Political Legitimacy in the Wake of Indigenous Governance Claims

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In March 1990, the indigenous community of Mohawks at Kanesatake, located west of Montreal, Canada, put up a series of roadblocks to prevent the expansion of a golf course, approved by the local municipality of Oka, Quebec, onto a traditional burial ground. By June of that year, the Quebec Superior Court had issued three injunctions in support of the municipality requesting that the Mohawk Warrior Society remove themselves and the blockade. Four months after the establishment of the blockade, the municipality of Oka requested the provincial police of Quebec intervene to enforce the court injunctions to the end the blockade. On July 11, 1990, shortly after the arrival of police at the blockade, shots were fired on both sides and Corporal Marcel Lemay of the Quebec police was killed. To show their support for the Oka blockade, a nearby indigenous community of Kahnawake established a blockade of Mercier Bridge, effectively preventing individuals from commuting from the south shore of the St. Lawrence River into Montreal. After increasing tensions and almost daily outbreaks of violence between indigenous activists and commuters, Premier Bourassa called in the army on August 14, 1990. On August 24, the blockade of the Mercier Bridge was dismantled and on September 26, the Warriors at Oka surrendered and many of their leaders were arrested.

Yet, the violent events surrounding the Oka Crisis in Canada were not totally unexpected. Two years before, George Eramus, leader of the Assembly of First Nations, stated, 'we want to let you know that you are dealing with fire. We say, Canada, deal with us today because our militant leaders are already born. We cannot promise that you are going to like the kind of violent political action we can just about guarantee the next generation is going to bring to our reserves'.[1] As Eramas predicted and

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1 Canadian Broadcasting Corporation, 'Standoff at Oka' (2001), <http://history.cbc.ca/history/webdriver?MIval=EpisContent&series_id=1&epidsode_id=17&chapter_id=2&page_id=2&lang=E> (accessed 14 June 2009).

protests at Grassy Narrows, New Caledonia, and the blockade of passenger rail on the National Day of Action in 2007 have shown, indigenous protests have become increasingly disobedient and occasionally violent. Indigenous communities are more and more often explicitly challenging and denying the authority of the state to arbitrate their justice claims. As John Ciaccia, Quebec's Minister for Indian Affairs at the time of Oka noted, 'the Warriors wanted the army... because then they could say they were fighting nation against nation, the Mohawk army against the Canadian army... They played it for all it was worth around the world'.[2] The Canadian state did not hold authority over the Mohawks at Oka, according to the Mohawk Warrior Society; rather, both Canada and the Mohawks both claimed ultimate political authority over the burial ground/golf course.

While the challenge to the authority of the Canadian state was ultimately unsuccessful, the Oka Crisis revealed that the state might be required to use coercive force to exert its authority over indigenous peoples. As the Royal Commission on Aboriginal Peoples argued, 'to be effective — to make things happen — any government must have three basic attributes: legitimacy, power and resources. Legitimacy refers to public confidence in and support for the government... When a government has little legitimacy, leaders have to work against public apathy or resistance and expend more power and resources to get things done'.[3] The Oka Crisis challenged the legitimacy often presumed to exist by non-indigenous residents of settler states and forced the Canadian state to invoke force to 'get things done.' What is the political philosopher to think of such indigenous denials of state legitimacy and the subsequent invocation of force by the state? Given that political philosophers have been troubled by the theoretical problem of political legitimacy, what should a theorist do when confronted with a practical case of individuals denying and/or refusing to accept the authority under which they live? More specifically, on what basis (if any does exist) can settler states, like Canada, claim legitimate political authority over indigenous peoples living on its territory?

In this paper, I will argue that if political philosophers take the justice claims of indigenous peoples seriously, these claims will have major impacts on the normative discourse of political legitimacy. This paper will demonstrate that no categorical account of political legitimacy can give an adequate account of the settler state's authority over indigenous peoples. Categorical accounts of political legitimacy attempt to identify a

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2 Ibid.

3 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) <http://www.collectionscanada.gc.ca/webarchives/20071211062420/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh17_e.html> (accessed 7 July 2009).

comprehensive set of criteria that establishes a moral obligation on citizens to obey that political authority. In the case of consent theories, this moral obligation is established by each citizen consenting, in some form, to be governed by a particular authority; in the case of natural duty theories, this moral obligation is established by the capacity of already existing authority to meet the burdens of justice. Under categorical accounts of political legitimacy, political authorities can be identified as legitimate or illegitimate, dependent on whether or not they possess the necessary characteristics. First, I will consider the dominant accounts of political legitimacy (consent, natural duty, fair play and association) through the lens of the contemporary justice claims of indigenous peoples. I will argue that each of these accounts is unable to provide a theoretical basis for the legitimacy of the settler state because the contemporary settler state is unable to meet the thresholds for legitimacy provided by these accounts.

Second, I will outline two possible conclusions from this survey of the literature on political legitimacy: (1) the settler state is, in fact, legitimate and a new theory of political legitimacy is required or (2) one or more of these accounts accurately captures something about political legitimacy and the settler state is not legitimate. In regards to the relationship between indigenous peoples and the settler state, I will argue that political philosophers should reject conclusion (1) in favour of conclusion (2).

Third, despite my support for conclusion (2), I will highlight the need to reject philosophical anarchism as a response to the justice claims of indigenous peoples. I will argue that philosophical anarchists accept the standard understanding that the only basis for political authority could be a categorical account of political legitimacy. Thus, when the state fails to meet the requirements of categorical legitimacy, philosophical anarchists argue that legitimate political authority is impossible. I will suggest that it is essential to separate questions of the legitimacy of the state from questions of the legitimacy of political authority, especially in considering the claims of indigenous peoples. Specifically, I believe that those who accept the failure of the categorical accounts of political legitimacy to justify the authority of the settler state must be prepared, following Nietzsche, to accept the impossibility of a categorical account of political legitimacy under conditions of normative plurality.

In the fourth section, I suggest that the challenge of normative plurality leaves theorists of political legitimacy with two conclusions if we wish to retain a categorical account of political legitimacy. One conclusion argues that political authorities should get in the game of enforcing normative consensus on the matter of political legitimacy through use of their coercive power. The second conclusion argues that since an

unenforced normative consensus on a categorical account of political legitimacy is impossible, legitimate political authority is itself impossible. I will argue that an agonistic dialogical approach to political legitimacy can avoid both of these potential conclusions. Political legitimacy achieved through agonistic dialogue is the best way to preserve the ability to judge political authorities as more or less legitimate while still taking the challenge of normative plurality to political legitimacy seriously, such as in the case of the relationship between indigenous peoples and the settler state. In addition, the agonistic dialogical approach to political legitimacy is the most compatible with the moral commitments of philosophical anarchists.

