THE JURISDICTION OF DIFFERENCE: GROUPS AND LAW

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Abstract

The diversity represented by group difference in liberal democracies is the source of significant philosophical and legal concern. This thesis examines how the law encounters and tolerates this evident diversity. It argues that law responds to group difference as a matter of course by sorting and ordering the group into ostensibly obvious categories. The concept of jurisdiction — understood as the moment in which law speaks to itself about the limits of its authority — grounds the inquiry. It opens the vista onto a broader theoretical understanding of law's attachments and it provides a lens through which to interpret law's acts of ordering. Drawing together jurisdictional and geographical insights, the thesis explores territorial manifestations of group difference in three legal orders: international law, national law, and sub-national law. Each of these scalar orders prescribes a distinct jurisdictional logic which governs the group. The optic of jurisdiction permits attention to the circumstances in which law reaches group difference and the scope and content it assumes once there. The nature and extent of this competence is examined through consideration of how group difference is scaled and adjudicated in the jurisprudence.

The scrutiny of jurisdictional theory reveals the discontinuities between jurisdiction as a technicality in legal theory and jurisdiction as a mode of governance in social theory. This thesis unites these jurisdictional modes of analysis by clarifying the pervasive political character of jurisdiction. This politicized concept of jurisdiction is then placed in conversation with the scalar governance of group difference. The motif of governance is important because it is the potential *ungovernability* of the group, specifically the enclave, which underlies liberal anxiety about group difference. Jurisdiction ultimately casts a long shadow over diversity. It is beholden to sovereignty and established legal forms of constituting the group, including statehood, constitutional federalism, and liberal individualism. Attention to the legal threshold reveals that one way that law treats groups is by *not* grouping them. Jurisdiction reinscribes the boundaries of each legal order, forging different legal objects — nation-states, minorities, cultures — in such a way that these manifestations are not perceived to be part of the same category at all.

Preface

This dissertation is original, unpublished, independent work by the author, Asha Kaushal.

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Chapter 1: Introduction

It is only possible to identify the different sites as different units if we already acknowledge that the underlying symbolic work involved in representing each of these sites as units - and so also as unities - requires a different way of knowing and ordering, a different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unities continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claims can be reconciled.[1]

This dissertation is about the jurisdiction of group difference. It examines the role of law in ordering the group. The concept of jurisdiction connotes regard to the legal threshold between law and non-law and focuses attention on the terms of law's reach or retraction. It is best summed up as the moment that law speaks to itself about the limits of its authority. The concept of group difference refers broadly to group identities which are held in common. The groups examined in this project concern religious, ethnic, and cultural identities. My thesis is that law perpetually encounters and adjudicates group difference, and that it manages that difference by sorting and scaling it between legal orders. The lens of jurisdiction permits attention to both the terms of that organization and the extent to which it constitutes a framework of governance. The dissertation relies on a blend of legal scales and cases in which territory, the group, and law dance in a configuration choreographed by jurisdiction.

1.1 The Problems of Group Difference and the Law

The core of this dissertation lies in the relationship between law and group difference. It evolved out of the burgeoning interest in enclaves in Canada and other countries of immigration. An enclave is a space that is numerically dominated by a particular group and which has spawned corresponding services and institutions.[2] The recent census in Canada has shown a marked increase in enclaves from 6 in 1981, to over 260 in 2006. Enclaves are notable in part for their symbolic heft: they have emerged as paradigmatic emblems of diversity in liberal-democratic societies. Both public discourse and private murmurings reveal concerns about their representations. There is disquietude about the isolation of enclaves, their model of neighbourhood segregation and laissez-faire integration into mainstream society, and their long-term effects on belonging. Enclaves mark a shift toward

[1] Neil Walker, "The Idea of Constitutionalism" (2002) 65 Mod L Rev 317.
[2] For more extensive evaluation of enclaves, see Chapter 5, Section 5.2.

residential separation as a voluntary choice, one that is no longer associated with poverty or forced exclusion. In all of this, it is clear that the root of discursive concern is about the terms of constituting the polity: who is included and on what terms.

As emblems of diversity, though, enclaves indicate a larger shift, and it is this shift which underlies the work of this dissertation. Enclaves are symbols of a new social order. In this world, countries of immigration across the globe are experiencing massive demographic dislocation. Aging populations and falling birth rates have made immigration a demographic necessity for these countries in order to simply maintain their populations.[3] In settler states, it is already possible to see the effects of these changing demographics.[4] These include larger numbers of visible minority immigrants on the ground, some of whom settle in enclaves, pressures in the public sphere surrounding integration and tolerance, and tensions in the legal sphere between equality and religious freedoms. This is a new landscape for group difference and for society, one that insists upon a revisiting of the terms of group difference in the legal frame. This dissertation is that revisiting. It is an effort to take stock of how the group is identified, claimed, adjudicated, and settled in law. We are, in an important sense, *after* international law now. It may contend with new issue areas and certainly new challenges but, for the most part, its sources and institutions are determined. We are equally in a post-*Charter* era, thirty years after its passage. It may also confront new subjects, but its rights and interpretative principles are delimited and exhaustive. Yet we are in no sense post-identity groups. So it seems appropriate to ask how various legal orders deal with difference and what they reveal about law's values, predispositions, and commitments.

This inquiry started with a close examination of the legal architecture of group difference. It examines group difference in three legal orders — international, national, and sub-national — to map how the rights and entitlements to difference are distributed. This led to the observation that groups are treated differently by law depending on their location. The lens of jurisdiction is employed to analyze this differential treatment. Claims about group difference are made against the background of a legal landscape which privileges some categories of groupness. Placing these legal categories and

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[3] Anthony M Messina & Gallya Lahav, eds, *The Migration Reader* (Boulder: Lynne Rienner Publishers, 2006). In Western Europe, nearly all labour force growth is due to immigration, as is about 40 percent of such growth in North America. See: Philip Martin, Manolo Abella & Christiane Kuptsch, *Managing Labor Migration in the Twenty-First Century* (New Haven: Yale University Press, 2006) 23.

[4] Statistics Canada projects that by 2031, one in three Canadians will belong to a visible minority. See: Joe Friesen, "The changing face of Canada: booming minority populations by 2031", *Globe & Mail* (9 March 2010).

concepts into conversation across scales turns out to be profoundly disruptive of the prevailing narratives about group difference. Moreover, it turns out that enclaves embody this categorical disarticulation. They reveal both the extent and terms of law's reach, and so they represent the difficulties with legal categories and the law of groups.

The tale that law recounts is that it has come to terms with group difference. It has wrestled with difference and, in the post-human rights era, difference has secured its place among rights. In the international legal order, there are individual minority rights and self-determination; in the national legal order, there are bilingualism, multiculturalism, and the unwritten constitutional principle of minority rights; in the sub-national legal order, there are individual rights and reasonable accommodations. But built into this narrative are several distinctions: between declarations of statehood and recognition, between national groups and minority groups, between historical groups and immigrant groups, between religion and culture. These distinctions undercut law's treatment of group difference. They keep the law from deep engagement with both the complex nature of the group and the theoretical and political meaning of its demands on the state. Indeed, the more accurate account suggests that law has not overcome group difference; it has exacerbated it by recognition.

