representatives act as liaisons between constituents and the government, canvassing voters, disseminating public information, providing constituent service, and so on.²⁶ The ombudsperson role is often said to be unusually difficult in certain types of districts, such as those that are geographically large or remote. Egalitarian liberals may thus insist that voters in large or remote districts be numerically overrepresented. This practice eschews formalistic parity in favor of an alternate parity, in which it is not the “weight” or “power” of voters that is equal but the “effectiveness” of representation they receive.

Yet if substantive equality is indeed the true aim of apportionment, then electoral-district mapmakers might also be required to adjust for factors other than district size and remoteness. These could include voters’ relative wealth, official-language fluency, education level, whether a high proportion of them require government attention (for instance, if they are immigrants or aged), whether government-service agencies are present in their district, and so on. (Critics, meanwhile, maintain that none of these disparities are best remedied by overrepresentation. They propose, for instance, that rural representatives might be given larger travel budgets, or provided with additional constituency offices, allowing them to provide “effective representation” with no need for malapportionment.)

Finally, to achieve substantive equality, mapmakers might need to adjust for variations in constituencies’ expectations of their representatives. Pitkin, for instance, discerns between certain forms of descriptive representation, where representatives are expected to thoroughly canvass voters and dutifully report their wishes to the government (she sees this as but a step away from “direct democracy”),²⁷ versus representation in which elected officials are authorized by voters to act on their behalf.²⁸ *Apropos* this distinction, Dacks has observed that in the pre-division NWT, Indigenous peoples demanded something like the former sort of representation: “They would prefer MLAs to consult them on all important

²⁶ *Dixon v. British Columbia (Attorney General)*, 1989 248 (BC SC), 29.

²⁷ Pitkin, *The Concept of Representation*, 84.

²⁸ *Ibid.*, 116.

issues.”²⁹ Settlers, meanwhile, expected the less-arduous, latter form of representation. It can easily be seen that where districts are formally equal, and thus equipopulous, “descriptive” representatives would be disadvantaged vis-à-vis “authorized” representatives, with the former less able than the latter to provide what their respective constituencies would deem “effective” representation.³⁰

A third dimension of representational egalitarianism is “community of interest” equality. As noted previously, voters who share politically salient concerns form “communities of interest.” Where such “communities of interest” are “cracked” or “stacked,” voters’ ability to elect their favored candidate, and thus to have their politically salient concerns addressed, may be diminished. They thus suffer unequal treatment vis-à-vis members of other, unimpaired communities of interest. As political scientist Robert Dixon observes, an apportionment process that achieves perfect numeric parity and yet thwarts the political ambitions of voters belonging to certain interest groups while favoring those of others is in no way egalitarian.³¹

Clearly, representation that takes into account “community of interest” need not always violate mathematical equality. In the U.S., despite the absolutism of “one person, one vote,” electors are aggregated to at least some extent by “community of interest.” However, where apportionment is not constrained by parity requirements, “community of interest” egalitarianism may permit, or even require, non-equipopulous districting.³² Scholars and jurists have speculated that Canada’s Charter of Rights and Freedoms not only allows but *mandates* the creation of districts for small but distinct communities of interest, in order to provide voters

²⁹ Gurston Dacks, “Political Representation in the Northwest Territories,” in *Representation and Electoral Systems*, eds. J. Paul Johnston and Harvey E. Pasis (Scarborough, Ontario: Prentice-Hall, 1990), 139.

³⁰ The distinction being drawn here is not the well-known distinction between “delegate” (a.k.a. “liberal”) and “trustee” (a.k.a. “Burkean”) representation. Pitkin sees both delegates and trustees as falling within the “authorization” school, as both are authorized to act on the behalf of their electors. Under the form of descriptive representation required by Indigenous NWT residents, however, elected officials are not so much actors as “reporters,” expected to dutifully convey the people’s will to the government. Says Pitkin, “That is why theorists of descriptive representation so often argue that the function of a representative assembly is talking rather than acting, deliberating rather than governing.” See her, *The Concept of Representation*, 84.

³¹ Dixon, *Democratic Representation*, 272.

³² Nicholas O. Stephanopolous, “Our Electoral Exceptionalism,” *University of Chicago Law Review* 80 (2013): 816.

therein with “effective representation.” Canadian electoral boundaries commissions have acted on this assumption. For many years the Nova Scotia provincial riding of Preston provided voters in an Afro-Canadian “community of interest” with a “protected seat.”³³ In 2013, Preston’s population was approximately half that of the provincial average, granting its constituents significant overrepresentation. Conversely, aggregating voters by “community of interest” has sometimes justified their *under*representation. In the federal reapportionment of 1991, the Inuit of northern Quebec successfully lobbied to be transferred from a lower-population, less-Aboriginal riding to a higher-population, more-Aboriginal riding, preferencing meaningful group-aggregation over raw numeric voting power.³⁴

A fourth dimension of representational egalitarianism is what might be called “stakeholder” equality. Stakeholder equality is premised on the common conviction that voting is a right because individuals inherently deserve a say in the laws that affect them. This was the inspiration behind such pro-democratic rallying cries as “No taxation without representation” and “Old enough to fight, old enough to vote.” But why, then, is the right to vote shared *equally*? Clearly, laws’ *effects* are not shared equally.³⁵ To suggest that where one person will be affected and another unaffected, both should have equal say, undermines the justification of the right to vote. Instead, says political scientist Ian Shapiro, “those whose basic interests are most vitally affected by a particular decision have the strongest claim to a say in its making.”³⁶ This was the logic behind the historical denial of “universal manhood suffrage,” whereby landed classes who claimed to bear the greatest burden of government decisions reserved the franchise to themselves. Today one can see less controversial applications of “stakeholder” egalitarianism. Most notable are durational and “bona fide” residency requirements, whereby an individual cannot cast a ballot in a jurisdiction where their residence has been deemed too brief or too tenuous for them to possess “stake” in election outcomes. Apportionment, too, may

³³ Jennifer Smith and Lori Turnbull, “On the Cusp of Change: The Nova Scotia House of Assembly,” *Canadian Parliamentary Review* 31, no. 2 (2008): 15.

³⁴ Courtney, *Commissioned Ridings*, 128.

³⁵ Robert E. Goodin, “Enfranchising All Affected Interests, and its Alternatives,” *Philosophy & Public Affairs* 35, no. 1 (2007), 48.

³⁶ Ian Shapiro, *Democratic Justice* (New Haven: Yale University Press, 1999), 37.

be conducted with an eye toward “stakeholder” egalitarianism. Where district sizes are based on equal populations not of “persons” but of citizens, or registered voters, or even *active* voters,³⁷ some might argue that “stakeholder” egalitarianism is enhanced, as qualifying to be a citizen, or better yet a voter, or even better an *engaged* voter, can be read as a proxy for “stake.”³⁸ This was indeed the theory used by Hawaii when, to prevent the voting power of “stakeholders” on Oahu from being improperly amplified by the island’s large transient military population, the state based apportionment not on population but on registered voters.³⁹ In 1966, in *Burns v. Richardson*, the U.S. Supreme Court upheld Hawaii’s decision. In doing so, the high court affirmed, in effect, that where a jurisdiction contains many transients, and also a distinctly non-transient population, apportioning voting power to both aggregations equally will abuse the “stakeholder” equality of the latter, invidiously harming those with a greater stake and arguably perverting the very purpose of the right to vote.

For the purpose of this thesis, it is suggested that the importance of “stakeholder” egalitarianism is even further amplified where transients and non-transients are starkly divided; where for non-transients the jurisdiction in which they seek influence is their ancestral homeland; where transients are clearly exogenous and enjoy a “right of exit”⁴⁰ to various other liberal-democratic sub-units in the state; where the government is nascent and at an evolutionary crux point; and where the decisions “at stake” involve not mere day-to-day legislative matters but

³⁷ This is, uniquely, the practice in Belarus, where apportionment is based on the voter turnout in the previous election. For more see Lisa Handley *et al.*, “Delimitation Equity Project: Resource Guide,” International Foundation for Electoral Systems (2006), 28, http://www.ifes.org/~media/Files/Publications/ManualHandbook/2006/292/Delimitations_Manual_full.pdf (accessed March 6, 2015).

³⁸ Ronald Keith Gaddie, Justin J. Wert and Charles S. Bullock III, “Seats, Votes, Citizens and the One-Person, One-Vote Problem,” *Stanford Law and Policy Review* 22 no. 2 (2012), 433.

³⁹ Kent D. Krabill and Jeremy A. Fielding, “No More Weighting: One Persons, One Vote Means One Person, One Vote,” *Texas Review of Law and Politics* 16 No. 2 (2012), 280.

⁴⁰ Helder de Schutter praises federalism as the most “fair” governmental arrangement in part because the presence of multiple jurisdictions in a single state provides residents who feel oppressed under the asymmetric laws of one jurisdiction with the “right of exit” into some other, more symmetric jurisdictions. See de Schutter, “Federalism as Fairness,” *Journal of Political Philosophy* 19, no. 2 (2011).

foundational, long-term constitutional questions.⁴¹ (Also for the purpose of this thesis, it is noteworthy that in voting-fraud parlance, the act of improperly skewing an election outcome by importing non-residents to cast ballots is called “colonization.”⁴²)

A fifth dimension of representational egalitarianism is partisan equality. In most liberal democracies, voters organize to achieve political ends through political parties. Voters’ equality may thus be abridged through unfair weighting of their partisan interests. Unfair weighting is, infamously, the aim of partisan gerrymandering. Even where all districts are perfectly equipopulous, boundaries may be configured to exaggerate the power of one party vis-à-vis others.⁴³ In the United States, apportionment is felt by some to be at a crisis point, with party operatives bluntly stating that artful boundary-rigging has “basically do[ne] away with the need for elections.”⁴⁴ Yet American judges have largely declined to intercede, citing an absence of standards by which to police the practice.⁴⁵ In Canada, the situation is different. Independent electoral boundaries commissions now apportion Parliament and provincial and territorial assemblies. Even in jurisdictions where legislators may override commissions’ decisions, they seldom do.⁴⁶ As will be seen, the NWT reapportionment in 1998-99 was a rare exception.

⁴¹ The concept of stakeholder egalitarianism is captured in a statement issued by the NWT’s Akaitcho First Nation when it refused to participate in a 1995 conference aimed at designing a territorial constitution: “We will not condone persons with no interest in our lands to dictate our future. For instance, the City of Yellowknife has been assigned 12 delegates for this conference, as opposed to the seven delegates assigned to the [Akaitcho], the rightful and legitimate government of these lands.” See Constitutional Development Steering Committee, *Working Toward Consensus: Conference Report, First Constitutional Conference, Western NWT* (Yellowknife: Constitutional Development Steering Committee, 1995), 12.

⁴² John A. MacLeod and Merle F. Wilberding, “State Voting Residency Requirements and Civil Rights,” *George Washington Law Review* 38, no. 1 (1969), 94.

⁴³ Grofman, “Criteria for Districting, 90.

⁴⁴ Andrew Gumbel, *Steal This Vote: Dirty Elections and the Rotten History of Democracy in America* (New York: Nation Books, 2005), 44.

⁴⁵ *New York Times*, “Democracy Takes a Hit,” April 29, 2004, <http://www.nytimes.com/2004/04/29/opinion/democracy-takes-a-hit.html> (accessed Feb. 8, 2015).

⁴⁶ Courtney, *Commissioned Ridings*, 116. Legislatures can, however, constrain commissions’ decisions in various ways, including by fixing the number of seats in the assembly or by requiring that commissions take into account considerations ranging from the commonplace, such as “geography,” to the unusual, such as *Inuit Qaujimagatuqangit* – Inuit traditional knowledge.

A final dimension of representational egalitarianism may be called “voting system” equality. According to Dixon, the purpose of government is to establish a set of power relationships “where a part may conclude the whole.”⁴⁷ This poses perhaps the most intractable problem for egalitarian representation. If part of the people may make decisions for the whole, what part? A plurality? Majority? Supermajority? Different political systems provide different answers, some more egalitarian than others. In a three-way race for a single-member district decided by winner-take-all voting, a bare plurality of voters may choose for everyone in the district who the district’s representative will be. If the same occurs in a majority of other districts, a party with comparatively little popular support can dominate the legislature outright. As Dixon observes, these sorts of “majority-exaggerating” effects at the district level, and “pyramiding” effects at the legislative level, overrepresent the interests of some voters while all but silencing others. He deems this an especially insidious form of malapportionment,⁴⁸ stating, “A mathematically equal vote which is politically worthless because of . . . winner-take-all districting is as deceiving as ‘emperor’s clothes.’”⁴⁹

4.2.3 The third axis: universalism

Questions such as those discussed above, concerning whether and how to respect the liberal principles of group-blindness and egalitarianism in the apportionment of representation, may arise in unitary as well as federal states and in mononational as well as multinational states. However, it is essential in this thesis to examine an additional dimension of representation applicable only to federal, multinational or other “divided” states. This dimension gauges whether representation is apportioned to voters as members of a unified demos or, if not, in what manner representation is apportioned to distinct, non-universal polities.

As discussed previously, in non-universal states, internal polities such as national minorities may demand, and be rightfully owed, “external protections.”

⁴⁷ Dixon, *Democratic Representation*, 38.

⁴⁸ *Ibid.*, 17.

⁴⁹ *Ibid.*, 22.

Where “external protections” include consociational power-sharing, either direct or indirect, then shares of political power, usually in the form of representation, must be apportioned to each consociating polity. Uniquely in this sort of apportionment, individual voters are not aggregated into groups for the purpose of facilitating individual voting rights. Rather, representation is apportioned to groups *as groups*, much in the same way as sovereign states are apportioned one seat each at the United Nations. Non-universal apportionment not only compromises group-blindness but also abridges individual voter parity. However, these violations of group-blindness and egalitarianism, unlike those that occur in a unified polity, are an epiphenomenal consequence of non-universalism.

In North America the most familiar example of multi-demos apportionment is the representational scheme of the U.S. Senate, in which every state, no matter its population, is guaranteed two senators.⁵⁰ This is deeply inegalitarian, providing voters in the smallest state, Wyoming, with approximately fifty times the voting “power” as those in the largest state, California. This inequality is the product of the underlying non-universalism of senatorial representation. It violates liberal universalism because it accords primacy to the individual states as “historic associations” predating, and “cultural forms” distinct from, the unified American demos. Chief Justice Warren recognized this undergirding non-universalism when, referencing senatorial apportionment in *Reynolds v. Sims*, he noted that “at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held

⁵⁰ The Senate is not the only example of high-level non-universalism in the U.S. political system. American presidential elections are notoriously non-universal, as the Electoral College accords disproportionate voting power to electors in less-populous states. Clearly non-universal is the lack of substantive Congressional representation for Washington D.C. and all U.S. territories and possessions. And even U.S. House of Representative districts are skewed by non-universalism: Though the districts within each state must be equipopulous, the size of districts *between* states varies dramatically, since each state must have at least one representative and since no district may cross state lines. As a consequence, the least populous House districts, those of Rhode Island, currently have barely half the voters of the most populous district, Montana. And of course, these examples of American non-universalism pale in comparison to the non-universalism of the country’s past, when, for instance, slave states were permitted to apportion blacks as three-fifths of a person, slave and free states were admitted to the union in consociational pairs, two-by-two, and various peoples, ranging from the aforementioned blacks to Native Americans to Asians were denied the right to vote on the grounds that they could not be citizens.

powers to the single national government.”⁵¹ For the states, this arrangement was a precondition of the American founding. Thus, despite the U.S.’s otherwise strict adherence to “one person, one vote,” senatorial apportionment is constitutionally protected.

Similarly anti-universal apportionment requirements are built into the fabric of federal Canada, where the “Senate floor” and “grandfather” clauses guarantee Parliamentary overrepresentation in varying degrees to certain provinces. According to political scientist Russell Alan Williams, “right from Confederation, a norm emerged that the allocation of seats in Parliament was to provinces, rather than to Canadian voters.”⁵² Anti-universal apportionment is further seen in the consociational regimes of places ranging from Northern Ireland⁵³ to Bosnia-Herzegovina⁵⁴ to Lebanon,⁵⁵ and to certain “ethno-republics” in Russia, which, to reverse Soviet-era “Russification,” have pressed for republic elections to be open only to members of the local ethnicity.⁵⁶

In multination states composed of settlers and Indigenous peoples, non-universal representational protections are similarly widespread, either shielding Native national minorities from political domination by *staatsvolk* or, at the very least, guaranteeing them power disproportionate to their numbers. Indigenous Fijians,⁵⁷ New Zealand Maori⁵⁸ and various constitutionally recognized “scheduled tribes” in India⁵⁹ enjoy such guarantees. Even in the U.S. territory of American Samoa, the upper house of the legislature is reserved for tribally appointed Indigenous chiefs – an arrangement which, though illiberal, has yet to be struck

⁵¹ *Reynolds v. Sims*, 377 U.S. 533 (1964), 377.

⁵² Russell Alan Williams, “Canada’s System of Representation in Crisis: The ‘279 Formula’ and Federal Electoral Redistributions,” *The American Review of Canadian Studies* Spring (2005): 103.

⁵³ Courtney, *Commissioned Ridings*, 11.

⁵⁴ Sujit Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008), 34.

⁵⁵ Stephanopolous, “Our Electoral Exceptionalism,” 838.

⁵⁶ Graham Smith, “Russia, Ethnoregionalism, and the Politics of Federation,” *Ethnic and Racial Studies* 19, no. 2 (1996): 405.

⁵⁷ Yash Pal Ghai, “Constitutional Asymmetries: Communal Representation, Federalism and Cultural Autonomy,” in *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), 150.

⁵⁸ Stephanopolous, “Our Electoral Exceptionalism,” 838.

⁵⁹ Louise Tillin, “United in Diversity? Asymmetry in Indian Federalism,” *Publius: The Journal of Federalism* 37, no. 1 (2007).

down.⁶⁰ However, in Canada, the integration of such non-universal Indigenous protections into apportionment has been fraught with controversy.

As noted earlier, Indigenous peoples were autonomous and self-governing before being non-consensually incorporated into Canada. Various treaties and declarations acknowledge their past and present non-universal status and provide them with “external protections.” The Royal Proclamation of 1763 promised protection of Aboriginal peoples and preservation of their unceded lands. Section 91(24) of the *Constitution Act, 1867* transferred responsibility for Aboriginal peoples from the British monarch to the Canadian federal government.⁶¹ The “numbered treaties,” struck between 1871 and 1921, promised to Aboriginals such benefits as reserve lands and annuities in exchange for either the surrender of their historic territories (in the federal government’s view) or peace and friendship (according to Aboriginal signatories).⁶² As early as the 1950s, Canadian courts ruled that the federal government has a unique fiduciary responsibility toward Aboriginal peoples.⁶³ Then, in the *Constitution Act, 1982*, and in the accompanying Charter of Rights and Freedoms, two key Indigenous “external protection” rights were recognized. Section 25 of the Charter, anticipating clashes between individual rights and collective Indigenous rights, shielded the latter from the former. Called the non-derogation clause, section 25 states that other Charter rights “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.” Meanwhile, Section 35 of the *Constitution Act, 1982* was eventually interpreted to affirm a positive right to Indigenous self-government.

Section 35 states that Aboriginal Canadians possess unspecified “existing rights.” In 1992, the Charlottetown Accord acknowledged an Aboriginal “inherent

⁶⁰ Michael W. Weaver, “The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa,” *Pacific Rim Law and Policy Journal* 17, no. 2 (2008): 325.

⁶¹ Royal Commission on Electoral Reform, *Reforming Electoral Democracy*, 180.

⁶² For example, the Akaitcho First Nation describes Treaty 8 as “an international peace treaty negotiated between two sovereign nations.” For more see Constitutional Development Steering Committee, *Working Toward Consensus: Conference Report, First Constitutional Conference, Western NWT* (Yellowknife: Constitutional Development Steering Committee, 1995), 12.

⁶³ *St. Ann’s Island Shooting & Fishing Club Ltd. v. R.*, [1950] S.C.R. 211; [1952] 2 D.L.R. 225, at 232.

right of self-government” (though the accord failed after being put to a referendum). Then, in 1995, the government of Prime Minister Jean Chrétien announced the “Inherent Right Policy.” The policy acknowledged that section 35 provides an Indigenous right to self-government and proposed how this right might be implemented in different parts of Canada. It affirmed the desire of many First Nations to establish “their own government on their land base.”⁶⁴ Such ethno-exclusive Aboriginal self-governments would relate to Ottawa and the provinces in a relationship that has been termed “treaty federalism.”⁶⁵ In the North, however, the policy urged that self-government be expressed through the public territorial governments, in which Aboriginals would be accorded “specific guarantees.” These guarantees can be understood as “external protections.” As Abele observes, this option has so far been utilized just once, through the creation of the territory of Nunavut.⁶⁶ There, the seminal “external protection” is the territorial boundary, drawn to accord local Inuit with a supermajority, thus all but ensuring their self-determination and limited autonomy.

4.3 Adjudicating apportionment in Canada: first- and second-axis questions

When according representation in a rights-based democracy, may liberal principles be compromised? If yes, in what ways, and to what degree? As noted previously, in Canada apportionment decisions were for decades left largely to legislators and boundaries commissioners. But with the adoption of the Charter, apportionment became judicable.

In Canada, first-axis apportionment questions, relating to liberal individualism, have provoked little controversy. May (or must) apportionment depart from group-blindness, and in what way? As representatives in Canada are

⁶⁴ Government of Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (Ottawa: Government of Canada, 1995), Part II.

⁶⁵ Graham White, “Treaty Federalism in Northern Canada: Aboriginal-Government Land Claims Boards,” *Publius: The Journal of Federalism* 32, no. 3 (2002).

⁶⁶ Frances Abele, “Aboriginal Peoples in Northern Canada: The Peaceful Revolution Meets Global Capital,” in *The Canadian North: Embracing Change*, ed. Centre for Research and Information on Canada (Montreal: Centre for Research and Information on Canada, 2002), 574.

elected from contiguous geographical districts, voters must be aggregated by proximity. Moreover, in affirming such districting principles as “community of interest” and “minority representation,”⁶⁷ Canadian courts have confirmed that the Charter rejects “blindness” in favor of other, non-geographic groupings. The limits of such aggregation have barely been tested. For instance, while it appears that districts based on racial, religious and linguistic minority status are permissible,⁶⁸ only a few cases – including *Raïche v. Canada*, to be discussed in greater detail below – have explored the degree to which such aggregation may, or indeed must, compromise other districting principles.

Second-axis questions, meanwhile, have in Canada been legally contentious. As noted above, such questions relate to liberal egalitarianism: May an apportionment scheme treat voters unequally? Prior to 1982, departure from formal egalitarianism was sometimes considerable, with rural ridings commonly overrepresented vis-à-vis urban ones. Adoption of the Charter, however, resulted in a number of malapportionment challenges, including the aforementioned climactic 1991 *Carter* decision. *Carter* saw the Supreme Court examine an earlier ruling in which the Saskatchewan Court of Appeals had invalidated a provincial apportionment scheme for departing too far from parity.⁶⁹ Ruling for the majority, Justice McLachlin disagreed. She insisted that the Charter be read in a “broad and purposive way, having regard to historical and social context.” Such a reading, she argued, showed that the absolutist standard of “one person, one vote” was neither a Canadian tradition nor the intent of the drafters of section 3. Instead, she declared that the right to vote guarantees “not equality of voting power per se, but the right to ‘effective representation.’” While “relative parity of voting power” is the principal requirement of effective representation, deviations from parity are permissible,

⁶⁷ Courtney, *Commissioned Ridings*, 159.

⁶⁸ *Ibid.*, 168.

⁶⁹ Robert G. Richards and Thomas Irvine, “Reference re Provincial Electoral Boundaries: An Analysis,” in *Drawing Boundaries: Legislatures, Courts and Electoral Values*, ed. John. C. Courtney *et al.* (Saskatoon: Fifth House, 1992), 52. According to Richards and Irvine, interested parties in the Northwest Territories waded into *Carter* on opposite sides of the case. While the territorial justice minister participated as an intervenor to press for the reversal of the lower court’s decision, a group of concerned NWT citizens made the contrary argument, acting as intervenors in support of one-person, one-vote.

even essential, if they provably contribute to the concept she had established in *Dixon* – that of “better government.”⁷⁰ McLachlin emphasized that “effective representation” must take into account not just formal but also substantive equality, and, as noted above, must consider the “effective representation” needs of various sorts of voter aggregations. Further, given the light touch required to discern if representation will indeed be “effective,” she urged judges to show deference toward the decisions of electoral-district mapmakers “unless it appears that reasonable persons applying appropriate principles . . . could not have set the electoral boundaries as they exist.”

The *Carter* ruling had multiple ramifications. On one hand, it indicated that the apportionment standard of “one person, one vote,” preeminent in the U.S., would in Canada take a back seat to the more nuanced principle of effective representation. On the other hand, as the first Supreme Court ruling to address apportionment, *Carter* announced that arbitrary or egregious departures from parity would no longer be tolerated. Finally, by refusing to provide a quantitative pan-Canadian guideline for permissible deviation, and insisting that the Charter be read with an eye toward “historical and social context,” *Carter* indicated that each case must be adjudicated qualitatively, as shaped by the circumstances of the jurisdiction in question. In essence, the court held that an electoral-boundary scheme providing “effective representation” in one place might not do so in another.

As a consequence of *Carter*, the balance between meaningful aggregation and formal equality varies by jurisdiction. Still, subsequent lower-court decisions have affirmed (if not enshrined) a rough quantitative guideline for permissible deviation from parity: +/-25 percent.⁷¹ (Parliament and six of Canada’s ten provinces have adopted this guideline as their legal standard. Three provinces have tighter guidelines. Writing in 2001, Courtney reported that just one province, Nova Scotia, exhibited a looser, unofficial pattern of +/-33.3. Canada’s territories have not

⁷⁰ Courtney, *Commissioned Ridings*, 159.

⁷¹ In Canadian redistricting, deviations from parity are expressed in percentages by which a riding’s population exceeds, or is exceeded by, the jurisdiction’s “electoral quotient,” i.e., the average population of its ridings. Ridings with populations above quotient are said to be underrepresented; ridings below quotient are overrepresented.

legislated fixed guidelines.⁷²) Under the +/-25 percent standard, “effective representation” may be pursued through the formation of districts that vary in population as much as 25 percent above or below the provincial/territorial average. The courts have suggested that deviations beyond this limit are unconstitutional, except in the case of legal outliers.

In these “exceptional circumstances,” faced mainly by low-population islands and remote regions, deviations below -25 percent are permitted (indeed, possibly even required). Establishing uniquely lenient apportionment standards for such places is, in legal scholar Kent Roach’s memorable phrase, “as Canadian as maple syrup.”⁷³ In provincial legislation and practice, such special cases fall into two categories. In the first, exceptional districts must not drop below a specific limit of overrepresentation. For instance, the two districts comprising northern Saskatchewan are held to a *de jure* limit of -50 percent, meaning their population can be no less than half the provincial average. In the second category, exceptional districts are held to no explicit limit. Thus, in the Yukon, the tiny, remote village of Old Crow has long enjoyed its own standalone district, Vuntut. Vuntut’s permissible departure from parity is not stipulated in law.⁷⁴

However, exceptionally small districts may face a significant judicial constraint. In some provinces and territories, lower courts have permitted “exceptional” overrepresentation only when it does not cause concomitant “exceptional” underrepresentation. A district may not be unusually small if it results in others being too big. The Alberta Court of Appeals articulated this rule when, in *Reference re Order in Council O.C. 91/91 in Respect of the Electoral Boundaries Commission Act*, usually called the *Alberta Reference Case*, it drew upon *Carter* to state, “No argument for effective representation of one group legitimizes under-

⁷² Courtney, *Commissioned Ridings*, Table 6.2.

⁷³ *Ibid.*, 42.

⁷⁴ Nor is Old Crow included when calculating the Yukon’s territorial electoral quotient. This is, frankly, a bit of sleight-of-hand. Determining the electoral quotient based on just 18 ridings, rather than the Yukon’s true 19, masks underrepresentation of large electoral districts. For example, in the Yukon’s 2008 reapportionment, removal of Old Crow resulted in a stated territorial electoral quotient of 1148 (20,658 ÷ 18), whereas the true quotient was 1096 (20,828 ÷ 19). Under the former, “official” quotient, the deviation from parity of the largest proposed district, Whitehorse Centre, was +19.3 percent. Using the true quotient, however, its deviation was +24.8 percent.

representation of another group.”⁷⁵ In provinces with proportionally few “exceptional” districts, such as Saskatchewan, this balance is easy to achieve, as the departure from parity of the few small ridings will have little mathematical impact on the nearness-to-parity of the many normal-sized ridings. As will be seen, however, in jurisdictions with few overall districts and numerous candidates for “exceptional” status, the creation of “exceptional” districts becomes more problematic. If the size of such a legislature is fixed, the formation of exceptionally low-population districts will be constrained by the need to keep down the populations of larger districts. If the size of the legislature is *not* fixed, low-population districts can be accommodated by concomitantly adding seats in above-parity regions – but of course, each extra seat in above-parity regions will water down the relative exceptionalism of the low-population districts.

4.4 Adjudicating apportionment in Canada: third axis questions

As noted previously, third-axis apportionment questions arise when redistricting must grapple with conflicts between liberal universalism and illiberal non-universalism. Where representation is apportioned non-universally, the resultant districting schemes will violate both individualism and egalitarianism. In the U.S. and Canada, where non-universal apportionment is rare, it is these latter, epiphenomenal violations – of parity and group-blindness – that may be most conspicuous. To explore third-axis questions, one must not confuse them with, or adjudicate them based on, their impacts on the first and second axis. This is because the balancing act required along the third axis is distinct from the more familiar apportionment challenges involving parity versus underrepresentation and blindness versus group aggregation. Those challenges are already *premised on* universalism, as they arise from the bedrock of a single state demos. But, again, universalism is a *precondition* of the formation of a singular rights-bearing polity. Where a state does not enjoy universalism, apportionment must first reckon with divisions between demoi. Those in charge of apportionment must decide whether

⁷⁵ *Reference re Order in Council O.C. 91/91 in Respect of the Electoral Boundaries Commission Act, 1991*, 86th DLR 4th 447 (1991).

power, in the form of representation, will be shared (and to what degree), or whether it will be denied to groups *qua* groups. The appropriateness of such decisions must be adjudicated along the third axis before being considered along the second or first. As states containing Indigenous and settler populations by definition do not enjoy universalism, “Kymlicka’s dilemma” involves a contest over voting rights straddling two demoi. Apportionments involving “Kymlicka’s dilemma” cannot be properly understood from the perspective of the first two axes.