I. The Legitimacy of the Settler State over Indigenous Peoples

While all of these accounts have been criticized previously,[4] I would like to concentrate on how the claims of indigenous peoples present a novel challenge to the dominant discourses of political legitimacy. I will argue that none of these accounts can provide a justification for why we should favour the assertion by the Canadian state to possessing legitimate authority over the golf course over the assertion by the Kanesatake community to possessing legitimate authority over the traditional burial ground. More generally, none of these accounts of political legitimacy can provide a convincing account of how settler states exercise legitimate authority over the indigenous peoples who existed on their territories previous to the establishment of the state.

Both Locke and Rousseau argue, albeit differently, that consent forms the basis for political legitimacy. That said, neither theory of consent could be the basis for the legitimate authority of the settler state. Locke's notion of consent rests to a great degree on the dispossession of indigenous peoples. At the time of the *Second Treatise*, British citizens could be said to tacitly consent to the British government when they remained in Britain because of the availability of exit; the choice to immigrate to the American colonies was available but not acted upon. So long as individuals willingly remained in England, the English government was a legitimate authority over them. As Klausen writes, 'Lockean liberalism not only thus enables and justifies settler-initiated colonialism; it ideologically requires it insofar as natural liberty relies on the availability of open space for full actualization'.[5]

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4 See A. John Simmons, *Moral Principles and Political Obligations* (1979) and A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (2001).

5 Jimmy Casus Klausen, 'Room Enough: America, Natural Liberty, and

Indigenous peoples, for Locke, did not need to consent to the settlement of their territories because their use of land did not qualify as ownership. Locke writes, '*as much land* as man tills, plants, improves, cultivates, and can use the product of, so much is his *property*... [God] gave [the world] to the use of industrious and rational, (and *labour* was to be *his title* to it)'.[6] Indigenous peoples' use of land did not qualify as property and, therefore, the land could (and arguably should) be taken without consent. James Tully writes, 'the title to property in land is solely individual labour, defined in terms specific to European agriculture: cultivating, tilling, improving and subduing. Hence, land used for hunting and gathering is considered vacant'.[7] Given that indigenous land use did not qualify as property, 'any person may appropriate uncultivated land without consent as long as there is enough and as good left in common for others'.[8] Thus, the application of the notion of consent as the basis for legitimate government over the non-indigenous, according to Lockean liberalism, requires the dispossession and denial of an indigenous right to consent.

Nevertheless, it may be possible to read Locke's theory of consent anachronistically to establish the legitimate authority of settler states over indigenous peoples through some conception of consent. It could be argued that the treaty process undertaken by the British Crown in Canada provided express consent by the indigenous peoples to the establishment of British authority (and subsequently the authority of the Canadian state) over their territory. The use of treaties as the basis of express consent raises two significant problems. First, the histories of the treaty process in Canada are subject to much controversy. While I do not have sufficient space to address these historical debates here,[9] it is important to note the indigenous oral histories argue that indigenous authority over the land was never ceded despite the assertions of the British Crown and the Canadian state. Taiaiake Alfred writes, 'indigenous peoples are by definition the original inhabitants of the land. They had complex societies and systems of government. And they never gave consent to European ownership of territory or the establishment of European sovereignty over them (treaties did not do this,

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Consent in Locke's Second Treatise' (2007) 69 *The Journal of Politics* 760, 762.

6 John Locke (C.B Macpherson ed.), *The Second Treatise of Government* (1980), 21.

7 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, (1995), 73-4.

8 Ibid 73.

9 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001), see 156-159 for a discussion of these legal/historical debates.

according to both historic Native understandings and contemporary legal analysis)'.[10]

Second, even if the treaties were an expression of consent to the British Crown, the subsequent violations of their guarantees (i.e., the removal of large tracts of promised lands and introduction of the reservation and wardship system) would under a Lockean conception qualify as acts that dissolved the government to which consent had been given. Locke writes,

> there is therefore... another way whereby *governments are dissolved*, and that is, when the legislative, or the prince, either of them, act contrary to their trust... The *legislative acts against the trust* reposed in them, when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters, or arbitrary disposers of the lives, liberties, or fortunes of the people.[11]

While the Lockean argument denies that indigenous peoples held property, it cannot be denied that they possessed natural liberty. Locke argues that all individuals in the state of nature possessed an abundance of liberty; 'to understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a *state of perfect freedom* to order their actions, and dispose of their possessions and person, as they think fit'.[12] Thus, even if the Lockean story did not bind the settlers to seek consent for the removal of property from indigenous peoples, it should have prevented the Crown from violating the natural liberty of indigenous peoples prior to the arrival of Europeans. The subsequent actions of the British Crown and Canadian state in violation of the treaties would challenge the use of treaties as the continued basis of legitimate political authority over indigenous peoples, if the treaties even ceded political authority in the first place.

The difficulties faced against using express consent as the basis of legitimate authority of the settler state over indigenous peoples leaves Lockeans with the discourse of tacit consent. Given that the force of the notion of tacit consent rests on the availability of exit, indigenous peoples continued residence and even acceptance of benefits from the settler state cannot be viewed as tacit consent. By the time of colonization and dispossession of indigenous peoples, most of the world was inhabited, leaving indigenous peoples with few places to go and few economic

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10 Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto* (1999), 58.

11 Locke, above n 7, 111.

12 Ibid 8.

resources to get there. Klausen states, 'absent America and its room enough, the natural liberty that Locke reserves for tacit consenters would lack much of its logical, critical force. The historical circumstance of a politically crowded globe would eviscerate it'.[13] As well, the deep importance of connection to specific land would also have diminished the possibility of indigenous peoples building lives completely removed from their traditional territories; 'land, culture, and government are inseparable in traditional philosophies; each depends on the others, and this means that denial of one aspect precludes recovery for the whole'.[14] Thus, to speak of indigenous peoples as tacitly consenting to the settler state through their continued residence and receipt of benefits is to commit a profound injustice; to argue that the removal of choice by imposition of the settler state was form of tacit consent is to deny any meaning to the concept of consent.