1.2 The Jurisdictional Lens: Categories, Technologies, and Territories

Jurisdiction itself has many meanings and is invoked in many different settings. The first chapter contends with these myriad theoretical and technical invocations of jurisdiction. In this dissertation, jurisdiction means the moment in which law speaks to itself about the limits of its authority.[5] It denotes a sphere or a moment that is a precondition for the juridical as such, for the law to come into effect. Temporally, then, jurisdiction is located in a moment before the law. This is part of its value: it focuses attention on the moment between law's invocation and legal decision. It invites us to consider the conditions for law's entry. The modes or manner of coming into law, of belonging to law, are always jurisdictional and thus always invoke the law at the limit of its competence. It is a threshold and at that threshold, jurisdiction defines the operations of law.

It turns out that the jurisdictional moment is full of information about why and how law organizes itself around some kinds of difference, some kinds of groups, and not others. It assembles questions

[5] Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of the Common Law, 1509-1625* (Chicago: University of Chicago Press, 2007).

about which claims succeed, which tropes and constructs each scale relies upon to police the boundaries of their group containers, how the constructs of each scale inform group difference in each frame, and how group claims jump scales. The answers to these questions provide a robust picture of groups and law. Part of this picture is that law sorts difference in part by *scaling* it — some manifestations of difference merit international self-determination, others are hemmed in by constitutional principles of secession, still others are considered organic phenomena outside of law's reach — and it performs this scaling using jurisdiction. Legal actors mobilize scale to shift and sort the group between legal planes to maintain its place at the very edge of law's jurisdiction.

1.2.1 On Categories

Jurisdiction invokes the idiom of categorization. This is helpful because it directs attention to what might be at play in the jurisdictional threshold. Law is "the practice of perceiving problems through categories".[6] The act of categorization has important consequences for what is being categorized as well as for the meaning of the category. This project relies upon the notion of legal categories as organizing law and social life. In particular, it approaches jurisdiction as the concept that polices the boundaries and content of legal categories. The study of jurisdiction is the study of how law sorts and attaches to categories. If what law is sorting out is categories, then identifying and analyzing the jurisdictional threshold becomes a task of "reading the categories": figuring out which categories are permitted, which are precluded, and how a case is shunted between them.[7]

Placing the legal orders into conversation and trying to map their categories is revealing. The meta-categorization is scalar — does this case fall to the international, national, or sub-national legal order? In other words, may the claimant invoke self-determination, exceptional national minority rights, or individual human rights? Scale is a category about categories: it tells which set of legal categories may be invoked. Then, the categorizations that follow have to do with fields of law and typologies of the group. Yet discontinuities and movement demonstrate that there is slippage between the categories in the chapters. In the international chapter, the conceptual categories are tightly mapped, but this overlay loosens and disintegrates as the dissertation progresses to the sub-national legal order. There are different legal categories in the scalar orders, and their modes of

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[6] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell: Cornell University Press, 1990) at 1.
[7] Geoffrey C Bowker & Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge: MIT Press, 1999).

categorization differ as well. Moreover, these categories are in motion; they are revised and remade to varying degrees through legal claims and decisions.

There is one further point to make about the categories of groupness examined in this dissertation. These categories run the gamut from statehood to minority groups to religious groups. They are all united by their concern with group difference. It is evident that aboriginal groups matter deeply for group difference and for jurisdiction: they inhabit and invoke territory, sovereignty and self-rule, and law in obvious ways. They figure throughout this dissertation, informing the discursive landscape and the categories of groups, yet they are not its focus. In Canada, the courts have characterized aboriginal rights as *sui generis,* a Latin term meaning "of its own kind".[8] While it is important to recognize that the designation of an entire set of rights or relationships to territory as different is its own legal categorization, I nonetheless follow this separation. States treat aboriginal groups differently from other groups in law, often employing special territorial designations and constitutional categories. This is partly because of their unique position: they are the original inhabitants of states, colonized but never decolonized, and so their claims register grievous historical injustices. Perhaps most importantly, aboriginal groups have sought to distinguish their claims from other groups based on these and other factors. For all of these reasons, aboriginal claims merit their own examination and this dissertation simply cannot perform that task. Accordingly, aboriginal groups figure in this project as a constitutive part of the legal environment, and they are occasionally brought to fore to illuminate the operation of jurisdictional claims to groupness, but they are not the subject of extensive analysis.

1.2.2 On Territories

It is sometimes difficult to find material representations of jurisdiction until it has already done its work. Territory is an exception to this difficulty. Territorial jurisdiction is one way that jurisdiction is commonly understood. It renders legal authority coextensive with territorial boundaries. Territory is a pivotal concept in this project for the work that it performs in categorizing, scaling, politicizing, and sorting the group and the law. Perhaps the most useful way to conceive of territory at the outset is as land. Then it is possible to conceive of the land of each scalar legal order and of all of the groups as overlapping. This is sometimes described as verticality or nested territories such that the

[8] See: John Borrows & Leonard I Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta L Rev 9.

community nests within the sub-state unit which nests within the nation-state and so on.[9] The point is that these territories mean differently in each of their nestings and this directs attention to the relational aspect of territory. Territory always implicates something else. These ideas are explored in more detail in the subsequent chapters. At this point, I simply want to explain the history of jurisdiction to situate this project in time and space.

The history of jurisdiction is a narrative in which territory comes to stand in for jurisdiction. Stuart Elden explains how territory emerged as a category in political thought through legal interpretation: in the later Middle Ages, the rediscovery of Justinian's *Corpus Iuris Civilis* provided the basis for linking the original Latin term *territorium* (understood as a synonym for land) to jurisdiction.[10] Justinian's text was discovered five hundred years after its promulgation, and so required reconstruction and interpretation. The task was to understand Roman law in the evolved context of "popes, emperors, kings, and independent cities".[11] It was the interpreter Bartolus of Sassoferrato who explicitly joined *territorium* to jurisdiction. Elden explains:

> He is taking the notion of land, or land belonging to an entity, as the thing to which jurisdiction applies, thus providing the extent of rule. The *territorium* then is not simply a property of the ruler; nor is jurisdiction simply a quality of the *territorium*. Rather, the *territorium* is the object of rule itself.[12]

This marked the shift from the personality of law to the territoriality of law.[13] This moment still far precedes the Peace of Westphalia in 1648, but it demonstrates the continuous nature of the relationship between rulers and their constituent parts. Historically, then, territory was a bounded space under the control of a group; now, territory is the very extent of political power.[14] This is the trajectory of how territory comes to stand in for the political and how it becomes part of the

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[9] David Delaney, *Territory: A Short Introduction* (Oxford: Wiley Blackwell, 2005) at 13.
[10] Justinian was a Byzantine Emperor in the 6th century who had codified Roman law up to his time. Stuart Elden, "Territory Part I" in John A Agnew & James S Duncan, eds, *The Wiley-Blackwell Companion to Human Geography*, 1st ed (Malden: Wiley-Blackwell, 2011) at 264-65.
[11] *Ibid* at 265.
[12] *Ibid* at 265.
[13] This shift is also the basis of Richard T. Ford's article, see Chapter 2, *infra*, but he focuses on what this shift means for state administration, while Stuart Elden and John Agnew, among others, conceive of the shift to territorial jurisdiction as shoring up sovereignty and statehood.
[14] Elden, *supra* note 10.

existential identity of the state. It is a story that is inextricably bound to jurisdiction. It is also the reason why the category of territory can only be understood in relation to sovereignty and the state.[15]

Yet, the dominance of territorial jurisdiction belies the existence of other, non-territorial forms of jurisdiction. In this dissertation, these forms are referred to as generic-conceptual jurisdiction. They include, for example, the jurisdiction of courts and tribunals. Although jurisdictional deliberations often refer back to territory, territory is no longer (if it ever was) the only appropriate modifier for jurisdiction. Instead, jurisdiction should be conceived more broadly as the threshold of law which invokes the political, and attention should be paid to jurisdictional technologies to see how jurisdiction goes about its work.