Sometimes distinguishing third-axis questions is easy, as in the aforementioned example of the U.S. Senate, where constitutionally enshrined non-universalism clearly shields inegalitarian senatorial apportionment from court challenge. Other times, however, what appears to be a third-axis case may not be. Many apportionments seek to balance power between discrete factions, but not all such factions are polities that can legitimately claim group-based voting rights. That is why, in *Reynolds v. Sims*, the U.S. Supreme Court found that inegalitarian *state* senate apportionment is unconstitutional. Chief Justice Warren, deeming analogies to the special case of the U.S. Senate “inapposite,” stated, “Political subdivisions of states – counties, cities, or whatever – never were and never have been considered as sovereign entities.”⁷⁶

Similarly, in Canada, *Carter* itself was prompted by a scheme in which the Saskatchewan legislature, by imposing “a strict quota of urban and rural ridings,” seemed to conceive of these two blocs as akin to “sovereign entities” deserving group-based representation. Justice McLachlin found the Saskatchewan scheme sufficiently egalitarian and thus, in effect, declared concerns about antecedent non-universalism to be moot. But Justice Peter Cory, delivering the court’s minority opinion, disagreed, arguing that the “weight” of Saskatchewan’s urban voters had been unnecessarily diluted due to the inappropriate non-universalism of the urban/rural quota. Stated Cory, “The province has failed to justify the need to shackle the commission with the mandatory urban-rural allocation.”⁷⁷

⁷⁶ *Reynolds v. Sims*, 377 U.S. 533 (1964), 377.

⁷⁷ *Reference re Provincial Electoral Boundaries (Saskatchewan)*.

Just as *Reynolds* and *Carter* involved first- and second-axis illiberalisms that unsuccessfully sought third-axis-based exemption, the reverse may also occur. Ostensibly first- and second-axis violations may be justified by third-axis protections. This was arguably the situation in *Raïche v. Canada*, a 2004 apportionment challenge in which Acadian voters in New Brunswick protested an apportionment plan that, to increase parity, would have moved them from a Francophone-majority district to an Anglophone one. In overturning the scheme, the Federal Court of Canada determined that the boundaries commission had erred in part by failing to fulfill requirements of the federal Official Languages Act. Those requirements, which protect language rights only of Anglophones and Francophones, are part of the non-universal fabric of Canadian consociation. *Raïche* ultimately succeeded because Francophones are not a run-of-the-mill “community of interest” whose aggregation and overrepresentation facilitate “effective representation” (per *Carter*), but rather because they are a constitutionally protected “founding peoples,” and thus a distinct polity whose right to inegalitarian overrepresentation flows from, and is shielded by, antecedent non-universalism.⁷⁸

Raïche may be seen as parallel to a similar, more overtly third-axis case, *Campbell v. British Columbia*, handed down in 2000. There, in what has been called Canada’s most significant case involving Aboriginal peoples and section 3 voting rights,⁷⁹ officials representing B.C.’s Liberal opposition had challenged the Nisga’a Treaty, a self-government agreement that had been signed between the Nisga’a First Nation, Ottawa, and B.C.’s New Democrat-controlled government. The applicants maintained that provisions of the treaty abridged Charter-protected voting rights of non-Nisga’a. The B.C. Supreme Court affirmed that this was so – but, it held that such

⁷⁸ Given the relative scarcity of post-*Carter* apportionment cases in Canada, it is noteworthy that *Raïche* was the *second* time Acadian New Brunswickers had challenged an apportionment scheme that threatened to diminish their representation in Parliament. In the mid-’90s a similar suit, again involving alleged violations of the Official Languages Act, fizzled after a local court worried that invalidating the impugned ridings would cause “electoral confusion.” For more see Courtney, *Commissioned Ridings*, 232, and Maxine Leger-Haskell, “Federal Electoral Boundary Redistribution and Official Language Minority Representation in Canada” (master’s thesis, University of Ottawa, 2009).

⁷⁹ Bradford W. Morse, “Twenty Years of Charter Protection: The Status of Aboriginal Peoples under the *Canadian Charter of Rights and Freedoms*,” *Windsor Yearbook of Access to Justice* 21 (2002), 394.

abridgement was protected under the Charter's section 25 "non-derogation clause," which guarded section 35 Indigenous rights, including self-government, from being overridden.⁸⁰ In effect, then, sections 25 and 35 provided to the Nisga'a the same "external protections" that the Official Languages Act had provided to Francophones in *Raïche* – a shield, guarding non-universal founding polities from first- and second-axis charges of voting-rights abuse.

From *Reynolds, Carter* and *Campbell*, if not *Raïche*, one can discern a general procedure courts might follow to distinguish third-axis questions from first- or second-axis ones. First, as in *Carter*, a court might determine whether first- or second-axis violations exist. If the finding is no, as the Supreme Court majority concluded in *Carter*, then the case need go no further: The scheme is constitutional. If, however, first- or second-axis violations are confirmed, then, per the minority in *Carter*, the court must determine if those violations are the epiphenomenal result of antecedent third-axis issues. If the answer to this question is no, then the case would need to be adjudicated on merely first- or second-axis bases. If, however, third-axis issues do exist – if the jurisdiction potentially comprises multiple voting-rights-bearing polities – a determination must be made as to whether these polities are constitutionally protected. Where they are not, as in the case of American counties in *Reynolds*, then the resultant first- and second-axis violations are indefensible. But where they *are* constitutionally legitimate – i.e., where non-universalism is legally protected, as in the case of the U.S. Senate – then the epiphenomenal first- or second-axis violations must presumably be allowed to stand.

I suggest that, unless a court follows the above-outlined process of investigation, it is possible that third-axis cases may be mistaken for first- or second-axis ones, leading them to be misadjudicated. Again, when an apportionment dispute involves a question of voting rights straddling two demoi, as in "Kymlicka's dilemma," attempts to resolve it from the perspective of only the first two axes will result in incoherence. It is further my contention that precisely this problem was

⁸⁰ Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People," *The Windsor Yearbook of Access to Justice* 21 (2002): 444.

encountered by the Supreme Court of the Northwest Territories when, in 1999, it adjudicated a climactic apportionment case that hinged on “Kymlicka’s dilemma.”

4.5 Summary

This chapter has demonstrated that where Kymlicka’s dilemma arises, the rights that are in conflict may relate to the apportionment of democratic representation. Conflicts involving representation may usefully be considered along three dimensions, corresponding to the three foundational liberal principles: individualism, egalitarianism, and universalism. Along the first axis, voting systems are rarely individualistic, as group-blindness is antithetical to the aggregation of voters to provide them a meaningful vote. Along the second axis, voting systems must weigh various interpretations of voter equality. These include formal equality, where voters are aggregated into districts with equal numbers, as well as substantive equality, where they enjoy equal quality of representation, and “stakeholder” equality, where the weight of their voting power is in proportion to their stake in the electoral results. Along the third axis, representation may be either universal, apportioned solely to voters as individuals, or, in a divided state, non-universal, and thus rightly apportioned first to “polities” and only secondarily to individuals. Entrenched non-universal, polity-based representation is an “external protection.” In settler-colonial states, such an external protection for Indigenous polities may be entrenched through treaties or “inherent rights.” In Canada, section 35 of the *Constitution Act, 1982* affirms such rights while section 25 “shields” those rights from “derogation.” For Francophones, the Official Languages Act protects such rights. As case law suggests, where apportionment encounters non-universal Aboriginal or Francophone voting protections, formal egalitarianism is compelled to give way. Thus, in at least certain cases where “Kymlicka’s dilemma” involves Canadian apportionment, the “constitutional quandary” has been resolved in favor of collective rights.

Chapter 5: The pre-division Northwest Territories: a background

As Kirk Cameron and Graham White stated in 1995, the Northwest Territories “stands out as the most distinctive society within Canada.”¹ This chapter provides an overview of the Northwest Territories’ history, geography, demographics and distinctive governance practices and policies, focusing on the pre-division and division-era period in the “western territory” – the current NWT. It notes that the western territory was equipopulously divided between non-Aboriginals (i.e., settlers, or *staatsvolk*) concentrated in the territorial capital of Yellowknife, and Aboriginals, who predominated throughout the rural areas. It further explores the transfer of governance from Ottawa to Yellowknife, noting that while some observers saw this as an act of decolonization, ostensibly providing the territory with home rule, others saw it as settler colonization, flooding Yellowknife with settlers sent north to manage, “swamp” and democratically dominate an Indigenous homeland. This chapter finally examines certain “consociational” features of the pre-division NWT government that distinguished it from more conventional parliamentary-style governments elsewhere in Canada.

5.1 Geography

The NWT currently encompasses 1.35 million square kilometers of land and water, an area four-fifths the size of Alaska (see Figure 1). It spans diverse landscapes: boreal forests in the south, Precambrian taiga and tundra in the east, the Mackenzie River and Mackenzie Mountains in the west, and the treeless Arctic coast and islands in the north.² Just thirty-three communities lie scattered through these regions. Of these, barely half are accessible by road today; even fewer were road-accessible in the decades before division. To drive from road-accessible communities of the southern NWT to those of the Mackenzie Delta requires a detour through British Columbia and the Yukon, an excursion of several days.

¹ Kirk Cameron and Graham White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: The Institute for Research on Public Policy, 1995), 44.

² Gurston Dacks, *A Choice of Futures: Politics in the Canadian North* (Toronto: Methuen, 1981), 10.

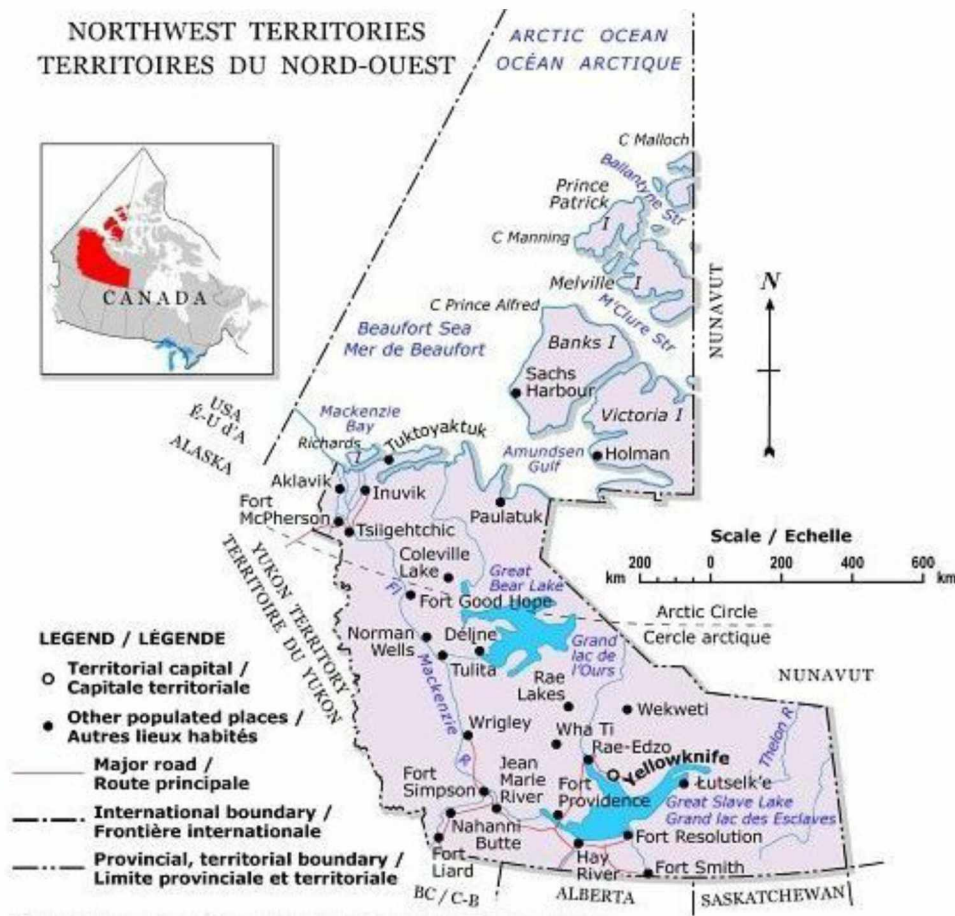


Figure 1: NWT geography (post-Nunavut-division)³

5.2 History

Indigenous peoples have occupied the NWT for perhaps 12,000 years.⁴ In the seventeenth and eighteenth centuries, the British Crown incorporated much of their homeland into the Hudson's Bay Company's vast fur-trading empire of Rupert's Land and The North-Western Territory. Soon after the birth of Canada in 1867, these regions became the Northwest Territories, which at the time sprawled over

³ Government of Canada, Natural Resources Canada, "The Atlas of Canada," <http://atlas.nrcan.gc.ca/site/english/maps/reference/index.html#provincial-and-territorial> (accessed March 25, 2015).

⁴ Gurston Dacks, "Canadian Government and Aboriginal Peoples: The Northwest Territories: Paper prepared for the Royal Commission on Aboriginal Peoples," *RCAP Notes* (Ottawa: Royal Commission on Aboriginal Peoples, 1995), 6.

most of the country. Iteratively this jurisdiction lost turf, leaving the modern NWT a rump state – “Canada’s leftovers.”⁵

In 1898, the Klondike gold rush led to the carving off of the Yukon Territory. In 1905, Alberta and Saskatchewan separated, becoming provinces. In 1912, Quebec, Ontario and Manitoba expanded northward, taking swaths of the NWT for themselves. A Northern vastness remained, thinly populated by largely nomadic Indigenous peoples. Administration defaulted to an Ottawa-based commissioner and a council of federal civil servants. Their management of the NWT was alternatively exploitative, custodial and inert. Influxes of gold- and then petroleum-seekers led to the signing of Treaties 8 and 11, which First Nations saw as peace treaties but which Ottawa considered cessions of Native land and sovereignty. At the same time, large areas of the North were declared off-limits to *staatsvolk* use. Between 1926 and 1946, in most of what is now Nunavut, non-Indigenous people were banned from hunting, trapping or pursuing other commercial activities.⁶

At first, modern government services were rare. In 1920, the entire NWT budget was just \$7,000.⁷ Change came after World War Two, when Indigenous Northerners experienced what political scientist Frances Abele calls “a quantum increase in the level of state intervention in their lives.”⁸ Suddenly, federal administrators awoke to the existence of the North, providing healthcare, building schools and requiring school-attendance, constructing social housing, introducing wildlife-management rules, and imposing Canadian-style policing and justice.

Abele makes note of “the lack of democracy in the introduction of all of these changes.”⁹ Politically, the NWT remained an internal colony, with no elected

⁵ Kenneth Coates and Judith Powell, *The Modern North: People, Politics and the Rejection of Colonialism* (Toronto: James Lorimer & Company, 1989), 75.

⁶ André Légaré, “Nunavut: The Construction of a Regional Collective Identity in the Canadian Arctic,” *Wicazo Sa Review* 17, no. 2 (2002), 75.

⁷ Mark Dickerson, *Whose North? Political Change, Political Development and Self-Government in the Northwest Territories* (Vancouver: UBC Press, 1992), 29.

⁸ Frances Abele, “Aboriginal Peoples in Northern Canada: The Peaceful Revolution Meets Global Capital,” in *The Canadian North: Embracing Change*, ed. Centre for Research and Information on Canada (Montreal: Centre for Research and Information on Canada, 2002), 10.

⁹ *Ibid.*, 10.

government.¹⁰ Residents had little say over territorial affairs. First Nations and Inuit people did not receive the right to vote in Parliamentary elections until 1960 and 1966, respectively.¹¹ The first territorial election was held in 1951, for three of the eight members of the otherwise-appointed territorial council, still based in Ottawa. Though this election was ostensibly open to Indigenous voters, electoral districts were created only in the less-Indigenous western NWT. No Natives stood for office.

In 1967, ostensibly as a move to “decolonize” the NWT by providing it with home rule, the federal Department of Indian and Northern Affairs relocated the territorial administration to Yellowknife. In that year, for the first time, residents elected a majority of the territorial council members – seven of twelve. In 1975 the council, now calling itself a legislature, became fully elected. In 1986 it assumed the final remaining duties of the federal commissioner.¹² The federal government increasingly devolved responsibilities to the territory: over education in the 1970s, transportation in 1986, forestry in 1987, and health-care services in 1988. After division, in 2014, responsibility over territorially owned lands and non-renewable resources was devolved (though Ottawa continues to own “Crown” land). Even now, unlike in Canada’s provinces, the NWT’s lawmaking powers are not constitutionally entrenched, meaning Parliament may override territorial laws.¹³ A final redrawing of the NWT’s map took place in 1999 when, following a long-anticipated Native-claims agreement, the Inuit of the Eastern Arctic formed the separate territory of Nunavut. As can be seen, the NWT’s evolution from “internal colony” to full-fledged federal subunit was slow, iterative and still remains incomplete.

¹⁰ The Yukon, while also a territory, had long enjoyed significantly more local autonomy than the NWT. The Yukon’s legislative branch, the territorial council, became fully elected in 1909 and began wielding considerable executive influence over the federally appointed commissioner as early as the 1950s. It achieved “responsible government” in 1979. For more see Michael Cameron and Kirk Cameron, “The Yukon Legislative Assembly: Similar in Form, Different in Style and Function,” Canadian Study of Parliament Group (2014), <http://www.studyparliament.ca/English/pdf/Yukon-e.pdf> (accessed March 20, 2015).

¹¹ Dickerson, *Whose North?*, 70.

¹² Government of the Northwest Territories, *Aboriginal Self-Government in the Northwest Territories, Supplementary Booklet 2: The Constitutional Development of the Northwest Territories* (Yellowknife: Government of the Northwest Territories, 1999).

¹³ *Ibid.*, 6.

5.3 Demographics

As of 1996 (the last year in which a Canadian federal census was conducted prior to Nunavut's separation), there lived only about 40,000 people in the region that currently comprises the NWT. These few people exhibited great diversity. In part because the NWT was the product of excision rather than creation, it enjoyed little demographic coherence. Gurston Dacks identified demographic schisms as the "fundamental feature of the population of the Northwest Territories."¹⁴ Cleavages existed along ethnic, regional, urban/rural and linguistic lines, often overlaying one another and thus amplifying their political significance. Consequently, the pre-division "western" NWT could be divided into two, three or four national factions, depending on one's point of view.¹⁵

As of 1996, just under half of NWT residents, 48 percent, were Indigenous. From one perspective, they formed a single ethnonational collective. Yet they were composed of either two or three smaller collectives, the Inuvialuit and the Dene/Métis. The Inuvialuit accounted for 11 percent of the total NWT population.¹⁶ The Métis accounted for nine percent. In some regions and political contexts the Métis were intermixed with the Dene, while in others they were distinct and even competed for land, resources and governance rights. The Dene formed 28 percent of the NWT population. They could be further broken down into five First Nations, the Gwich'in, Sahtu, Tłı̄chǫ, Deh Cho and Akaitcho, some of which were themselves politically and linguistically divided. Two of these First Nations, the Gwich'in and Sahtu, along with the Inuvialuit, had settled comprehensive land-claims agreements with the federal government. Four land-claims remained under negotiation: those of the Tłı̄chǫ, Deh Cho, Akaitcho and Métis, of which only that of the Tłı̄chǫ has since been signed (see Figure 2).¹⁷ (Before division, no self-government agreements had

¹⁴ Gurston Dacks, "Political Representation in the Northwest Territories," in *Representation and Electoral Systems*, eds. J. Paul Johnston and Harvey E. Pasis (Scarborough, Ontario: Prentice-Hall, 1990), 138.

¹⁵ *Ibid.*, 95.

¹⁶ Government of the Northwest Territories, *Aboriginal Self-Government in the Northwest Territories, Supplementary Booklet 4: Our Population Profile* (Yellowknife: Government of the Northwest Territories, 1999), 4.

¹⁷ Government of Canada Department of Indian and Northern Affairs, "Settled NWT Land Claims and Self-Government Agreements, 2010."

been settled; today, such agreements have been settled only with the Tłı̨chǫ and the small Sahtu community of Délı̨ne.) According to Dacks, the NWT's Indigenous peoples "lead the country on the indicators of Aboriginal cultural vigour. . . . However, they suffer from such social problems as high levels of unemployment, conflict with the law, suicide and substance abuse."¹⁸

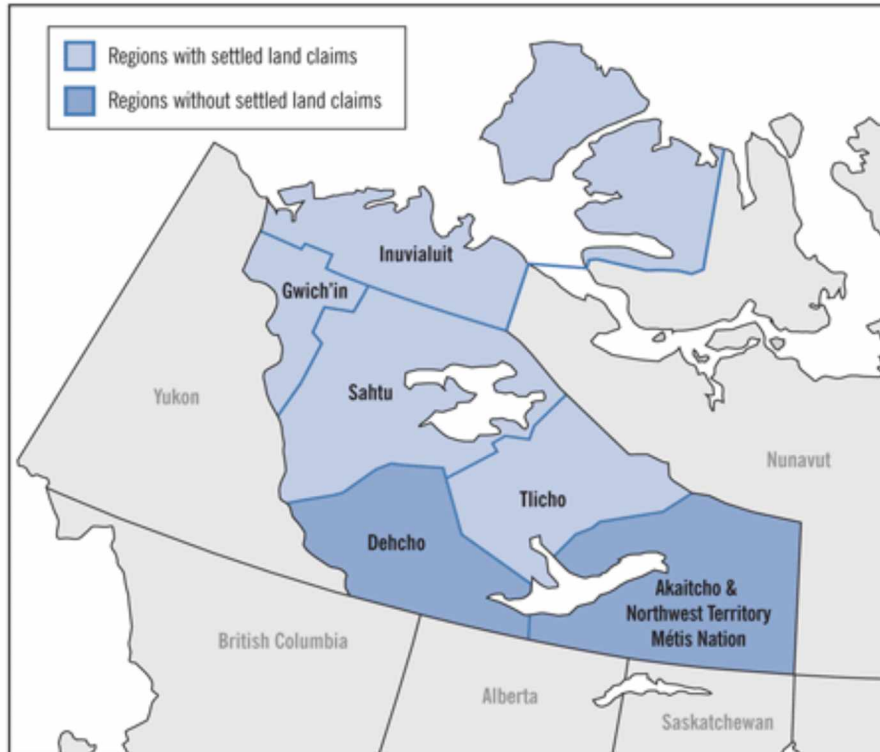


Figure 2: NWT Aboriginal groups and land-claims status (post-Nunavut-division)¹⁹

As of 1996, non-Indigenous residents comprised just over half of the NWT's population, 52 percent. Compared to the NWT's Indigenous population they were well-educated, highly employed, well-paid, healthy and long-lived.²⁰ In the words of Peter Jull, the "white community has done very well, and has the most enviable social statistics in the country."²¹ *Staatsvolk* were not linguistically, culturally or

¹⁸ Dacks, "Canadian Government and Aboriginal Peoples," ii.

¹⁹ Government of Canada, Office of the Auditor General, "2010 Spring Report of the Auditor General of Canada," http://www.oag-bvg.gc.ca/internet/English/parl_oag_201004_04_e_33717.html (accessed March 25, 2015).

²⁰ Dacks, "Canadian Government and Aboriginal Peoples," ii.

²¹ Peter Jull, *Political Development in the Northwest Territories* (Ottawa: Government of Canada

regionally divided in the same way as the NWT's Indigenous population. In general, however, they were weakly linked to the territory.

In the words of Kenneth Coates and Judith Powell, "Since the early days of the fur trade, non-Natives have, as a group, demonstrated little commitment to the North."²² Like the aforementioned soldiers stationed on Oahu, for many *staatsvolk* the NWT was a temporary home. In 1971, 93 percent of the NWT's First Nations and Inuit residents had been born in the territory, whereas for the remainder of the population that figure was 27 percent.²³ In that same year, at least 49 percent of the NWT's settlers had arrived in the past five years.²⁴ Even today just 22 percent of the NWT's non-Indigenous residents were born in the territory.²⁵ Turnover remains high: As of the 2011 federal census, 27.5 percent of the NWT's *staatsvolk* had arrived in the past five years. A similar proportion had departed.²⁶ Fully five percent were so new that they would not have met the NWT's one-year residency requirement for voting.²⁷ Predictably, *staatsvolk* transience mirrors transience in Yellowknife, which has for decades been home to most of the NWT's non-Aboriginals. In 1996, at the cusp of division, 29 percent of Yellowknifers had arrived in the NWT in the past year

Federal-Provincial Relations Office, 1978), 35.

²² Coates and Powell, *The Modern North*, 16.

²³ Government of the Northwest Territories, Legislative Assembly, Special Committee on Constitutional Development, "Residency Requirements" (Yellowknife: Government of the Northwest Territories, 1983), part II, 11. In this study, it is unclear to which of these two categories Métis were assigned.

²⁴ *Ibid.*, 10. This study divided NWT residents into the categories "English," "French" and "other." It would appear that the category "other" included not merely Aboriginals but immigrants to Canada. The cited 49-percent figure refers only to the combined "English" and "French" population, and thus excludes immigrants who were neither Anglophones nor Francophones. This figure is thus likely an underestimation of true settler in-migration.

²⁵ Kate Odziemkowska, Government of the Northwest Territories statistician, e-mail message to author, April 13, 2011.

²⁶ Viktoria Bassarguina, Government of the Northwest Territories statistician, e-mail message to author, May 8, 2014.

²⁷ A word of caution: I have compiled these statistics by adding the number of "inter-provincial" migrants (i.e., the number of people within Canada who moved into or out of the NWT) to the number of external migrants (i.e., the number of people from outside Canada who did so). It is only for the former category that Census Canada records the Indigenous/non-Indigenous breakdown. It seems safe to assume, however, that the vast majority of people moving to the NWT from foreign countries are not people Indigenous to the NWT.

compared to 12 percent of non-Yellowknifers.²⁸ After division, between 2006 and 2011, Yellowknifers, though comprising less than half of the NWT population, accounted for two-thirds of the territory's in- and out-migration, a lack of attachment to the NWT starkly at odds with the stability found in outlying Indigenous communities.

In 1996, 44 percent of NWT residents lived in Yellowknife, 29 percent in five other semi-urban regional centers (Fort Simpson, Fort Smith, Hay River, Inuvik and Norman Wells), and 27 percent in twenty-seven outlying communities.²⁹ Residential patterns divided deeply along ethnic lines, with non-Indigenous people overwhelmingly predominant in Yellowknife and Indigenous people forming a supermajority almost everywhere else. As of 1996 approximately 82 percent of the NWT's Indigenous people lived outside Yellowknife. They made up at least 90 percent of the population in all but six NWT communities, and formed approximately half the population in the five semi-urban regional centers. In Yellowknife alone, Indigenous people were a small minority: just one-fifth of the population.³⁰ It can thus be said that there were two NWTs: non-Indigenous urban Yellowknife, and the Indigenous rural territory everywhere else.

5.4 Devolution of power to Yellowknife

As has been demonstrated above, the NWT's key demographic divide lay between Yellowknife and the predominantly Indigenous remainder of the territory. Such a schism would almost invariably have presented political challenges, but Yellowknife's distinctive history exacerbated those challenges.

In the post-World War Two era, says Coates, the federal government "sent large numbers of civil servants north and their arrival recast several northern

²⁸ Government of Canada, Statistics Canada, "Electronic Area Profiles: Data Tables," <http://www12.statcan.ca/english/census96/data/profiles/Rp-eng.cfm?TABID=2&LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GK=0&GRP=1&PID=35782&PRID=0&PTYPE=3&S=0&SHOWALL=0&SUB=0&Temporal=1996&THEME=34&VID=0&VNAMEE=&VNAMEF=> (accessed April 13, 2015).

²⁹ GNWT, *Our Population Profile*, 5.

³⁰ *Ibid.*, 6.

towns.”³¹ Recast most dramatically was Yellowknife, which, as noted above, became the NWT capital in 1967. This move triggered a dramatic expansion of the territorial bureaucracy. According to Dene political scientist Glen Coulthard, “Between 1967 and 1979 . . . the GNWT [Government of the Northwest Territories] grew from seventy-five to 2,845 employees.”³² Yellowknife’s population boomed, jumping by 64 percent between 1966 and 1971.³³ In this same period the territory’s overall population grew just 21 percent. Coulthard thus concludes that bringing “home rule” to the NWT in fact substantially increased the territory’s proportion of settlers.

Both the deployment of civil servants to the NWT and the establishment of Yellowknife as the home of the devolved territorial administration might have been interpreted as establishing a “social contract,” *a la* Locke. Power had been authorized to Yellowknife generally, and to bureaucrats specifically, ostensibly to benefit Northerners. These Yellowknife bureaucrats were overwhelmingly *staatsvolk*. Even as of 2008, only about 30 percent of the NWT government’s civil servants were Indigenous, and among senior bureaucrats that number was just 15 percent.³⁴ Graham White has called this bureaucracy “the principle human face of government” in the NWT, noting that it was disproportionately powerful and observing that its values were overwhelming Euro-Canadian.³⁵

It is unsurprising, then, that as the NWT swelled with bureaucratically powerful outsiders who formed a substantial voting bloc, some Aboriginals saw this influx not as a benefit but a threat. According to Dene leaders, after 1967, “[W]e were finding ourselves to have less say in the administration and laws of our land.”³⁶ This might be perceived as an unintended consequence of devolution: Bringing

³¹ Kenneth Coates, *Canada’s Colonies: A History of the Yukon and Northwest Territories* (Toronto: James Lorimer & Company, 1985), 212.

³² Glen Coulthard, “Facing the Challenge of Freedom: Dene Nationalism and the Politics of Cultural Recognition” (master’s thesis, University of Victoria, 2003), 30.

³³ Peter Edward Ostergaard, “Quality of Life in a Northern City: A Social Geography of Yellowknife, N.W.T.” (master’s thesis, University of British Columbia, 1976), 19.

³⁴ Herb Mathisen, “Aboriginal Jobs With GNWT Flatlines,” *Northern News Services*, July 13, 2008, http://www.nnsi.com/frames/newspapers/2008-06/jun13_08aj.html (accessed April 27, 2011).

³⁵ Graham White, “Politics and Government in the Territorial North: Familiar and Exotic,” in *The Canadian North: Embracing Change*, ed. Centre for Research and Information on Canada. Montreal: Centre for Research and Information on Canada (2002), 19.

³⁶ Rene Fumoleau, *Denendeh: A Dene Celebration* (Yellowknife: Dene Nation, 1984), 19.

home rule to the NWT had incidentally created a constituency of transplants. Others found the process more nefarious. According to Coulthard:

From the standpoint of the Dene, the path chosen for northern economic and political development reflected anything but the promotion of legitimate and responsible government in the north. Instead, for them, the influx of . . . government officials and non-Native settlers that occurred after 1967 better reflected a continuation of Canada's profoundly illegitimate colonial exploitation of Denendeh's land and original inhabitants."³⁷

In a paper written for the Canadian Arctic Resources Committee, a Northern-focused social and environmental activist organization, Richard Laing and his co-authors expressed this view even more emphatically:

Thousands of civil servants and their families were stationed in a few tiny enclaves, and the fiction of the 'northerner' was created. 'All northerners are equal' was the proclamation. . . . One could claim to be a 'northerner' however recent one's residence, and the status claimed by those with no intention of staying beyond retirement or promotion to Ottawa. Moreover, the effect of the declaration was that thousands of transient bureaucrats, concentrated in a few small enclaves, assumed the right to voice their opinions about what happened in all of the Northwest Territories. . . . However absurd the 'equality' of the mythical 'northerner,' the fiction plays an important part in the colonization of the Northwest Territories. In exchange for this 'gift' of formal equality, the Native peoples are expected to pay with real inequality, the denial of their national identities, and, indeed, the denial of their Aboriginal rights.³⁸

According to this argument, having numerically "swamped" the NWT, settlers then sought to legitimize their bid for dominance by deeming themselves "Northerners" whose "stake" in territorial affairs was equal to that of Aboriginals. Critics cried foul. Political scientist Michael Asch wrote that giving NWT transients the same voting rights as locals "would create a situation unique in Canada: a province in which those persons with the least commitment to the jurisdiction and its people would have legislative control."³⁹ It is no wonder that Indigenous people viewed

³⁷ Coulthard, "Facing the Challenge of Freedom," 31.