Rousseau's theory of consent to the general will also does not provide an account of how the settler state exercises legitimate authority over indigenous peoples. First, Rousseau does not argue for representative democracy but direct democracy. Contemporary settler states like Australia and Canada do not meet this condition. Second, the modern settler state fails to meet the standard of the general will. Rousseau writes, 'there is considerable difference between the will of all and the general will: the later looks only to the common interest, the former looks to private interest, and is nothing more but a sum of particular wills'.[15] Individuals when voting for representatives and representatives voting for legislation do not necessarily consider whether the representative or legislation will conform to the general will but will often appeal to personal interest. Even if majority decisions are more often motivated by reflection on the collective good than I suppose, the institutional arrangements in most contemporary settler states do not explicitly encourage this sort of reflection. Third, settler states were not constituted originally through unanimous asset on the part of all current inhabitants to government by the general will. Thus, contemporary settler states fail to meet the conditions of Rousseauian legitimacy.

In addition, even if the settler state could be reformulated to be governed according to the general will, that will would have to include the harmonized interests of indigenous and non-indigenous citizens. For Rousseau, the goal is 'to find a form of association that will defend and protect the person and goods of each associate with the full common force, and by means of which each, uniting with all, nevertheless obey only

13 Klausen, above n 6, 768.

14 Alfred, above n 11, 2.

15 Jean-Jacques Rousseau (V. Gourevitch ed.), *The Social Contract and other later political writings* (1997), 63.

himself and remain as free as before'.[16] Yet, envisioning the harmonized interests of indigenous and non-indigenous is difficult. Radical indigenous scholars like Alfred reject the possibility of harmonized interests of indigenous and non-indigenous peoples, at least within the context of the state; 'harmonious cooperation and coexistence founded on respect for autonomy and the principle of self-determination are precluded by the state's insistence on dominion and its exclusionary notion of sovereignty'.[17] Even indigenous scholars who view a healthy relationship between indigenous and non-indigenous peoples as an important step towards decolonization do not view this relationship as harmonized but rather, dialogical. Dale Turner states, 'it is the *process* of decolonization that I find difficult to imagine. As with the drive for indigenous forms of political recognition, in order to create the space for us to be free from colonialism, we must engage the dominant culture. We may not know what the process will look like, but we do know *it has to be a dialogical one*'.[18] Since the settler state does not currently govern according to the Rousseauian principle of the general will and the possibility of harmonizing the interests of the indigenous and non-indigenous peoples of many settler states into one will is unrealistic at this historical moment, Rousseau's theory of the general will cannot be the basis for the legitimacy of the settler state.

Similarly, natural duty theories cannot be the basis of the settler state's legitimacy as a political authority over indigenous peoples. Kant grounds the legitimacy of the law in what he calls the principles of right, which are accessible through human reason. Public right dictates that all lawful states are characterized by the following: (1) 'the freedom of every member of society as a human being', (2) 'the equality of each with all the others as a subject', and (3) 'the independence of each member of a commonwealth as a citizen'.[19] The settler state, without adopting a very weak ideal of justice, could not be said to be an example of a just state. Many settler states, including Canada and Australia, have failed to uphold Kant's second characteristic of politics of right: equality of citizens. Alfred, quoting a 33-year-old Kwa'kwala'wakw woman and activist living in Victoria, British Columbia, writes,

> actually, I've tried to search for the moment in time when Canada decided legally – at least legally – that we were considered citizens. Which is kind of a joke, because as

16 Ibid 49-50.

17 Alfred, above n 11, 72.

18 Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (2006), 108 (emphasis added).

19 Immanuel Kant, 'On the Common Saying: "This May be True in Theory, but does not Apply in Practice"' in H. Reiss (ed.), *Political Writings* (1991), 64.

> I've heard someone say, 'Legally yes, we are regarded as citizens. Yet the same legislation – the Indian Act – is always there to remind us that we're not.' To me, you can't look at the Indian Act, and look at the precedents in the courts, and then draw the conclusion that we're citizens.[20]

While in Canada the way that indigenous difference is recognized under the Indian Act is viewed as denying equality, the failure to politically recognize indigenous difference is considered an injustice in Australia. As Stuart Bradfield notes, 'indigenous peoples are allowed entry into the [Australian] political community only at the cost and consequence of giving up their cultural *and political* distinctiveness. The message is you can be 'one of us' as long as you deny who you are'.[21] Given that a major assumption of this work is that indigenous claims should be taken seriously, either the framing of indigenous identity as wardship or the outright denial of the politically salient identity in the first place seem like gross injustices that cannot be the basis of the legitimacy of the settler state over indigenous peoples. As long as unjust policies like residential schools, child removal and the ongoing Northern Territory Intervention characterize the settler state's relationship with indigenous citizens, it cannot be said to be a legitimate state and indigenous peoples, under a natural duty theory, have no moral duty to obey.

Similar to the Kantian theory of natural duty, the Rawlsian fair play account of legitimacy cannot provide a basis for the settler state's contemporary authority over indigenous peoples. The settler state cannot, at least in its current form, be said to uphold the two principles of justice. Often, indigenous peoples' liberty has been reduced in order to provide a greater liberty for the non-indigenous of settler states. Alfred writes, 'within a few generations, Turtle Island [North America] has been devastated and degraded. The land has been shamefully exploited, indigenous peoples have borne every form of oppression, and Native American ideas have been denigrated'.[22] It is difficult to reflect on the policies of the colonial government and settler states toward indigenous peoples and argue that it is a history where indigenous peoples were made 'better-off', without appeals to an assumption of European superiority. The inequalities faced by many indigenous peoples living under settler states does not increase the well-being of all, indigenous and non-indigenous alike. Unless one is prepared to

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20 Alfred, above n 11, 19 (interview with 33-year-old Kwa'kwala'wakw woman living in Victoria, BC, Canada).

21 Stuart Bradfield, 'Citizenship, History and Indigenous Status in Australia: Back to the Future, or Toward Treaty?' (2004) 80 *Journal of Australian Studies* 165, 168.

22 Alfred, above n 11, 5.

assert that indigenous peoples are better-off under the system of reservations, wardship, residential schools, child removal and the Northern Intervention, it is difficult to assert that the inequalities under settler states are in line with the Rawlsian principles of justice.