1.3 The Concepts and Terms: Definitions and Delimitations

1.3.1 On the Group

As part of the story of law and society, this dissertation parses the work that law performs as a body of theories and rules in constructing and regulating the relationship between law and groups. Groups are a key part of the 'society' part of law and society. From families to communities to organizations, social life is an amalgam of various kinds of groups. It is a key contention of this dissertation that law does not squarely meet society in the context of group difference. Not only does law lack the resources to consider these complex social solidarities, but also the jurisdictional threshold does not reach this far. When jurisdiction approaches social solidarities, it becomes a choice between law and non-law — between law and the social — rather than between applicable laws.

In light of the examination of group difference that lies at the heart of this project, it is necessary at the outset to explain the meaning of 'group'.[16] The social group — whether in the form of community, ethnic group, people, or nation-state — is an enormously contested category in social theory. This project is committed to a concept of group that acknowledges the role of social

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[15] *Ibid*.

[16] I have chosen not to similarly define 'difference' because I use it more as a motif than a defined term. It is meant to convey visible difference and to carry the theoretical weight of the Other as a site of foreignness and incommensurability. As a category, it does not have firm boundaries but instead appertains to any individual or group who finds him or herself outside of mainstream categories. This includes but is not limited to visible minorities, immigrants, national minorities, religious groups, and, in other contexts, gender groups and sexuality groups. And, like all boundaries of the group, their meaning and composition shifts and varies.

solidarities and culture in constituting human life.[17] This does not mean that groups are pure, stable, and precisely bounded units. The criticisms of the inherently fluid and politicized nature of groups do not make their groupness less important; they simply make them more complex and problematic.[18] This section reviews the terms of the debate, looking for ways to retain the analytical value of the group without falling into the trap of constituting the very phenomenon that is the object of study.

But — and this is a big but — even if one believes, with Rogers Brubaker, that groups are instrumental and political, or, with Seyla Benhabib, that groups are dynamic and shifting, this dissertation still renders productive insights. The point of this project is to use the lens of jurisdiction to examine how law governs group difference. It is uncontroversial to suggest that groups are embedded in a larger context. This context includes law, politics, economics, and several other axes of significance. It does not matter much what this group difference may have looked like before it was politicized and claimed *because the group that law adjudicates is always, already touched by society, politics, and law*.[19] The very act of making a legal claim categorizes members, draws boundaries, and sets collective goals. Indeed, the notions of sharp boundaries and established group composition are themselves partly constitutive of group identity and solidarity.[20] It is not clear that groups are ever "entirely pre-political".[21] The group may be more or less loose; members may be bound only by their desire to exercise certain rights in common or they may be bound by deeply constitutive "webs of significance".[22] The point is that they present as a group and the ambition of this project is to pay attention to how law hears and interprets that presentation.

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[17] Craig Calhoun, "'Belonging' in the Cosmopolitan Imaginary" (2003) 3 Ethnicities 531 at 535.
[18] *Ibid* at 547.
[19] Even religious enclaves which seek to excise themselves from their larger societal context are partially constituted by law and sometimes seek it out to sanction the terms of that excision. See, *e.g.*, the Satmar Hasidic Jewish sect in New York state, which employed law to carve out its own school district jurisdiction (*Board of Education of Kiryas Joel Village School District v Grumet*, 512 US 687 (1994); Judith Lynn Failer, "The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel" (1997) 72 Ind LJ 383), and the Amish and Hutterite sects which have used law to appeal for exemptions from compulsory schooling and from driver license photographs, respectively (*Wisconsin v Yoder*, 406 US 205 (1972); *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567.
[20] Calhoun, *supra* note 17 at 547.
[21] *Ibid*.
[22] This is Clifford Geertz's formulation of culture. See: Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture" in *The Interpretation of Cultures* (New York: Basic Books, 1973) at 5.

Social theorists, whatever their bent, are concerned with how to use the group in social theory and analysis. There are two relevant strains of criticism to be disentangled. Rogers Brubaker has mounted a thoughtful appraisal of the tendency to reify groups, which he calls "groupism":

> The tendency to take discrete, bounded groups as basic constituents of social life, chief protagonists of social conflicts and fundamental units of social analysis.[23]

The core of his critique is that constructivism has pressed the category of identity into meaninglessness: trotting out the standard constructivist tropes about fluidity and multiplicity lacks analytical purchase and leaves scholars unable to study the "power and pathos of identity politics".[24] This critique is closely aligned to the critiques of scale explored in the first chapter: they are both concerned with the treatment of scale or the group as real, substantial 'things-in-the-world'. Instead, the critique goes, they are perspectives *on* the world. The solution, for Brubaker, is not individualism — "groupist idioms are as flat as individualist ones" — but to think in "relational, processual, and dynamic terms" about groupness as an event.[25] From another direction, there are the qualms of the post-modernists and the liberal cosmopolitans, who charge that group identity is ephemeral, constantly in motion, and defined by its hybridity and impurity.[26] The necessary implication is that it cannot be pinned down for its members, let alone for theoretical or empirical analysis.

These lessons are valuable, but they give up too much when it comes to group identity. We see all around us that group identities *mean* something to people. This meaning matters for law because groups use law to claim and defend their groupness. Scholarship about group identity that forgoes analysis of what groups have in common, what they say about themselves, and what claims they make, misses too much about both the constitution of the self and the nature of power and authority in society.[27] To study group identity as an ontological concept that matters does not require succumbing to some notion of flattened and essentialized groupness. There is no compulsion to

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[23] Rogers Brubaker, *Ethnicity without Groups* (Cambridge: Harvard University Press, 2002) at 8.
[24] Frederick Cooper & Rogers Brubaker, "Beyond Identity" (2000) 29 Theory & Soc'y 1 at 1.
[25] Rogers Brubaker, "Neither Individualism nor Groupism: A Reply to Craig Calhoun" (2003) 3 Ethnicities 553.
[26] Homi Bhabha, *The Location of Culture* (London: Routledge, 1994); Salman Rushdie, "In Good Faith" in *Imaginary Homelands: Essays and Criticism 1981-1991* (New York: Penguin Books, 1992); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002); Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005).
[27] Dismissing the group out of hand has important political and legal consequences: it neglects the effects of ascription (and discrimination) as determinants of social identities and the extent to which people are implicated in social actions that they did not choose, and it undermines attempts to redistribute benefits across groups in the social order. See: Calhoun, *supra* note 17.

presume the universality and unity of the group subject; it is possible to engage with intersectionality, to acknowledge that identities are based on exclusion, even, with Judith Butler, to agree that identities belong to the imaginary, all without giving up the task of studying them in their legal and political modes.[28] In the tension between claiming and taking apart identities that characterizes social theory, then, the groups in this dissertation are concerned with their claiming.[29]

This is the second point: the claim of this work is not that the underlying nature of the groups studied is the same (for example, that they could all be or even aspire to be nation-states), even though it may sometimes seem to suggest a leap of imagination to that effect. The claim of this dissertation — that law sorts groups and that this is best analyzed through jurisdiction — only depends upon the reader agreeing that *these are all groups*. Each chapter spends some time analyzing the categories of groupness that inform the logic of each legal order with a view to showing that these categories both conceal commonalities and inform the legal resonance of them. In trying to demonstrate that the categories are theoretically collapsible but also legally determinative, the point is not that the groups are the same in kind, but rather that there is something common to their claims and that law governs groups according to distinctions underpinned by those categories. The point, in other words, is to demonstrate that these are all groups yet they are governed by profoundly different legal technologies.