³⁸ Richard Laing, Peter Puxley, C. Gerald Sutton, and Wilf Bean, "Political Development in the Northwest Territories," in *Northern Transitions Volume 2: Second National Workshop on People, Resources and the Environment North of 60°*, eds. Robert F. Keith and Janet B. Wright (Ottawa: Canadian Arctic Resources Committee, 1978), 319.

³⁹ Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution*, New York: Methuen (1984), 104.

Yellowknife as not merely demographically distinct from the rest of the NWT but as a sort of colonial Trojan Horse. The federal government's decision to make Yellowknife the capital of the NWT was not, in this view, an act of Northern empowerment, but the opposite: a duplicitous betrayal of Indigenous self-determination.

5.5 Consociational accommodations

As articulated previously, NWT settlers and Indigenous residents long competed to define the constitutional parameters of the territory. In the midst of this conflict, the NWT government⁴⁰ was nonetheless compelled to govern. Perhaps by default as much as by design, it adopted certain consociational practices. Various scholars⁴¹ explored these distinctive adaptations. White deemed these "more than an exotic curiosity, but . . . political responses to the unique political problems of the North."⁴² The NWT's distinctive policies and practices included the recognition of nine official Indigenous languages, an affirmative-action policy favoring Indigenous residents,⁴³ the decentralization of administration to Indigenous-dominated regions, and public government that blended Northern political culture with traditional British parliamentarianism.⁴⁴ Several elements of that blend warrant examination.

⁴⁰ In the context of the Northwest Territories, "NWT government" means different things in different contexts. Most broadly, it refers to the entire architecture of territorial public-governance, including the NWT's administrative, judicial, legislative and executive functions. In this context, "NWT government" is synonymous with the commonly used acronym "the GNWT." More narrowly, "NWT government" sometimes refers only to the NWT legislative assembly, the legislative/executive entity that, separate from the territorial bureaucracy or the judiciary, makes and executes the laws. Finally and most narrowly, "NWT government" often refers only to the assembly's premier and cabinet – the executors of governance.

⁴¹ Michael Asch, "Consociation and the Resolution of Aboriginal Political Rights: The Example of the Northwest Territories, Canada." *Culture X*, no. 1 (1990); Michael Asch and Gurston Dacks, "The Relevance of Consociation to the Western Northwest Territories," in *Partners for the Future: A Collection of Papers Related to Constitutional Development in the Western Northwest Territories*, ed. Western Constitutional Forum (Yellowknife: Government of the Northwest Territories, 1985), 39; Graham White, "Northern Distinctiveness, Representation by Population and the Charter: The Politics of Redistribution in the Northwest Territories," *Journal of Canadian Studies* 28, no. 3 (1993).

⁴² White, "Northern Distinctiveness," 28.

⁴³ Government of the Northwest Territories Department of Human Resources, "Human Resources Manual - Affirmative Action Policy," <http://www.hr.gov.nt.ca/policy/hrm/0100%20-%20Hiring%20Process/101/default.htm> (accessed April 23, 2011).

⁴⁴ Cameron and White, *Northern Governments in Transition*, 53.

The most frequently cited example of consociation in the pre-division NWT was the legislature's convention of operating by "consensus." As White explains, under consensus government there exist neither political parties nor numeric domination by a governing faction of an opposition faction.⁴⁵ Rather, by tradition, candidates run as independents, without party affiliation. Once elected, members of the legislative assembly (MLAs) decide by majority vote who among them will be the premier and the ministers in cabinet. Under consensus government, the premier and cabinet are a numeric minority vis-à-vis the "regular" (non-cabinet) MLAs. While the term "consensus" is a misnomer, as the assembly operates by majority rule and the cabinet needs the support of only a few of the regular members to pass legislation, it remains true that the NWT consensus system has typically been more collaborative than politics elsewhere in Canada.⁴⁶ Though "consensus government" was of bureaucratic rather than Aboriginal origin, Indigenous Northerners widely viewed it as preferable to southern party politics. This is at least in part because, as Dacks observes, Native governance traditions tend to be "consensual rather than adversarial."⁴⁷

Another distinctive governance convention in the pre-division NWT was regional balance in cabinet. This meant allotting specific proportions of cabinet positions to the eastern portion of the territory, dominated by Inuit, and to the western portion, home to Dene, Métis, Inuvialuit and settlers.⁴⁸ As will be shown, on the cusp of division, proposals were made to preserve this tradition by insuring that representatives of non-Yellowknife (and therefore likely Indigenous) electoral districts would numerically dominate the cabinet.

A further consociational feature of NWT governance was the traditional numeric dominance of the legislature by rural Indigenous representatives. Between 1975, when the assembly became a fully elected body, and division in 1999, the

⁴⁵ Graham White, "The Adaptation of Non-Aboriginal Institutions of Governance in the Northwest Territories," (Paper prepared for the Royal Commission on Aboriginal Peoples, 1993), 7.

⁴⁶ *Ibid.*, 8.

⁴⁷ Dacks, *A Choice of Futures*, 31.

⁴⁸ White, "Northern Distinctiveness," 16.

majority of representatives, and all but two premiers, were Indigenous.⁴⁹ This historical dominance owed mainly to the substantially greater ratio of Indigenous to non-Indigenous residents in the pre-division NWT. However, a contributing factor was the practice of overrepresenting rural Indigenous residents. Though proponents sometimes justified this practice on substantively egalitarian grounds (i.e., providing equal quality of representation to voters in remote districts), other factors were also important. White noted that Indigenous political culture puts emphasis on “cultural communities as collectivities, with the corollary that representation of cultural groups may be more important than that of individuals.”⁵⁰ This augured in favor of providing representation to Native cultural communities even in cases where their small population might not otherwise have justified it. Finally, rural overrepresentation was fueled by a desire to preserve the consociational “balance of power” between Aboriginals and settlers in the NWT. As White’s research showed in the case of the NWT’s 1989 reapportionment, overrepresentation was considered a “central element in maintaining th[e] precarious arrangement” of consociation.⁵¹ It was feared that eliminating rural overrepresentation, and thus shifting power toward urban non-Natives, might bring consociation toppling down.

Apart from the structure and function of the NWT assembly, certain policies gave the pre-division territory an arguably consociational flavor. Key among these was the federal government’s longstanding practice of fulfilling its fiduciary responsibility to the Indigenous people of the NWT by way of the territorial government. Unlike in the provinces, where many Aboriginal live on reserves which interact directly with Ottawa, in the NWT only a tiny proportion of Aboriginals live on reserves. For non-reserve NWT Aboriginals, the public government has functioned as a federal agent, with Ottawa fulfilling its financial obligation to Aboriginals through its annual operating grant to the territory.⁵² The NWT government, in turn, provided to Aboriginal residents services to which they are

⁴⁹ Abele, “Aboriginal Peoples in Northern Canada,” 10.

⁵⁰ White, “Northern Distinctiveness,” 24.

⁵¹ *Ibid.*, 16.

⁵² Dacks, “Canadian Government and Aboriginal Peoples,” 30.

entitled by historic treaties, as well as programs deemed “integral to distinct Aboriginal culture” under the federal Inherent Right Policy, including adoption and child welfare, education and housing.⁵³ (Aboriginal groups, it should be noted, did not consent to this arrangement, and some have accused the NWT government of usurping what should properly have been a role reserved to Ottawa.⁵⁴)

5.6 Summary

This chapter has demonstrated that the pre-division “western” NWT was distinctively divided – culturally, demographically and historically. The territory comprised at minimum two discrete demographic groups: highly transient settlers, mostly in Yellowknife, and Aboriginals, deeply rooted in their rural home regions. Though Yellowknife was made the territorial headquarters ostensibly to devolve power from Ottawa to the North, some Aboriginals perceived the booming new capital to be a beachhead of colonialism, through which an influx of *staatsvolk* could “swamp” and democratically dominate the territory. To reconcile the political cultures and aspirations of these two constituent groups, the NWT government developed various consociational features that distinguished it from more conventional parliamentary-style governments elsewhere in Canada. These consociational features, including Aboriginal overrepresentation both on cabinet and in the assembly as a whole, demonstrated a compromise between settler and Indigenous political modes and goals. As will be shown, however, this compromise was tenuous, with both settlers and Indigenous peoples consistently pressing for the realization of their own polity’s particular constitutional vision.

⁵³ Western NWT Aboriginal Summit, “Letter to the Honourable Jane Stewart” (March 22, 1999), 3.

⁵⁴ Aboriginal Summit, “Letter to Jane Stewart,” 3.

Chapter 6: Constitutional development in the pre-division NWT

Gurston Dacks' observation, cited previously, bears repeating: "[O]f all jurisdictions in Canada, only in the NWT does the question still remain open as to which political philosophy – liberalism based on the individual, nationalism based on ethnic identity, or consociationalism which attempts to integrate the two – will ultimately guide the political process."¹ This chapter traces the constitutional evolution of the NWT until the separation of Nunavut. It shows that Aboriginals and non-Aboriginals long pursued divergent constitutional paths for their people and for the territory as a whole, pitting them against one another in a power struggle and placing the territory in constitutional limbo. This chapter analyzes the history of that conflict, in which settlers pressed for the NWT to evolve into a liberal region-based federal subunit in the mold of Canada's eight Anglophone provinces, while Aboriginals pressed for the NWT to become, or at least exhibit qualities of, a nationalist federal subunit not unlike Quebec or Nunavut, or a consociational subunit not unlike New Brunswick. This chapter shows that each of these two competing peoples perceived that the realization of their constitutional ambitions would hinge in part on their relative political power, including their power in the NWT government – power accorded to them by the apportionment of representation in the legislative assembly. This chapter finally shows that, in the absence of a clear victory on either side, the pre-division NWT was governed through an uneasy consociational *détente*.

6.1 Settler and Indigenous visions for constitutional development

As has already been suggested, Indigenous and settler visions for the constitutional development of the NWT were long at odds. In the words of Dacks, long-term Northern *staatsvolk* displayed a "colonial political culture."² More specifically, they exhibited "settler colonialism," working to replicate their exogenous political,

¹ Gurston Dacks, "Politics on the Last Frontier: Consociationalism in the Northwest Territories," *Canadian Journal of Political Science* 19, no. 2 (1986): 354.

² Gurston Dacks, *A Choice of Futures: Politics in the Canadian North* (Toronto: Methuen, 1981), 94.

cultural and economic systems on an expropriated Indigenous land base.³ These imported *staatsvolk* cultural systems included the philosophy of liberal-universalism, according to which the NWT comprised a single polity and should feature a unitary government and a political culture in which, as Dacks explains,

homogeneity dominates difference. According to this vision, all people who have chosen to make their lives in the North are fundamentally northerners, hence should be treated uniformly in a territorial constitution, regardless of their ethnic identity. Moreover, differential rights enjoyed by different groups of northerners should be minimized because they involve potential injustice, contradict the spirit of universalism expressed by the Charter of Rights and Freedoms and are likely to provoke tensions within territorial society.⁴

As will be seen, for many years the federal government supported this view. When the NWT government was under settler control, it championed this view as well.

Indigenous inhabitants supported a very different, nationalist vision for the NWT's constitutional development.⁵ As such, says constitutional lawyer Bernard Funston, they championed "cultural, political and economic 'self-determination' . . . [which] suggests a desire to establish new or modified structures of public government, with a requisite extension of legislative power to accomplish and to maintain this restructuring."⁶ This vision challenged the legitimacy of the existing "settler colonial" NWT government and saw the rightful future of territorial governance as Indigenous-controlled, either through a nationalist public government, a constellation of "treaty-federal" Indigenous self-governments, a

³ Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 388. Asch and Dacks confirm this, stating that NWT settlers "conceived of themselves as representing . . . majority culture" and "presumed that, by and large, the future institutional development of the NWT will reflect [their] values." See Michael Asch and Gurston Dacks, "The Relevance of Consociation to the Western Northwest Territories," in *Partners for the Future: A Collection of Papers Related to Constitutional Development in the Western Northwest Territories*, ed. Western Constitutional Forum (Yellowknife: Government of the Northwest Territories, 1985), 56.

⁴ Gurston Dacks, "Canadian Government and Aboriginal Peoples: The Northwest Territories: Paper prepared for the Royal Commission on Aboriginal Peoples," *RCAP Notes* (Ottawa: Royal Commission on Aboriginal Peoples, 1995), 17.

⁵ According to Dacks, "A major concern of the Aboriginal people is validation of their belief that the different Native groups constitute peoples or nations." See Gurston Dacks, "Political Representation in the Northwest Territories," in *Representation and Electoral Systems*, eds. J. Paul Johnston and Harvey E. Pasis (Scarborough, Ontario: Prentice-Hall, 1990), 138.

⁶ Bernard W. Funston, "The Northwest Territories and its Future Constitutional and Political Development: An Examination of the Drury Report," *Polar Record* 21, no. 131 (1982): 117.

number of highly decentralized Indigenous-majority regional governments, or various combinations thereof. The ultimate goal of any of these arrangements was to establish “external protections” that guarded Indigenous rights to self-determination and autonomy, ensuring their cultural survival.⁷ They thus desired an NWT constitutional structure that blocked rather than accommodated settlers in their quest to import *staatsvolk* governance.

6.2 History of constitutional development: 1960s

As a territory rather than a province, the NWT has by definition always been a government in transition. As was noted previously, the NWT government is not constitutionally entrenched and its framework remains under development. Multinational divisions, especially between Indigenous and *staatsvolk* residents, hobbled its evolution out of “internal colony” status. Two countervailing forces characterized this evolution: The empowerment of *staatsvolk*-style public government institutions, on one hand, and the campaign for Aboriginal self-determination, on the other.⁸

During the first half of the twentieth century, when the NWT was administered remotely from Ottawa, the territory’s Indigenous population was neither enfranchised nor, likely, sufficiently politically organized to press for its constitutional interests. The NWT’s settler population, meanwhile, also remained relatively politically powerless, due in part to its small size and its transient frontier nature. This began to change in the early 1960s.

In the words of Peter Jull, in the NWT “[t]he white people are very conscious of the fact that they’re building a new society, but it isn’t new in any qualitative way. . . . For them there is no interest in new forms of organization but rather getting the

⁷ Their goal, says Canadian political scientist Peter Jull, “is ‘security.’ The Native people fear the loss of their land and way of life as has happened elsewhere in Canada, and not only wish to preserve these, but do not want to have settlers move in and dominate all their actions in their region.” See Peter Jull, *Political Development in the Northwest Territories* (Ottawa: Government of Canada Federal-Provincial Relations Office, 1978), 58.

⁸ *Friends of Democracy v. Northwest Territories (Commissioner)*, 4256 NWT SC (1999), “Amended Brief of Fact and Law of the Intervenors,” 6.

proven Canadian ones, pronto, and dominating them.”⁹ At the same time, settlers in the 1960s bristled under the authority of the federal government in Ottawa, conceiving of themselves as a people colonized from afar by out-of-touch, self-serving bureaucrats.¹⁰ Political scientist Jerald Sabin has termed this hybrid status, in which the NWT’s settlers were both colonizers and colonized, “contested colonialism.”¹¹ Settlers took advantage of both roles in their campaign to draw down power from the federal government while denying the same power to Indigenous peoples. As early as 1962, *staatsvolk* leaders, predominantly in Yellowknife, began agitating for greater territorial autonomy and a move toward province-like status.¹² They pressed for the NWT to be divided between the Inuit-dominated eastern Arctic, to be called Nunatsiaq Territory, and the more non-Indigenous west, to be called Mackenzie Territory.¹³ By separating, and thus altering the boundaries of their subunit to give it an approximate *staatsvolk* majority, these settlers sought to transform the western NWT from an internal colony into a self-governing, region-based federal subunit that would operate in accordance with Canada’s mainstream, majority-nation traditions.

In response to these demands, Prime Minister Lester Pearson established the Carrothers Commission, which in 1966 issued recommendations on NWT constitutional development. The commission’s seminal proposition, enacted the following year, was that Ottawa devolve administration of the territory to Yellowknife. But if this was a victory for the NWT’s settlers, the federal government did not concede entirely to settler demands. Out of apparent concern for balancing Indigenous and settler interests, the commission advised against splitting the territory, stating that, “Division would create a white majority in the Mackenzie, with the very great likelihood of a white government. Division could have the accidental and unintended effect of gerrymandering the Indigenous peoples of the

⁹ Jull, *Political Development*, 34.

¹⁰ *Ibid.*, 7.

¹¹ Jerald Sabin, “Contested Colonialism: Responsible Government and Political Development in Yukon,” *Canadian Journal of Political Science* 47, no. 2 (2014): 392.

¹² Dacks, *A Choice of Futures*, 102.

¹³ Mark Dickerson, *Whose North? Political Change, Political Development and Self-Government in the Northwest Territories* (Vancouver: UBC Press, 1992), 85.

north out of effective participation in territorial self-government.”¹⁴ The report thus recognized that separation would amount to “cracking” the territory’s Indigenous population, disempowering them.¹⁵ The Carrothers report did not, however, represent a victory for Native self-determination. It presumed that territorial governance would develop along the standard *staatsvolk* model, applying universally to all residents, with no accommodations for Indigenous nationalism.¹⁶ According to historian Kerry Abel, the commission “was clearly a white man’s commission appointed to investigate the white man’s grievances.”¹⁷

6.3 History of constitutional development: 1970s

In the 1970s, the power gap between Indigenous and non-Indigenous northerners began to close.¹⁸ Though settlers enjoyed enhanced autonomy after the territorial administration moved to Yellowknife, their efforts to convert the NWT into a southern-style province hit a roadblock.¹⁹ For the first time, Northern Indigenous peoples mounted a nationalist campaign, resisting settlers’ region-based federal aspirations. In the western NWT this campaign was led by the Indian Brotherhood, which soon renamed itself the Dene Nation. After the NWT Supreme Court ruled in 1973 that Treaties 8 and 11 had not legally extinguished Dene ownership of their traditional territory, and following the federal government’s release that same year of a comprehensive Aboriginal land-claims settlement policy, Dene Nation leaders

¹⁴ A.W.R. Carrothers, *Report of the Advisory Commission on Development of Government in the Northwest Territories* (Ottawa: Government of Canada, 1966), 148.

¹⁵ As Asch and Dacks observed, “It is, of course, possible to achieve democratic government through the use of a universal system and hence by the strict application of majority rule. This will likely lead ultimately to legislative control by the portion of the population that now forms (or at least may soon form) a distinct majority, the non-Aboriginals. Under these conditions, there is concern that the assimilative tendencies inherent in universalism as well as other factors may undermine the ability of the Dene/Métis and the Inuvialuit to retain and strengthen their cultural communities.” See Asch and Dacks, “The Relevance of Consociation,” 42.

¹⁶ Kirk Cameron and Graham White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: The Institute for Research on Public Policy, 1995), 49.

¹⁷ Kerry Abel, *Drum Songs: Glimpses of Dene History* (Montreal: McGill-Queen’s University Press, 1993), 244.

¹⁸ Dacks, *A Choice of Futures*, 99.

¹⁹ As Jull states, non-Natives’ “unwittingly monoethnic approach to the future . . . received a pretty devastating jolt since the Natives began speaking out [to] . . . articulate their own visions via land claims proposals.” See Jull, *Political Development*, 35.

announced their intention to file claim to more than a million square kilometers of NWT land. They also condemned the NWT's *staatsvolk*-dominated administration as, in the words of political scientist Graham White, "transitional and illegitimate"²⁰ – a false front for colonialism.²¹ Tellingly, in 1975, the same year the NWT legislative assembly became fully elected (and thus, in the view of many settlers, democratically legitimate), the Dene Nation boycotted the assembly and both of its sitting Dene members, George Barnaby and former Dene Nation grand chief James Wah-Shee, resigned.²² Indigenous groups articulated their own visions for self-determination. In a proposal that inverted the earlier "Mackenzie Territory" scenario, Eastern Arctic Inuit in 1976 demanded formation of Nunavut, a nationalist federal subunit that would be overseen by a *de facto* Inuit-dominated public government. Meanwhile, in the west, Dene and Métis pursued plans for self-rule designed to prevent swamping and domination by settlers.

In 1976, the Dene Nation issued the "Dene Declaration," demanding "independence and self-determination within the country of Canada."²³ Shortly thereafter, the Dene Nation served the federal government with a self-government proposal entitled "Agreement in Principle between the Dene Nation and Her Majesty the Queen, in Right of Canada." The proposal demanded that, to prevent Dene from being overwhelmed by *staatsvolk*, "[t]here will therefore be within Confederation, a Dene Government with jurisdiction over a geographical area and over subject matter now within the jurisdiction of either the Government of Canada or the Government of the Northwest Territories."²⁴

Staatsvolk blasted this proposal as illiberally race-based, prompting the Dene in 1977 to issue an revised plan for self-government, the so-called "Metro Proposal," urging that the NWT be split into Dene-, Inuit- and non-Indigenous-majority

²⁰ Graham White, "Northern Distinctiveness, Representation by Population and the Charter: The Politics of Redistribution in the Northwest Territories," *Journal of Canadian Studies* 28, no. 3 (1993): 14.

²¹ Dickerson, *Whose North?*, 102.

²² Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 68.

²³ Mel Watkins ed., *Dene Nation: The Colony Within* (Toronto: University of Toronto Press, 1977), 3.

²⁴ Dene Nation, *Agreement in Principle Between the Dene Nation and Her Majesty the Queen in Right of Canada* (Yellowknife: Dene Nation, 1976), 3.

territories. According to this proposal, each jurisdiction would be ostensibly race-neutral, providing self-determination and *de facto* autonomy to each ethnic group indirectly, as each group would have a territory in which they were numerically preponderant.²⁵

When federal and territorial officials rejected the Metro Proposal, the Dene and Métis in 1981 jointly advanced the plan “Public Government for the People of the North.” It proposed transforming the western NWT into an Indigenous-nationalist territory – a “province-like” jurisdiction called “Denendeh”²⁶ incorporating both Indigenous peoples and settlers. Though the Denendeh government would ostensibly be public, it would depart radically from the Anglo-Canadian norm. Political decisions would be made by consensus “rather than by a small cabinet representing a political party with a majority in the legislative body.”²⁷ Major decisions would be made by public referenda. The assembly (which would notably be called the “national assembly,” *a la* Quebec) would have a minimum of 30 percent Dene seats. This body would be backstopped by a fully Indigenous senate, empowered to veto any law that “adversely affects Aboriginal rights,” sending it back to the “national assembly” for revision.²⁸ A “Charter of Founding Principles” would reflect Indigenous values and provide guidance to the government and its bureaucracy. Finally, all voters would have to meet a ten-year residency

²⁵ Doug McArthur, “The Changing Architecture of Governance in Yukon and the Northwest Territories,” in *Northern Exposure Volume 4: Peoples, Powers and Prospects in Canada’s North*, eds. Frances Abele, Thomas J. Courchene, F. Leslie Seidle, and France St-Hilaire (Montreal: Institute for Research on Public Policy, 2009), 200.

²⁶ Bernard W. Funston, “The Northwest Territories and its Future Constitutional and Political Development: An Examination of the Drury Report,” *Polar Record* 21, no. 131 (1982): 124.

²⁷ *Ibid.*, 124.

²⁸ Dene Nation, “Public Government for the People of the North” (Yellowknife: The Dene and Métis Association of the Northwest Territories, 1982), 17.

requirement to vote in Denendeh elections,²⁹ effectively barring non-stakeholding transient *staatsvolk* from the voter rolls.

As with the Dene Declaration, *Staatsvolk* reacted to these subsequent proposals with outrage.³⁰ Feeling settler rights and interests threatened,³¹ the non-Indigenous-dominated³² NWT legislative assembly went on the attack. In 1977 it produced an incendiary pamphlet entitled “You’ve Heard From the Radical Few About Canada’s North . . . Now Hear From the Moderate Many,” decrying the Dene Nation’s views as “abhorrent,” un-Canadian and akin to apartheid.³³ In a related statement, the assembly scornfully suggested the Dene Nation “be renamed the Radical Left.”³⁴ It called upon the federal government to insure that “the settlement of Native claims . . . shall not erode any constitutional authority of the Government of the Northwest Territories.”³⁵

Then, in a more measured document entitled “Priorities for the North,” the assembly rejected calls to alter the boundaries of the western NWT, maintaining that “the ‘Native state’ concept is, and always will be, totally unacceptable to the

²⁹ Noted Dacks, “This requirement would certainly enable the Aboriginal people to dominate the system of representation, but would certainly be judged unconstitutional for unjustifiably limiting the right to vote guaranteed in the Charter of Rights and Freedoms. It has been suggested that three years would be the longest residence requirement the courts would accept, with two years more likely to be the maximum acceptable. Extending the residence requirement by an extra year would enhance the representation of the Aboriginal population, but it would not guarantee its future domination over the system of representation.” See Dacks, “Political Representation,” 143. Notably, in the 1982 plebiscite on territorial division, voters had to meet a three-year eligibility requirement. See Kenneth Coates and Judith Powell, *The Modern North: People, Politics and the Rejection of Colonialism* (Toronto: James Lorimer & Company, 1989), 76.

³⁰ Coulthard, *Red Skin, White Masks*, 66.

³¹ In Dacks’ understated assessment, settlers felt “some anxieties about how they would fair at the hands of governments controlled by well organized and politically self-conscious Native people.” See Dacks, *A Choice of Futures*, 68.

³² Nominally, even after Wah-Shee and Barnaby’s resignations, the 1975-79 NWT legislative assembly retained an Indigenous majority: six Inuit, six whites and one Métis. However, perhaps due to regional and inter-ethnic divisions, or due to the ideologies of certain Aboriginal MLAs, or because the head of the government remained the non-Aboriginal, federally appointed commissioner, Dacks confirms that *staatsvolk* sympathies nonetheless dominated the body.

³³ Government of the Northwest Territories Legislative Assembly, “You’ve Heard from the Radical Few . . . Now Hear from the Moderate Many” (Yellowknife: Government of the Northwest Territories, 1977), 6.

³⁴ Coates and Powell, *The Modern North*, 112.

³⁵ Dacks, *A Choice of Futures*, 69.

people of the Northwest Territories”³⁶ as it is “foreign to the Canadian political tradition”³⁷ – that is to say, contrary to liberal universalism.³⁸ Legislators specifically referenced both mobility and voting, the two rights at play in “Kymlicka’s dilemma”: “There can be no institution of government in Canada which denies minorities that freedom of movement within and without the Territories which Canadians enjoy in other parts of the country. Nor can any person living in Canada be denied the right to participate in local political institutions in his country, having fulfilled a reasonable residency requirement in his region.”³⁹ In short, settlers viewed Indigenous nationalist demands for adjustments to the boundaries and/or powers of the NWT as affronts to liberally sacrosanct mobility and voting rights. They insisted those rights be protected.⁴⁰

The government of the Northwest Territories did not merely appeal to the federal government to rebuff Indigenous nationalism, but moved to intercede directly, by inserting itself into claims talks between Aboriginal groups and Ottawa. According to Dacks, the NWT government sought “full participation in the negotiations and a veto power over the outcome.”⁴¹ The NWT government insisted that Native claims be treated as real-estate transactions, with no political component. Unsurprisingly, Natives groups opposed the NWT’s participation in claims negotiations, seeing the settler-controlled territorial government as not merely resistant to, but in direct competition with, Aboriginal interests. In 1979, for example, Inuit leaders passed a unanimous resolution calling on the federal government to bar the NWT government from negotiations over the formation of

³⁶ Government of the Northwest Territories Legislative Assembly, “Priorities for the North,” (Yellowknife: Government of the Northwest Territories, 1977), ii.

³⁷ *Ibid.*, 1.

³⁸ Coulthard, *Red Skin, White Masks*, 70.

³⁹ GNWT Legislative Assembly, “Priorities for the North,” ii.

⁴⁰ According to Jull, NWT settlers “saw their deep-rooted liberalism menaced by apparent racism and rejection of the individualist values of the English and French Revolutions; they began to insist on the clear consummation of the political values they felt comfortable with, but which appeared to the Native majority as a recipe for their own destruction.” See Jull, *Political Development*, 5.

⁴¹ Dacks, *A Choice of Futures*, 69.

Nunavut.⁴² The federal government, however, defended the NWT government's right to a place at claims-negotiating tables.⁴³

According to Dacks, the NWT's *staatsvolk* were frustrated when, out of deference to Dene concerns, the federal government in Ottawa refused to transfer even greater powers to the territorial assembly.⁴⁴ At the same time, many *staatsvolk* likely took solace in the fact that Ottawa rejected the legitimacy of Indigenous nationalism.⁴⁵ Infamously, the federal minister of Indian Affairs and Northern Development, Judd Buchanan, called the Dene Declaration "gobbledygook that a grade ten student could have written in fifteen minutes"⁴⁶ and cut off funding that it had been providing to Dene land-claims negotiators.⁴⁷ Similarly, the federal government condemned the 1977 Metro Proposal as offensive to liberal individualism: "[T]here is no place in Canada for governments based on race or ethnicity."⁴⁸ The 1981 Denendeh Proposal, too, was rejected. As a condition of further discussions with the Dene, the federal government insisted the Dene Nation drop "its previous insistence . . . that a substantive right to self-government form a fundamental component of any land claim."⁴⁹ The federal government affirmed that the only government of the NWT would be the existing one, providing rights to individuals but not cultural groups.⁵⁰ Ottawa remained committed to pointing the NWT in a universal, majority-nation direction. Even if land was ceded to Aboriginals, power would not be. *Staatsvolk*, both in Ottawa and Yellowknife, had no desire to see the territory become an Aboriginal nationalist subunit.

⁴² Inuit Tapiriit Kanatami, "ITC Calls for Removal of GNWT from Land-Claims Negotiations," July 17, 1979, <https://www.itk.ca/itc-calls-removal-gnwt-land-claims-negotiations> (accessed March 28, 2015).

⁴³ Dacks, *A Choice of Futures*, 69.

⁴⁴ *Ibid.*, 89.

⁴⁵ *Ibid.*, 68.

⁴⁶ Coulthard, *Red Skin, White Masks*, 69.

⁴⁷ Coates and Powell, *The Modern North*, 123.

⁴⁸ Richard Laing, Peter Puxley, C. Gerald Sutton, and Wilf Bean, "Political Development in the Northwest Territories," in *Northern Transitions Volume 2: Second National Workshop on People, Resources and the Environment North of 60°*, eds. Robert F. Keith and Janet B. Wright (Ottawa: Canadian Arctic Resources Committee, 1978), 314.

⁴⁹ Coulthard, *Red Skin, White Masks*, 75.

⁵⁰ *Ibid.*, 75.