As well, even if the relationship between the settler state and indigenous peoples were reformed to meet the threshold of justice (in either the Kantian or Rawlsian sense), it is unclear why indigenous peoples should be bound by duty to obey the particular settler state that has been imposed on them. Speaking of conscription and mandated military service, A. John Simmons writes, 'the duty to serve were conceived a part of a natural duty to support just governments, we would be bound to support not only our own just government, but any other as well... What needs to be explained is why a government's being *ours* grounds special moral ties to *it*, such as the requirements to pay taxes to it, obey its laws, and serve in its military'.[23] Jeremy Waldron attempts to respond to Simmons' critique; he argues that the problem of coordination requires individuals to be morally obligated to obey the organization most capable of exercising justice on a given territory. He writes, 'in most cases, the fact that there *is* a state and that it is, for all practical reasons, dominant and unchallenged in a territory will be sufficient. This is the organization that deserves out support in the enterprise of doing justice if any organization does'.[24] Thus, according to Waldron, we have an obligation to obey our just government, as opposed to all just governments, because it is the most capable of administering justice in the territory where we live. While I do not have sufficient space to consider how convincing a response this is to the case of non-indigenous citizens of non-indigenous states, in the case of indigenous peoples, this assertion does not clearly explain why indigenous peoples should have an obligation to the settler state and not to traditional forms of governance, if they could be better able to provide for justice in indigenous communities. In fact, Alfred suggests that the imposition of the settler state upon indigenous peoples does not alleviate coordination problems, but creates them;

> the imposition of colonial political structures is the source of most factionalism within Native communities... [T]hose structures have solidified into major obstacles to achievement of peace and harmony in Native communities, spawning a non-traditional or anti-traditionalist political subculture among those individuals who draw their status and income from them.[25]

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23 Simmons (2001), above n 5, 47.

24 Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22 *Philosophy & Public Affairs* 3, 25.

25 Alfred, above n 11, 27.

Thus, it seems difficult to provide an account of how indigenous peoples have an obligation from justice to abide the authority of the settler state, as opposed to other more traditional forms of governance within their own communities beyond appeals to the capacity of the state to coerce through the exercise of force. If appeals to political legitimacy are rooted in the capacity to exercise force, this account seems to be based not on appeals to justice but rather appeals to might and coercion.

Dworkin's theory of association is also unable to account for the settler state's authority over indigenous peoples. According to Dworkin, to be an association of the type that incurs such a natural duty, an association must meet several criteria. The participants in the association must treat one another in a reciprocal fashion (although these reciprocal understandings of the association's obligation need not be identical).[26] The responsibilities arising from the association must be viewed by all participants as special (i.e. distinctive to that association), personal (i.e., between individual members as opposed to between individuals and the group), based out of concern (i.e. specific obligations arise out of a more general concern for wellbeing), and equal (i.e. each member's interests must be viewed as equal to all others).[27] Dworkin calls associations that meet these criteria 'true' communities.[28] My first criticism of association as the basis for the settler state's legitimacy is that it seems likely that the political community between indigenous and non-indigenous within the context of setter states would only meet the threshold of a 'bare' community for Dworkin. The sorts of connections required in a true community rarely exist on a political level, if they exist at all, between the indigenous and non-indigenous in the context of contemporary settler states.[29] Thus, contemporary settler states must be bare communities. While Dworkin does not explicitly address whether associative obligations exist in bare communities, it seems fair to assert that they are only binding in true communities because otherwise Dworkin would have to assert that we could be morally obligated to fulfill obligations under situations of inequality.[30] Given that settler states can be characterized as bare, not true, communities, it would be difficult to assume

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26 Ronald Dworkin, *Law's Empire* (1986), 199.

27 Ibid 199-200.

28 Ibid 201.

29 This assertion is not meant to deny the possibility of personal and intimate relationships between indigenous and non-indigenous peoples within settler states that may incur associative obligations. Rather, I believe that the political community (ie. Canada and/or Australia) between indigenous and non-indigenous cannot, at least in its current form, be a 'true' community.

30 For example, it would seem very odd, given Dworkin's liberal commitments, that he would be prepared to assert that a grossly unequal community (such as one characterized by slavery) would be the sort of association that would give rise to moral obligations.

that indigenous peoples within them have an obligation to abide the law because of associative obligations.

Like criticizing natural duty, it is not enough to show that the settler state in its current form fails to meet the threshold of associative obligations. If we assume that the settler state were to undergo significant reforms and meet Dworkin's four criteria for a true community, it must be established whether indigenous peoples would be bound to obey the laws of the settler state. Dworkin notes that associative obligations always involve an interpretative framework; 'friends have responsibility to treat one another as friends, and that means, put subjectively, that each must act out of a conception of friendship he is ready to recognize as vulnerable to an interpretative test, as open to the objection that this is a not a plausible account of what friendship means in our culture'.[31] Friendship is constituted not by pre-established agreement that two (or more) people will assume the obligations of friendship but that both parties act out of a conscious conception of friendship that is open to the interpretation of the other party or parties. Nevertheless, it would not follow from this explanation that one individual, call him John, could unilaterally decide that they are friends with another individual, call her Jane, and thus, incur on Jane the associative obligations of friendship towards John. While Dworkin argues that associative obligations are not the product of explicit consent,[32] it should also be apparent that the associative obligations of friendship in this case cannot be established completely without some degree of Jane's consent or agency. Dworkin writes, 'I would not become a citizen of Fiji if people there decided for some reason to treat me as one of them. Nor am I the friend of a stranger sitting next to me on a plane just because he decides he is a friend of mine'.[33] Just as John cannot impose associative obligations of friendship on Jane without Jane's implicit or explicit permission, it would be difficult to assume that the settler state could unilaterally impose associative obligations of citizenship upon indigenous peoples and expect these to be morally binding. Even if the settler state could meet the burdens of true community, continued indigenous resistance to the association of the settler state would challenge the capacity of associative obligations to account for the authority of the settler state over indigenous peoples.

II. Towards the Anarchist Conclusion

Given that the prominent discourses of political legitimacy cannot justify the settler state's claim to political legitimacy over indigenous peoples, political philosophers concerned with legitimacy in these cases are left with

31 Dworkin, above n 27, 199.
32 Ibid 198.
33 Ibid 202.

two potential conclusions. Conclusion (1) asserts that the settler state is, in fact, a legitimate authority over indigenous peoples. The failure of the prominent discourses of political legitimacy merely points to the continued need to generate an adequate account of political legitimacy. I will call this conclusion the statist conclusion. Conclusion (2) contends that the settler state's failure to meet any of the standards of legitimacy presented by these categorical accounts points to the illegitimacy of the settler state and perhaps the impossibility of categorical account of political legitimacy. I will call this conclusion the anarchist conclusion. I will now present a defense of the anarchist conclusion in favour of the statist conclusion in the case of indigenous claims.