1.3.2 On the State

It may seem obvious at this point that a project focused on jurisdiction would also focus on the nation-state as the ultimate source of legal authority. It is nonetheless important to defend this focus in light of the realignments of state authority and functions in all directions. These realignments raise questions about the nature of statehood itself and so they deserve attention. This project is sympathetic to scholarship concerned with supra-state and sub-state reconfigurations, but it nonetheless comes to rest on the state.

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[28] For the original formulation of intersectionality, see: Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 Stanford L Rev 1241. For the notion that identities are imagined and performed, see: Judith Butler, *Bodies that Matter* (New York: Routledge, 1993).

[29] I owe this formulation to Joshua Gamson. See: Joshua Gamson, "Book Review of Craig Calhoun, Social Theory and the Politics of Identity" (1995) 24 Contemp Soc 294.

The first point to make is that the state never enjoyed "untrammelled sovereignty", and so realignments of sovereignty and jurisdiction, capacity and competence, can continue to be accommodated within the framework of statehood.[30] The state continues to be the organizing category for understanding political and legal authority. It remains the case that the powers to exclude and to define and enforce rights remain the purview of the state.[31] Indeed, Wendy Brown has argued that thinking about power without or outside of the state misses "the extent to which the state remains a unique and uniquely vulnerable object of political accountability".[32] The state's legitimacy concerns matter for at least some portion of political life and become acute in the context of group claims: "it is not that the state is the only source of governance or even the most important one; but where it is involved, the question of legitimacy is immediately at issue".[33]

The second point is that the categories of self-rule, recognition, and rights that are at the heart of the intersection between groups and law are state categories; rather like the rules of international jurisdiction, they depend upon the state for their prescription and enforcement. They are squarely about the exercise of state authority. The group is frequently seeking to exercise some form of state power for itself or (and these often amount to the same thing) seeking to be exempt from some form of state power. Indeed, it is worth noting that references to "law" throughout this text are frequently shorthand for references to *law that pertains to groups*. Moreover, *theories* about statehood are an important source and justification for law's reach and retraction. These range from theories about recognition to theories about democracy. The group is in conversation with the state about access to and limits on statehood, self-rule, and rights.

This dissertation is thus focused on the ordered structure of law associated with states and the international system of states. The state is the axis upon which the jurisdiction of the group turns. Although the modern nation-state emerges as a particular form of jurisdictional organization, it is the most legally powerful one and thus the orienting frame for this project.

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[30] On untrammelled sovereignty, see: Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2006) at 73; on capacity and competence, see: Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).
[31] Elden, *supra* note 10; Loughlin, *supra* note 30.
[32] Wendy Brown, "Power After Foucault" in John S Dryzek, Bonnie Honig & Anne Phillips, eds, *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2006) 65.
[33] *Ibid*.

1.4 The Contributions and Structure of the Dissertation

1.4.1 The Contributions of the Project

This is a project of expansive reach, delving into legal theory, drawing from geography, and crossing three scalar legal orders. As such, it relies on the work of innumerable other scholars and does not always approach the depth of their expertise. It is, first and foremost, a meditation on legal theory and group difference, and, hopefully, a prolegomenon to new ways of doing both. In terms of jurisdiction, this dissertation aggregates and analyzes the disparate scholarship on the subject, reveals the disruptions, and then seeks to reconcile them based on the concept of political jurisdiction. The dissertation uses this concept of jurisdiction to unite the analysis of group difference across legal orders. By following the jurisdictional threshold and jurisdictional imaginings in the case law of different legal orders, the governance of group difference is revealed. This turns out to be a cataloguing of jurisdictional technologies. Ultimately, the categories of territory and the political carry their meanings across theory and doctrine to sort and sift groups into scalar orders. This sorting buries incommensurabilities, paradoxes, and contradictions. The frame for some groups is statehood; the frame for other groups is constitutional; the frame for still other groups is liberal individualism. Part of this exercise is to consider that groups or group claims might share something across scales. As set out above, this is not to say that groups are the same in kind across scales or legal orders; groups differ qualitatively from one another in all kinds of ways. Rather, it is to posit that we can glean something insightful from thinking about groups in this way, thinking about what scalar legal orders render opaque and how this is accomplished.

The contributions of this dissertation thus lie primarily in its substantial critical assembly of concepts, theories, and cases across theoretical, scalar, disciplinary, and legal fields. It moves between various levels, shifting from theoretical scholarship to legal doctrine and back again. From one angle, this is a law and society project, concerned to demonstrate how law deals with social groups. This makes a contribution to the law of groups — that extensive body of scholarship about group rights, recognition, and self-rule that straddles political philosophy and law. It reveals that neither law nor philosophy has come to terms with the nature of the self or the balance between the collective and the individual. From another angle, this project represents a deep engagement with legal theory, concerned to reveal the theoretical logics that matter for group difference. Here, the project finally gives jurisdiction its due, pulling together a vast and disparate body of scholarship on jurisdiction, which stretches from local government law to conflicts of laws to social theory to Shakespearean

literature, to make sense of its connections and discontinuities. From yet another angle, this is a doctrinal project, concerned to read jurisprudence for the legal commitments that live in the jurisdictional threshold. This is a contribution to legal doctrine, rendered principally in insights about how law is interpreted and applied to group difference and what kinds of jurisdictional technologies are employed in these legal decisions. Finally, this is an interdisciplinary project, concerned to bring the weight of geographical insights on territory and scale to bear on law. This is a contribution to law and geography scholarship that greatly extends token references to territory and scale into the deep recesses of law. It builds on the notion of territory as relationships and scale as a jurisdictional technology to generate insights that may be used in other legal contexts at other times. Together, these contributions tell a rich story about how law conceives, theorizes, and regulates group difference.

As a final contribution, this dissertation speaks to the ethics of space or spatial justice. It seeks to counter the notion that space is neutral by showing the political and legal commitments that reside in the various spaces of group difference. It thus contributes to the literature on the ethics of difference and the geographies of resistance by bringing to the fore the tension between the liberal democratic commitment to difference, ensconced in theories of pluralism, toleration, and recognition, and the equally compelling liberal democratic commitment to universalism, embodied in theories of equality, sameness, and the nation. In short, by isolating and examining the legal landscape of group difference, it gestures toward other modalities of doing jurisdiction and performing difference.