6.4 History of constitutional development: 1980s

At the dawn of the 1980s, the Dene Nation switched tactics, dropping its boycott of the NWT government. Native activists, once again including the Dene Nation's former grand chief, James Wah-Shee, ran for and won election to the territorial assembly. The body became, for the first time, Indigenous-dominated.⁵¹ It immediately repudiated the previous assembly's hostile attitude toward Native claims.⁵² In 1981, formal land-claims negotiations commenced with the Dene and Métis. (The Inuvialuit, having begun negotiations in the mid-1970s, signed the Inuvialuit Final Agreement, a land-claims but not self-government deal, in 1984.) While Indigenous groups did not pin their nationalist hopes for self-determination exclusively on their newfound control of the NWT public government, they harnessed it to their cause.⁵³

As Dacks stated, "only in the NWT does the pursuit of Aboriginal self-government raise fundamental questions about the future structure of public government."⁵⁴ Both the NWT and federal governments began exploring forms of constitutional development aimed at politically accommodating the NWT's ethnic divisions without abridging liberal principles.⁵⁵ At least initially, *staatsvolk*, both in Yellowknife and Ottawa, appeared to favor decentralizing authority to cultural communities and sub-regions in the NWT, rather than altering boundaries and powers as the Dene Nation had suggested in its various self-government proposals. That was the recommendation of the 1980 federally commissioned report *Constitutional Development in the Northwest Territories*, compiled by C.M. Drury and often called the Drury Report.⁵⁶ The report did not embrace ethnically exclusive

⁵¹ Dacks, *A Choice of Futures*, 70.

⁵² *Ibid.*, 70.

⁵³ Kenneth Coates, *Canada's Colonies: A History of the Yukon and Northwest Territories* (Toronto: James Lorimer & Company, 1985), 231.

⁵⁴ Dacks, "Canadian Government and Aboriginal Peoples," 1.

⁵⁵ Asch and Dacks, "The Relevance of Consociation," 37.

⁵⁶ Cameron and White, *Northern Governments in Transition*, 50. As Cameron and White put it, "Aboriginal styles of governance emphasize keeping government close to the people and maximizing popular participation in political decision making. Accordingly, Aboriginal self-government is by its very nature community-centered." See their *Northern Governments in Transition*, 59.

Indigenous self-government. Rather, it conceived of public government as preeminent.⁵⁷

Beginning with the 1982 plebiscite approving the separation of Nunavut, meanwhile, Indigenous groups and the Native-dominated NWT territorial government began jointly studying ways to merge Aboriginal self-government and public government in the “western” NWT – the part that would remain after Nunavut’s departure. The first such effort, by the Western Constitutional Forum, commissioned papers exploring options ranging from exclusive Indigenous control of a “quasi-provincial nature” to a “completely integrated Indigenous/public government system”⁵⁸ in which Native residents would enjoy guaranteed representation. The Western Constitutional Forum also explored requiring NWT voters to meet “possibly a longer than usual requirement for residency”⁵⁹ – perhaps as much as three years.⁶⁰ Fearing that the splitting off of Nunavut might render Aboriginals a minority in the western NWT (a circumstance certain to diminish their majoritarian political power in the public government) Aboriginal negotiators insisted that no changes to the territory’s boundaries should occur until self-government powers were integrated into the fabric of public government and Indigenous rights were enshrined in law.⁶¹

Then, in 1987, an agreement struck between Nunavut negotiators and NWT officials laid out a set of principles for developing a constitution for the post-division NWT. Foremost among these would be “to build a system of public government

⁵⁷ Cameron and White, *Northern Governments in Transition*, 50.

⁵⁸ Western Constitutional Forum and Nunavut Constitutional Forum, *Boundary and Constitutional Agreement for the Implementation of Division of the Northwest Territories between the Western Constitutional Forum and the Nunavut Constitutional Forum* (Iqaluit: Canadian Arctic Resources Committee, 1997), introduction.

⁵⁹ Steve Iveson, “Several Ways to Interface Aboriginal Self-Government with Public Government in the Western Northwest Territories,” in *Partners for the Future: A Collection of Papers Related to Constitutional Development in the Western Northwest Territories*, ed. Western Constitutional Forum (Yellowknife: Government of the Northwest Territories, 1985), 32.

⁶⁰ Government of the Northwest Territories, Legislative Assembly, Special Committee on Constitutional Development, “Residency Requirements” (Yellowknife: Government of the Northwest Territories, 1983), part II, 2. It is noteworthy that voters in the 1982 plebiscite on division of the NWT were required to meet a three-year term of residency.

⁶¹ Lesley Malloch, *Dene Government Past and Future: A Traditional Dene Model of Government and its Implications for Constitutional Development in the Northwest Territories Today* (Yellowknife: Western Constitutional Forum, 1984), 38.

which will protect the individual rights of all of its citizens and the collective rights of its Aboriginal peoples and whose overarching principle is one of bringing peoples together.”⁶² The agreement proposed that “mechanisms shall be entrenched to enable each community to flourish as a distinct cultural entity regardless of its proportion of the total population.”⁶³ The agreement stated that such mechanisms would include a guarantee of Indigenous participation in government.⁶⁴

In 1989, the federal government agreed to a Dene/Métis comprehensive land-claims agreement-in-principle. However, the tentative settlement did not address Aboriginal self-determination, which the federal government felt should be exercised through public-government channels.⁶⁵ Dene leaders supported the agreement-in-principle, but at the 1990 Dene Assembly, rank-and-file First Nations members rejected it, feeling the draft agreement wrongly conceded Aboriginal “inherent” and treaty rights. Ottawa refused to renegotiate. The NWT’s Indigenous groups then splintered, at once weakening Indigenous self-determination efforts (a boon to settlers) and raising the specter of territorial balkanization and unmanageability (which settlers feared).

The federal government soon signed land-claims agreements with the Gwich’in, in the Mackenzie Delta, and the Sahtu, in the central NWT. Those First Nations, and the NWT’s other Aboriginal groups, have since pursued diverse self-government arrangements. The Sahtu for a time proposed a “segmental” plan providing for public government for economic development, social services and taxation but Indigenous-exclusive government for the management of lands and resources; in 2013, one small Sahtu community, Délı̄ne, signed a self-government agreement. The Gwich’in and the Inuvialuit for a time jointly sought decentralization of power to a public sub-jurisdiction to be called the Western Arctic Regional Municipality;⁶⁶ now the Gwich’in are seeking self-government separate from the Inuvialuit. The Akaitcho have pursued self-determination through a strictly

⁶² Western Constitutional Forum, *Boundary and Constitutional Agreement*, 3.

⁶³ *Ibid.*, 3.

⁶⁴ *Ibid.*, 4.

⁶⁵ McArthur, “The Changing Architecture of Governance,” 200.

⁶⁶ Cameron and White, *Northern Governments in Transition*, 69.

Indigenous government encompassing their traditional homeland in the territory's southeast. The Deh Cho pressed for a new, separate territory in the southwestern NWT that would, *a la* Nunavut, provide *de facto* Indigenous control under a nationalistic public government. And after division, in 2003, a settlement with the Tłı̨chǫ became the first joint land-claim and self-government agreement in the NWT, with the Tłı̨chǫ establishing an Indigenous government that provides limited (though not non-existent) representation and services to non-Tłı̨chǫ residing in its homeland.

With this splintering of Native claims, dreams of a territory-wide, Indigenous-controlled public government, as once envisioned by the Dene Nation, seemed to dissipate. Nationalists devoted more energy to the claims of individual First Nations, and to self-determination that would be expressed through exclusive, ethnonational, community- or region-based governments. These governments, such as the aforementioned Délı̨ne and Tłı̨chǫ governments, would interact with Yellowknife and Ottawa through interstate "treaty federalism." However, as will be seen, many Indigenous leaders still pressed for the NWT public government to take on a more nationalist character, either as a means to an end (i.e., facilitating the negotiation of ethnonational self-governments) or as an end in itself. As well, some settler leaders, likely fearing a disintegration of the NWT into multiple Indigenous regimes and a concomitant weakening of the public government,⁶⁷ changed their tune: If Indigenous aspirations could be accommodated by weaving "external protections" into public government, and thus achieving direct, intrastate consociation, perhaps the center could hold. There remained concerns, however, that among the general settler population, such "external protections" would prove unpalatable, as they would be seen as privileging Aboriginal interests over those of settlers.⁶⁸ In this dichotomy, parallels can be drawn to Canada's failed Charlottetown Accord: Though *staatsvolk* elites might grant concessions to minority nationalists, would the *staatsvolk* public go along?

⁶⁷ Dacks, "Canadian Government and Aboriginal Peoples," 19.

⁶⁸ *Ibid.*, 75.

6.5 History of constitutional development: 1990s

The 1990s saw three developments that collectively both complicated and spurred work on an NWT constitutional accord. The first was the impending separation of Nunavut, which raised the stakes of ethnic competition due to both geographic and demographic opportunities and threats. Second, the federal government affirmed the “inherent right” of Indigenous self-government, and, moreover, announced that it desired to accommodate this right within the NWT public government, providing hope for Indigenous nationalists. Third and finally, providing countervailing hope for settlers, the adoption of the Charter of Rights and Freedoms and the consequent adjudicability of voting rights called into question the constitutionality of overrepresentation in general⁶⁹ and, more specifically, the constitutionality of the accommodation of the Indigenous “inherent right” in public government. These developments brought “Kymlicka’s dilemma” to a head in the NWT. They amplified the constitutional struggle, leveled the political playing field, and provided each side – Aboriginals and settlers – with a potential constitutional trump card. While the resultant intensification of competition may have spurred efforts to devise a workable governance regime in time for Nunavut’s separation, it also, conversely, underscored the dramatic divisions that stood in the way. These divisions pitted universal individual rights against non-universal Indigenous rights.

6.5.1 Nunavut’s separation and resulting threats and opportunities

The first of the NWT’s three key constitutional developments of the 1990s was the prospect of Nunavut’s separation. As has been shown, the NWT was preparing for the departure of Nunavut long before the official 1993 signing of the Nunavut Land Claims Agreement. For the western NWT, the separation of Nunavut presented both an opportunity and a threat. Opportunity lay in the fact that separation would create

⁶⁹ Kent Roach, “One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting,” in *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform*, ed. David Small (Toronto: Dundurn Press, 1991), 4.

not one new territory but two.⁷⁰ The west, like Nunavut, would become a new jurisdiction, potentially with a new name and certainly with new borders, demographics and political dynamics. For both Indigenous and non-Indigenous residents, this would present a chance to shape the NWT in their own ethnocultural image. For non-Indigenous residents, the territory, shorn of its less-developed, Inuit-nationalist eastern half, could finally evolve into something like “Mackenzie Territory.” For Indigenous residents, conversely, the new NWT might finally become a Dene nationalist jurisdiction.

Essential to both Indigenous and settler visions would be the issue of boundaries and powers. The NWT’s new boundaries would, for both groups, be something of an opportunity. For Indigenous people, the post-division NWT would become largely co-extensive with the historic Dene homeland, providing better geographic “fit” with Dene self-determination. For settlers, meanwhile, the new borders would be similar to those of the once-proposed Mackenzie Territory, encompassing the more economically valuable, *staatsvolk*-influenced portion of the NWT. The issue of powers, however, was highly fraught. As noted previously, demographics in the post-division NWT would become almost precisely evenly divided. For settlers, this would represent a dramatic gain. They would either have a numerical upper hand or could easily achieve one by adding just a few hundred *staatsvolk* from the millions in southern Canada. This prospect, according to Dacks, gave settlers no incentive “to support a constitutional innovation what would undermine the majoritarian principle.”⁷¹ The opposite would be the case for Indigenous people. Without the entrenchment of “external protections,” the post-division demographic situation would open them up to swamping. Hence, the lead-up to Nunavut’s separation brought into even sharper relief the conflict between Indigenous residents and *staatsvolk* regarding the acceptability of Indigenous voting-rights-related “external protections.”

⁷⁰ Constitutional Development Steering Committee, *Working Toward Consensus: Conference Report, First Constitutional Conference, Western NWT* (Yellowknife: Constitutional Development Steering Committee, 1995), 1.

⁷¹ Dacks, “Political Representation,” 151.

6.5.2 The 'inherent right' of self-government

The second of the aforementioned seminal constitutional developments of the 1990s was the recognition of the "inherent right" of Aboriginal self-government. As previously noted, when the Chrétien government issued the "Inherent Right Policy" in 1995, affirming that section 35 of the *Constitution Act, 1982* guarantees Indigenous self-government rights, it discussed various means of implementing those rights. One avenue, which it deemed especially applicable to the NWT, was through Indigenous accommodations in public government:

Aboriginal groups in the western NWT have a unique opportunity to develop self-government arrangements that are not readily available south of the sixtieth parallel. In the western NWT, the Government would prefer that the inherent right find expression primarily, although not exclusively, through public government. . . .

In the federal government's view, the self-government aspirations of Aboriginal peoples in the NWT can be addressed by providing specific guarantees within public government institutions. The creation of Aboriginal institutions to exercise certain authorities may also be a useful approach.⁷²

The phrase "specific guarantees" must be read as referring to non-universal "external protections," particularly the asymmetric apportionment of representation. As has been shown, Aboriginal groups pressing for power-sharing in the NWT had for two decades been calling for guarantees of representation.

At the time of the "Inherent Right Policy," the idea of guaranteed representation was enjoying currency. In 1996, the federal government's Royal Commission on Aboriginal Peoples suggested Native self-government in Canada might include "sharing power in joint governmental institutions, with guaranteed representation for the nations and peoples involved."⁷³ Various scholars proposed that guaranteed representation is among the "inherent rights" of Canadian Aboriginals. Some argued that guaranteed representation should accrue to Aboriginals as a consequence of their loss of sovereignty, in the same way that the

⁷² Government of Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (Ottawa: Government of Canada, 1995).

⁷³ Royal Commission on Aboriginal Peoples, *Final Report* (1996), Chapter 3 – Governance, Section 1-1.1.

former colonies of British Columbia and Newfoundland relinquished their autonomy and joined the confederation in exchange for seats in Parliament.⁷⁴ Other scholars suggested guaranteed representation in public bodies is an essential corollary to enacting and preserving of Aboriginal self-government.⁷⁵ Finally, some thinkers suggested that Aboriginals' unique constitutional status as fiduciary dependents of the federal government entitles them to a fixed share of power in Parliament.⁷⁶ Based on that logic it might follow that, as the NWT government acts as Ottawa's fiduciary agent in the North, Aboriginals there deserve a fixed share of power in the NWT legislature.

For at least some of these legal and philosophical reasons, and likely also in the simple interests of unity and efficiency, by the mid-1990s the federal government was clearly keen to accommodate Indigenous nationalism within, rather than outside of, the public government of the NWT. By maintaining the western NWT's boundaries, and by adjusting its powers through consociational "specific guarantees within public government institutions," federal officials seemed to hope the "inherent right" could be satisfied without offending the majority-nation liberal principles of *staatsvolk*, including the territory's settlers. The NWT government also championed this goal, vowing in 1996 "to move forward with a meaningful self-government agenda which is based on both a recognition of the Inherent Right and on an integrated public government/self-government model for the rationalized delivery of services."⁷⁷ It remained unclear, however, exactly how the integration of self-government and public government would be achieved.

⁷⁴ Trevor Knight, "Electoral Justice for Aboriginal People in Canada," *McGill Law Journal* 46 (2001), 1108.

⁷⁵ Tim Schouls, "Aboriginal People and Electoral Reform in Canada: Differentiated Representation versus Voter Equality," *Canadian Journal of Political Science* 39, no 4 (1996), 739-740.

⁷⁶ Government of Canada Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report, Vol. 1* (Ottawa: Minister of Supply and Services Canada, 1991), 182.

⁷⁷ Government of the Northwest Territories Legislative Assembly, "Building a Foundation for the Future: The Northwest Territories' Agenda for Change" (Yellowknife: Government of the Northwest Territories, 1996), 16.

6.5.3 Implications of Charter voting-rights protections

The third of the NWT's three significant constitutional developments in the 1990s was the threat posed by the Charter to illiberal voting rights protections. Following the adoption of the Charter of Rights and Freedoms, the specter of constitutional challenges quickly began to constrain formal inegalitarianism in Canadian apportionment. As will be shown, this was the case in the NWT: During the territory's 1989 apportionment, its legislatively-appointed boundaries commission warned of the perils of departure from parity and took unprecedented steps to reduce malapportionment. Yet as will also be shown, settlers in Yellowknife nonetheless clamored for even greater parity, insisting they were unconstitutionally underrepresented and threatening legal action. Thus, by the mid-1990s, the prospect of a Charter challenge was the key sticking point in the plan to provide the "inherent right" of self-government through Indigenous accommodations in the NWT public government.

6.5.4 Pre-division proposals for merging public and self-government

Prior to the 1995 release of the Chrétien government's "Inherent Right Policy," the NWT-commissioned report *Working Toward a Common Future*, (often called the Bourque Report, after the report's lead author, J.W. Bourque) had in 1992 avoided explicitly recommending Indigenous self-government for the future western territory, instead proposing a potentially radical decentralization of power from Yellowknife to "district orders of government" that might encompass individual communities or entire regions. The Bourque Report also floated the idea of pairing the NWT legislative assembly with a second, Indigenous-controlled body, a "senate or council of elders,"⁷⁸ but did not explicitly recommend it.

On the heels of the Bourque Report, and during and after the release of Chrétien's "Inherent Right Policy," there came an array of efforts to develop a new governance arrangement for the post-division NWT. These efforts were made by a succession of joint Indigenous/public-government bodies, including the Committee

⁷⁸ Commission for Constitutional Development, *Working Toward a Common Future* (Yellowknife: Commission for Constitutional Development, 1992), 36.

of Political Leaders, the Commission for Constitutional Development, the Constitutional Development Steering Committee and the Western Constitutional Forum. Proposals with titles such as *Partners in a New Beginning* and *Common Ground* advanced various schemes.⁷⁹ These included constituting a public government that “may provide for guaranteed representation for Aboriginal people within the legislative assembly,”⁸⁰ a consociational arrangement involving a legislature consisting of two discrete cultural caucuses either of which could veto legislation, and various bicameral scenarios in which an Indigenous-only chamber would wield veto power.

Despite the diversity of these proposals, they shared the same goal: to unite Indigenous self-government and public government via direct, intrastate consociation.⁸¹ Also identical was the challenge facing these proposals: To create a regime with enough deference to collective Indigenous rights to please nationalists and enough majority-nation liberal-universalism to reassure *staatsvolk* settlers. Though both the federal and territorial governments supported direct consociation, elements of the NWT’s Indigenous polity were wary of compromise. For example, in 1995 the Akaitcho condemned any partnership with the NWT government as illegitimate and declared it would “opt out of the new western territory constitutional process and seek a direct link with the federal government.”⁸² Some settlers, too, were intransigent: According to Dacks, “[They] will have to modify their liberal individualist assumptions”⁸³ and accept that “it is not likely that any central territorial government based on universal assumptions will be able to meet

⁷⁹ These hardly represented the only efforts to spur discussion and encourage consensus among Northerners concerning the direction of NWT constitutional development. Efforts such as the NWT government’s 1999 “Agenda for the New North” cited the territory’s foremost challenge as being that of devising, once again, “[a] system of government that respects the collective rights of Aboriginal peoples and the individual rights of all Northerners.” See Government of the Northwest Territories, *Agenda for a New North: Achieving Our Potential in the 21st Century* (Yellowknife: Government of the Northwest Territories, 1999), 1.

⁸⁰ Constitutional Working Group, Western Caucus of the NWT Legislative Assembly, “Common Ground” (Yellowknife: Government of the Northwest Territories, 1997), 4.

⁸¹ Constitutional Working Group, *Partners in a New Beginning*, 16.

⁸² Constitutional Development Steering Committee, *Working Toward Consensus*, 13.

⁸³ Dacks, “Politics on the Last Frontier,” 360.

the expectations of the groups and also govern with a reasonable degree of efficiency.”⁸⁴ If settlers failed to compromise, he warned,

the Native people will most likely attempt to distance themselves from any form of public government and to pursue separate Dene/Métis political institutions gained through the national process for creating Aboriginal first nations governments. Because this expedient would limit inter-ethnic political contact, it would limit conflict and also the threat of assimilation facing Native people. However it would also greatly reduce the prospects for a true process of inter-ethnic integration, and for a unified voice for the NWT on the national stage.⁸⁵

Even as the NWT stood at the brink of division, this challenge had not been resolved. In 1995, Dacks again wrote, “A balance will be struck between these contending forces. The question is where exactly the balance will lie on the axis between self-government and public government.”⁸⁶ At the time, he predicted victory for consociationalists. But he added a caveat: “The only development which might counter these trends is a successful court challenge of the distribution of constituencies in the NWT. A stricter adherence to a ‘one person, one vote’ system of representation would increase the number of Yellowknife constituencies,” strengthening opposition in the assembly to Indigenous nationalism.⁸⁷ As will be seen, Dacks was correct. The court challenge indeed occurred, its verdict hinging on the degree to which rural Indigenous peoples could be overrepresented, and Yellowknife *staatsvolk* underrepresented, in the NWT legislative assembly.

6.6 Summary

This chapter demonstrated that the NWT’s pre-division constitutional evolution was defined by a decades-long struggle for power between its two polities, Aboriginals and settlers. In the 1960s, settlers sought division of the territory so the west, where they were more numerous, could draw down powers from Ottawa and move toward liberal-universalist provincehood. Countervailingly, in the 1970s, Indigenous

⁸⁴ Dacks, “Politics on the Last Frontier,” 357.

⁸⁵ *Ibid.*, 361.

⁸⁶ Dacks, “Canadian Government and Aboriginal Peoples,” 19.

⁸⁷ *Ibid.*, 39.

nationalists proposed that the territory, or subdivisions within it, should receive “external protections,” entrenching Native power. Throughout the 1980s and 1990s, Aboriginal and settler leaders worked toward a constitutional détente. Yet the 1990s also saw three developments that brought the conflict between the two sides into stark relief. First, the adoption of the Charter placed greater emphasis on formal egalitarianism in the apportionment of representation, favoring settlers. Second, affirmation of the “inherent right” of self-government offered Aboriginals “external protections,” possibly including guaranteed majority power in the NWT government. Third, the separation of Nunavut, in the east, threatened to leave the west’s settler and Aboriginal polities equipopulous, raising the stakes for both sides. At the moment when majority representation in the NWT seemed most essential, the rules governing the apportionment of representation were thrown into limbo. A constitutional crisis seemed at hand.

Chapter 7: Representation in the NWT

As noted previously, if a federal subunit is to provide a minority nation with autonomy and self-determination, the subunit's boundaries and powers must be appropriate to the task. Boundaries alone may not be enough: They can be breached through swamping. Hence, a minority nation may seek "external protections" concerning how representation in the subunit is apportioned. By arming itself with non-universal voting rights, the minority may safeguard itself from outside domination. Yet settlers in the subunit, possibly with the backing of the majority nation at large, may attack such protections as illiberal. This opposition may be grounded in principled liberal individualism or may, of course, merely exploit such principles as a means to secure *staatsvolk* hegemony over the subunit.¹

Such a struggle consumed the pre-division NWT, making the process of legislative reapportionment there all but unique among Canadian jurisdictions. While political disagreements over apportionment in other territories and provinces were undoubtedly often heated, they largely involved intra-national competition, waged within unified polities between comparatively fluid factions of majority-nationals.² In the NWT, however, pre-division conflicts over representation involved, in Peter Jull's words, "[n]ot healthy dissent to be resolved by the ballot box, but fundamental dispute about whose country it is and what the ground rules are."³ Indeed, reapportionment in the NWT exhibited a nation-versus-nation quality. Moreover, it encountered Will Kymlicka's thorny paradox, in which the liberal rights of settlers ran headlong into the collective self-governance rights of Indigenous

¹ Avigail Eisenberg, "Domination and Political Representation in Canada," in *Painting the Maple: Essays on Race, Gender and the Construction of Canada*, eds. Veronica Strong-Boag, Sherrill Grace, Joan Anderson and Avigail Eisenberg (Vancouver: UBC Press, 1998).

² This may arguably not be the case in New Brunswick, which, like the NWT, is home to substantial populations of two founding peoples. As has already been shown in this paper, New Brunswick has seen Francophone partitionist movements quelled through consociational accommodations. By law, boundaries commissions in that province must take into account "effective representation of the English and French linguistic communities." In recent years, New Brunswick Francophones, displeased by commission decisions, have sued to enhance their voting power. As well, of course, other "internal minority" founding peoples – such as Anglophones in Quebec – have at times pressed for, and been accorded, non-universal representation.

³ Peter Jull, *Political Development in the Northwest Territories* (Ottawa: Government of Canada Federal-Provincial Relations Office, 1978), 7.

people. This conflict, once again, made the NWT a laboratory for the study of political representation.⁴

As has been noted previously, the federal government remotely administrated the NWT for most of the twentieth century. A fully elected assembly was not in place until 1975. Since then, as in other Canadian provinces and territories, MLAs have been elected from geographically based single-member districts. Also as in other provinces and territories, these districts have been periodically reapportioned to respond to demographic and statutory changes.⁵ Territorial legislation has required this redrawing take place after every second general election. It has further required that an independent electoral boundaries commission be impaneled to recommend districting changes, but has left the decision as to whether to enact those recommendations to the legislative assembly. As will be shown in this chapter, pre-division electoral reapportionments in the NWT consistently provided overrepresentation to Indigenous rural districts, for reasons ostensibly related to substantive egalitarianism and non-universal, consociational “balance.” As will also be shown, this practice was not universally accepted. Yellowknife settlers, boundary commissioners and members of the territorial assembly frequently called for greater formal parity for voters in the capital, often justifying their demands by citing section 3 of the Charter of Rights and Freedoms.⁶

7.1 The reapportionment of 1978

When the NWT legislature first became fully elected in 1975, it was a fifteen-seat body in which Yellowknife held two seats, or about 13 percent of the total. To provide recommendations for reapportionment of the territorial electoral districts in 1978, a three-member electoral boundaries commission was formed. The

⁴ Gurston Dacks, “Political Representation in the Northwest Territories,” in *Representation and Electoral Systems*, eds. J. Paul Johnston and Harvey E. Pasis (Scarborough, Ontario: Prentice-Hall, 1990), 138.

⁵ Graham White, “Northern Distinctiveness, Representation by Population and the Charter: The Politics of Redistribution in the Northwest Territories,” *Journal of Canadian Studies* 28, no. 3 (1993), 5.

⁶ *Ibid.*, 7.

commission's chair, appointed by the NWT's federal commissioner, was a non-Indigenous NWT Supreme Court Justice, C.F. Tallis. Upon the advice of the legislative assembly, the federal commissioner then appointed an Inuit member, Louis Tapardjuk, from the eastern Arctic community of Igloolik. Finally, upon the joint recommendation of Tallis and Tapardjuk, Ted Trindell, a Métis from the western community of Fort Liard, was made the third member.

The territory's *Electoral District Boundaries Commission Ordinance*, assented to in May of 1978, guided the commission's work. The ordinance required the commission to address "geographic and demographic considerations," including those relating to population and accessibility; the diversity of "communities of interest" in the territory; "means of communication between various parts" of the NWT; and "other similar and relevant factors." The commission reported that among the additional factors it considered were "legislative efficiency and efficacy," and, most notably, the goal of "balancing the varied interests."⁷ It can thus be seen that, even in the NWT's first electoral boundaries reapportionment exercise, boundary-makers grappled with second-axis questions of formal, substantive (i.e., "ombudsperson") and "community of interest" egalitarianism, as well as with third-axis questions relating to inter-polity "balance."

Per the commission's unanimous recommendations, the assembly was expanded to twenty-two seats. Yellowknife gained one seat, maintaining its proportion of representation at 13 percent of the NWT total. At the time, Yellowknife accounted for 19 percent of territorial residents, meaning its voters were underrepresented, with one district exceeding parity by 52 percent. The only district more populous was Hay River, the sole *staatsvolk*-majority riding outside of Yellowknife,⁸ at 75.4 percent beyond parity. Meanwhile, the tiniest electoral district was Hudson Bay, comprising the small and exceptionally remote Inuit community of Sanikiluaq, located on an island accessible only from Quebec. Hudson Bay's population was less than a tenth that of Hay River – 74.4 percent below parity.

⁷ Northwest Territories Electoral Districts Boundaries Commission, *Report* (Yellowknife: Government of the Northwest Territories, 1978), Appendix 4.

⁸ Hay River, on the south shore of Great Slave Lake not far from the Alberta border, has for decades been the NWT's road, railway, and river-barge hub, with a substantial settler population.

7.2 The reapportionment of 1983

For the 1983 territorial reapportionment, a three-member boundaries commission was again appointed. It consisted of a non-Aboriginal chair, Supreme Court Justice Joseph Potts, and two Native members, Dene chief Jim Antoine of Fort Simpson and David Alagalak from the Inuit community of Arviat.

This time, in making its recommendations, the boundaries commission was split. Antoine and Alagalak wrote the majority report, which was adopted by the legislative assembly. Though since the last reapportionment Yellowknife's population had grown to 21.3 percent of the territorial total, the capital's share of representation was not increased. Indeed, as the assembly was expanded to twenty-four seats, Yellowknife's proportion of seats actually dropped, to 12.5 percent.⁹ The capital's three districts were left between 44.1 percent and 95.5 percent above parity. The only other similarly underrepresented electoral district was Inuvik (also with a significant non-Indigenous population) at 62.8 percent over parity. As in 1978, Hudson Bay was by far the smallest riding.

Once again, the *Electoral District Boundaries Commission Ordinance* guided the commission's work. The majority, in explaining its recommendations, cited such factors as "diversity of interests and great distance between communities," "means of transportation and communication," "the large number of communities" in a particular electoral district, "community of interests," and the amelioration of malapportionment. The majority did not address non-universal factors such as "balance" between cultural communities. Nor did it explain its reasons for advising that Yellowknife's share of representation be kept at three seats. Notably, the majority did mention that the committee had explored creating a seat reserved for Indigenous people in Yellowknife, but concluded such a move would first require revisions to the *Northwest Territories Act*.¹⁰

In an extensive "minority report," the chief commissioner, Justice Potts, agreed with the majority in all ways but one. Though noting that the NWT "is very unique" with respect to accessibility, diversity of interests, and means of

⁹ White, "Northern Distinctiveness," 7.

¹⁰ NWT Electoral Districts Boundaries Commission, *Report* (1983), 13.

communication, Potts called for a fourth seat for Yellowknife. He maintained that, while providing ombudsperson service is undeniably difficult in the rural NWT, MLAs' other, and "probably the more important role," is representing constituents "by speaking and voting for them in the legislative assembly."¹¹ Given this fact, Potts argued that the principle of representation by population "cannot be ignored." Potts cited testimony of several Yellowknife residents who told the commission that providing the capital with an additional seat would not only be democratic and just, but would encourage Yellowknifers to perceive the NWT government as politically legitimate.

7.3 The reapportionment of 1989

As in previous years, the 1989 boundaries commission consisted of three members. Justice Tallis was again the chair, with the other members being Rosemarie Kuptana, an Inuvialuit leader from Sachs Harbor, and Richard Hardy, a Métis leader from the Sahtu region. The commission's work took place under the territory's new *Electoral District Boundaries Commission Act*, passed earlier that year. In wording almost identical to that of the 1978 ordinance, the act required the commission to address "geographic and demographic considerations," including those relating to population and accessibility; "any special community or diversity of interests" in the territory; "means of communication among various parts" of the NWT; and "other similar and relevant factors." The act did not establish a threshold of permissible deviation from parity.