I believe that political theorists considering the issues of indigenous justice claims should be willing to consider the implications of holding these claims to be true. If we are to hold these claims to be true, the statist conclusion faces a significant obstacle. The statist conclusion begins with the assumption that the settler state is a legitimate authority over indigenous peoples. As Alfred states, 'the assumption here is that Canada has until now possessed rightful jurisdiction over indigenous peoples and lands, and that vacating that jurisdiction is a matter of delegating power to Native governments'.[34] In contrast, indigenous peoples' claims are often incompatible with the authority that the settler state asserts. As Turner states, 'for many Aboriginal people Aboriginal rights are political rights that predate the formation of the Canadian state, not rights that arise from a post-Confederation concept of shared citizenship'.[35] The assumption contained in the statist conclusion seems to exclude the possibility of taking these claims about the illegitimacy of the settler state into account. If, in fact, it is important to take all indigenous claims seriously, a major assumption of this work, then political theorists cannot accept the *assumption* that the settler state is legitimate.

In addition, the statist conclusion points to a troubling tendency within normative political theory surrounding the issue of political legitimacy. Political theorists have a tendency in arguments about legitimacy 'to put the cart before the horse.' As quoted earlier, Waldron, in his discussion of natural duty, argues that since the state exists and since it is, in practice, sovereign over a particular territory, it is the legitimate

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34 Alfred, above n 11, 123. This sort of argument for self-government rights is articulated by Will Kymlicka when he writes, 'self-government claims, then, typically take the form of devolving political power to a political unit substantially controlled by the members of the national minority, and substantially corresponding to the historical homeland or territory' (See Will Kymlicka, *Multicultural Citizenship* (1995), 30).

35 Turner, above n 19, 44.

authority to which the citizenry must oblige.[36] Waldron's formulation reflects the overall tendency to structure arguments for political legitimacy in the following way:

> (1) states exist and exercise coercive political authority
> (2) normative political theory requires a justification for coercive political authority
> (3) coercive authority can be based on X; therefore, X justifies the coercive authority of the state.

This formulation of argument suffers from two significant problems. First, it makes discussions of legitimate political authority synonymous with discussions of the legitimacy of the state. While the state remains the dominant mode for organizing political authority, there are other potential ways to organizing political authority that should not be excluded or disadvantaged in normative discussions of political legitimacy.

Second, the statist conclusion faces the is-ought problem. It concludes that since the state exists, it ought to exist; all political theorists need to do is work up an adequate account to justify the state's existence. As Hume famously remarked

> [i]n every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, `tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.[37]

As long as political theorists continue to assume that because the state exists, it should exist, accounts of political legitimacy will commit some version of the is-ought problem. To use the existence of the state as a measuring stick for political legitimacy is to assume the state's legitimacy without the necessary argument.

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36 Waldron, 'Special Ties and Natural Duties', 25.

37 David Hume, *A Treatise of Human Nature* (2008), 302.

Why should the state be given this predominance in *normative* discussions of political legitimacy because it exists and can be efficient at resolving coordination problems? I argue that it should not. Rather, I argue that discussions of political legitimacy should be structured as follows:

(1) normative political philosophy requires that coercive political authority be justified
(2) coercive political authority can be justified based on X
(3) thus, coercive political authority of the kind X is legitimate.

It is only after working up a conception of political legitimacy that political theorists should turn to the state; it would then become necessary put pressure on the institutional arrangements of the state to test to see if the state can live up to the burdens of political legitimacy. Once we conclude that contemporary settler states fail to meet the criteria of political legitimacy, political theorists would have an obligation to reject the settler state as the legitimate political authority. We must privilege legitimacy over the state. Claims for legitimacy must drive the claims of political authority, not the other way around. In other words, normative political theorists must begin to put the horse before the cart.

III. The Necessary Rejection of Philosophical Anarchism

Above, I referred to the conclusion in favour of rejecting the settler state as the anarchist conclusion. It is necessary to now differentiate the implications of the anarchist conclusion from philosophical anarchism because despite their immediate similarities, philosophical anarchism cannot support indigenous claims. Before addressing the significant differences, it is important to acknowledge the shared commitments of philosophical anarchism and the anarchist conclusion. Philosophical anarchism and the anarchist conclusion both are committed to the illegitimacy of the (settler) state. As Simmons writes, 'commitment to one central claim unites all forms of anarchist political philosophy: all existing states are illegitimate. I take this thesis to be an essential, if not the defining, element of anarchism'.[38] The anarchist conclusion argues that the gap between the prominent accounts of political legitimacy and the reality of the settler state means that the settler state cannot be legitimate. Similarly, the philosophical anarchist, because of a moral commitment to voluntarism, egalitarianism, communitarism, etc., views all existing states as illegitimate.

Nevertheless, despite this similarity philosophical anarchism is not appropriate for addressing the problem of legitimacy raised by the

38 Simmons (2001), above n 5, 103

relationship between indigenous peoples and the settler state. I will argue here that while philosophical anarchism presents the correct conclusion about the legitimacy of the settler state, it has not asked the correct question. Similar to the accounts of legitimacy surveyed above, philosophical anarchism accepts that the only satisfactory account of political legitimacy is one that produces a categorical obligation to obey to dictates of the relevant political authority. As Wolff states, 'obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *because he tells you to do* it. Legitimate, or *de jure*, authority thus concerns the grounds and sources of moral obligation'.[39] For Wolff, where authority is legitimate we have a moral obligation to obey. Where Wolff disagrees with the theorists of political legitimacy highlighted above is on the capacity of any authority to create this sort of moral obligation. While Locke or Rousseau root obligation to political authority in consent, Wolff (in)famously argues that all political authority removes the possibility of individual autonomy and it is the cultivation and preservation of our own autonomy, and not political authority, to which we have a stronger moral obligation. He writes, 'insofar as a man fulfills his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him. That is to say, he will deny that he has a duty to obey the laws of the state *simply because they are the laws*. In that sense, it would seem that anarchism is the only political doctrine consistent with the virtue of autonomy'.[40] Thus, given our moral obligation to our individual autonomy, Wolff concludes that legitimate authority is impossible.