1.4.2 The Structure of the Dissertation

The dissertation proceeds in six parts. This Introduction is followed by Chapter One, which explores the theory and methodology of this project. I explore the theories of jurisdiction, draw out their gaps and discontinuities, and offer a theoretical and methodological resolution. Following this, there are three substantive chapters on different legal orders. Chapter Two traces jurisdiction through group difference in the international legal order. It focuses on the norm of self-determination. Chapter Three examines group difference in the national legal order. It focuses on Canadian constitutional federalism. Chapter Four explores group difference in the sub-national legal order. It focuses on religious and cultural enclaves. The final chapter is the Conclusion.

In terms of the legal order chapters, I begin with the international legal order for two reasons. First, one of the tools for analysis in this dissertation is scale and scale is produced at different orders of magnitude. It is helpful to start at the largest order of magnitude, which is also the site of the ultimate legal form of the group: statehood. The relationship between the group and law is most easily grasped when its referent is statehood. Second, jurisdictional analysis — even in the other legal orders — turns around the axis of the state and so it is helpful to have this analysis in hand at the outset. The national legal order is addressed next for similar reasons, as well as because it encompasses the attempt to make a group coterminous with a nation-state. This is the work of nation and the project of constitutional theory. The sub-national legal order, or the legal order invoked by groups such as enclaves who are not recognized by the constitutional text, follows next. The reasons for this ordering and for the selection of Canada are intertwined.

The national scale focuses on Canada for two reasons. First, it is where my inquiry began and my intuitions are strongest. Enclaves were not a public and academic issue in Canada first, but it is today the site of hundreds of robust enclaves. Moreover, the discursive field for enclaves is not as mistrustful in Canada, as compared to the United Kingdom or France. Canada has not experienced incidents similar to the 7/7 terrorist attacks on the London underground, orchestrated by individuals born in the United Kingdom, nor has it experienced overlaid class distinctions similar to those that mirror the urban/banlieue distinction in France.[34] This makes the discourse surrounding enclaves more purely about group difference and space in the nation-state because the debate is not also configured by the trumps of security or class or intersectionality. The corollary of this is the perception of Canada as a robust protector of groups. Here, there is Canada's official policy of multiculturalism, which is considered to be part and parcel of its national identity. While all of this makes Canada a fitting site for the study of law and territorial group difference, the broader analysis is not intended to be limited to this context.

By examining these legal orders as part of one project, several insights are gleaned. Three are mentioned here. First, it is possible to see how the delimiting concepts in one legal order repeat as the emancipatory concepts in the next. So, for example, minority rights guarantees are used to hem and hedge group claims to self-determination in the international legal order, but they are the pinnacle of

[34] This is not to suggest that Canada has not had terrorist threats in its recent history or that there is no indication of poverty in some urban enclaves, but rather that these concerns have not overwhelmed the more banal aspects of enclaves.

group emancipation in the national legal order. Second, the role of territory as an orienting concept and physical space is revealed in each frame. Group claims ultimately all involve the same underlying land, scaled and sorted differently. As the lens moves in closer, the territory morphs from state to province to enclave. Territory turns out to be a modulating concept in jurisdictional theory, one that is closely aligned to the form of the state. Third, studying the legal orders together demonstrates how group difference is always already governed. Jurisdiction, especially territorial jurisdiction, is a term that is loosely bandied about but its specific meaning as the limit of law's authority focuses the study on where that limit lies for groups in different settings. The point is to show the nature and extent of group difference when it comes to law. Ultimately, it comes back to the terms of inclusion and their allegiance to the construct of the nation-state.

Chapter 2: On Jurisdiction: Concepts, Theories, and Methods

Listening for how the law goes about doing what it does at the limit of its competence, we come to hear also all that it also lets in.[1]

2.1 Overview

This dissertation is an inquiry into how the law treats groups. More specifically, it asks how the law treats territorially-manifested group difference across various settings. The answer turns out to be contextual and multivalent, but a larger point emerges from the inquiry itself: there has been no robust, comprehensive analysis of group difference in the legal frame. I suggest that one reason for this lacuna is that lawyers and scholars have heretofore lacked the vocabulary to analyze different manifestations of group claims. In fact, these different manifestations — nation-states, peoples, ethnic groups, communities, and enclaves — are not perceived to be part of the same category at all.

This dissertation proffers the vocabulary of jurisdiction, understood as the moment in which law speaks to itself about the scope and content of its own authority. Territorial manifestations of group difference are treated differently depending on their conceptual and geographical location, and this location is materialized through jurisdiction. The framework of jurisdiction permits the assembly of similarities and the comparison of differences between categories of group rights and claims. In short, it enables the grouping of groups in law. Not only does this yield insights on its own terms, but it also suggests that one of the ways that law treats groups is, in fact, by *not* grouping them. Law uses jurisdictional scale to sift and sort, thus fixing the group and keeping difference in its place.

The project aims to identify and bridge the disarticulations in jurisdictional theory and discourse, and to use the resulting conceptual framework to analyze how the location of the group matters for its treatment in and by law. It aims to unite sites that are substantively the same but formally different. It begins with the concept of jurisdiction that animates the dissertation. Jurisdiction is a term that is well understood at the level of high abstraction (as legal extensions of legitimate sovereignty) and at the level of technical doctrine (as connections to territory and nationality), but it is harder to apprehend in between. It seems to mean different things in different circumstances. The crux of this

[1] Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of the Common Law, 1509-1625* (Chicago: University of Chicago Press, 2007).

chapter, then, is to analyze the various meanings and invocations of jurisdiction, to reconcile its different dimensions, and to propose a conceptual definition and method. It comes to terms with jurisdiction and begins a conversation about how to use the substance of jurisdictional theory.

The chapter begins with an overview of the juridical and academic meanings of jurisdiction. It then reaches back historically to examine the origins of jurisdiction. This examination takes place in the context of a larger focus on the structures of law associated with states and the international system of states. It thus entails an interrogation into the relationship between sovereignty and jurisdiction. It is in the founding moment that the *political* nature of jurisdiction is revealed. This observation, that jurisdiction is political, is the basis for uniting jurisdiction's myriad meanings. This insight is then employed to examine the canon of jurisdictional scholarship to see what might lie beneath. In reviewing the contributions and gaps of this literature, I underscore three conceptions that inform all jurisdictional theories and analyses. I then identify the discontinuities across them, and suggest the important role that categories and territory play. Finally, the chapter sets out a jurisdictional method that acknowledges the theoretical and technical schools of jurisdictional thought and tries to add rigour to the concept of jurisdiction as the limit of the law.

2.2 Conceiving Jurisdiction: What Does 'Jurisdiction' Mean?

The term "jurisdiction" conjures the terrain of cartography: its imagery relies on territories with palpable borders, sovereigns with territorial laws, and occasional transgressions by people and acts that cross the places of the map. This reference to cartography reminds us that jurisdiction is both a legal and a geographical category that situates legal authority in our imaginations, practices, and spaces.