Graham White extensively analyzed the reapportionment of 1989, studying whether, in the wake of the adoption of the Charter of Rights and Freedoms, judicial attention to the section 3 voting-rights provision would constrain the NWT government's "distinctiveness," and especially its ability to accommodate Indigenous nationalism through overrepresentation.¹² In effect, he examined

¹¹ Northwest Territories Electoral Districts Boundaries Commission, *Report of the Northwest Territories Electoral District Boundaries Commission to the Speaker of the Legislative Assembly* (Yellowknife: Government of the Northwest Territories, 1983), 14.

¹² White, "Northern Distinctiveness."

whether the Charter might do to non-universal voting rights in the NWT what it had done to non-universal language rights in Quebec.

White confirmed that it did. He reported that the NWT's 1989 reapportionment featured unprecedented conflict between advocates of formal egalitarianism, on one hand, and defenders of what White called "Northern distinctiveness," on the other. During the boundaries commission's hearings, Yellowknife residents, demanding fairness, called for two additional seats. Non-Yellowknifers pushed back on various grounds: that no single community should be dominant in the assembly, that advantaging Yellowknife would destabilize the NWT's balance of power, that Yellowknifers were transient, that they already enjoyed disproportionate access to government representatives and services, and that the city was unlike, out of touch with, and unconcerned about, the rest of the NWT. One prominent witness even "noted approvingly that in the United States, the national capital has no representation."¹³

In its report, the electoral boundaries commission, though noting "the unique nature of this vast territory," for the first time dwelt upon the topic of voter parity. It cited section 3 of the Charter, stating, "[I]f deviation from the principle of voter equality becomes too large, then one's vote may be debased to the point where it cannot be justified by special circumstances and considerations."¹⁴ The commission thus recommended the elimination of the tiny Hudson Bay riding ("Disparity in voting power on the basis of special circumstances has its limits . . ."¹⁵) and, more significantly, provided Yellowknife with a fourth seat in the twenty-four-seat assembly. Though noting that this move "was resisted by some citizens," the commissioners maintained it "will not disturb the balance that was stressed by so many speakers."¹⁶ This was because the new seat would be transferred to the capital from Pine Point, a *staatsvolk* mining town that had recently shut down, leaving behind a vacant "rotten borough." Though the new seat would increase

¹³ Ibid., 15.

¹⁴ Northwest Territories Electoral Districts Boundaries Commission, *Report of the 1989/90 Electoral District Boundaries Commission, Northwest Territories* (Yellowknife: Government of the Northwest Territories, 1989), 18.

¹⁵ Ibid., 19.

¹⁶ Ibid., 19.

Yellowknife's proportion of MLAs to 16.7 percent, the capital's population, too, had increased, to 25.5 percent, meaning its four electoral districts would still be malapportioned, by values ranging from 52.8 to 54.1 percent above parity. Under the commission's plan, most of the NWT's semi-urban districts would also exceed parity; all but one rural Indigenous district would fall below parity. The two smallest NWT electoral districts would be Deh Cho and Tu Nedhe, at 63.4 and 65.7 percent below parity, respectively.

According to White, when the assembly took up the issue of the boundary commission's plan, it did so for the first time under the threat of a lawsuit by NWT settlers claiming abridgement of their section 3 voting rights.¹⁷ A lawsuit was indeed launched, targeting not the proposed plan but the existing, 1983-era boundary scheme. The assembly ultimately approved the new plan in all but a few minor details, rendering the lawsuit moot. Still, White's analysis of the NWT's 1989 reapportionment exercise included a trenchant forecast. He noted that, unprecedentedly:

[t]he Charter forced the commission to concentrate on the equality of individual voters, which is only one component of representation even in liberal democracies and, in light of the social and political distinctiveness of the NWT, by no means the most important component of representation there. . . . [T]o the extent that northern political distinctiveness is more than an exotic curiosity, but represents a political response to the unique political problems of the North, this is not a positive development.¹⁸

7.4 The NWT as an intervenor in the *Carter* case

It is noteworthy that, shortly after the 1989 reapportionment, in the Supreme Court of Canada's *Carter* case, the NWT government participated as an intervenor. The territorial minister of justice protested to the court that the Charter of Rights and Freedoms does not apply to apportionment, as, since confederation, the redrawing of electoral maps had been solely the responsibility of the provinces and

¹⁷ Writes White, "For some time, rumours had been circulating of pending legal action by Yellowknife business interests, which would challenge the Boundary Commission report. . . . [T]he mayor of Yellowknife gave an interview on CBC radio warning that serious legal consequences could ensue if the city were not granted greater representation than that recommended by the commission." See White, "Northern Distinctiveness," 21.

¹⁸ *Ibid.*, 25.

territories.¹⁹ It can be assumed that the NWT government felt compelled to participate in this case out of concern for further Charter constraint of its “Northern distinctiveness.” Like Quebec in its opposition to the Charter’s adoption a decade earlier, the NWT government presumably worried that the Charter’s limitations on “centrifugal territorialism” would imperil the territory’s freedom to use voting-rights-related “external protections” that guarded Aboriginal self-determination and were at the heart of the NWT’s inter-polity consociational arrangement. The Supreme Court, of course, disregarded the NWT government’s argument, confirming that provincial and territorial apportionment must indeed respect the Charter.

7.5 Summary

As was shown in this chapter, the apportionment of representation in the pre-division NWT assembly reflected the territory’s long-running power struggle. In the 1970s, rural Aboriginals were overrepresented vis-à-vis Yellowknife. This practice continued in the next decade, though settlers began agitating for, and threatened to launch Charter challenges concerning, their underrepresentation. By the cusp of the 1990s it seemed likely that in future reapportionments, the Charter might constrain rural Indigenous overrepresentation. Combined with the threat of settler “swamping” posed by Nunavut’s separation, this prospect boded ill for power-sharing in the NWT public government, bringing “Kymlicka’s dilemma” into high relief.

¹⁹ Robert Behrman, “Equal or Effective Representation: Redistricting Jurisprudence in Canada and the United States,” *American Journal of Legal History* 51, no. 2 (2011): 289.

Chapter 8: Findings and analysis

In representative democracies, apportionment is inherently contentious, as it affects the distribution of power. But in an ethnically divided, constitutionally evolving jurisdiction in which nationalist Indigenous peoples and majority-nation settlers suddenly find themselves equipopulous, and where the course of constitutional evolution has long been torn between nationalist and “region-based” ambitions, and where political and judicial decisions about “external protections” such as non-universal apportionment may be the deciding factor regarding the constitutional shape the jurisdiction will take, it can be surmised that redistricting might be especially competitive. In such instances, it would be no surprise that apportionment might take on a zero-sum, nation-versus-nation character, and that questions of voting-rights theory might be hotly debated. In the NWT at the brink of division, the most fundamental of these questions was the challenge posed by “Kymlicka’s dilemma.” If, in a multination state, the individual voting rights of settlers serve to constrain the self-determination interests of Indigenous national minorities, and vice versa, whose rights should prevail?

It has been established in this thesis that, as the NWT neared 1999, a constitutional impasse loomed. Yet while significant scholarship was at the time devoted to those building tensions, their climax and denouement were largely overlooked. This oversight has left fallow a rich field of inquiry, with a potential yield of insights. This chapter analyzes the 1998-99 NWT reapportionment and related events in three steps. First, this chapter examines the developments leading up to the *Friends of Democracy* lawsuit: the legislative debates about whether to reapportion the NWT at the cusp of division, the work of the 1998 boundaries commission, and the legislative reaction to the commission’s recommendations. Second, this chapter explores the *Friends of Democracy* lawsuit: the submissions of the applicants, respondents and intervenors, and the ruling of the court. Finally, this chapter looks at the legislative and judicial reaction to the lawsuit: the decisions made by the NWT cabinet, the countervailing arguments made by Aboriginal organizations and non-cabinet MLAs, the attempt to appeal the *Friends* decision, and the hearings, report, and votes on an act aimed to satisfy the *Friends* ruling. These

events are analyzed through the lenses of liberal theory, voting-rights jurisprudence and the political history of the NWT. By taking this approach, I aim to illuminate how “Kymlicka’s dilemma” was confronted in the division-era NWT.

8.1 The 1998-99 reapportionment

The NWT’s 1998 reapportionment was proposed in anticipation of the territory’s first post-division election, slated for autumn 1999. Without districting adjustments, Nunavut’s separation would leave the NWT legislature with just fourteen seats (see Table 1). Of these, four, or 28.6 percent, would be in Yellowknife. The city’s post-division population would be 44.2 percent of the territorial total, meaning that without adjustment, Yellowknifers would be significantly underrepresented. One district, Yellowknife South, with 7,105 residents, would exceed parity by 152 percent. Yet due to the confluence of legal and demographic factors already discussed, any proposal to alter the balance of seats in the territory was sure to engender controversy. Thus, when a motion to establish an electoral boundaries commission came before the assembly in June 1998, several rural MLAs urged that reapportionment be delayed. The ensuing assembly debate represented a microcosm of the conflict that would surround the 1998-99 reapportionment.

MLAs opposed to the formation of an electoral boundaries commission justified their stance using various rationale. Some said adding assembly members would be both too expensive and, as division would reduce the NWT population, unnecessary. Some cited “ombudsperson” challenges posed by representing remote districts. Some challenged the notion that Yellowknife districts were underrepresented, arguing that their populations were miniscule relative to the crowded ridings found in most provinces. One MLA, David Krutko, representing three small Gwich’in and Inuvialuit communities in the Mackenzie Delta, appealed directly for “representation by place,” suggesting that apportionment be based “not by the size of the community but by the size of your land base.”¹ Some, citing an informal agreement struck earlier that year between MLAs and the Aboriginal

¹ Government of the Northwest Territories Legislative Assembly, “Hansard,” (Yellowknife: Government of the Northwest Territories, June 2, 1998), 1568.

Summit, an umbrella organization representing the territory's Dene, Métis and Inuvialuit, urged reapportionment be delayed for "process" reasons, to allow time for a constitutional accord to be crafted between the government and Indigenous groups. According to Thebacha MLA Michael Miltenberger, "We can do [reapportionment] once division happens, once the dust settles, when two territories are up and running, once the constitutional process, which we have invested millions in, ha[s] had a chance to deal with this issue."² Some appealed directly for "balance." Tu Nedhe MLA Don Morin, whose constituency comprised two small Akaitcho Dene and Métis communities, stated, "[Y]ou always have to watch the balance of what is happening in this legislative assembly. There is no doubt in anybody's mind that Yellowknife is growing."³ In speaking about this balance, Morin and the assembly's other opponents of reapportionment referred to urban-rural and socioeconomic divisions. At no point did they publicly frame the debate in ethnocultural terms.

MLAs supporting formation of a boundaries commission, meanwhile, provided similarly diverse justifications for their position. Some, including but not limited to Yellowknifers, suggested that having just fourteen members would lead to an excessive workload for both ministers and "regular" MLAs, a shortage of committee members vis-à-vis committees, a power imbalance between cabinet and regular MLAs, and a similar imbalance between legislators and "the bureaucrats." Some challenged the above-mentioned "process" argument, suggesting the timeline for achieving a constitutional accord was indefinite and growing more so. Finally some MLAs appealed directly for greater representation. At least one, an Inuvik MLA, called for more seats for the northern NWT. The others, of whom most but not all were Yellowknife MLAs, demanded equitable representation for Yellowknifers. As stated by Yellowknife MLA Seamus Henry, "[T]he question we have to decide here today . . . is about fairness and equality in representation."⁴ Some warned that, without districting adjustments, a lawsuit was inevitable. Only once did pro-

² GNWT Legislative Assembly, "Hansard" (June 2, 1998), 1565.

³ Ibid., 1567.

⁴ Ibid., 1569.

reapportionment MLAs address ethnocultural divisions. According to Yellowknife MLA Roy Erasmus, who was himself Indigenous, “There are a lot of Aboriginal people, as well as non-Aboriginal people, in my riding, and obviously the Aboriginal Summit has indicated that they do not wish to see a boundaries commission. However, I have to consider what it best for the whole of my constituency, not just one part.”⁵ Ultimately the assembly voted nine-to-four to appoint a boundaries commission.

Table 1: NWT Legislative Assembly composition, 1998-99

Electoral District	MLA	District Type	Position
Deh Cho	Sam Gargan	Rural	Speaker
Frame Lake	Charles Dent	Yellowknife	Cabinet
Hay River	Jane Groenewegen	Semi-urban	Regular MLA
Inuvik	Floyd Roland	Semi-urban	Cabinet
Mackenzie Delta	David Krutko	Rural	Regular MLA
Nahendeh	Jim Antoine	Rural	Cabinet
North Slave	James Rabesca	Rural	Regular MLA
Nunakput	Vince Steen	Rural	Cabinet
Sahtu	Stephen Kakfwi	Rural	Cabinet
Thebacha	Michael Miltenberger	Semi-urban	Cabinet
Tu Nedhe	Don Morin	Rural	Regular MLA*
Yellowknife Centre	Jake Ootes	Yellowknife	Regular MLA
Yellowknife North	Roy Erasmus	Yellowknife	Regular MLA
Yellowknife South	Seamus Henry	Yellowknife	Regular MLA

*Morin served as premier, and thus as a cabinet member, until resigning in December 1998.

8.1.1 The 1998 electoral boundaries commission

On June 10, the assembly appointed the commission’s three members: Nick Sibbeston, a Métis and former NWT premier from Fort Simpson, Lucy Kuptana, an Inuvialuk from Tuktoyaktuk, and chair Virginia Schuler, a non-Indigenous Yellowknifer and NWT Supreme Court judge. As per the NWT’s *Electoral Boundaries Commission Act*, the three were tasked with reviewing “the area, boundaries, name and representation of the existing electoral districts” and preparing a report recommending whether, and what, changes should be made.

⁵ GNWT Legislative Assembly, “Hansard” (June 2, 1998), 1564.

That summer the commissioners conducted hearings across the territory. In September they issued their report. In it, they explained that their research had, as in past reapportionments, been guided by factors laid out in the *Electoral Boundaries Commission Act*, which might generally be categorized as attention to voter parity (“demographic considerations”), consideration of communities of interest (“cultural and linguistic interests”) and challenges presented by ombudsperson service (“accessibility,” “the means of communication,” etc.). All of the above factors relate to the rights of voters as individuals.⁶ But the commissioners also noted that the legislative assembly had issued them a special directive, related to the interests not of individuals but collectivities: to “strive to maintain a balance between urban and rural populations.”⁷

The commissioners reported that in their hearings, public comments centered around themes such as opposition to the expense of additional ridings, “substantial concern on the part of smaller communities about being ‘overwhelmed’ by Yellowknife,”⁸ the need to proceed cautiously in the face of change, and concerns about interrupting or complicating the ongoing process of constitutional negotiations. According to the report, “Many view the latter process [constitutional negotiations] as the forum where major political changes will be made.”⁹ In outlying regions, including the Deh Cho, Mackenzie Delta, Sahtu and Tłı̄chǫ, some presenters called for additional seats. Many pointed to challenges concerning “ombudsperson” service in their remote regions. Some “urged us to consider that there are factors in the north which may justify departure from the 25% rule.”¹⁰ In Yellowknife, residents of the Indigenous enclaves of Detah and N’dilo called for their own district. As for the rest of Yellowknife, “the majority . . . wanted to see the electoral districts changed to reflect the principle of ‘representation by population.’”¹¹ A number of

⁶ Again, per *Shaw v. Hunt*, voters are aggregated by “community of interest” in order to provide *individuals* with a meaningful vote. The right to be aggregated in this manner thus attaches to people, not “peoples.”

⁷ Northwest Territories Electoral Boundaries Commission, *Report of the NWT Electoral Boundaries Commission* (Yellowknife: Government of the Northwest Territories, 1998), 1.

⁸ *Ibid.*, 4.

⁹ *Ibid.*, 4.

¹⁰ *Ibid.*, 10.

¹¹ *Ibid.*, 8.

Yellowknifers made reference to the *Carter* decision. Some urged adherence to the +/-25 percent deviation-from-parity standard “accepted elsewhere in Canada.”¹²

When it came to making recommendations, the commission was divided. As in 1983, the commission’s Aboriginal members penned the majority proposal. In it, Sibbeston and Kuptana prefaced their remarks by discussing factors that make the NWT “very different from the provinces”¹³: a “unique” political history, layers of ethnocultural and geographic divisions, the “desire and right of Aboriginal peoples to attain and play a meaningful role in the Legislative Assembly,”¹⁴ the “ombudsperson” advantages of large communities, the need for urban-rural balance, the challenges of “adoption and blending of democratic ideals, practices and systems of government,”¹⁵ and especially the ongoing process of constitution-making. Regarding this last factor, the majority went so far as to suggest that “if significant changes are to be considered, they should wait until the current processes have resulted in a constitutional framework and structure of government which can be expected to last for some time. We recognize and indeed we recommend that a further boundaries commission should be established when that government is in place.”¹⁶ The majority then called for Yellowknife to receive two additional electoral districts, including a small one, encompassing Detah and N’dilo, where Indigenous people would form a near, if not clear, majority. This would result in a sixteen-seat assembly in which Yellowknife would occupy 37.5 percent of the seats. Under this scheme, all but two of Yellowknife’s districts would exceed parity by more than 25 percent. The largest would be 38 percent above parity, four times larger than the NWT’s smallest district, Tu Nedhe.

In the minority report, the commission’s chair, Justice Schuler, proposed a more symmetric division of the six proposed Yellowknife districts in which none would have an Indigenous majority nor exceed +25 percent. In rejecting the call for a district comprising mainly Detah and N’dilo, she suggested that the riding’s small

¹² NWT Electoral Boundaries Commission, *Report* (1998), 10.

¹³ *Ibid.*, 11.

¹⁴ *Ibid.*, 11.

¹⁵ *Ibid.*, 11.

¹⁶ *Ibid.*, 12.

population would create “an imbalance in the Yellowknife electoral districts as a whole.”¹⁷ Moreover, she suggested that the Akaitcho First Nation’s ongoing self-government negotiations (mentioned previously), in which Detah and N’dilo were involved, “may better address the goals of the Yellowknives Dene First Nation than new electoral boundaries can.”¹⁸ Justice Schuler seemed to suggest that the NWT assembly was not the best venue through which to protect collective Indigenous rights.

8.1.2 The 1998 legislative debates

For two days in November 1998, MLAs gathered in the assembly to discuss and vote on the electoral boundaries commission’s recommendations. Compared to the assembly’s earlier deliberations over whether to form the commission, this debate was more combative, squarely confronting the territory’s ethnocultural divisions.

Several MLAs, including those from Yellowknife, lauded the electoral boundaries commission, noting its diverse and esteemed membership, praising its hard work, and pointing to what they felt was its right-minded conclusion: that Yellowknife should receive two additional seats. In backing this view, supporters offered various justifications. These included the inefficacy of a fourteen-seat government, the elusiveness of a constitutional accord between Indigenous and public-government leaders, the disproportionate tax burden shouldered by Yellowknife (an appeal to “stakeholder” egalitarianism), and the potential consequences of legislative inaction, including that, in the event of a legal challenge, a court might not only add seats in Yellowknife but also strike down the NWT’s exceptionally low-population districts, some of which were far more than 25 percent below parity.

But predominantly, these MLAs grounded their arguments in the logic of formal egalitarianism. In doing so, they tacitly characterized the NWT as a unified demos composed of individuals, each formally equal to one another. Frequent reference was made to democracy, fairness, parity and the Charter. In a forthright

¹⁷ NWT Electoral Boundaries Commission, *Report* (1998), 15.

¹⁸ *Ibid.*, 15.

speech that championed formal over substantive egalitarianism, Yellowknife MLA Charles Dent acknowledged the capital city's enviable socio-economic position but deemed it no justification for underrepresentation: "There is no question government has fueled the growth of Yellowknife over the past twenty years. The law of Canada, the Charter of Rights and Freedoms, says individual rights must be respected. Relative parity is required. Economic advantage . . . or ability to walk into the legislature is not what governs the size of the legislature."¹⁹ Seamus Henry, also a Yellowknife MLA, called for egalitarian reciprocity, saying, "You can tell your constituents, I did nothing more for the residents of Yellowknife than I would do for my own community."²⁰ Further, echoing Madison, he warned that majorities that abuse minorities may end up reaping what they sow: "If individuals of this house deny the right to equal representation for one community, it may be your turn tomorrow."²¹ Meanwhile, Yellowknife MLA Roy Erasmus was even more direct in accusing the majority of tyranny: "[T]he sentiment of the members and the rest of the communities . . . exactly demonstrates why Yellowknife needs more seats."²² In effect, he charged that rural lawmakers had put reapportionment in a self-serving "stranglehold" – the same sort of anti-democratic monopoly on power that had prompted American courts to finally enter the "political thicket."

Yet perhaps the more distinctive arguments in favor of greater representation for Yellowknife were premised not on universalism but the opposite. Erasmus, for one, suggested that satisfying Yellowknife's demands would not impair Indigenous self-determination, because in the near future "Aboriginal governments may be just as powerful, and perhaps more powerful, than this house," the consequence being that "the communities will have additional representation outside of this house. Why are some members afraid to give the Yellowknife area more seats in such a diluted government?"²³ In effect, Erasmus was raising the issue at the heart of "West Lothian problem," which is ultimately one of "stakeholder"

¹⁹ GNWT Legislative Assembly, "Hansard" (Nov. 12, 1998), 18.

²⁰ *Ibid.*, 25.

²¹ *Ibid.*, 22.

²² *Ibid.*, 30.

²³ *Ibid.*, 23.

inequality: Why should splinter governments need to both draw down power from, and also retain disproportionate power in, a central government? Meanwhile, Stephen Kakfwi, the MLA for Sahtu, noted that the Indigenous population of Yellowknife was growing, meaning it, too, was increasingly underrepresented.²⁴ Drawing on utilitarian understandings of political legitimacy,²⁵ Kakfwi argued that “as long as the Aboriginal population is part of the economic growth of this country and that they feel they are partners in the development, the number of people representing them directly or indirectly in this legislature would not be that significant a concern.”²⁶ Then Kakfwi proposed what amounted to a consociational “external protection” to guard Indigenous interests in an otherwise egalitarian legislature. He suggested that the assembly could ensure that non-Yellowknife ministers dominate the cabinet by establishing a convention whereby two ministers would be chosen from the northern NWT, two from the southern NWT, and two from the capital.²⁷

Opponents of additional Yellowknife representation spoke with equal vehemence. They pointed to the capital’s conspicuous wealth, its disproportionate receipt of government projects and funding, the adequacy of a fourteen-seat legislature, the expense of adding assembly seats, and, conversely, their displeasure at having their own regions’ requests for new seats denied. Some of their logic was substantively egalitarian, including emphasis on the ease of direct access to government enjoyed by Yellowknifers and the “ombudsperson” challenges said to hobble effective representation in remote districts. In a classic appeal to substantive egalitarianism, Michael Miltenberger, the Thebacha MLA, quoting a newspaper editorial, questioned, “In a democracy everyone is equal on voting day, but what happens to equality between elections?”²⁸

²⁴ GNWT Legislative Assembly, “Hansard” (Nov. 12, 1998), 20.

²⁵ This was the view perhaps most famously espoused by Jeremy Bentham, who “proposed that legitimacy depends on whether a law contributes to the happiness of the citizens.” For more, see Fabienne Peter, “Political Legitimacy,” *Stanford Encyclopedia of Philosophy (Summer 2010 Edition)*, ed. Edward N. Zalta. <http://plato.stanford.edu/archives/sum2010/entries/legitimacy/> (accessed April 27, 2011).

²⁶ GNWT Legislative Assembly, “Hansard” (Nov. 12, 1998), 21.

²⁷ *Ibid.*, 21.

²⁸ *Ibid.*, 15.

Most of the arguments of these opponents were premised on a conception of the NWT as non-universal. They spoke of the territory not as a united polity of individuals who deserved equality (formal, substantive, or otherwise), but as a landscape riven by pluralism. Some referenced the threat of “swamping” by Yellowknife newcomers: Said Miltenberger, “Since 1967, they have basically quadrupled in size.”²⁹ They characterized the NWT as in need not of egalitarianism but of balance among factions. Jim Antoine, the MLA for Nahendeh, who had served on the 1983 boundaries commission, implied that the NWT’s rural peoples had already made good-faith efforts to share power with the capital: “We have here as a government, and this legislative assembly, been able to accommodate Yellowknife.”³⁰ Now, however, Yellowknife was keen on what Inuvik MLA Floyd Roland called “hoarding the power,”³¹ which the capital sought to justify by citing individual rights. This “hoarding,” it was said, would upset the precarious “balance of power” between Yellowknife and the remainder of the NWT. “If this report was to go as it is,” said Roland, it would “make for a very difficult operation of a government, because you would potentially set up a Yellowknife caucus versus the rest of the Western Territory.”³²

To preserve the delicate equilibrium upon which the NWT’s political stability was said to depend, opponents urged collaboration between polities. Don Morin, the Tu Nedhe MLA, stated, “I believe that it is our government’s responsibility to supply the glue that holds all those regions together. I myself personally am not ready to throw up my hands and give up on establishing a new Western Territory where all people can work together for the betterment of all.”³³ Miltenberger struck a similar note: “We are in the process of . . . trying to weave the political fabric for the new Northwest Territories. The fabric has to be strong in the north, south, east and west,

²⁹ GNWT Legislative Assembly, “Hansard” (Nov. 12, 1998), 15.

³⁰ *Ibid.*, 24.

³¹ GNWT Legislative Assembly, “Hansard” (Nov. 10, 1998), 29.

³² *Ibid.*, 29.

³³ GNWT Legislative Assembly, “Hansard” (Nov. 12, 1998), 19.

and not just in the centre.”³⁴ To achieve this, he suggested, “[W]e cannot forget our partners in the Aboriginal Summit.”³⁵

Respecting the NWT’s government’s Indigenous “partners,” opponents suggested, was a duty that inhered to Yellowknife as the territorial capital. In effect, they suggested that failing to do so would betray a sort of “social contract,” whereby, *a la* Locke, the NWT’s hinterlands had bequeathed power to the capital on the condition that it protect Indigenous interests. According to Antoine, “[T]here should be an effort by the city to promote Yellowknife as the capital for all the north and not only turn its own attention to the interests of Yellowknife.”³⁶ If Yellowknife refused to consociate, warned Mackenzie Delta MLA David Krutko, Indigenous leaders would follow suit. A rebellion would be at hand. “[T]he Aboriginal groups that have been involved in the constitutional process have come to a point of not seeing any light at the end of the tunnel to say that there is a possibility of us working together and striving for a better Western Territory.”³⁷ Morin issued a similar warning, worthy of Lijphart. Indigenous groups, he said, “are going to express their inherent right of self-government one way or another, by working together or by working in a parallel system” which would likely involve ethnoculturally exclusive self-governments.³⁸ Direct, public-government consociation would be rejected in favor of a looser Indigenous relationship with settlers – a sort of quasi-separation. “Intrastate federalism” in the NWT would be replaced by interstate “treaty federalism,” weakening and perhaps completely bypassing the NWT’s public government, dealing a blow to Yellowknife. Indeed, Miltenberger suggested that the capital would acquire power not by taking it, but giving it: “In this case, a strong Northwest Territories is good for Yellowknife.”³⁹

Finally, the MLAs once again noted that the NWT is constitutionally evolving – “a government in transition” – and called for deference to the process through which the territory’s disparate peoples were negotiating a constitutional accord.

³⁴ GNWT Legislative Assembly, “Hansard” (Nov. 12, 1998), 14.

³⁵ *Ibid.*, 15.

³⁶ *Ibid.*, 23.

³⁷ *Ibid.*, 21.

³⁸ *Ibid.*, 19.

³⁹ *Ibid.*, 26.

This process, they suggested, shouldn't be preempted. According to Hay River MLA Jane Groenewegen, "When some of the constitutional and governance issues are established . . . I will be all for supporting Yellowknife's equal and fair representation in this legislature with additional members."⁴⁰ In effect, Groenewegen seemed to say, only after representation was apportioned appropriately to non-universal polities in the NWT should egalitarianism for individuals be addressed.

A contentious series of votes followed. First, a Yellowknife MLA moved to enact the recommendations of the boundaries commission, granting two extra seats to Yellowknife. This was defeated six-to-seven, with all four Yellowknife MLAs, plus Stephen Kakfwi and Nunakput MLA Vince Steen, on the losing side. It was only the third time in Canada's history that the recommendation of an electoral boundaries commission had been rejected by a legislature.⁴¹ Next came a motion from a Yellowknife MLA to add just one extra Yellowknife seat, which was also defeated.

Then, opponents of additional representation for Yellowknife proposed a motion to equalize the populations of the city's four ridings, ameliorating underrepresentation in the most egregious outlier, the district of Yellowknife South. Yellowknife MLAs and their supporters blasted this suggestion, in part on the grounds that compelling parity among Yellowknife districts, while instituting no similar requirement across the rest of the NWT, would be a non-universal double-standard.⁴² Groenewegen joined Kakfwi, Steen and the Yellowknifers to defeat this motion. Legislative options seemingly exhausted, the debate over the electoral boundaries commission's report ended as it had begun, with Yellowknife significantly underrepresented and the district of Yellowknife South severely so.

8.2 The *Friends of Democracy* case

The following day, Yellowknife MLA Jake Ootes rose in the assembly to announce a meeting of Yellowknife citizens vowing to challenge the assembly's boundaries

⁴⁰ GNWT Legislative Assembly, "Hansard" (Nov. 12, 1998), 26.

⁴¹ John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal: McGill-Queens University Press, 2001), 117.

⁴² GNWT Legislative Assembly, "Hansard" (Nov. 12, 1998), 30.

decision in court.⁴³ This came as no surprise. Opponents such as Miltenberger said they welcomed judicial intervention: “[L]et there be a court challenge. . . . I think it is up to us to make a strong legal case, substantiating the unique northern characteristics that would justify maintaining the current number of MLAs.”⁴⁴ Others lamented the news, with Steen, who had voted with the Yellowknife MLAs, suggesting that if the assembly left the decision to the courts, it would be acquiescing to a form of colonial rule.⁴⁵ Yellowknife MLA Charles Dent made a last-ditch proposal that the assembly add five new seats, three in Yellowknife and one each in Hay River and Inuvik.⁴⁶ It came to naught.

8.2.1 The applicants’ case

In early December, a group of Yellowknife residents calling themselves the Friends of Democracy⁴⁷ filed the lawsuit *Friends of Democracy v. Northwest Territories (Commissioner)* in the NWT Supreme Court. NWT Supreme Court Justice Mark de Weerd, a longtime Northern judge, heard the applicants’⁴⁸ case. In the applicants’ submission, they showed that seven of the NWT’s fourteen electoral districts deviated from parity in excess of +/-25 percent, the generally accepted Canadian standard. Of these, two Yellowknife districts and the Hay River district were exceptionally large while four rural districts were exceptionally small. The applicants further noted that the variance in population between the NWT’s largest and smallest districts, Yellowknife South and Tu Nedhe, was 843 percent, “meaning that, in practical terms, it takes 8.4 votes in Yellowknife South to equal one vote in

⁴³ GNWT Legislative Assembly, “Hansard” (Nov. 13, 1998), 6.

⁴⁴ GNWT Legislative Assembly, “Hansard” (Nov. 12, 1998), 15.