Simmons also assumes that the only possibility for legitimate political authority is the sort established by a discourse of categorical legitimacy. Unlike Wolff, Simmons argues that such a legitimate political authority is theoretically possible, just practically unachievable. Simmons writes, 'it is hard to deny that free, informed consent at least looks like an act that might give one party a right or some authority to direct and coerce another'.[41] He continues, 'if only our own consent can subject us to and obligate us to obey a political authority, and if (as seems to be the case) very few people in actual political societies have done anything that looks much like a declaration of political consent, then we seem to face the disturbing conclusion that few residents of real political societies are bound to obey their political authorities and the laws that issue from them'.[42] Simmons assumes that the function of any discourse of political legitimacy must be to provide the reason why individuals have a binding obligation to obey any particular political authority. Given that, for Simmons, no account

39 Robert Paul Wolff, *In Defense of Anarchism* (1970), 9.
40 Ibid 18.
41 Simmons (2001), above n 5, 134.
42 Ibid 158.

short of free, informed consent is able to provide this reason means that only free informed consent can be the basis of political legitimacy. Since free, informed consent is unlikely to ever be achieved, the reality of ever achieving political legitimacy is also thwarted.

Both Wolff and Simmons accept that the only satisfying account of political legitimacy is a categorical account. Just as the dominant theories of political legitimacy have focused on the state as the relevant unit for considerations of political legitimacy, these theories have also focused on the kind of authority created by categorical accounts of legitimacy. Categorical accounts of political legitimacy seek to create authority of the kind defined by Wolff; 'authority is the right to command, and correlatively, the right to be obeyed'.[43] While philosophical anarchists are correct to doubt that capacity of the modern state to meet the burdens of political legitimacy, especially in the case of indigenous justice claims, they are incorrect in viewing the only relevant account of political legitimacy as a categorical one for two reasons: first, it is immensely difficult, if not impossible, to give a categorical account of the legitimacy of any political authority and second, they neglect the possibility of providing an alternative account of political legitimacy that may allow for political authorities more compatible with both the moral commitments of some philosophical anarchists and, more importantly, the claims of indigenous peoples.

First, it is necessary to argue why a categorical account of political legitimacy presents too great a burden for political theorists interested in describing legitimate political authority. As outlined above, supporters of categorical accounts of political legitimacy maintain that legitimacy is determined by outlining a fixed set of criteria; when a political authority possesses all these criteria, it is described as legitimate and without these criteria, it is illegitimate. However, this sort of fixed criteria to determine political legitimacy requires a certain amount of uniformity in normative values. In other words, if we all agreed that natural duties of a Kantian kind grounded political legitimacy, then assessing which political authorities were legitimate would be a matter for descriptive political scientists. Rather, what endless theoretical debate about the nature of political legitimacy show is, simply, that contemporary political societies do not possess the necessary uniformity in normative values to provide a fixed set of criteria. We are divided about whether consent or duty or fairness or associations creates the necessary criteria for political legitimacy or, following Wolff, if all of these criteria should be subordinated to our individual autonomy. As Nietzsche remarked, '[w]ithout the help of priests, no power can become "legitimate" even now'.[44] Without normative uniformity, political

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43 Wolff, above n 40, 4.

44 Friedrich Nietzsche (M. Faber, S. Lehmann trs.), *Human All Too Human: A*

legitimacy of a categorical kind is immensely difficult, if not impossible, to determine.

Yet, without an alternative, the impossibility of a categorical account of political legitimacy in times of normative diversity leaves us with two, and unequally unpalatable, conclusions. The first conclusion would be that political authorities should get in the game of enforcing normative uniformity so as ensure their own legitimacy. For Nietzsche, the perceived legitimacy of contemporary states is rooted in this sort of political coercion. He writes, 'every people speaks its own tongue of good and evil, which the neighbour does not understand. It has invented its own language of customs and rights. But the state tells lies in all the tongues of good and evil; and whatever it says it lies'.[45] This sort of conclusion would allow for the possibility of perceived political legitimacy but make discussions of normative political legitimacy besides the point. If all political authority is solely based on coercion, then the normative question of how to justify coercive political authority is irrelevant. Also, this conclusion would make it difficult to take the claims of indigenous peoples seriously when they question the legitimacy of settler states like Canada and Australia. If legitimacy is solely a matter of an authority's ability to coerce, the challenge posed by indigenous claims would either appear insignificant compared to the presumed legitimacy of settler states on the part of the non-indigenous majority or would be a testament to the settler's state inability to exercise its coercive power effectively.

Alternatively, one could conclude from the impossibility of a categorical account of political legitimacy that political legitimacy is, itself, impossible. This approach is the one taken by philosophical anarchists, especially Simmons. Simmons writes,

> a state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties. It follows that "on balance" state legitimacy may be complete or partial, depending on whether such relations hold with all or only with some of those against whom the state enforces the duties it imposes (though the state is, of course, either fully legitimate or fully illegitimate with respect to each individual under its rule).[46]

Book for Free Spirits (1986), 223.

45 Friedrich Nietzsche, *Thus Spoke Zarathustra* (1969), 76.

46 Simmons (2001), above n 5, 130.

Given that legitimacy is an all-or-nothing game for Simmons and that it is unlikely that any political authority could meet the burden of consent that he sets as the basis for legitimacy, political legitimacy is conceived as impossible. For a philosophical anarchist like Simmons, since categorical accounts of legitimacy are impossible, political legitimacy is itself impossible.

These conclusions are unpalatable. In the first case, political legitimacy is determined by the dictates of political authority, which is itself the entity that is being legitimated. As Tamsin Shaw writes, 'although people will not consciously espouse views that they know to be mere prescriptions of state ideology, states, through their control of apparently independent institutions — for instance, educational and religious institutions — have powerful means of implicitly asserting control over belief. States can thereby manufacture the very normative beliefs to which they then appeal in their claims to legitimacy'.[47] Thus, in this sort of situation the measure of legitimacy is no longer some sort of normative criteria or process, but rather a measure of the state's coercive abilities in affecting the discourse of legitimacy in its favour. In terms of indigenous claims, this conclusion leaves almost no room for criticizing the current political relationship between indigenous peoples and settler states as illegitimate. The second conclusion is no better. It eliminates the possibility of discussing political legitimacy at all. By adopting the second conclusion, we are left with no way to evaluate existing (or even possible) political authorities as more or less legitimate. They are simply all non-legitimate or, more radically, illegitimate. In the case of the claims of indigenous peoples, this conclusion would leave no room for articulating that the Canadian state policy of residential schools was less legitimate that the proposed policy of negotiated self-government agreements. While it must be acknowledged that neither of these policy arrangements may achieve, nor even approach, ideal political legitimacy, a workable understanding of what could constitute political legitimacy is required if this evaluation remains possible.