The etymology of jurisdiction derives from *ius,* meaning "law", and *dicere,* meaning "to speak". Jurisdiction, then, is the speaking of law, or, more precisely, "the speaking of the sovereign law of the community".[2] It is immediately apparent that law has a foundational relationship with jurisdiction: jurisdiction is a reference back to law's authority and thus an expression of sovereign

[2] Emile Benveniste, *Indo-European Language and Society* (London: Faber and Faber, 1973); Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007).

legitimacy. The concept of jurisdiction designates the authority to speak the law and this authority presupposes a separation of the legal from the non-legal.[3]

Jurisdiction is the "signature canon in law".[4] It tells us where law can speak and shows us where law is authoritative. In a general sense, jurisdiction denotes the 'scope' or 'reach' of a thing or activity. It incorporates the idea of the state's power to govern, understood as its general authority over all persons and things in its territory. Various scholars have described it as "the legal power or competence of States to exercise governmental functions", "a State's authority to subject persons (natural or juridical) and things to its legal order", "the rights and powers of the nation over its inhabitants", and "the administrative principle that orders power as authority by defining the scope of a particular power over a matter or territory".[5] Justice Holmes wrote that jurisdiction is concerned with the State's right of regulation, with the right "to apply law to the acts of men".[6] It does not matter whether the jurisdiction act travels through legislative, judicial, or executive channels.

The nature of jurisdiction as a many-headed hydra is obvious to those who study the phenomenon. It is a word of "many, too many, meanings".[7] Jurisdiction can be a territorial space (this side of the border is Michigan; that side is Ontario), a status (Canadian nationality; EU citizenship), a technical legal doctrine (the 'real and substantial connection' test), a political concept of legitimate authority (John Locke's jurisdiction based on tacit consent), an expression of the reach of sovereign law (international law rules on extraterritoriality), and a preliminary inquiry into law's attachment (a court's capacity to hear the case).

Jurisdiction has been accurately called an omnibus term because it incorporates several principles, both theoretical and doctrinal, about authority over persons, places, events, and things, not all of

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[3] Maria Drakopoulou, "Of the founding of law's jurisdiction and the politics of sexual difference: the case of Roman law" in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 33.
[4] John Brigham, "Seeing Jurisdiction: Some Jurisprudential Issues Arising from Law Being '...All Over'" (2009) 31 L & Pol'y 381.
[5] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008); James R Crawford, *The Creation of States in International Law*, 2nd ed (Oxford: Oxford University Press, 2006); Cormack, *supra* note 1.
[6] FA Mann, "The Doctrine of Jurisdiction in International Law" in *Studies in International Law* (Oxford: Clarendon Press, 1973) 1.
[7] *United States v Vanness*, 85 F 3d 661 (CADC 1996).

which are neatly related.[8] For example, jurisdiction can refer to both the adjudicatory capacity of a court to hear a case as well as to a territorially located electoral district – qualitatively different phenomena with equally different measures for determining jurisdiction. In *Lipohar v. The Queen,* the High Court of Australia aptly described jurisdiction as follows:

> The term 'jurisdiction' here, as elsewhere, gives rise to difficulty. It is a generic term... . It is used in a variety of senses, some relating to geography, some to persons and procedures, others to constitutional and judicial structures and powers.[9]

Most of these meanings of jurisdiction have been subjected to some degree of scholarly analysis. Significant ink has been spilled on the technical jurisdictional doctrines for various settings, all of which derive from variations on the definitions set out above. These tests are most developed in the fields of international law and conflict of laws, where state assertions of jurisdiction conflict. While technical jurisdictional tests necessarily refer back to an abstraction of the concept — to jurisdiction as a legitimate assertion of legal authority — they do not expressly address the abstraction. The abstraction that is jurisdiction has not received much attention. Theorizing jurisdiction *as jurisdiction*, as a concept, has been rare, and largely confined to looking behind doctrine to find the political or social theory sheltered there. In its theoretical and technical forms, jurisdiction is a concept that starts to crumble when one shifts to the other foot. The theoretical form collapses into questions of origins, while the technical one re-projects foundational concerns onto questions of scope.

The crux of the confusion around jurisdiction lies in its multivocality. Jurisdiction looks different in different places and it has different meanings in different circumstances. There are infinite ways to arrange these meanings. The approach of this dissertation is to reorient the inquiry by focusing on *what* jurisdiction does and *how* jurisdiction does it. It is through jurisdiction that "a life before the law is instituted, a place is subjected to rule and occupation, and an event is articulated as juridical".[10] On the ground, jurisdiction allocates legal authority. In the books, jurisdiction creates different forms of law and different legal objects; it establishes different networks of facts and different legal orders.

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[8] Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003); *Lipohar v The Queen* (1999), 200 CLR 485 (High Court of Australia).
[9] Lipohar, *ibid*.
[10] Shaunnagh Dorsett & Shaun McVeigh, "Questions of jurisdiction" in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 3.

It is necessary, then, to both theorize and explain the processes and technologies of jurisdiction *and* to theorize jurisdiction itself. The latter task is the primary focus of this chapter.

2.3 Politicizing Jurisdiction

2.3.1 The Politics of Origins

2.3.1.1 Inaugural Jurisdiction

It is here, at the beginning, that the meaning of jurisdiction becomes intelligible, that the fraught relationship between sovereignty and jurisdiction is clearest, and thus that jurisdiction can be recast for productive analysis. This section necessarily locates jurisdiction among its conceptual and institutional bedfellows — sovereignty and territory — but it tries to avoid dwelling on questions about the origins and validity of law.[11] Although jurisdiction and sovereignty travel much of the same terrain, the jurisdictional approach locates questions about state power elsewhere, in quotidian legal practice, rather than in political theology.[12] However, given the vast theorizations of the subject of sovereignty, it is necessary to unpack this claim and to review the relationship between sovereignty and jurisdiction.

Starting with sovereignty directs attention to jurisdiction's ancient, even inaugural, roots. By 'inaugural', I refer to the ushering in of law's authority to bear upon the matter, territory, or individual at hand. There are two categories of inaugural jurisdictional acts. The first manifestation of jurisdiction as inaugural concerns the metaphysics of law: the original act in which law emerges *as law*.[13] Here, there is the act through which the collective is brought into existence and then law's founding moment.

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[11] In this, it only partly succeeds: these questions about the inauguration and origins of law turn out to be essential. See: Costas Douzinas, "The metaphysics of jurisdiction" in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 21;Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Cambridge: MIT Press, 1985); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998); Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: Chicago University Press, 2005); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001).

[12] Justin B Richland, "Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty" (2011) 36 Law & Soc Inquiry 201.

[13] The term "metaphysical" is used by Shaun McVeigh and Costas Douzinas to describe the foundation and authorization of jurisdiction. See: Cormack, *supra* note 1. Douzinas, *supra* note 11.

This implicates jurisdiction in the original act in which law institutes itself.[14] For metaphysical jurisdiction, the union of sovereignty and jurisdiction is a constant. Jurisdiction depends upon a sovereign community for both justification and form. It is this articulation that brings law into existence and allows law's emergence as law.[15] Jurisdiction contains the "motif of a declaration that gives now and prospectively reproduces the power of law as always linked with a polity and a politics".[16] In short, sovereignty haunts both jurisdiction and the group, demanding that the ultimate form of community is statehood, and that the community give law to itself.

Costas Douzinas describes the domains of law as constituted and reconstituted against the backdrop of the linking of the juridical and the political. In all legislation, but particularly in constitution-making, which is the inaugural act of the power to legislate, the political (as decision, act or judgment) attaches to law as the precondition of law's coming into being.[17] The political and the juridical are not exactly contemporaneous but they are co-generative:

> But for the law to come into existence, it must declare itself to be the law of a specific community and attach to a particular polity. The juridical too links itself to the political, to the *polis* as its constituting provision.[18]

Sovereignty, then, always comes first and it lingers in the frame.[19] As a result, metaphysical jurisdiction is intricately bound up with sovereignty, and with the relentless problems of origins and political representation.