⁴⁵ GNWT Legislative Assembly, “Hansard” (Nov. 13, 1998), 7.

⁴⁶ GNWT Legislative Assembly, “Hansard” (Nov. 11, 1998), 4.

⁴⁷ The group Friends of Democracy was founded by Robert Slaven, at the time a Yellowknife city councillor. Other members included Yellowknife Mayor David Lovell, Fraser Weir, Bill Enge and Sandy Holmes. Notably, Slaven moved away from Yellowknife in 2001. For more see Brent Reaney, “Former Yellowknifer Knows His Questions,” Northern News Services, March 23, 2005, http://www.nnsl.com/frames/newspapers/2005-03/mar23_05j.html (accessed April 5, 2015).

⁴⁸ In Canadian legal parlance, applicants are parties who file suit, respondent are parties being sued, and intervenors are third parties with an interest in the outcome of the case granted leave to make arguments and submit evidence. These roles are largely analogous to plaintiffs, defendants and intervenors in the U.S. legal system.

Tu Nedhe.”⁴⁹ They concluded: “The existing electoral boundaries therefore clearly offend the principle of parity of voting power which is at the heart of the section 3 right to vote.”⁵⁰ Arguing in effect that this offense is not redeemed by any uniquely Northern requirements of “effective representation,” nor by the territory’s distinctive “historical and social context,” the applicants insisted that the NWT “is not so different that fundamental democratic principles do not apply.”⁵¹ Then they attacked other rationale for urban underrepresentation. Questioning justifications rooted in substantive rather than formal equality, they suggested that “ombudsperson” service was not easier but possibly *harder* to provide in Yellowknife than in remote communities, due to the capital’s greater population and heterogeneity of interests. Regardless, they deemed “ombudsperson” arguments to be moot. As per the *Alberta Reference* ruling detailed previously, they maintained that “the fact that smaller populations may be warranted for certain rural or isolated ridings does *not* justify the underrepresentation of urban voters [emphasis in original].”⁵² In short, the applicants argued that even if rural ridings are exceptionally small, Yellowknife ridings must not be exceptionally large. This problem was solvable, they suggested, by providing Yellowknife with additional seats.

The applicants then challenged suggestions that adding urban seats would upset the territory’s “balance of power.” Such balance, they said, was relevant only to the degree that it should reflect the true urban/rural population balance in the NWT – that it respect the sort of “partisan” equality championed by Grofman, whereby parties’ proportion of legislative seats should be equal to their vote share. Such a view, of course, rests on universalism, presuming that the groups whose power must be balanced are second-axis “communities of interest” – aggregations formed of, and designed to protect the rights of, individual voters. The countervailing suggestion that “balance of power” should be maintained in a ratio

⁴⁹ *Friends of Democracy v. Northwest Territories (Commissioner)*, 4256 NWT SC (1999), “Brief of Fact and Law of the Applicants,” 19.

⁵⁰ *Ibid.*, 20.

⁵¹ *Ibid.*, 29.

⁵² *Ibid.*, 22.

not reflective of the territory's population balance presumes that the jurisdiction is non-universal, composed of collective "peoples" first and individual people secondarily. According to the applicants, this view "represent[s] a fundamental misapprehension of the right to vote under section 3. The section 3 right is an *individual* right [emphasis in original]."⁵³ In essence the applicants argued that non-universal demands for "balance" are claims that the Charter's voting-rights clause does not acknowledge, and which it would certainly not favor over the voting rights of individuals.

Finally, the applicants challenged process-based arguments for delaying egalitarian apportionment. They suggested that the NWT's constitutional negotiations might continue for an unforeseeable and possibly protracted period, and that in the interim the suspension of section 3 rights was intolerable. In effect, they maintained that voting rights in the NWT must be accorded to voters in a universal manner at least until such a time as non-universalism became constitutionally recognized. Moreover they argued that, given the very gravity of these ongoing constitutional talks, and given that the NWT government was a key party to the negotiations, insuring that all NWT residents were effectively represented in that government, and thus in the establishment of power-sharing, was all the more critical.⁵⁴ (This argument, while on its face laudably egalitarian, raises a host of questions related to the previously discussed "boundary problem," concerning whether there exists a universally fair method of constituting a non-universalistic state. Delving into that question is beyond the scope of this thesis, though it is surely clear that power-sharing cannot be decided by popular vote. After all, to repeat Vernon Van Dyke's observation, "[In] a multinational state, it is as inappropriate to think of majority rule as it would be in the world as a whole."⁵⁵) In summing up their arguments, the applicants asked the court to invalidate the NWT's existing apportionment scheme.

⁵³ *Friends*, "Brief of the Applicants," 24.

⁵⁴ *Ibid.*, 25.

⁵⁵ Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport, Connecticut: Greenwood Press, 1985), 172.

8.2.2 The respondents' case

In mid-February of 1999, the legal counsel for the NWT attorney general submitted the territorial government's response to the applicants' submission. The response began by quoting Justice McLachlin – not from *Carter*, but from the previously mentioned *Dixon* case, decided when she was still the chief justice of the British Columbia Supreme Court. In it, McLachlin announced that “departure from the ideal of absolute equality may not constitute breach of section 3 of the Charter so long as the departure can be objectively justified as contributing to better government of the populace as a whole.”⁵⁶ “Better government,” the NWT government argued, was precisely what the territory's present apportionment scheme had been crafted to provide.

“Better government” is a nuanced term. Though McLachlin in *Carter* repeated and affirmed the rationale of “better government,” it is unclear whether she was conflating it with her more oft-used phrase in that case, “effective representation.” The two concepts are arguably distinct. Where “effective representation” seems to attach solely to individuals, better government could be read more broadly, protecting meaningful representation of individuals while *also* securing such governance-related values as stability and justice, including perhaps by striking consociational *détentes* between competing polities. As the respondents, the NWT government suggested that in the North, better government had always trumped voter parity. Since the territory's first reapportionment in 1978, leaders had “accepted that Yellowknife would be underrepresented in favor of the smaller communities with Aboriginal majorities.”⁵⁷ Yellowknife's underrepresentation compensated for rural disadvantages related to “ombudsperson” service, travel and socioeconomics, provided effective representation to small but culturally distinct “communities of interest” (such as the Chipewyan-language speakers in Tu Nedhe), and facilitated tacit power-sharing between the NWT's two competing peoples, Yellowknifers and Aboriginals. For twenty years, the NWT government maintained,

⁵⁶ *Dixon v. British Columbia (Attorney General)*, 1989 248 (BC SC).

⁵⁷ *Friends of Democracy v. Northwest Territories (Commissioner)*, 4256 NWT SC (1999), “Brief of Fact and Law of the Respondents,” 15.

the territory had honored this “better government” arrangement, making no substantive changes to the apportionment of representation. “The record is clear,” it stated, “that there has been an historic balance of interests . . . to preserve a balance of power.”⁵⁸ Now, more than ever, such a balance was essential. Yellowknife still dominated the territory by almost every measure. Quoting Graham White,⁵⁹ the government maintained that the capital, home to the NWT’s large, influential and mostly non-Indigenous bureaucracy, “represents a concentration of economic and political power as formidable as it is unpalatable.” Given what was at stake at the cusp of division – the birth of a new jurisdiction, the negotiation of a landmark constitution – the government argued that, “the limitation on the voters of Yellowknife . . . is justified because of the potential political polarization and paralysis along ethnic lines which could occur because of the disturbance to the balance of power.”⁶⁰

Just as the apportionment value of “balance of power” was essential in the NWT, the government argued that parity had always been a secondary consideration. Canada’s federal electoral-boundaries scheme, after all, guaranteed representation to Canada’s territories regardless of their population, which the government cited as proof that the North was a special case, where perhaps the common +/-25-percent “departure from parity” standard should be relaxed. *Carter*, similarly, had exempted Saskatchewan’s two northernmost districts from a strict interpretation of section 3.⁶¹ If, as McLachlin had written in *Carter*, “[t]he northern regions are in a class by themselves,”⁶² then shouldn’t the NWT’s remote districts be also? From this, the NWT government argued that Yellowknife South should be measured not against Tu Nedhe but against typical provincial districts, compared to which Yellowknife South’s population was, they said, “miniscule.”⁶³ The NWT

⁵⁸ *Friends*, “Brief of the Respondents,” 16.

⁵⁹ Graham White, “Northern Distinctiveness, Representation by Population and the Charter: The Politics of Redistribution in the Northwest Territories,” *Journal of Canadian Studies* 28, no. 3 (1993), 7.

⁶⁰ *Friends*, “Brief of the Respondents,” 18.

⁶¹ *Ibid.*, 12.

⁶² *Reference re Provincial Electoral Boundaries (Saskatchewan)*, 2 SCR 158 (1991).

⁶³ *Friends*, “Brief of the Respondents,” 16.

government thus seemed to suggest that districts “in a class by themselves” should be considered in isolation, being neither measured against other districts in the territory *nor having other districts measured against them*. (As such, districts like Tu Nedhe would in fact *not* be treated in the same manner as the northern Saskatchewan ridings, which are held to a fixed 50-percent standard and included in the overall provincial calculation of parity, but rather would be treated like the aforementioned Vuntut district in the Yukon, the population of which is neither limited nor used in parity calculations.) The latter is key, especially in small legislatures such as that of the NWT, as otherwise, inclusion of extremely small ridings would mathematically amplify the degree of underrepresentation in large ridings, increasing the likelihood of a breach of section 3.

In its submission, the NWT government then posed the question, would continued underrepresentation of Yellowknife lead to the capital being “tyrannized”? Unlikely, it said. The NWT’s Indigenous population was too heterogeneous to conspire against the capital (more echoes of Madison), and anyway, so far, “the Aboriginal majority . . . [has] failed to halt the spectacular economic growth of Yellowknife.”⁶⁴ Not only was Yellowknife currently substantively advantaged, but it also had little at “stake” in being underrepresented, as it would feel few ill effects. The NWT government conceded that the territory’s current apportionment scheme did not impair Yellowknife “as minimally as possible.”⁶⁵ “Better government” could still have been achieved with a more egalitarian scheme. But the absence of such a scheme, the NWT government said, was the fault of Yellowknife’s own MLAs, who had blocked the motion to equalize the population of their four districts.

Given the NWT’s historic and ongoing need for balancing power between its discrete polities, and given the import of protecting various sorts of egalitarianism of which formal parity had always been but one, and given the minimal “stake” that Yellowknifers had in diminishing malapportionment vis-à-vis ruralites’ stake in maintaining it, the NWT government argued that “[t]he deviations and electoral

⁶⁴ *Friends*, “Brief of the Respondents,” 18.

⁶⁵ *Ibid.*, 18.

boundaries can be justified . . . because they contribute to better government.”⁶⁶ The government called for deference: *Carter*, it noted, had held that “courts ought not to interfere with the legislature’s electoral map under section 3 of the Charter unless it appears that reasonable persons applying appropriate principles . . . could not have set the electoral boundaries as they exist.”⁶⁷ The NWT, it argued, “is unique and deserving of a northern solution which could result in the long run with a model of government that could be the envy of any jurisdiction with a significant Aboriginal population.”⁶⁸ To permit this consociational future, to cope with the distinctive Northern circumstances of the present, and in conformity with long-honored past practices, the NWT government argued that the legislature had behaved reasonably and appropriately, and that the apportionment scheme it had approved should be allowed to stand.

8.2.3 The intervenors’ case

In the *Friends* case, several Indigenous organizations, together representing almost all of the NWT’s Dene and Métis people, successfully petitioned the NWT Supreme Court to be accepted as intervenors. In their submission to the court they made little effort to muster egalitarian justifications for Yellowknife’s exceptional underrepresentation. They barely mentioned the “ombudsperson” role or socioeconomic disparities suffered by remote districts. As well, they made only oblique appeals to such apportionment considerations as “community of interest” or “minority representation” – considerations that, *Carter* had affirmed, “may justify departure from absolute voter parity in the pursuit of more effective representation.”⁶⁹ Instead, the intervenors’ case hinged on two arguments. The first resembled that of the respondents: That section 3 must be interpreted in the light of, and that the impugned legislative decision should receive particular judicial deference due to, the special historical and political context of the NWT. Secondly, the intervenors argued that even if section 3 was found to have been violated, the

⁶⁶ *Friends*, “Brief of the Respondents,” 19.

⁶⁷ *Reference re Provincial Electoral Boundaries (Saskatchewan)*, 2 SCR 158 (1991).

⁶⁸ *Friends*, “Brief of the Respondents,” 16.

⁶⁹ *Reference re Provincial Electoral Boundaries (Saskatchewan)*, 2 SCR 158 (1991).

impugned legislation should be considered constitutionally “saved” by the Charter’s section 25, the Aboriginal “non-derogation” clause.

Concerning the first argument, the intervenors cited *Carter*: “the content of a Charter right is to be determined in a broad and purposive way, having regard to historical and social context.”⁷⁰ They implored that section 3 “be interpreted and applied so as to ensure effective representation within the cultural and political context of the post-division Northwest Territories.”⁷¹ This context reflected the NWT’s unique evolution: a decades-long process of reconciling the rights and ambitions of, in effect, two demoi – Indigenous peoples seeking self-determination and settlers championing universal liberal democracy. This evolution had reached a decisive moment. They quoted Gurston Dacks: “It is to be hoped that the two visions will converge as the western NWT constitutional-development process unfolds. However, should either side prove too inflexible, the outcome of very separate, and cost-ineffective, governments is very apparent.”⁷² Given all these circumstances, they said, “it may not even be appropriate to consider parity of voting power as having primacy at the present stage of evolution.”⁷³ Like the respondents, the intervenors cited *Carter’s* call for deference: “the courts must be cautious in interfering unduly in decisions that involved the balancing of conflicting policy considerations.”⁷⁴ The legislature’s decision should stand, the intervenors said, as it “represents an accommodation which is justifiable under section 3 of the Charter at this point in time.”⁷⁵

Pursuing their second argument, the intervenors suggested that, even if a section 3 violation had occurred, the NWT’s current apportionment scheme was protected by section 25. The intervenors argued that altering the assembly, especially on the brink of division and with a constitutional accord under

⁷⁰ *Reference re Provincial Electoral Boundaries (Saskatchewan)*, 2 SCR 158 (1991).

⁷¹ *Friends*, “Brief of the Intervenors,” 3.

⁷² Gurston Dacks, “Canadian Government and Aboriginal Peoples: The Northwest Territories: Paper prepared for the Royal Commission on Aboriginal Peoples,” *RCAP Notes* (Ottawa: Royal Commission on Aboriginal Peoples, 1995), 3.

⁷³ *Friends*, “Brief of the Intervenors,” 17.

⁷⁴ *Reference re Provincial Electoral Boundaries (Saskatchewan)*, 2 SCR 158 (1991).

⁷⁵ *Friends*, “Brief of the Intervenors,” 18.

development, would violate the collective rights of NWT Indigenous peoples. The collective rights they emphasized were in effect “process” rights. As the “inherent right” would be meaningless if it was not successfully implemented, and as implementation required negotiating with the *staatsvolk* government, the intervenors claimed that the “inherent right” implied a corollary “right to a full and unfettered negotiation process.”⁷⁶ They cited extensive case law to show that such “process” rights were indeed among the Indigenous rights granted by the constitution and protected by section 25. The NWT assembly, they stated, honored the “process” when it voted “to postpone electoral realignment until the new territory and its government are in place and an appropriate and democratic process can be pursued to reshape the government of the territory.”⁷⁷ In effect, the NWT assembly had respected Aboriginals’ “negative” right to protection so their “positive” right to self-determination could be freely fulfilled. Alteration of the status quo, the intervenors suggested, would betray good-faith negotiations, a move that, in contravention of section 25, would “abrogate and derogate from” Indigenous rights. The intervenors asked the court to deny the applicants’ challenge.

8.2.4 The ruling

On March 5, 1999, Justice de Weerdts issued his decision. De Weerdts stated that the question before the court was “whether the underrepresentation of voters at Yellowknife . . . is in violation of section 3 of the Charter.”⁷⁸ He ruled it was.

In explaining his decision, de Weerdts first addressed issues relating to egalitarianism. He made no references to issues of “stakeholder” equality, nor “community of interest” equality. Concerning substantive equality, however, he agreed that, given the NWT’s distinctive geographical and other features, performance of the “ombudsperson” role was doubtlessly difficult in rural districts. Hence, he said, many of those districts had been apportioned to have significantly fewer constituents than the territorial average, an adjustment providing each voter

⁷⁶ *Friends*, “Brief of the Intervenors,” 22.

⁷⁷ *Ibid.*, 52.

⁷⁸ *Friends of Democracy v. Northwest Territories (Commissioner)*, 4256 NWT SC (1999), 6.

therein with “effective representation.” Having already compensated voters in rural districts by making their ridings smaller, why additionally impair urban electors by making their districts exceptionally large? Said de Weerdt, “It is surely not necessary or appropriate to ensure that the ‘ombudsman role’ of Yellowknife representatives is made more burdensome.”⁷⁹ Then de Weerdt, quoting the *Alberta Reference* decision – “No argument for effective representation of one group legitimizes underrepresentation of another group”⁸⁰ – went on to suggest that the obvious solution was a larger legislature. Providing two seats to Yellowknife, as recommended by the boundaries commission, would “reduce to some degree the levels of numerical overrepresentation in many of the outlying districts while at the same time reducing quite markedly the levels of underrepresentation in the larger centers at Yellowknife.”⁸¹

De Weerdt then tackled the non-universal issues advanced by the intervenors. While the judge was careful not to concede that concerns relating to “balance of power” were germane to the question before the court, he suggested that, regardless, they were moot. Providing Yellowknife with two more seats would still leave the capital’s legislative share at just six of sixteen, a clear minority. Given this, mitigating the underrepresentation of Yellowknifers “need not in any really significant way alter the existing balance of political power,” he wrote.⁸² As this balance was not in jeopardy, the judge concluded that judicial deference was unnecessary.

De Weerdt then suggested that without judicial action, power would be unduly denied – not merely to Yellowknife settlers but to Yellowknife Aboriginals, who formed a fifth of the capital’s population. Here, of course, he was affirming egalitarian rights of individual Native voters, not collective rights of non-universal Indigenous polities. Finally, de Weerdt condemned suggestions that the population of Yellowknife’s four existing ridings should simply be equalized to solve the extraordinary underrepresentation of Yellowknife South. To do so, he said, “would

⁷⁹ *Friends*, 13.

⁸⁰ *Reference re Provincial Electoral Boundaries (Saskatchewan)*.

⁸¹ *Friends*, 13.

⁸² *Ibid.*, 12.

create a separate enclave at Yellowknife where all citizens, including Aboriginals, would be held to a markedly different standard of effective representation.”⁸³ In effect, the judge argued that treating Yellowknife as a “third axis” collectivity would be impermissible because doing so would result in “second axis” dilution of the voting power of Yellowknifers as individuals.

De Weerdt took a similarly dim view of arguments concerning the Charter’s section 25 “shield” and its capability of “saving” voting-rights violations. First, given the central role of voting in democracy, he questioned whether Indigenous protections could *ever* trump voting rights: “It is clear that neither the existence nor the due exercise of that right should depend on the leave . . . of any government or executive authority, be it in relation to the negotiation or enjoyment of any Aboriginal land claim or other Aboriginal treaty right.”⁸⁴ Second, he argued that, as laws cannot be enacted if they violate the Charter, any legislation that does so (including, he seemed to imply, “external protections” aimed at superseding section 3) would be *ipso facto* invalid.⁸⁵ But he then qualified his stance, stating that section 3 was not subject to section 25 “at least in the present instance,” given that the evidence before the court failed to show how two additional Yellowknife districts would imperil identifiable, existing collective rights. The only Aboriginal rights purportedly at stake in this case, he declared, are “process rights,” and it is “entirely unacceptable that such a fundamental right of citizenship as that recognized and guaranteed in section 3 . . . should be held in suspense, and thus be withheld, during government negotiations over the future self-government of Aboriginal or other groups which might yet take decades to bring to a conclusion.”⁸⁶

De Weerdt concluded his ruling by stating, “I am unable to find . . . justification for the gross underrepresentation of those . . . districts where the variations are markedly (25% or more) above the average. This gross underrepresentation must constitute a clear violation of section 3.”⁸⁷ De Weerdt

⁸³ *Friends*, 12.

⁸⁴ *Ibid.*, 10.

⁸⁵ *Ibid.*, 10.

⁸⁶ *Ibid.*, 11.

⁸⁷ *Ibid.*, 8.

thus found the above-parity “ceiling” in the NWT to be encountered at +25 percent. As was previously noted, this is the general Canadian standard, albeit tighter than that observed in at least one province at the time, Nova Scotia. He deemed all three of the NWT’s “markedly” large districts – Yellowknife South, Yellowknife North and Hay River – unconstitutional. He gave the assembly one month, soon to be extended to six months, to create a new apportionment scheme.

8.2.5 *Friends of Democracy*: an assessment

When examined against the background of liberal theory, existing apportionment case law, and the NWT’s constitutional history, the submissions and ruling in *Friends of Democracy v. Northwest Territories* prompt numerous questions and observations. The first set of these questions and observations relate to liberal egalitarianism, the next set to liberal universalism.

Did *Friends* give appropriate consideration to “substantive” equality (i.e., the equal *quality* of representation provided to individuals) vis-à-vis formal equality (i.e., numerically equal “weight” or “power”)? This question may be approached from several angles. First, it may be asked whether formal equality was as relevant to representation in the division-era NWT as it was in other Canadian jurisdictions. As noted previously, the NWT legislature, unlike provincial assemblies such as Saskatchewan’s, to which the *Carter* ruling applied, had long operated by “consensus.” NWT MLAs thus ostensibly interacted with each other via “Burkean” collaboration, not “liberal” competition. As was shown previously, formal equality among districts is of little import in a Burkean system, where constituencies are not seen to be at odds. It could thus be argued that formally equal apportionment was of less relevance in the division-era NWT than it would have been elsewhere in Canada. Of course, if the NWT assembly’s “consensus” system was a misnomer, as suggested previously, or if settlers desired to end the consociational convention of “consensus” in favor of the “liberal,” competitive model practiced in Canada’s *staatsvolk*-controlled provinces, then formally egalitarian districting would arguably remain relevant.

What about the other side of the equation? Was *substantive* equality *more* relevant in the NWT than it was in other jurisdictions? Given the NWT's unique geography, the performance of "ombudsperson" service in the territory certainly posed greater challenges than elsewhere in Canada. It could also be said that the rural NWT faced other "substantive" disabilities, due to poverty, English illiteracy, low education levels, significant need for government services, and unavailability of government-service agencies. Finally, it is true that in the NWT, rural Indigenous constituents embraced a "descriptive" concept of representation that would arguably have been more difficult to provide in large districts than the "authorization" concept of representation embraced by settlers. For all these reasons it can be argued that adjusting district sizes to compensate for substantive inequality would have been of unusual import in the division-era NWT.

Of course, the *Friends* ruling did not condemn the creation of very small districts in the NWT – at least not straightforwardly. Instead, it constrained such districts backhandedly, in at least two ways. First, it applied the *Alberta Reference* ruling to the NWT, which, by lowering the ceiling on large districts, concomitantly raised the floor on small ones, diluting their voice. Second, it set the ceiling specifically at +25 percent, the Canadian norm. Each of these decisions must be examined in turn.

First, regarding *Alberta Reference*, was Justice de Weerdt correct in observing that, having already made rural ridings exceptionally small, "[i]t is surely not necessary or appropriate to ensure that the 'ombudsman role' of Yellowknife representatives is made more burdensome"?⁸⁸ This seems an arguably facile statement, for if the remedy for substantive inequality is to provide rural ridings with a "quotient" of *relatively* greater representation, it is mathematically irrelevant whether one increases the relative representation of the rural "numerator" or decreases the relative representation of the urban "denominator." Under- and overrepresentation are yin and yang, irrevocably interlinked.

⁸⁸ *Friends of Democracy v. Northwest Territories (Commissioner)*, 4256 NWT SC (1999), 13.

Application of the *Alberta Reference* decision leaves electoral-district mapmakers with two options – or possibly three. The first, which the *Friends* ruling required in the NWT, involves diminishing urban underrepresentation by adding more urban ridings. De Weerdts corrected his above oversight by noting that adding urban ridings would also impact rural ridings, “reduc[ing] to some degree the levels of numerical overrepresentation in many of the outlying districts while at the same time reducing quite markedly the levels of underrepresentation in the larger centers at Yellowknife.” Increasing the number of seats in the NWT legislative assembly would mitigate the territory’s degree of urban underrepresentation. It would do this by diminishing rural overrepresentation. Of course, in a large assembly like Alberta, where the number of exceptional rural ridings is small and the number of “unexceptional” districts is large, adding urban seats will have little effect on rural overrepresentation. But in the division-era NWT, where exceptional rural districts were almost as numerous as “unexceptional” ridings, adjustments to the latter would significantly impact the former. Due to simple mathematics, the *Alberta Reference* ruling’s effects on “exceptional overrepresentation” weighed disproportionately heavily on the NWT. This is because, in small legislatures, the aforementioned yin-and-yang of under- and overrepresentation are linked more tightly than they are in larger legislatures.

Alberta Reference, of course, offers a second option for remedying egregious underrepresentation: subjecting small ridings (or perhaps all ridings) to mergers. Given the division-era NWT’s clearly exceptional “ombudsperson” challenges, which militated against elimination of small ridings, as well as its diverse “communities of interest,” which would have been harmed by merging them with other ridings, this option would clearly have been undesirable and perhaps, per *Carter*, illegal, as it might have denied “effective representation” to small-district constituents. Thus, in this second option as in the first, *Alberta Reference* provided the NWT with less leeway to achieve “effective representation” through variable-sized districting than would have been open to less “exceptional” jurisdictions such as Alberta.

Of course, in its response to the court, the NWT government pressed for a third option, which would have sidestepped *Alberta Reference*, in effect de-linking

over- and underrepresentation. The NWT government argued that the territory's exceptionally small districts should be considered "in a class by themselves" and thus should neither be measured against larger NWT ridings (not a problem, said de Weerd) nor have those larger ridings measured against them (which de Weerd, through *Alberta Reference*, rejected). By treating the small districts as free-floating, they would have been provided with not less but more leeway than is available in southern provinces. As noted previously, this is how various territories and provinces treat exceptional districts, including the riding encompassing the tiny community of Old Crow in the Yukon.

A second and related way in which *Friends* backhandedly condemned the NWT's small districts relates to where the ruling set the territory's departure-from-parity "ceiling." The location of this "ceiling" is critical, of course, because it is only when urban districts rise above the ceiling that *Alberta Reference* kicks in. *Friends* put the ceiling in the NWT at +25 percent, the Canadian norm, and deemed all ridings in excess of that norm to be unconstitutional. Critics might question this decision. After all, the Supreme Court of Canada's precedent-setting *Carter* decision avoided entrenching a fixed upper limit on departure from parity, thus encouraging flexibility where circumstances require it. Yet the "ceiling" established in *Friends* was identical to, and thus no more flexible than, the legislated threshold in Ontario, Quebec and B.C. Indeed, +25 percent was *lower* than the ceiling observed at the time in Nova Scotia. Given the division-era NWT's exceptional "ombudsperson" and "community of interest" challenges, and the fact that the application of *Alberta Reference* would impact the NWT disproportionately, it might seem odd that the territory would be required to observe a departure-from-parity "ceiling" providing it with less apportionment flexibility than was enjoyed by the far more conventional jurisdiction of Nova Scotia.

The final second-axis observation that arises from the *Friends* case is that the decision did not address "stakeholder" egalitarianism. As shown previously, the holding of a "stake" in the outcome of government decisions is what justifies the right to vote. It seems clear that in the NWT in 1998-99, Indigenous voters, as compared to Yellowknifers, had more at "stake" – they had both more to gain and

more to lose. This was the case the NWT government made to the court, arguing that Yellowknife's record of disproportionate economic success *despite* its past underrepresentation was evidence that its voters had little to fear if underrepresentation continued. The government might also have cited the capital's rather remarkable rate of population turnover, the consequence of which was that far fewer settlers than Aboriginals would feel the long-term effects of territorial legislation, especially legislation of a constitutional nature. Even more so, the government might have noted that for Aboriginal people, the NWT was an ancestral homeland, whereas for *staatsvolk* it was a place where almost all of them were exogenous and *from which* they enjoyed a "right of exit" back into any of Canada's other federal jurisdictions. Where two groups are constitutionally opposed, as they were in the NWT, and where for one group but not the other the "stakes" at play in constitutional decision-making may involve, in effect, cultural survival, it can be seen as violating "stakeholder" egalitarianism, and undermining the purpose of the right to vote, not to acknowledge that distinction.

Similarly challenging observations arise when *Friends* is studied from a third-axis perspective. To what degree did the ruling take into account the existence of, and remedies for, non-universalism in the NWT? This question can be examined through various sub-questions: First, was Justice de Weerdts wrong to avoid deeming "balance of power" to be relevant to the *Friends* case? The applicants had argued that such concerns mattered only insofar as seats in the assembly should accord with, in effect, second-axis "partisan" egalitarianism, whereby "balance of power" in the territory would be in line with the balance of population. But as has been shown, by the time of division the NWT had seen decades of conflict between competing non-universal polities – Indigenous people and *staatsvolk* – each seeking dominance. Meanwhile, through consociational political devices, administrative decentralization, constitutional negotiations, and the like, these polities had struck a tentative balance of power. Because of the threat of settler "swamping," the key demand of Aboriginals was that, in the NWT, representation *not* be fixed to population share. Rather, of course, Aboriginals sought "external protections" ensuring retention of control of their homeland even if they became outnumbered.

The NWT assembly had acknowledged these non-universal concerns when it directed the 1998 boundaries commission to “strive to maintain a balance between urban and rural populations,” and even the boundaries commission had recognized the deep schisms in the territory when it urged deference to the ongoing process of constitution-making. So why was the judge dismissive of the relevance of “balance”? This question can be examined from a number of angles.

The applicants in *Friends* had argued that section 3 was a definitively individual right, and that to think otherwise “represent[ed] a fundamental misapprehension of the right to vote.” Did it? The truth may hinge on whether the Charter is read to guarantee “effective representation,” which was the central principle in *Carter* and was the preferred interpretation in the *Friends* decision, or whether it instead guarantees the broader concept of “better government,” central to *Dixon* but merely affirmed in *Carter*. As noted previously, whereas “effective representation” *does* seem definitively individual, “better government” does not. The latter would appear capable of encompassing not just first- and second-axis questions, relating to individualism and egalitarianism, but also superordinate third-axis questions where conflicts must be reconciled not just between people but *peoples*. Where power-sharing arrangements must be established either directly or indirectly – as occurred at Canada’s confederation, or through the U.S. “Great Compromise,” or via Belgian consociation – the aim is not primarily the provision of “effective representation” to individuals but rather the “constitutionally prior” goal of balancing power between consociating polities so as to achieve “better government.”