IV. A Dialogical Account of Political Legitimacy

Given the difficulties of providing a categorical account of political legitimacy and the continued need for a discourse of political legitimacy, it is necessary to identify an alternative account of political legitimacy. Through an examination of work in deliberative democracy and critical theory, we can identify an alternative to the categorical account of political legitimacy. I will call this alternative the dialogical account of political legitimacy. However, the dialogical account of political legitimacy can be sub-divided further into two sub-accounts: the consensus dialogical account

47 Tasmin Shaw, *Nietzsche's Political Skepticism* (2007), 5.

and the agonistic dialogical account. In this section, I will briefly describe these sub-accounts of the dialogical approach to legitimacy and argue for the agonistic dialogical account over the consensus dialogical account. I will then highlight how the agonistic dialogical account is fundamentally different from categorical accounts of political legitimacy.

The work of contemporary deliberative democrats, most notably Jürgen Habermas, characterizes the consensus dialogical approach to political legitimacy. Habermas argues that the validity of norms should be derived from agreement based on generalizable reasons. The principles that govern our public life should be arrived at through rational public deliberation that allows for maximal participation. It is this process of deliberation that establishes political authority and thus, determines legitimacy. He writes, 'the appropriate model is... the communication community [*Kommunikationsgemeinschaft*] of those affected, who as participants in a practical discourse test the validity claims of norms and, to the extent that they accept them with reasons, arrive at the conviction that in the given circumstances the proposed norms are "right"'.[48] The object of this sort of dialogue is to reach consensus; 'it follows that we cannot explain the validity claim of norms without recourse to rationally motivated agreement or at least to the conviction that consensus on a recommended norm could be brought about *with reasons*'.[49] Thus, according to this account, political legitimacy would be established through the process of communicative rationality where all are allowed to participate equality in deliberation. In addition, all participants are expected to reason in a public way, leaving aside personal and particular interest. From this communicative reasoning eventually a consensus will emerge and this consensus is the basis for legitimate political authority.

While I find consensus-dialogical legitimacy more promising than the categorical accounts of political legitimacy, I do not think it is ideal for several reasons. First, a goal of consensus pushes strongly against the normative plurality found between indigenous and non-indigenous peoples in settler states. Normative political theorists need to be open to the idea that, similar to my critique of Rousseauian consent, consensus between indigenous and non-indigenous peoples on issues of governance, resources and land may be an impossible goal. That said, some scholars of Habermas have insisted that consensus is a regulative idea within Habermasian thought.[50] If consensus is merely a regulative idea, than the potential

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48 Jürgen Habermas (Thomas McCarthy tr.), *Legitimation Crisis* (1976), 105.

49 Ibid 105.

50 See, for example, Samantha Ashenden, 'Pluralism within the limits of reason alone? Habermas and the discursive negotiation of consensus', (1998) 1 *Critical Review of International Social and Political Philosophy*

impossibility of an actual consensus is not that damaging to legitimacy as consensus-based dialogue. Treating consensus as a regulative idea turns us to the second concern with Habermasian consensus as the basis of political legitimacy. Habermas, himself, is not convinced about the value of indigenous claims. While he has become more tolerant of the role of pluralism within rational deliberation, he does not see indigenous claims as compatible with liberalism or egalitarianism. For example, he writes,

> there are tribal societies and forms of life and also cultic practices that do not fit with the political framework of an egalitarian and individualistic legal order. That is apparent in the attempts by the United States, Canada and Australia to correct the historical injustice to indigenous peoples who were subjugated, compulsory integrated and discriminated against for centuries. These groups use the concession of far-reaching autonomy to maintain or to restore particular forms of traditional authority and collective property, even though in individual cases these conflict with the egalitarian principle and individualistic reference of 'equal rights for all.' According to the modern understanding of law, there cannot really be 'a state within a state.' If a so-called 'illiberal' group is nevertheless allowed to assume its own legal order within a liberal state, that results in irresolvable contradictions.[51]

As Habermas has become more committed to including certain kinds of pluralism within his limits of rational deliberation, he has placed more explicit limits on the inclusion of indigenous claims. If indigenous claims must be excluded from Habermasian consensus in the way that Habermas seems to indicate above, than this account cannot be ideal for constructing an account of dialogical legitimacy appropriate to the relationship between indigenous and non-indigenous peoples in the context of settler states.

The second dialogical account of political legitimacy denies the possibility of ultimate consensus on normative values. However, unlike Nietzsche's conclusion above, it does not deny the possibility of political legitimacy in the face of normative plurality. Whereas the consensus dialogical approach to political legitimacy seeks to remove controversial opinions from public dialogue in order to generate consensus, the agonistic dialogical approach accepts that deep disagreement about norms are an intractable part of public/political life. Foucault defines agonism in the following way: 'Rather than speaking of an essential freedom, it would be better to speak of an "*agonism*" – of a relationship which is at the same time

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117, 117-136.

51 Jürgen Habermas, 'Equal Treatment of Cultures and the Limits of Postmodern Liberalism', (2005) 13 *Journal of Political Philosophy* 1, 23.

reciprocal incitation and struggle; less of a face-to-face confrontation which paralyzes both sides than a permanent provocation'.[52] For Foucault and others, agonism is characterized by ongoing contestations. If agonism is a permanent aspect of our experience of freedom in modern societies, any usable account of the political should be able to take freedom as agonism into account. As Mouffe writes,

> we can therefore reformulate our problem by saying that envisaged from the perspective of 'agonistic pluralism' the aim of democratic politics is to transform *antagonism* into *agonism*... An important difference with the model of 'deliberative democracy' is that for 'agonistic pluralism', the prime task of democratic politics is not to eliminate passions form the sphere of the public, in order to render a rational consensus possible, but to mobilize those passions towards democratic designs.[53]

Yet, it remains necessary to consider how the idea of politics as inherently agonistic lead to a dialogical theory of political legitimacy. In an environment of constant contestation, how can the legitimacy of political authorities be established? Unlike the categorical approaches to political legitimacy, under an agonistic dialogical approach political legitimacy is not fixed and constantly contestable. Unlike the consensus approach, agonistic dialogical legitimacy does not arise out of consensus arrived through deliberation, a permanent solution out of much democratic discussion, but as a continued commitment to a process that allows for the continuation of agonisms, while preventing the creation of antagonisms. For this reason, my view of agonism is not as thick as Mouffe's; I do believe that for a procedure to be viewed as legitimate, there must be a procedural-level commitment[54] to listen to the other side and remain committed to the process of agonistic dialogue.