Before parsing that binding more thoroughly, it is productive to turn to the <u>second</u> category of inaugural jurisdictional acts. These concern the conditions of attachment of an individual, place, or event to a legal and political order, or what Shaun McVeigh calls "the modes or manner of coming into law and of being with law".[20] In this incarnation, each jurisdictional attachment is inaugural, each instance of coming into law marks the extension of law's authority to that particular person,

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[14] Douzinas, *supra* note 11.
[15] Jean-Luc Nancy, *A Finite Thinking* (Stanford: Stanford University Press, 2003).
[16] Douzinas, *supra* note 11 at 23.
[17] *Ibid*.
[18] *Ibid*.
[19] This account is true for the structure of law associated with states, but it may not hold for forms of non-state law. It is also true of liberal democracies or aspiring liberal democracies, but not necessarily of other forms of community such as monarchy or theocracy. I am indebted to Mary Liston for this point.
[20] Dorsett & McVeigh, *supra* note 10.

place, object, or event. It marks what is capable of belonging to law. This is the other course by which jurisdiction inaugurates law.

Bradin Cormack, in his brilliant theoretical introduction to jurisdiction in the literary context, looks to jurisdiction as the place where the limits of any legal order become "explicit, discursive, and contestable".[21] The point is this: the modes or manner of coming into law are always jurisdictional and thus always invoke the law at the limit of its competence. Jurisdiction defines the operations of law, and in so doing, sets the parameters for attachment to the legal order in question. It is at the jurisdictional threshold that the law speaks to itself.[22]

Cormack wants to show that jurisdiction is deeply implicated in political philosophy discussions about the impossibility of grounding the juridical order within itself, but he refuses to treat legal scenarios as instances of the state's need to continually mystify and secure its own legitimacy.[23] Instead, he argues, jurisdiction sidesteps the question of its original source of authority by re-projecting the problem onto technical questions of scope.[24]

> The law functions by keeping the source of its authority in fixed view as, insistently, the merely technical (and for that reason discursively unassailable) image of its own jurisdictional scope and operation.[25]

Here, Cormack is claiming that jurisdiction permits the eclipse of sovereignty by focusing on concerns about the scope and content of law. In other words, the law projects its source of authority as technical, not political. He shows how jurisdiction constantly produces law's authority through articulating its limits.[26] The focus, Cormack contends, must be on "the discursive work undertaken at the boundaries of any one legal authority, or jurisdiction, to enable the extension of its operations, or to contest the extension of another".[27]

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[21] Lorna Hutson, "Review of Bradin Cormack, A Power to do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625" (2010) 22 Law & Lit 508.
[22] Cormack, *supra* note 1.
[23] *Ibid* at 6. In this, Cormack is reading against Jacques Derrida's *The Force of Law*, and trying to move beyond the vertical account of a juridical norm in search of its origin. See Jacques Derrida, "Force de Loi: Le 'Fondement Mystique de L'Autorite'" (1989) 11 Cardozo L Rev 920.
[24] Cormack, *supra* note 1.
[25] *Ibid* at 7.
[26] Hutson, *supra* note 21.
[27] *Ibid* at 509.

It turns out that boundaries and limits are the very precondition of law's power. Jurisdiction delineates a sphere (spatial, temporal, or generic) that is a premise for the juridical as such, for the capacity of law to come into effect.[28] Jurisdiction inhabits the threshold between law and non-law. This is what Nicholas Blomley means when he says that jurisdiction is interstitial; it is located in between.[29] It is in the space before the law decides, either refusing to reach the matter or extending its authority there, that jurisdiction resides. Cormack calls this the 'root liminality' of law. These images of interstitiality and liminality seem to be both spatial and temporal and this is helpful in conceiving of the threshold. They signal that jurisdiction is located a moment before law's extension or retraction and they suggest a metaphorical spatial boundary or edge where law's commitments are sorted out. However, they do not get to heart of what lies in that moment or limit.

What exists in the moment before law, or even between law and non-law, is sovereignty. Thus, theorizing jurisdiction as the legal threshold that sets the conditions for law's attachment — not as the metaphysics of law — does not entirely avoid questions about the origins and grounding of law. It might well be the case that re-projecting foundational questions as technical issues of scope pushes the matter to the background. However, by highlighting notions of power and authority produced at the limit, the exercise implicates the scholarship about conceptions of sovereignty at the limit, and thus the nature of sovereignty itself.

2.3.1.2 Jurisdiction in the State of Exception

One of the most enduring conceptions of sovereignty comes from Carl Schmitt, for whom the sovereign is "he who decides on the state of exception".[30] Schmitt's state of exception is a general concept in his theory of the state. The power to declare the exception is the *sine qua non* of statehood. His organizing principle of the political is based on the friend/enemy distinction; accordingly, the exception is the moment when that relation intensifies so that the sovereign order

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[28] Cormack, *supra* note 1.
[29] Nicholas Blomley, "What Sort of Legal Space is a City?" in Andrea Mubi Brighenti, ed, *Urban Interstices: The Aesthetics and the Politics of the In-between* (Burlington: Ashgate, 2013).
[30] Schmitt, *supra* note 11. The definitional challenges of sovereignty are tremendous. Sovereignty consists of "a plausible claim to ultimate authority made on behalf of a particular polity" (Neil Walker, "Sovereignty and Differentiated Integration in the European Union" (1998) 4 Eur LJ 355. It does not require that power must be vested in one place; it is constituted by the form of the political relationship between the state and citizens. I follow Martin Loughlin in describing sovereignty as a relational activity encapsulated in the relationship between government and people *and* law and politics (Stephen Tierney, "Sovereignty and the Idea of Public Law" in Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) 15.

must face the enemy.[31] The exception is "a case of extreme peril, a danger to the existence of the state, or the like".[32] Schmitt explores the state of exception through the dual elements of norm and exception, the latter underwriting the former.

> The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception.[33]

What characterizes the exception is "principally unlimited authority" which ultimately entails the suspension of the entire existing order.[34] The state remains, but law recedes. The result is a paradoxical situation in which the law is legally suspended by sovereign power.[35]

Despite Schmitt's problematic support for the Third Reich, his conception of sovereignty retains currency.[36] This is in part because it interfaces with modern constitutionalism's preoccupation with the grounding of legal authority, particularly in a post-9/11 era of exception.[37] Schmitt's theory highlights decisive political action as the manner in which a nation defines itself.[38] It is apposite here for its conception of juristic sovereignty. This directs attention to the nature of the legal which might remain when law recedes. In the paragraphs that follow, I develop Schmitt's theory to argue that this legal residue is properly understood as jurisdiction. This reverses the emphasis of the standard script, which suggests that 'legal' modifies the noun of sovereignty to posit instead that 'sovereign' modifies the noun of law. Seen from this perspective, the state of exception reveals not only the political underpinnings of law, but also its encompassing jurisdictional framework.