According to both the NWT government and the intervenors in their submissions to the court, and certainly in the view of rural MLAs, the key issues at stake at the brink of Nunavut’s separation were not primarily ones of individual voting rights but of avoiding “political polarization and paralysis along ethnic lines,” striving to “weave the political fabric for the new Northwest Territories,” protecting “the collective right of Aboriginal/First Nations peoples to govern themselves, and indeed, to survive as peoples,” and so on. These were non-universal concerns, essential to “better government.” And what, in cases such as this, might “better”

mean? It could mean any of the previously discussed reasons why multinational states depart from official universalism and grant group-based rights to internal minorities: to better facilitate minority-nation self-determination, to better avoid anti-democratic majority tyranny, to better promote culturally rooted liberal “individual flourishing,” to better respect preexisting treaties and agreements, to better provide Rawlsian justice, and to better facilitate legitimacy, stability and peace. To subordinate these goals to egalitarianism, as *Friends* did, might be seen as putting the second-axis cart before the non-universal horse.

Why did *Friends* do this? After all, *Carter* declared that the Charter of Rights and Freedoms should be read in a “broad and purposive way, having regard to historical and social context,” and that, moreover, judicial deference should be paid to laws passed by “reasonable persons applying the appropriate principles.” Certainly, examining the “historical and social context” of apportionment in the NWT might have been expected to reveal that “balance of power” was at the crux of territorial apportionment, not incidental to it. Further, it might have been expected to lead the court to defer to the assembly’s decision, deeming the MLAs to have been “reasonable persons” who had “appl[ied] appropriate principles” when, in November 1998, they voted to maintain the districting status quo. To turn a blind eye to the political salience of non-universalism in the division-era NWT, and to treat the case as nothing more than a classic example of “silent gerrymandering,” with rural legislators clinging to power by avoiding formally egalitarian adjustments, might be seen as historically and politically myopic.

Of course, without deeming “balance of power” to be germane, Justice de Weerd *did* address concerns about Yellowknife “hoarding the power,” concluding that such concerns were baseless. Was he right? He maintained that Yellowknife, though it would gain two seats for a total of six, would remain a clear minority in a sixteen-seat assembly. This conclusion was premised on two assumptions, one definitely faulty and the other arguably so. The first was that striking down three underrepresented ridings would result in just three new seats being added. Yet as will be seen, *Friends* ultimately resulted in the creation of five new assembly seats – three in Yellowknife, four with a *staatsvolk* majority, and all five in urban/semi-

urban areas. While this brought Yellowknife no closer to outright dominance than would have been the case in the six-of-sixteen scenario, it gave *staatsvolk* a bare minority of seats, 47 percent, and removed legislative control from rural Indigenous communities, turning it over to urban and semi-urban areas. The court's second, arguably faulty assumption was that the power-balance of the assembly would "tip" only once Yellowknife had at least half the MLAs. This possibly mischaracterized the real "tipping" threat. Even without 50-percent control, each new seat gained by *staatsvolk* meant they could more easily build majorities by exploiting schisms in the Aboriginal community – between Métis, Inuvialuit and Dene, or even between individual Dene First Nations. While some observers might see this as the construction of "Madisonian" coalitions of minorities, and thus evidence of healthy liberal-democratic pluralism in action, others might deem it the brokering of pacts between fixed collectivities, as might occur in consociational states comprising three or more polities.

Of course, Justice de Weerd's conclusion that *Friends* was not a third-axis case was based not solely on his reading of section 3 of the Charter as exclusively individualistic, nor his dismissal of "balance of power" concerns as irrelevant due to the mathematics at hand. His conclusion also hinged on his determination that section 25 of the Charter had no application in this case. For Aboriginal leaders in the NWT, none of the findings in *Friends* were so alarming as this. Was the "non-derogation clause" indeed inapplicable to NWT apportionment? The judge seemed at first to entirely dismiss section 25, concluding that it did not in fact trump Charter rights such as section 3 even if they "abrogate or derogate from any aboriginal . . . rights or freedoms." This conclusion seems unsupportable. Legal scholar Bernard Morse, in surveying caselaw pertaining to Aboriginal peoples and the Charter, noted that de Weerd's initial dismissal of section 25 is "the only possible exception" to the common judicial understanding of the non-derogation clause.⁸⁹ Indeed, de Weerd's argument was explicitly rejected two years later in the aforementioned *Campbell v. British Columbia*, when the B.C. Supreme Court confirmed that provisions of the

⁸⁹ Bradford W. Morse, "Twenty Years of Charter Protection: The Status of Aboriginal Peoples under the *Canadian Charter of Rights and Freedoms*," *Windsor Yearbook of Access to Justice* 21 (2002), 421.

Nisga'a Treaty denying section 3 voting rights to non-Nisga'a were nonetheless shielded by section 25.⁹⁰ De Weerd's second conclusion, that no law can be made that violates the Charter, and that thus any law violating section 3 is *ipso facto* invalid, is similarly suspect: The Nisga'a Treaty became law in 1999; it clearly abridges section 3 and yet was signed by the federal and B.C. governments and upheld by the B.C. Supreme Court.

Finally there is de Weerd's more qualified conclusion: That even if section 25 protects the "inherent right" of Aboriginal self-government, it does not provide blanket protection of the process used to determine how that right will be implemented. It is because of this distinction between "process" rights and existing self-government rights that *Friends* may be seen to differ from the later non-universal voting-rights cases of *Campbell v. B.C.* and *Raïche v. Canada*. In both of those decisions, founding peoples were shielded from section 3 parity requirements by third-axis "external protections" that had already been implemented – the *Official Languages Act* in the case of New Brunswick Francophones and the Nisga'a Treaty in the case of the Nisga'a First Nation. In *Friends*, however, the self-government rights of NWT Aboriginals, though affirmed as "inherent," had not yet been enacted. What can one make of this distinction between existing and "process" rights? On one hand, while it is easy to imagine "process" violations so egregious that they would unquestionably "abrogate" Indigenous interests, the violation alleged by the intervenors, involving ameliorating malapportionment in a public legislature, was not *prima facie* so flagrant. Moreover, many might argue that the judge was not unwise to fear the prospect of section 3 being "held in suspense" for "decades." Up to that point, constitutional talks in the NWT had progressed only haltingly. Even today, self-government negotiations are unresolved in the case of the Inuvialuit, Métis and four of the territory's five First Nations.

Yet this observation must be considered with caution. Just like over- and underrepresentation, settler power and the development of Aboriginal self-government in the NWT had long been irrevocably intertwined. Years before,

⁹⁰ Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People," *The Windsor Yearbook of Access to Justice* 21 (2002): 444.

Richard Laing and his co-authors had stated this view bluntly: “It is important to recognize that ‘negotiation’ and a racist relationship are mutually exclusive.”⁹¹ *Friends* could be seen as having stepped into, and then having accelerated, a vicious circle. At least in part due to the longstanding opposition of settlers, who feared diminution of their existing authority, the “inherent right” had not yet been enacted in the NWT by the time of the 1998-99 reapportionment. The fact that self-government had not yet been enacted, in turn, obviated the use of the section 25 “shield” in *Friends*, as Aboriginals did not yet have an enacted self-government agreement that they could claim had been abrogated. This, in turn, threatened to pave the way for even more settler power, and thus more resistance to the enactment of Indigenous self-government, *ad infinitum*. Indeed, given the overwhelming hostility to Aboriginal self-determination displayed by the NWT assembly when it had last been controlled by *staatsvolk* two decades previously, and given Ottawa’s insistence that the NWT government must nonetheless have a seat at claims-negotiating tables, Aboriginals were arguably not wrong to fear a return of settler dominance over the assembly. Self-government would not only be valueless until it was implemented, it would be of diminished value, perhaps permanently, if it was not *satisfactorily* implemented.⁹² Both by delaying and diminishing self-government, a settler-controlled NWT government could use its role in self-government negotiations to advance settler ends. The electoral boundaries commission, in its majority decision, had recognized this when it recommended that major adjustments to the assembly be delayed so as not to prejudice self-government talks. MLAs like Groenewegen had recognized this too: “When some of the constitutional and governance issues are established . . . I will be all for

⁹¹ Richard Laing, Peter Puxley, C. Gerald Sutton, and Wilf Bean, “Political Development in the Northwest Territories,” in *Northern Transitions Volume 2: Second National Workshop on People, Resources and the Environment North of 60°*, eds. Robert F. Keith and Janet B. Wright (Ottawa: Canadian Arctic Resources Committee, 1978), 319.

⁹² Gurston Dacks phrased the problem this way: “Whenever a phenomenon is viewed as a variable, the question of the threshold or boundary arises: at what point is the ability of a First Nation to govern itself so attenuated that it is wrong to accept a set of arrangements as being meaningfully a First Nation governments?” For more, see his “Canadian Government and Aboriginal Peoples: The Northwest Territories: Paper prepared for the Royal Commission on Aboriginal Peoples,” *RCAP Notes* (Ottawa: Royal Commission on Aboriginal Peoples, 1995), 3.

supporting Yellowknife's equal and fair representation." Given the widespread view that the fair implementation of self-government – a constitutional right, shielded from "abrogation" by a Charter right – was at stake, it is hardly surprising, then, that Aboriginals sought to temporarily enjoin the formally egalitarian application of section 3 in the 1998-99 reapportionment.

Finally, related to the above, was the court wrong not to consider the impact of the *Friends* ruling on the long-discussed constitutional accord, through which it was hoped Aboriginal and public government might be merged? The merger of Aboriginal and public government was arguably the most promising, and certainly the most innovative, avenue for the enactment of the "inherent right" of self-government in the NWT. Merger had been championed by Ottawa four years earlier in its Inherent Right Policy and was backed by many Aboriginals and *staatsvolk*. Over the years, at several constitutional summits, representatives of the NWT's two competing polities had labored to move the idea forward. The constitutional accord hinged, of course, on guarantees of Aboriginal overrepresentation in the NWT assembly. Any decision by the court that declared such overrepresentation to be unconstitutional would inevitably quash prospects for an accord. In this sense, the battle over the rules of apportionment in the NWT was the negotiation of self-government, at least in its most-touted form. As will be seen, by dramatically limiting the options available on the negotiating table, the *Friends* ruling all but *decided* the outcome of the NWT's constitutional talks, effectively derailing them.

8.3 The reaction to *Friends of Democracy*

De Weerd's ruling plunged the NWT into what media and politicians labeled an unprecedented "constitutional crisis."⁹³ Some observers suggested the ruling might have national implications, with British Columbia political scientist Norman Ruff calling it "an example of judicial activism that touches very deeply into the political

⁹³ GNWT Legislative Assembly, "Hansard" (March 23, 1999), 66,

process.”⁹⁴ The Aboriginal Summit stated in a press release that it “strongly disagrees” with adding urban seats and blasted de Weerd’s ruling as “narrow, and very disappointing,” giving improper weight to individual vis-à-vis collective rights.⁹⁵ Then, in a dramatic protest, the Aboriginal Summit appealed to the federal minister of Indian Affairs and Northern Development, Jane Stewart, to consider “the abolition of an elected public government in the western Northwest Territories,”⁹⁶ thereby returning the territory to federal management. The Summit accused the NWT government of breaking what is in effect the “social contract” (or sub-contract, really) through which it had been delegated the authority to exercise Ottawa’s “fiduciary responsibility” to Northern Indigenous peoples. (Wrote the Summit, “Our people have tolerated this anomaly . . . because there was a majority of MLAs who represented ridings with a majority of Aboriginal voters. Now it appears that even this minimal degree of Aboriginal control will be diluted. . . .”⁹⁷)

As well, the Aboriginal Summit made a plea for “stakeholder” egalitarianism: “There is something unfair in a system that places so much more importance on an individual’s right to an effective vote, where the largest riding contains only 7,105 people, than on the collective right of Aboriginal/First Nations peoples to govern themselves, and indeed, to survive as peoples.”⁹⁸ The Summit maintained that *both* sides had much at stake, as permitting settler interests to take control of the NWT legislature would harm both Aboriginals and *staatsvolk*, on one hand sabotaging self-government negotiations and on the other amplifying Native resistance to the devolution of province-like powers from Ottawa to the territorial assembly.⁹⁹ The Summit condemned the notion that section 3 voting rights should not be balanced

⁹⁴ “Yellowknife Wins Important Political Battle,” *CBC News*, March 9, 1999, <http://www.cbc.ca/news/canada/yellowknife-wins-important-political-battle-1.171460> (accessed April 5, 2015).

⁹⁵ Daniel MacIsaac, “MLAs Struggle Over New Seats,” *Northern News Services*, March 17, 1999, http://www.nnsl.com/frames/newspapers/1999-03/mar17_99leg.html (accessed October 30, 2014).

⁹⁶ GNWT Legislative Assembly, “Hansard” (March 23, 1999).

⁹⁷ Western NWT Aboriginal Summit, “Letter to the Honourable Jane Stewart” (March 22, 1999), 4.

⁹⁸ *Ibid.*, 2.

⁹⁹ *Ibid.*, 4.

with section 25 and 35 Indigenous rights,¹⁰⁰ and suggested that, without dramatic action, the long-held goal of instituting self-government through the NWT public government (“for example through guaranteed representation of Aboriginal governments”) would be foreclosed. Instead of direct consociation, quasi-separation, through “treaty federalism,” would be the only remaining option¹⁰¹ – but even this avenue of self-government might be foreclosed. Wrote the Summit, “Some of us have already experienced roadblocks in these negotiations. . . . How likely is it that a legislature composed of more ridings comprised of a majority of non-Aboriginal voters will . . . be more liberal?” The Aboriginal Summit implored both the federal and territorial governments to appeal the *Friends* decision, citing the NWT government’s fiduciary duty to defend Indigenous interests and its responsibility to negotiate in good faith on land claims and self-government.

Meanwhile, MLAs met to seek a solution. This would not be easy, as some Yellowknife MLAs cheered the court’s decision and urged the government to comply by immediately increasing representation in Yellowknife and Hay River.¹⁰² Others, however, suggested the ruling could be satisfied with no (or almost no) addition of seats, by merging sections of underrepresented urban ridings into rural districts. For example, Michael Miltenberger called for creating a single new Yellowknife constituency (“the minimum necessary to comply with the judgment”) and readjusting the NWT’s other ridings such that none would be underrepresented by more than 25 percent.¹⁰³ Here can be seen the alternative to the *Alberta Reference* prescription: To avoid adding urban districts, as de Weerdt had envisioned, existing seats could be amalgamated. Yet this would reduce overrepresentation (and thus substantive equality) of rural ridings and would also, in this instance, gut second-axis “interest” equality, both by “cracking” many Yellowknifers into rural-controlled districts and by mixing rural voters belonging to different communities of interest into the same riding. Ultimately the assembly rejected this option, likely for reasons similar to those expressed by Hay River’s Jane Groenewegen: “I am not prepared to

¹⁰⁰ Western NWT Aboriginal Summit, “Letter to the Honourable Jane Stewart” (March 22, 1999), 4.

¹⁰¹ *Ibid.*, 4.

¹⁰² GNWT Legislative Assembly, “Hansard” (March 24, 1999), 110-111.

¹⁰³ GNWT Legislative Assembly, “Hansard” (March 26, 1999), 5.

impose extinguishment on small ridings, or rolling them up with non-traditional components in the interests of balancing the numbers.”¹⁰⁴ Also rejected were even more unorthodox proposals, such as amending assembly rules so that even if seats were added in Yellowknife, legislation could only be passed by a supermajority, thus obviating the threat of Yellowknife majoritarianism.¹⁰⁵

8.3.1 Bill 15

On March 24, Premier Jim Antoine gave an extended speech before the assembly in which he lamented de Weerd’s ruling: “At a time that the world is congratulating the people of Nunavut for creating their own territory, we risk tearing ours apart.”¹⁰⁶ Yet he suggested that, based on the legal advice his government had received, there was “no other viable option” than to comply with the decision. With that, Antoine formally introduced Bill 15. In keeping with the proposal MLA Charles Dent had made in December, the bill would add five electoral districts, three in Yellowknife and one each in Hay River and Inuvik, bringing the total number of assembly seats to nineteen. The proposal was said to be the most conservative way to satisfy de Weerd’s ruling without amalgamating or radically altering existing ridings.¹⁰⁷ It had the advantage of leaving small ridings, such as Tu Nedhe, intact. On the other hand, by increasing the size of the assembly by more than one-third, it would have the effect of diluting the overrepresentation of Tu Nedhe and other “exceptional” ridings. Moreover, it would have dramatic non-universal impacts. Yellowknife’s seat share would jump from four of fourteen MLAs to seven of nineteen, an increase of 75 percent. The proportion of *staatsvolk*-majority ridings

¹⁰⁴ GNWT Legislative Assembly, “Hansard” (March 26, 1999), 5.

¹⁰⁵ Daniel MacIsaac, “MLAs Debate Friends Ruling,” *Northern News Services*, March 12, 1999, http://www.nnsl.com/frames/newspapers/1999-03/mar12_99fod.html (accessed October 30, 2014).

¹⁰⁶ GNWT Legislative Assembly, “Hansard” (March 24, 1999), 91.

¹⁰⁷ The decision to add five seats, rather than three, was driven by what John Courtney calls “the peculiar domino effect of boundary readjustments.” This effect is amplified in small legislatures such as that of the NWT, where each change has proportionally greater impact. Assigning two new ridings in Yellowknife and one in Hay River, as might have seemed the obvious response to the *Friends* ruling, would have lowered the territory’s average riding size so that an additional Yellowknife riding would exceed the plus-25-percent threshold. Adding another Yellowknife seat to cope with *that* malapportionment would in turn send Inuvik over the brink. Only once Inuvik received additional representation did all districts finally find themselves within the law.

would climb from five of fourteen to nine of nineteen, up by 80 percent. And urban/semi-urban ridings would become a majority, increasing from six of fourteen seats to eleven of nineteen, an 83-percent increase. The proportion of Indigenous-majority ridings, meanwhile, would fall to a bare majority: 53 percent. And the proportion of rural, Indigenous-supermajority ridings would plunge, from nearly 60 percent to barely 40 percent.

8.3.2 The appeals

Immediately following Premier Antoine's speech, Tu Nedhe MLA Don Morin condemned the proposed bill. In an address deemed "sometimes blunt, sometimes emotional" he accused the NWT government of betraying the territory's Indigenous people, a breach of its tacit social contract.¹⁰⁸ He instead presented a motion calling on the government to appeal de Weerd's decision. The motion highlighted the territory's role in facilitating the implementation of the "inherent right" through the negotiation of joint land-claim and self-government agreements. (As noted previously, the territorial government was, along with the federal government and Aboriginal groups, a partner in these negotiations. Historically, when the NWT government had been Indigenous-dominated, it had championed Native claims; when it was *staatsvolk*-dominated it had worked to quash such claims.) Morin's motion also questioned de Weerd's interpretation of the relationship between sections 3 and 25 of the Charter and section 35 of the *Constitution Act, 1982*. At the heart of his speech was a plea for consociation over separation and potential instability: "If people want to vote to keep the western territory together, to work together, they'll vote in favor of that motion – if they want to break it apart . . . then vote against that motion."¹⁰⁹ Other MLAs backed Morin in his call for the NWT government to appeal the *Friends* decision, including David Krutko, James Rabesca, Michael Miltenberger and, in a noteworthy turnabout, Roy Erasmus, Yellowknife's

¹⁰⁸ Daniel MacIsaac, "Government Says No to Morin," *Northern News Services*, March 26, 1999, http://www.nnsl.com/frames/newspapers/1999-03/mar26_99fod.html (accessed December 15, 2014).

¹⁰⁹ Daniel MacIsaac, "The House is Divided," *Northern News Services*, March 24, 1999, http://www.nnsl.com/frames/newspapers/1999-03/mar24_99fod.html (accessed December 14, 2014).

sole Aboriginal member, who in November had passionately appealed for more Yellowknife seats. Erasmus now told the assembly, “I realized I had to do what was right and not what would probably be best for me. . . . [T]his issue is more than about seats for Yellowknife . . . It is about how rights are interpreted.”¹¹⁰ (Erasmus later suggested that de Weerd’s decision “is tantamount to reading sections 25 and 35 out of the Charter altogether.”¹¹¹) Yet Premier Antoine remained steadfast in his view that the government had “no basis to appeal on the merit of the judgment”¹¹² and suggested that territorial resources would be better spent seeking a “political solution rather than having the court decide.”¹¹³ When Morin’s motion was put to a vote, Antoine and his ministers abstained. The motion passed easily, but, as motions are simply expressions of opinion by the assembly and not legally binding, it was to no avail.

Antoine did, however, commit his government to financially supporting an appeal by the Aboriginal intervenors in the *Friends* case. Unlike the NWT government, which as the respondent had an automatic right to appeal, the intervenors needed permission from the court to contest de Weerd’s ruling. The government stated that its lawyers felt there was a “pretty good chance” of permission to appeal being granted. In May the intervenors applied to the NWT Court of Appeal for leave to appeal, maintaining that the *Friends* decision contravened their Indigenous rights guaranteed in sections 25 and 35. On June 16, Justice René Foisy denied their application. Foisy ruled that the intervenors “cannot point to any specific agreement or negotiation or treaty which is or may be affected by [de Weerd’s] decision.”¹¹⁴ Rather, he said, the intervenors merely asserted that negotiations on the future implementation of their rights “might be affected.” Even on this point, Foisy was not persuaded. “As governments succeed one another, there is nothing concrete to suggest that bona fide negotiations with respect to self-government and/or treaty negotiations will not continue. If they do not, and section

¹¹⁰ GNWT Legislative Assembly, “Hansard” (March 24, 1999), 108.

¹¹¹ GNWT Legislative Assembly, “Hansard” (March 26, 1999), 137.

¹¹² GNWT Legislative Assembly, “Hansard” (March 24, 1999), 109.

¹¹³ GNWT Legislative Assembly, “Hansard” (March 26, 1999), 144.

¹¹⁴ *Friends of Democracy v. Northwest Territories (Commissioner)*, 4256 NWT SC (1999), “Reasons for Decision,” 3.

25 and/or section 35 rights are infringed, remedies are available through the judicial process.”¹¹⁵ With that, the *Friends of Democracy* court case came to a close.

8.3.3 The report on Bill 15

After receiving second reading in March, Bill 15, the proposal to expand the assembly to nineteen seats, moved into the assembly’s Standing Committee on Government Operations, which had 120 days to review the legislation and propose amendments before delivering it to the full assembly for a vote. The standing committee, formed of the assembly’s seven non-cabinet MLAs, splintered along ethnic lines. Non-Aboriginals Jake Ootes and Seamus Henry from Yellowknife had vocally backed Bill 15, and Jane Groenewegen, though having expressed doubts about the practical necessity of a second seat in her community of Hay River, and thus less clearly a supporter of Bill 15, had nonetheless opposed Morin’s motion to appeal. When the committee’s four Aboriginal members, Morin, Erasmus, Krutko and Rabesca, declared they would “take Bill 15 to the people” and conduct public hearings on the legislation throughout the NWT, the dissenting members declined to participate. Public hearings took place in June and early July in six NWT communities, including Yellowknife. About four-dozen presenters testified. Yellowknife media reported that “[w]hile . . . the hearings have been sparsely attended . . . the issues involved are weighty.”¹¹⁶ Journalists confirmed that the NWT public displayed only moderate interest in, and understanding of, the ongoing “constitutional crisis.”¹¹⁷ While some urban commentators condemned the hearings as a dog-and-pony show “for politically motivated individuals to garner some free publicity,” and some Indigenous leaders complained the hearings visited too few rural communities and were thus “biased” in favor of urbanites,¹¹⁸ others cheered

¹¹⁵ *Friends*, “Reasons for Decision,” 3.

¹¹⁶ David MacIsaac, “Bill Divides NWT: Numbers are Small but Issues are Big,” *Northern New Services*, June 28, 1999, http://www.nnsl.com/frames/newspapers/1999-06/jun28_99b15.html (accessed April 5, 2015).

¹¹⁷ David MacIsaac, former reporter, *Northern News Services*, e-mail message to author, April 3, 2015; Lee Selleck, former editor, *Native Press*, e-mail message to author, March 29, 2015; Cooper Langford, former editor, *Up Here*, e-mail message to author, March 29, 2015.

¹¹⁸ Editorial, “The Road to Redundancy,” *Northern News Services*, June 25, 1999, http://www.nnsl.com/frames/newspapers/1999-06/jun25_99edit.html (accessed March 8, 2015).

the hearings as a way to spur discussion about a “political solution,” as well as to buy time for the intervenors, whose appeal at that point was still outstanding. On July 27, less than two weeks after the intervenors were rebuffed, the standing committee issued a report in which it summarized its findings and presented recommendations.

In its “Report on Bill 15: An Act to Amend the Legislative Assembly and Executive Council Act,” the standing committee reported that in Yellowknife it had heard substantial support for Bill 15. Outside Yellowknife, residents vociferously opposed the measure, feeling the new bill’s electoral scheme would upset the political equilibrium of the territory, shifting power, perhaps irrevocably, to urbanites. The committee reported that this view did not appear to be race-based, as it had been expressed by both rural *staatsvolk* and Aboriginals.¹¹⁹ The standing committee cited testimony from rural presenters who felt Bill 15 would “alienate,” “betray” or “disenfranchise” the NWT’s Indigenous population, and would entrench a colonial regime that should instead have given way to Indigenous self-determination. The report quoted Bill Erasmus, the grand chief of the Dene Nation, who had testified, “the imbalance we have always feared is upon us.”¹²⁰ It also quoted Nick Sibbeston, the former premier and, only months before, a member of the electoral boundaries commission, who told the standing committee that Bill 15 would over-concentrate power in urban centers and potentially spell the end of consensus government.

The report stated that some rural residents had derided the *Friends* applicants as the “Fathers of Apartheid”¹²¹ and suggested that the NWT government “should have learned from the Oka crisis.”¹²² One presenter reportedly lamented that Bill 15 is “setting up a government for people who move here from, and retire

¹¹⁹ GNWT Legislative Assembly, “Hansard” (July 29, 1999), 21.

¹²⁰ Government of the Northwest Territories Legislative Assembly Standing Committee on Government Operations, “Report on Bill 15: An Act to Amend the Legislative Assembly and Executive Council Act” (Yellowknife: Government of the Northwest Territories, 1999), 8.

¹²¹ GNWT Legislative Assembly Standing Committee, “Report on Bill 15,” 9.

¹²² *Ibid.*, 9. The “Oka crisis” took place over two months in 1990, when Mohawk protestors engaged in an armed and at times violent standoff with police and military at Oka, Quebec, where municipal officials had approved construction of a golf course on land the First Nation deemed sacred. In the end, a single Quebec police corporal was killed and the golf-course development was cancelled.

to, the south,”¹²³ in effect compromising the “stakeholder” equality of locals. Others feared that if Bill 15 passed, “this would be the end of any meaningful constitutional development or discussions in the Northwest Territories,”¹²⁴ with Aboriginals “separating” via ethnoculturally exclusive self-governments. Some residents in Inuvik and Hay River questioned whether their towns needed additional representation, suggesting that splitting each community into two districts might be divisive and confusing (an argument that places “community of interest” concerns above those of formal parity).¹²⁵

Presenters proposed blunting the effect of the new electoral scheme through means such as longer terms of residency for voting (upping “stakeholder” egalitarianism), decentralizing government offices to rural communities (a limited form of indirect consociation), or even relocating the seat of government out of Yellowknife (an inverse sort of separatism, whereby, instead of breaking from an oppressive government, the government is broken from the oppressors).¹²⁶ Many, however, warned that no matter what, cooperation with settlers was at an end: “There was a strong sentiment that perhaps the GNWT should be bypassed, and that the expression of the inherent right to self government through parallel governments may be the only viable option.”¹²⁷

Having relayed the above testimony, the report then provided the committee’s own conclusions. Stating that “the political, economic and social fabric of the Northwest Territories is jeopardized by Bill 15,”¹²⁸ the committee condemned the cabinet for not appealing the *Friends* ruling. Noting that *Friends* suggested “that the right to vote protected by section 3 of the Canadian Charter of Rights and Freedoms is not to be read together with the sections which protect and guarantee Aboriginal and treaty rights,”¹²⁹ it called upon the cabinet to request that the

¹²³ GNWT Legislative Assembly Standing Committee, “Report on Bill 15,” 9.

¹²⁴ *Ibid.*, 11.

¹²⁵ Daniel MacIsaac, “Bill Divides the North,” *Northern News Services*, July 12, 1999, http://www.nnsl.com/frames/newspapers/1999-07/jul12_99bill15.html (accessed Jan. 17, 2015).

¹²⁶ Daniel MacIsaac, “Bill Divides NWT,” *Northern News Services*, June 30, 1999, http://www.nnsl.com/frames/newspapers/1999-06/jun30_99b15.html (accessed Jan. 17, 2015).

¹²⁷ GNWT Legislative Assembly Standing Committee, “Report on Bill 15,” 10.

¹²⁸ *Ibid.*, 10.

¹²⁹ *Ibid.*, 16.

Supreme Court of Canada clarify the relationship between sections 3 and 25 of the Charter and section 35 of the *Constitution Act, 1982*. The standing committee further recommended that Bill 15 automatically “sunset” when the term of the next legislature expired. Then, through various means, it called for the entrenchment of non-universalism in the NWT. It suggested Indigenous power be bolstered by requiring rural overrepresentation in cabinet – in effect, a form of intrastate consociation. Further, the committee urged the government to develop a “workplan with clear timelines for the negotiation of a political accord with NWT Aboriginal governments,”¹³⁰ and, further, to establish a constitutional commission that would prepare a draft constitution for review by NWT residents within three years. It called for exploration of other innovative electoral arrangements, including an Indigenous-only at-large riding in Yellowknife and a territorial senate in which representation would be apportioned based on region rather than population. The standing committee concluded its report on an ominous note: “If the government chooses not to support the standing committee recommendations . . . it risks seeing the territory break apart.”¹³¹

8.3.4 Legislative consideration of Bill 15

On July 28, the NWT legislative assembly considered the recommendations made by the standing committee in its report on Bill 15. In introducing the recommendations, the committee chair, Yellowknife MLA Roy Erasmus, stated that the *Friends* ruling, and the subsequent electoral scheme laid out in Bill 15, had created “tremendous animosity” between rural and urban residents. “I certainly hope,” he said, “that we can do the few things that we have suggested to bring some measure of relief, some measure of comfort to the smaller communities . . . who are very, very frightened by the bill that we are going to pass over the next little while.”¹³² Committee member Don Morin, the MLA from Tu Nedhe, was even more demonstrative: “If people believe that there is no hope to hold the western territory together, then they should

¹³⁰ GNWT Legislative Assembly Standing Committee, “Report on Bill 15,” 16.

¹³¹ *Ibid.*, 22.