Thus, the most legitimate political processes are ones that have this second-order commitment and allow for and promote agonistic dialogue among citizens. Tully writes,

> participation is a strategic-communicative game. Citizens struggle for recognition and rule, negotiate within and sometimes over the rules, bargain, compromise, take two steps back, reach a provisional agreement or agree to disagree, and start over again. They learn to govern and

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52 Michel Foucault, 'The Subject and Power', in Hubert L. Dreyfus and Paul Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982), 222-3.

53 Chantal Mouffe, *The Democratic Paradox* (2000), 103.

54 This discussion of the level of commitment required by an agonistic politics has benefited greatly from my discussions with Dr. Duncan Ivison.

> be governed in the context of relatively stable irresolution where the possibility of dissent is an implicit 'permanent provocation' that effects the negotiations... When these activities are unavailable or arbitrarily restricted, the members of a political association remain 'subjects' rather than 'citizens' because power is exercised over them without their say, non-democratically. As a result, the political association is experienced as alien and imposed, as a structure of domination that is 'unfree' and '*illegitimate.*'[55]

Arguably, legitimacy on the agonistic dialogical approach depends on the availability and acceptability of agonistic dialogue. Political communities that foster agonistic dialogue amongst citizens are the sort of political communities that approach, but perhaps never, reach ideal legitimacy. Communities that bring in the army to dismantle road blockades without engaging in a dialogue, no matter how confronting the other side, lacks legitimacy. Mouffe writes of democracy, 'it should be conceived of as a good that only exists so long as it cannot be reached. Such a democracy will therefore always be a democracy "to come", as conflict and antagonism are at the same time its condition of possibility and the condition of impossibility of its full realization'.[56] As Mouffe sees the future of democracy in terms both possibility and impossibility, I believe that political legitimacy should be viewed similarly. An agonistic dialogical legitimacy will too always be a legitimacy 'to come.'

V. Conclusion

Political theorists concerned with political legitimacy in the case of indigenous peoples and settler states need to be willing to move beyond the categorical accounts of legitimacy that tend to place too much emphasis on normative uniformity and the institutional structures of the state. These categorical accounts, it has been shown, are unable to address the relationship between indigenous peoples and the settler state because they cannot provide a convincing account of how the settler state has come to exercise political authority over indigenous peoples. The inability of the traditional categorical accounts of legitimacy to account for the state's authority leaves us with either the statist or the anarchist conclusion. I have argued that the statist conclusion does not allow us to take the claims of indigenous peoples seriously because it presupposes the legitimacy of the settler state, the very thing brought into question by taking indigenous

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55 James Tully, *Public Philosophy in a New Key Volume 1: Democracy and Civic Freedom* (2008), 147 (emphasis added).

56 Chantal Mouffe, *The Return of the Political* (1993), 8.

claims seriously. Therefore, it is not legitimate political authority that is impossible, but the legitimacy of the settler state that is rejected.

Then, I turned to the challenge of philosophical anarchism. I argued that while philosophical anarchists have reached the correct answer, i.e., 'the (settler) state is illegitimate,' they have asked the wrong question. As I have attempted to show, philosophical anarchists assume the only possible way to legitimate political authority is through some sort of categorical account of political legitimacy. However, the impossibility of normative uniformity would require that categorical legitimacy would either have to be coerced (by the very authority supposedly legitimated by it) or that political legitimacy would be impossible. Without any account of political legitimacy, political philosophers would be unable to differentiate between more and less legitimate regimes, which is especially important when considering the claims of indigenous peoples. Thus, a non-categorical account of political legitimacy is required to prevent the conclusion of philosophical anarchism.

I have outlined the dialogical approach to political legitimacy, which can further be divided into two strands: consensus and agonistic. I have highlighted some reasons why I believe the agonistic dialogical approach to political legitimacy is preferable, primarily because it takes more seriously the lack of normative uniformity in pluralistic political communities. The legitimacy derived from an agonistic dialogue is better suited to addressing the justice claims of indigenous peoples and the moral commitments of philosophical anarchists. In terms of the moral commitments of philosophical anarchists, because legitimacy based on agonistic dialogue is never fixed or permanent, the capacity to challenge, revise, criticize and resist any particular political decision remains open. Under this model, legitimacy does not result in a particular institution that is able to issue orders that are binding on individual's actions. Rather, legitimacy is sustained by a process that allows citizens to constantly participate in and potentially contest the political decisions that affect their lives. This sort of model appears much more compatible with the philosophical anarchists' commitments to individual autonomy than the categorical accounts outlined above. However, it should be acknowledged that the kind of legitimacy created through an agonistic dialogue will not create the sort of binding obligations that philosophical anarchists seem, ironically, to assume should be result of a satisfactory discourse of political legitimacy.

Second, and more importantly for this project, an agonistic dialogical approach to political legitimacy is more compatible with the claims of indigenous peoples. Unlike categorical accounts of political legitimacy that seem preoccupied with giving an account of how the state has come to be a legitimate political authority, an agonistic dialogical approach asserts that

legitimacy is created through process that does not necessarily have to be concerned solely with the state. Indigenous claims often openly challenge the assumed legitimacy of settler states and an agonistic dialogical approach outlines how the refusal to engage with indigenous peoples' claims seriously challenges the legitimacy of the settler state. Also, given that agonistic dialogical legitimacy is concerned with the legitimacy of political associations, not just states, it opens up space for considering what sort of procedural conditions would be necessary to create non-statist legitimate political associations, perhaps the sort of political associations that would be more compatible with some indigenous forms of governance.

I have articulated the need for political philosophers interested in indigenous claims to consider the implications of adopting a solely statist framework for articulating political legitimacy. Unless we are prepared to consider political legitimacy in terms of non-statist forms of political association, the full extent of the critique levelled at the settler state by indigenous peoples will remain elusive. I have argued that fostering and preserving of agonistic dialogues provides the best model for talking about political legitimacy for indigenous claims because of its capacity to apply to both state and non-state political institutions and association

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