¹³² GNWT Legislative Assembly, “Hansard” (July 28, 1999), 21.

say that. But if members believe that we should show some leadership and supply the glue that holds the fabric of the new western territory together, then you should make bold decisions and move ahead.”¹³³ Sounding a more despondent note, Mackenzie Delta MLA David Krutko opined: “I think that the biggest losers in all of this is the relationship that has been worked on for twenty years, regarding Aboriginal people’s desires, expectations and goals of some day being able to deal with their own problems, programs and services and be a positive light in the society of building a new Northwest Territories.”¹³⁴ Yellowknife members fired back, with MLA Seamus Henry stating, “I believe that people in the territories understand the democratic principles and the rights that are granted to all citizens with the passage of this bill are also granted to people who are complaining about a power shift. These democratic principles are tried and proven and they will protect each and every person in the Northwest Territories.”¹³⁵

The standing committee then advanced a series of non-binding motions related to the recommendations in its report. In keeping with assembly convention, the cabinet abstained from voting, though the premier, in his comments on the recommendations, made clear the government’s position. With only “regular” (i.e., non-cabinet) MLAs voting, the assembly approved a motion to develop a workplan for achieving a political accord with Indigenous governments. The assembly also approved a motion to pursue a legal reference on Indigenous Charter rights, seeking an advisory opinion from the courts on the relationship between sections 3, 25 and 35, though this motion received only cool support from Yellowknife MLAs Jake Ootes and Seamus Henry, and cabinet expressed uncertainty as to whether such a reference could legally proceed. More divisive was a motion to require regional overrepresentation on cabinet, with Ootes and Henry opposed and the premier insistent that overrepresentation be achieved via unwritten convention rather than through law. Finally, the assembly considered a motion to establish a constitutional commission that would strive to prepare a draft constitution for review by NWT

¹³³ GNWT Legislative Assembly, “Hansard” (July 28, 1999), 21.

¹³⁴ *Ibid.*, 22.

¹³⁵ *Ibid.*, 23.

residents within three years. With the premier rejecting the idea and instead suggesting that the government would pursue constitutional talks through a non-legislated “intergovernmental forum,” the motion passed four-to-two with cabinet once again abstaining. With the government having refused to support two of the standing committee’s recommendations, and having offered only guarded support for a third, Morin declared, “I have never been so disgusted in my life to see people sit on their hands and offer no solution. . . . This is a dark day in the history of the Northwest Territories.”¹³⁶

On July 29, the assembly began formal consideration of Bill 15. MLAs Erasmus and Morin continued pressing the government to commit to establishing a constitutional commission as well as to requiring regional overrepresentation on cabinet. Premier Jim Antoine vowed to consult with Indigenous leaders on those ideas. As well, the assembly pressed cabinet to amend Bill 15 to dissolve the nineteen-seat electoral scheme at the end of the next legislative term. With this last demand, the so-called sunset clause, cabinet complied. The amendment was carried, with dissenting votes only from the two Yellowknife regular MLAs. The text of Bill 15 was then approved clause by clause. The next day, July 30, Bill 15 saw third reading and anticlimactically passed into law. It was supported by cabinet *en bloc*, and was supported as well as by the three Yellowknife regular MLAs, notably including Erasmus. Three rural regular MLAs, Krutko, Morin and Rabesca, opposed the bill. At the upcoming election, five seats would be added to the assembly – three in Yellowknife and one each in Hay River and Inuvik – with the scheme slated to sunset before the subsequent election. In the media, even the bill’s official proponent, Premier Antoine called the change “a bitter pill and . . . a shift in power.”¹³⁷ Commentators condemned the government for passing the buck to the

¹³⁶ GNWT Legislative Assembly, “Hansard” (July 28, 1999), 691.

¹³⁷ “Struggle for Democracy Continues in the North,” *Windspeaker*, Aug. 1, 1999, <http://www.thefreelibrary.com/Struggle+for+democracy+continues+in+North.-a030503966> (accessed April 5, 2015).

next assembly, leaving to the next crop of leaders the challenge of reconciling section 3 voting rights and Aboriginal self-government.¹³⁸

8.4 Summary

As this chapter demonstrates, in the NWT's 1998-99 reapportionment, which overlapped with Nunavut's separation, the NWT's rural-controlled assembly at first declined to ameliorate the longstanding underrepresentation of Yellowknife. Yellowknifers sued, and the NWT Supreme Court ruled in their favor. The court held that, while rural NWT ridings may permissibly be very small, urban ridings may not be overly large. It concluded that adding seats in Yellowknife would remedy this problem. The court further suggested that "balance of power" was not relevant to the case at hand; that even if "balance of power" was relevant, such balance was not under threat; and that at least in this case, the Charter's section 25 "non-derogation" clause did not shield the NWT government from section 3 claims. Following the decision, the NWT government resisted Aboriginal pressure to appeal the ruling and proposed a bill that would add five seats, in Yellowknife, Hay River and Inuvik. An appeal by Aboriginal groups failed, as did efforts by opposition MLAs to devise various last-ditch solutions. Significant changes, if they were occur, would have to be made by the next legislative assembly.

¹³⁸ Editorial, "Leadership Rides Into the Sunset," *Northern News Services*, Aug. 9, 1999. http://www.nnsl.com/frames/newspapers/1999-08/aug9_99edit.html (accessed Jan. 17, 2015).

Chapter 9: Epilogue

While it is beyond the scope of this thesis to examine thoroughly the constitutional evolution of, and the reapportionments exercises in, the NWT in the years since the events of 1998-99, it would be remiss not to acknowledge some of them in passing. As in the NWT's division-era period, relatively little scholarly attention has been given to the territory post-division; thus, the post-division developments discussed in this chapter merit further research. This chapter first addresses the denouement of the 1998-99 NWT electoral boundaries reapportionment "crisis." This chapter then examines the degree to which predictions made during the 1998-99 reapportionment "crisis" came to fruition. Finally, this chapter glances at the NWT's reapportionment exercises of 2006 and 2013, observing similarities between those exercises and the NWT's pre-division and division-era reapportionments.

9.1 Denouement

As noted in the preceding chapter, upon the approval of Bill 15 in July 1999, critics of the NWT government chided it for "passing the buck," shifting responsibility for resolving the NWT's constitutional impasse to the next legislative assembly. Yet in late-2003, when the life of the next assembly came to an end and the previously discussed "sunset clause" was to have taken effect, the territory's electoral map instead remained unchanged, with the size of the legislature still at nineteen members. In a sixty-four-page report issued in May 2003 by that assembly's Special Committee on the Implementation of Self-Government and the Sunset Clause, the eponymous clause was barely mentioned. The report revealed clearly that the territory's constitutional evolution had entered a new era.

Gurston Dacks had observed after the *Friends* ruling that "[t]here is now only one table for implementing the inherent right – the self-government table."¹ The aforementioned report confirmed this: No longer were Aboriginal leaders seeking to express self-government primarily, or even partially, through "special guarantees" in public government. In 2003 the Tłı̄chǫ Agreement, the first comprehensive

¹ GNWT Legislative Assembly Standing Committee, "Report on Bill 15," Appendix: Presentation by Gary Bohnet, Métis Nation, 4.

Aboriginal self-government agreement in the NWT, was signed into law, establishing a standalone government, including a constitution, assembly, administration and funding structure, for the territory's most populous Indigenous group, the Tłı̨chǫ. Clearly, creating similar self-governments had become the primary goal of the NWT's Aboriginal leaders. Such governments would at most seek an "interstate" relationship with Yellowknife, via "treaty federalism." Indeed, they might look to bypass the territorial government entirely, preferring more direct nation-to-nation interactions with Ottawa.

Likely as a consequence of this focus by Aboriginal groups on *de facto* separation, efforts to fashion a consociational territorial constitution fell by the wayside. Both Native and *staatsvolk* leaders seemed to accept that the governance-structure of the future NWT would develop in an ad hoc fashion, reacting to decisions made at Aboriginal negotiating tables. The special committee's report dealt almost entirely with how the territorial government might cope with this constitutional sea-change.² High-level power sharing, to the degree that it would occur at all in the NWT, would thenceforth be quasi-federal. Power would not so much be shared at the center, in Yellowknife, but drawn down from both Ottawa and the NWT government, to varying degrees at various times, by outlying Native governments. Clearly, between 1999 and 2003, the NWT government's vision of the territory's constitutional future had undergone a dramatic alteration. Scholars might find it fruitful to give further attention to how and why this occurred.

9.2 The predictions of 1998-99

Were predictions made during the NWT's 1998-99 reapportionment regarding the threat of nation-versus-nation discord accurate? Despite talk at that time of the NWT "tearing apart" if Aboriginal "external protections" were not entrenched, overt inter-ethnic conflict neither persisted in the political realm nor spilled over into broader areas of Northern life. The NWT saw no drama similar to the separatism

² Northwest Territories Legislative Assembly, Special Committee on the Implementation of Self-Government and the Sunset Clause, "The Circle of Self-Government: Report of the Special Committee on the Implementation of Self-Government and the Sunset Clause" (Yellowknife: Government of the Northwest Territories, 2003).

crisis that engulfed Quebec following the rejection of Bill 101. Rather than escalating, the NWT's "constitutional crisis" by all appearances largely abated. It may be argued that relations between NWT Aboriginals and *staatsvolk* are no worse than they were in 1998-99.

Though high-level, inter-polity power-sharing has not come about within the NWT public government, and though the broadly accepted vision for the territory's future has shifted from "intrastate" to "interstate" consociation, many of the NWT's on-the-ground realities remain the same. Aspects of the public government's uneasy consociational *détente* endure. That government still exhibits many "distinctive" consociational features observed by Graham White and other scholars twenty-five or more years ago. These include the practice of governing by "consensus," the (now more constrained) overrepresentation of rural Indigenous ridings in the legislature, the convention of guaranteeing regional representation on cabinet, and uniquely Northern policies relating to language, affirmative-action and decentralization.

Aboriginal MLAs have remained a majority in the assembly, both overall and in cabinet. All four NWT premiers since 1999 have been Aboriginal. Native participation in territorial elections is especially noteworthy: In all NWT elections since 1999 (indeed, since at least 1983), non-Yellowknife ridings have seen higher voter turnout than Yellowknife ridings, usually by a substantial margin.³ Studies in other jurisdictions suggest a linkage between electoral participation and perceptions of governmental legitimacy,⁴ conceivably suggesting that Indigenous residents, more so than settlers, accept the GNWT as a rightful authority. (It should be noted, however, that other factors, such as rurality and duration of residency, are also positively associated with voter turnout.⁵)

³ In 1983, Yellowknife's turnout was 68.6 percent while the territorial average was 69.7 percent. In 1987, the respective turnouts were 52.7 percent versus 71.6 percent; in 1991, 58.8 percent versus 76.3 percent; in 1995, 60.6 percent versus 75.4 percent; in 1999, 63.9 percent versus 71.6 percent; in 2003, 54.3 percent versus 68.5 percent; in 2007, 57.6 percent versus 67.0 percent; and in 2011, 34.2 percent versus 48.0 percent.

⁴ Sarah Birch, "Perceptions of Electoral Fairness and Voter Turnout," *Comparative Political Studies* 43, no. 12 (2010): 1603.

⁵ Alan D. Monroe, "Urbanism and Voter Turnout: A Note on Some Unexpected Findings," *American Journal of Political Science* 21, no. 1 (1977): 71.

Meanwhile, despite concerns about the NWT splintering into a constellation of competing ethnocultural regimes, Aboriginal self-governments have not proliferated. As noted previously, since 1999, only the Tłı̄chǫ First Nation and the small Sahtu community of Délı̄ne have enacted self-government agreements. From one perspective this could be interpreted as indicating Indigenous satisfaction with the status quo and a lack of urgency to “separate” from the territory’s *staatsvolk*-style political system. On the other hand, it would also appear that Aboriginal groups have continued pursuing self-government. The lack of tangible progress could thus countervailingly be seen as the product of the aforementioned “vicious circle” of settler control, whereby increased settler power in public government presents a barrier to the realization of Indigenous self-determination. Further research would be required to determine whether either of these interpretations is correct.

As well, some might argue that, to the degree that Aboriginal groups and the NWT government now exhibit a “treaty-federal” relationship, this relationship has been collaborative rather than confrontational. For example, when the federal government devolved authority over lands and resources to the NWT government in 2014, the NWT government successfully struck “devolution agreements” with most of the territory’s Aboriginal groups, guaranteeing them a portion of the territory’s revenues from natural-resource development. This could be seen as an example of a flourishing interstate relationship between Yellowknife and the NWT’s Indigenous polities. On the other hand, two Indigenous groups, the Deh Cho and Akaitcho, have thus far refused to sign a devolution agreement; the territory’s Dene chiefs denounced devolution (literally rallying outside the legislative assembly);⁶ and, in at least one case, an Aboriginal group filed suit to block devolution from taking place.⁷ Thus again, additional scholarship would be required before

⁶ Patrick Scott, “Dene Rally Against Devolution Yellowknife,” January 26, 2011, <http://www.youtube.com/watch?v=0dnkjf73vHc> (April 21, 2011).

⁷ CBC News, “Gwich’in Tribal Council Launches Court Case over Devolution,” February 1, 2012, <http://www.cbc.ca/news/canada/north/gwich-in-tribal-council-launches-court-case-over-devolution-1.1170842> (accessed March 26, 2015).

determining whether contemporary “treaty federalism” exemplifies fruitful inter-polity consociation in the NWT.

As noted previously, “Kymlicka’s dilemma” came to a head in the division-era NWT not merely as a result of an inter-polity clash of rights, but due to the equipopulousness of those polities and the threat that one would swamp the other. This observation, too, opens a door to further research. Despite considerable fears, sixteen years after Nunavut’s separation, exogenous settlers have not numerically “swamped” the NWT. Whereas in 1996 settlers formed a bare majority of the overall population in the western territory, they are now a slight minority – 48.6 percent as of July 2014.⁸ This is likely because *staatsvolk* out-migration has exceeded in-migration⁹ while the territory’s Aboriginal ranks have grown due to natural increase. Over the past decade, settler numbers in the territory have fallen by approximately 750 even as the Aboriginal population has increased by more than 1,000.¹⁰ A recent NWT government plan to recruit 2,000 new settlers to the NWT by 2019, ostensibly to bolster the territorial economy, has thus far born little fruit.¹¹

Scholars might also explore whether the sharp political line between settler-dominated Yellowknife and the NWT’s rural Indigenous regions has begun to blur. As in many hinterland jurisdictions, the NWT is urbanizing, with rural Indigenous people relocating to the city. Thus, Yellowknife’s share of the NWT’s Aboriginal population has grown. Whereas in 1996 only one-fifth of the capital’s residents were Indigenous, that fraction is now one-quarter.¹² And it is conceivable that the eroding of the NWT’s urban/rural divide may not merely be demographic. Though research is lacking, one might speculate that factors such as technological change and improved transportation may be reducing the perceived gap between the territory’s

⁸ Government of the Northwest Territories, Bureau of Statistics, “Population Estimates: Community Population by Ethnicity, 2001-2014,” <http://www.statsnwt.ca/population/population-estimates/> (accessed March 26, 2015).

⁹ Dall Carmichael, “Statistics Show NWT Population Decline in 2014,” *Northern Journal* March 23, 2015, <http://norj.ca/2015/03/statistics-show-nwt-population-decline-in-2014/> (accessed March 26, 2015).

¹⁰ GNWT Bureau of Statistics, “Population Estimates.”

¹¹ Chris Windeyer, “People Moving: Can the GNWT Really Attract 2,000 More Residents?” *YK Edge*, February 18, 2015, <https://edgelyk.com/article/people-moving-can-the-gnwt-really-attract-2000-more-residents/> (accessed March 26, 2015).

¹² GNWT Bureau of Statistics, “Population Estimates.”

metropole and hinterlands. The erosion of geographic and cultural barriers separating the NWT's two polities – Indigenous peoples and *staatsvolk* – could reduce the likelihood of, and diminish the stakes involved in, constitutional conflict.

If this is the case, scholars might also return to the observation made near the beginning of this thesis: that one person's nation-building is another's colonialism. Critics might suggest that the absence of an ongoing "crisis" in the NWT demonstrates that the fears of 1998-99 have come true. Certainly the current vision for (to say nothing of the present reality of) inter-polity power-sharing in the NWT is quite attenuated when compared to the ambitions of First Nations leaders in the pre-division era, or to the goals articulated by consociation-oriented *staatsvolk* in the federal Inherent Right Policy, or to the very real accomplishments of Inuit in the creation of Nunavut. It might be found that Indigenous nationalists, with their hopes for intrastate power-sharing eliminated, and with the possibility of quasi-federal "treaty" power-sharing still unrealized for all but the Tłı̄chǰ and Délı̄ne, have not made peace with the NWT government but rather have acquiesced to it. Some scholars have suggested that, in some cases, Indigenous nationalism in the NWT has been co-opted: Says Dene political scientist Glen Coulthard, there "has been a reorientation of the meaning of self-determination for many (but not all) Indigenous people in the North; a reorientation of Indigenous struggle from one that was once deeply *informed* by the land . . . to a struggle that is now increasingly *for* land, understood now as a material resource to be exploited in the capital accumulation process."¹³ The goal of settler-colonialism, of course, is not to tear Indigenous jurisdictions apart, but to incorporate them into the fold of the majority nation. If the current political situation in the NWT seems subdued, scholars might examine whether this is because Indigenous nationalism has, in a sense, *been subdued*. Certainly, whether settler-colonialism in the territory has failed or succeeded in the NWT remains an open question, ripe for further inquiry.

¹³ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 78.

9.3 The reapportionments of 2006 and 2013

Given that the NWT public government's uneasy consociational *détente* remains in place, it is no surprise that both of the post-1999 reapportionment exercises in the territory have been contentious. In 2006 and again in 2013, efforts to redesign the NWT legislative map once again pitted Yellowknifers against Indigenous interests. In 2006, the territory's electoral boundaries commission recommended two new seats, in Yellowknife and the fast-growing community of Behchokò, home to the new Tłìchò government. Though every Yellowknife MLA supported that recommendation, the assembly rejected it. Yellowknife MLAs raised the specter of a Charter challenge again based on universal rights of representation,¹⁴ but none was launched.

Then, in 2013, per the mandate of the NWT legislature, the boundaries commission presented three options, for an eighteen-, nineteen- or twenty-one-seat assembly. MLAs chose the middle option, and ordered the merger of the tiny, Chipewyan-speaking Tu Nedhe riding with N'dilo and Detah, the two Tłìchò-speaking Aboriginal enclaves on the outskirts of Yellowknife. This move prompted protests both from Yellowknifers, who once again had hoped for more seats, and constituents of Tu Nedhe, who maintained that their voting power would be swamped by the more numerous Tłìchò-speakers. In late 2014 the City of Yellowknife hired a legal firm to prepare a malapportionment challenge,¹⁵ which the riding of Tu Nedhe reportedly planned to join.¹⁶ As of this writing, no suit has yet been filed.¹⁷ Certainly, the NWT reapportionments of 2006 and 2013 might merit further scholarship.

9.4 Summary

This chapter highlighted several of the post-division developments in the NWT, identifying areas that arguably might justify continuing research. This chapter showed that in the denouement of the 1998-99 NWT electoral boundaries

¹⁴ GNWT Legislative Assembly, "Hansard" (October 24, 2006), 432.

¹⁵ Dan Wong, Yellowknife city councilor, e-mail message to author, November 4, 2014.

¹⁶ Tom Beaulieu, Tu Nedhe MLA, e-mail message to author, February 4, 2015.

¹⁷ Nalini Naidoo, City of Yellowknife, e-mail message to author, April 16, 2015.

reapportionment “crisis,” the vision for power-sharing in the NWT seemed to shift significantly, from an intrastate orientation, involving Aboriginal/*staatsvolk* power-sharing at the center, to an interstate orientation, involving a “treaty-federal” relationship between the federal government in Ottawa, the territory’s public, *staatsvolk*-dominated metropole in Yellowknife, and quasi-separate outlying Aboriginal governments. Next, this chapter explored whether predictions made during the 1998-99 constitutional crisis have indeed come true. It suggests that, though low-level consociational interaction continues in the territory, the relative absence of ongoing strife in the territory might be attributable to demographic and cultural change, to mutually satisfactory inter-polity power-sharing, or to the opposite: the quashing of Aboriginal nationalism. Finally, this chapter looked at the NWT’s reapportionment exercises of 2006 and 2013, noting that, as before, they featured discord between underrepresented Yellowknife settlers and overrepresented rural Aboriginal interests.

Chapter 10: Conclusion

According to Canadian political theorist Will Kymlicka, in liberal-democratic multination states, settlers from the majority-nation *staatsvolk* may, by exercising their universal mobility and voting rights, “swamp” and democratically dominate the homelands of Indigenous national minorities – or, conversely, these minorities, by exercising collective rights, may challenge the universal rights of settlers. I have called this clash-of-rights phenomenon “Kymlicka’s dilemma.” As was shown in this thesis, this clash constrained the pre-division constitutional evolution of Canada’s Northwest Territories, and finally came to a head during the territory’s 1998-99 electoral-district reapportionment. The 1998-99 reapportionment pitted the individual rights of NWT settlers to live where they want and to vote where they live against the collective rights of NWT Indigenous peoples to enjoy self-determination and autonomy in their homeland. Per the legal and political decisions made during the “constitutional crisis” that resulted from the reapportionment, settler rights predominated over Aboriginal rights within public government, resolving this instance of “Kymlicka’s dilemma” in favor of settler interests and reshaping the constitutional fabric of the territory.

This thesis argued that, for numerous reasons – nationalistic, democratic, liberal, legal, moral and pragmatic – liberal democratic multination states owe minority nations “external protections” that shield their collective rights to self-determination and internal autonomy from violation by majority-nation *staatsvolk*. Such protections may be facilitated through consociational power-sharing: either via direct “intrastate” arrangements, or indirectly, via federalism. Yet while federalism may empower national minorities, it may alternatively be arranged to disempower them, through “cracking” or “stacking.” One form of stacking, which poses a particular threat in settler-colonial states, is “swamping.” There, *staatsvolk* settlers exercise their individual rights of movement and voting to occupy and democratically dominate a national-minority homeland. Where the national minority exercises “external protections” to prevent “swamping” and democratic domination, a clash of rights arises, presenting a constitutional quandary. This quandary is “Kymlicka’s dilemma.”

Where “Kymlicka’s dilemma” occurs, the rights in conflict are likely to relate to the apportionment of democratic representation. Conflicts involving representation may usefully be considered along three dimensions, corresponding to the three foundational liberal principles: individualism, egalitarianism, and universalism. Along the first axis, voting systems are rarely individualistic, as group-blindness is antithetical to the aggregation of voters so as to provide them with a meaningful vote. Hence, for purposes of representation, voters are grouped into districts based in part on commonalities they share with fellow voters, such as social class, ethnicity or employment-type. Along the second axis, voting systems must weigh various interpretations of voter equality. These include formal equality, where voters are aggregated into districts with equal numbers, as well as substantive equality, where they enjoy equal quality of representation, and “stakeholder” equality, where the weight of their voting power is proportional to their stake in the electoral results. Along the third axis, representation may be either universal, apportioned solely to voters as individuals, or, in a divided state, non-universal, and thus apportioned first to “polities” and only secondarily to individuals. Entrenched non-universal, polity-based representation is an “external protection.” In settler-colonial states, such an external protection for Indigenous polities may be entrenched through treaties or “inherent rights.” In Canada, section 35 of the *Constitution Act, 1982* affirms such rights, while section 25 “shields” those rights from “derogation.” For Francophones, the *Official Languages Act* protects such rights. As Canadian case law suggests, where apportionment encounters non-universal Aboriginal or Francophone voting protections, formal egalitarianism likely must give way. Thus, in at least certain cases where “Kymlicka’s dilemma” involves Canadian apportionment, the “constitutional quandary” has been resolved in favor of collective rights.

Canadian political scientist Gurston Dacks called the NWT “a laboratory for students of political representation.” Owing to unique demographic and historical factors, “Kymlicka’s dilemma” simmered there for decades prior to Nunavut’s division. The pre-division “western” NWT was a “divided state,” split along cultural, demographic and historical lines. The territory comprised at minimum two discrete

demographic groups: highly transient settlers, mostly in Yellowknife, and Aboriginals, deeply rooted in their rural home regions. From at least the mid-1970s, the NWT's pre-division constitutional evolution was defined by a struggle for power between these two polities. Though Yellowknife was made the territorial capital ostensibly to devolve power to Northerners, some Aboriginals perceived the booming capital to be a beachhead of colonialism, through which an influx of *staatsvolk* could "swamp" the territory and not only democratically dominate the public government but inhibit Aboriginal land-claims and self-government. Indeed, in the 1960s, settlers sought division of the territory so the west, where they were more numerous, could draw down powers from Ottawa and move toward liberal-universalist provincehood. Countervailingly, in the 1970s, Indigenous nationalists proposed that the territory, or subdivisions within it, should receive "external protections," entrenching Native self-determination and autonomy. To reconcile the political cultures and aspirations of these two constituent groups, the NWT government developed various consociational features that distinguished it from more conventional parliamentary-style governments elsewhere in Canada. Throughout the 1980s and 1990s, Aboriginal and settler leaders worked toward a high-level constitutional *détente* where the rights and interests of both polities would be reconciled within public government. Yet the 1990s also saw three developments that brought the conflict between the two sides into stark relief. First, the adoption of the Charter placed greater emphasis on formal egalitarianism in the apportionment of representation, favoring settlers. Second, affirmation of the "inherent right" of self-government offered Aboriginals "external protections," possibly including guaranteed majority power in the NWT government. Third, the separation of Nunavut, in the east, threatened to leave the west's settler and Aboriginal polities equipopulous, raising the stakes for both sides. A constitutional crisis seemed at hand.

Unsurprisingly, the apportionment of representation in the pre-division NWT assembly reflected the territory's long-running power struggle. In the 1970s, rural Aboriginals were overrepresented vis-à-vis Yellowknife. This practice continued in the next decade, though settlers began agitating for, and threatened to

launch Charter challenges concerning, urban underrepresentation. By the cusp of the 1990s it seemed likely that in future reapportionments, the Charter might constrain rural Indigenous overrepresentation. Combined with the threat of settler “swamping” posed by Nunavut’s separation, this prospect boded ill for hopes of establishing consociational power-sharing in the NWT public government, bringing “Kymlicka’s dilemma” into high relief. As if in a natural experiment, these developments created the conditions for a volatile reaction, finally catalyzed by the NWT’s electoral reapportionment of 1998-99. This thesis analyzed that reapportionment.

The clash-of-rights phenomenon that I call “Kymlicka’s dilemma” was at the crux of the constitutional crisis that engulfed the 1998-99 reapportionment. The clash was apparent from the beginning. Even before a boundaries commission was impaneled, Aboriginal interests in the territory pressed for delaying reapportionment, fearing that redrawing the electoral map would result in the egalitarian transfer of voting power to individual settlers, pre-empting Indigenous efforts to secure self-determination and autonomy at the brink of division – the very moment when Aboriginal rights had become most vulnerable.

The NWT assembly nonetheless appointed a boundaries commission, which gathered testimony highlighting the two irreconcilable sides of “Kymlicka’s dilemma.” Yellowknifers appealed to the commission for formally egalitarian treatment, which would result in greater representation for the capital. Aboriginals, meanwhile, asked the commission to reject such appeals, citing non-universal concerns relating to balance of power and Indigenous rights. In its report, the electoral boundaries commission acknowledged Aboriginal concerns and suggested that a more thorough reapportionment be conducted once high-level, constitutionally entrenched consociation was arranged between the territory’s two polities. Yet, likely feeling constrained by requirements of the Charter of Rights and Freedoms, as Canadian political scientist Graham White had forecast, the commission also recommended adding two Yellowknife seats to the assembly.

When the boundaries commission’s report went before the assembly, the debate was starkly divided between settler and Indigenous interests. Yellowknife

MLAs and their supporters, citing the Charter and the values of liberal universalism, called for equality and fairness for individuals, which they said necessitated greater formal parity in the apportionment of representation. Aboriginal MLAs and their supporters, meanwhile, called for consociational “balance of power” and respect for the process by which the NWT’s two non-universal polities were working to establish intrastate power-sharing. They argued that diminishing rural overrepresentation would undermine both inter-polity collaboration and Native rights at a highly sensitive time. In a majority vote, the assembly sided with Aboriginal interests, and the electoral map remained unchanged.

Disgruntled Yellowknife *staatsvolk* then launched a lawsuit in the NWT Supreme Court, *Friends of Democracy v. Northwest Territories*. The appellants, characterizing the NWT as a liberal-universalist, mononational polity, appealed for egalitarian treatment of all residents, and suggested that the Charter’s section 3 voting provision, interpreted by *Carter* as guaranteeing “effective representation” to all Canadian citizens, does not countenance non-universalistic rights or interests. The respondents, the NWT government, countervailingly maintained that section 3, interpreted by *Dixon* as guaranteeing to Canadians “better government,” requires that apportionment take into account non-universalistic concerns such as inter-polity power-sharing. Taking a similarly non-universalistic position, the intervenors maintained that NWT Aboriginals, as a discrete rights-bearing polity, possess not only positive rights (the section 35 right to self-government) but also negative “external protection” rights (the section 25 “shield”), causing their collective self-determination concerns to trump the individual egalitarian demands of settlers. In the court’s decision, Justice Mark de Weerd effectively privileged egalitarianism over non-universalism, embracing the “effective representation” interpretation of Section 3, suggesting that “better government” concerns are moot as Yellowknife majoritarianism was not an immediate threat, and ruling that Indigenous “external protections,” if defensible at all, could not be brought to bear on the case at hand.

In the wake of the *Friends* ruling, the NWT government (i.e., the premier and cabinet) seemed to resign itself to the court’s universalistic interpretation of section 3. It declined to appeal the decision and introduced legislation to significantly

increase urban and semi-urban representation in the assembly. Aboriginal detractors, however, argued that the court had acted as an agent of colonialism, promulgating a view of rights certain to advance settler interests. They maintained that the court had wrongly rejected the applicability of section 25 “external protections.” The appeals court, however, agreed with the Supreme Court. Meanwhile, Aboriginal members of the Standing Committee on Government Relations, challenging the government’s proposal for enhanced urban and semi-urban representation, detailed widespread concerns on the part of non-Yellowknife citizens, and proposed a variety of non-universalistic remedies. The NWT government, though, acted on few of these suggestions. Though non-universal representation *did* become a convention of the NWT’s post-division cabinet, the government otherwise “kicked the can down the road,” increasing *staatsvolk* seats and suggesting that future legislatures could work to achieve intrastate, inter-polity power-sharing. In the end, however, intrastate, inter-polity power sharing was not further pursued. It appears the legal and legislative decisions of 1998-99 convinced both Aboriginal and settler leaders that “treaty federalism,” rather than high-level intrastate consociation, was the inevitable future of the NWT. Within public government, “Kymlicka’s dilemma” had been resolved in favor of universalistic settler interests.

Some scholars might say they anticipated this outcome. Writing nearly forty years ago, Richard Laing and his co-authors stated that, in the NWT, “the creation of a ‘settler’ phase of colonialism so as to overcome the population advantage of the Native peoples” was accomplished by recruiting “a bureaucracy and ship[ing] them north by the thousands. Immediately the population ratio is profoundly affected. Overnight a settler class is created. In the name of the non-Native ‘settler,’ certain democratic rights are asserted.”¹ It could be argued that, in the 1998-99 reapportionment, at least within public government, the decisions of the NWT government and the courts finally and decisively affirmed these long-asserted

¹ Richard Laing, Peter Puxley, C. Gerald Sutton, and Wilf Bean, “Political Development in the Northwest Territories,” in *Northern Transitions Volume 2: Second National Workshop on People, Resources and the Environment North of 60°*, eds. Robert F. Keith and Janet B. Wright (Ottawa: Canadian Arctic Resources Committee, 1978), 318.

settler-class rights, perhaps putting the finishing touches on the NWT's settler phase of colonialism.

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