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[31] Jeff Huysmans, "The Jargon of Exception - On Schmitt, Agamben and the Absence of Political Society" (2008) 2 Int'l Pol Soc 165.
[32] Schmitt, *supra* note 11 at 6.
[33] *Ibid* at 15.
[34] *Ibid* at 12.
[35] Bonnie Honig, "The Miracle of Metaphor: Rethinking the State of Exception with Rosenzweig and Schmitt" (2007) 37 Diacritics 78.
[36] Indeed, the implications of Schmitt's support for the Third Reich are visible in some of the problematic aspects of his theory of the strong state, including a tendency toward dictatorship and anti-democratic and anti-rule of law preferences. I am grateful to Mary Liston for this point. See also Jeremy Webber, "National Sovereignty, Migration, and the Tenuous Hold of International Legality: The Resurfacing (and Resubmersion) of Carl Schmitt" in Oliver Schmidtke & Saime Ozcurumez, eds, *Of States, Rights, and Social Closure* (New York: Palgrave Macmillan, 2008) 61.
[37] David Dyzenhaus, "Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27 Cardozo L Rev 2005.
[38] Webber, *supra* note 36 at 68.

On first reading, Schmitt appears to read the exception as revealing the autonomy of the political from law. This is based on the threshold between the norm and the exception. At this threshold between the legal norm and the sovereign exception, it is the sovereign who decides. "The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law".[39] Yet Schmitt is not merely claiming that the exception is political; his account retains a role for law, suggesting that political authority, itself outside of law, ends up producing a legal condition. It is this — the juristic significance of the exception — which is the basis for a theory of jurisdiction. This is how Schmitt describes the order that remains:

> Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.[40]

The essence of sovereignty, juristically defined, is not the monopoly to coerce or to rule but the monopoly to decide. The result seems to place the sovereign somewhere between law and non-law: "the state of exception is itself a legal condition of alegality".[41] The sovereign's political decision has the force of law, such that the juridical order is preserved even when law is suspended.

For Martin Loughlin, Schmitt's exception is really just a dramatic presentation of the concept of political sovereignty.[42] He reads Schmitt's contention — that although the sovereign stands outside of the normal legal system he nevertheless belongs to it for he is the one who decides whether the constitution needs to be suspended in its entirety — as his primary juristic insight.[43] For Loughlin, though, Schmitt's error lay in then finding that the fact that the exception was not rule-governed meant it was resolved through arbitrary will.[44] Indeed, in *The Foundations of Public Law*, Loughlin seems to intimate something like what I am describing as jurisdiction. He describes the question of emergency as lying within the field of public law. For Loughlin, in the state of exception, "positive law recedes, but *droit politique* remains".[45] However, this claim relies on Loughlin's articulation of public law, and for this reason, it cannot be squarely transplanted here. The reason is that jurisdiction and public law do not connote the same commitments. Jurisdiction cannot abide by an internal

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[39] Schmitt, *supra* note 11 at 13.
[40] Schmitt, *supra* note 11 at 12.
[41] Honig, *supra* note 35.
[42] Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) at 68
[43] Schmitt, *supra* note 11 at 7; Loughlin, *supra* note 42.
[44] Loughlin, *supra* note 42 at 69.
[45] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) at 401.

distinction between positive and fundamental law, or between technical and sovereign law. Jurisdiction casts a wider net. Nonetheless, Loughlin's alignment of the state with *droit politique* in the state of exception, substituting the latter for Schmitt's formulation, is a useful harbinger to jurisdiction.

In fact, Schmitt himself refers briefly to jurisdiction. It is implied in Schmitt's theory but it seems to perform no role.

> The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all.[46]

This mention of jurisdiction conjures the insight that jurisdiction continues to govern the exception. Yet, for Schmitt, jurisdiction was a non-starter. It existed as a feeble and irrelevant technicality insofar as it was either unlimited or non-existent. The effort, then, is to reclaim the place for jurisdiction in the theory of the sovereign exception.

For Schmitt, the applicability of law is not itself a matter of jurisprudence. Whether something is an exception to the law is a matter to be decided by the sovereign. Norm and exception are matters of state power. The limit of the juridical order is marked by sovereignty. In short, the threshold of the legal order and its applicability are distinctly non-legal, falling instead to politics and the sovereign. For Schmitt, the decision on the exception parts from the law and (paradoxically) proves that to produce law, it need not be based on law.[47] Indeed, Bull describes the state of exception as, "in itself, a purely formal device which allows 'the state to exist even as the law recedes'".[48]

But what lives between law and non-law if not jurisdiction? What concept governs whether law is applicable if not jurisdiction? What polices the limits of the legal order if not jurisdiction? If jurisdiction amounts to the delimitation of a sphere that is the precondition for the juridical as such, then surely this is its work. This jurisdiction is not apolitical, it does not only manage technical legal rules. It is robustly implicated in politics and sovereignty, part of the original constitution of the *polis*

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[46] Schmitt, *supra* note 11 at 7.
[47] *Ibid* at 13.
[48] Malcolm Bull, "States don't really mind their citizens dying (provided they don't all do it at once): they just don't like anyone else to kill them" *London Review of Books* (2004).

as well as its ongoing reconstitution. Despite Schmitt's complex claims about the imbrications of law and sovereignty and his attention to the threshold between general norm and exceptional decision, he misses the work that the concept of jurisdiction does in both of those realms, likely in part because of the neglected political aspect of jurisdiction.[49] The value of Schmitt's theory lies in its rendering of law's underpinnings and this point is well-taken. Law's ambit rests on the sovereign. Yet, due in part to his focus on the political, Schmitt neglects to consider the law as jurisdiction, rather than as constitutional rules.

For Giorgio Agamben, the shortcoming of Schmitt was that his state of exception failed to call into question the very threshold of the political order itself.[50] Since Agamben relies heavily on Schmitt's theory of sovereign exception, it is useful to briefly articulate how his theory intersects with jurisdiction. For Agamben, sovereign power is concerned with the threshold of the political order, produced at the limit between the juridical order and its own suspension.[51] He explains sovereignty as constituted by the legal exception:

> If the exception is the structure of sovereignty, then sovereignty is not an exclusive political concept, an exclusive juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Hans Kelsen); it is the originary structure in which law refers to life and includes it in itself by suspending it. ... [This is the] potentiality of the law to maintain itself in its own privation, to apply in no longer applying.[52]

As Malcolm Bull paraphrases, "it is all very well having a legal system, but sovereignty cannot finally repose in the law if someone is able to decide that the law is no longer in force".[53]

For Agamben, the exception is a kind of exclusion. It is the decision to abandon life, to place it beyond law, which is the decision on the exception which constitutes the law.[54] This is bare life or *homo sacer.* The modern condition is marked by the "inclusive-exclusion" of bare life in the political

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[49] Schmitt*, supra* note 11 at 13.
[50] Agamben does not develop an account of jurisdiction although *State of Exception* briefly recounts the historical states of exception in terms of jurisdiction: see Shaun McVeigh, "Subjects of jurisdiction: the dying, Northern Territory, Australia, 1995-1997" in Shaun McVeigh, ed, (New York: Routledge-Cavendish, 2007) 202.
[51] Agamben, *supra* note 11.
[52] *Ibid* at 28.
[53] Bull, *supra* note 48.
[54] Agamben, *Homo Sacer, supra* note 11 at 18.

order.[55] Agamben executes the link between sovereignty and bare life by bringing Michel Foucault's distinction between juridico-political power and biopolitical power *inside* sovereignty.[56] Here, it is law that "refers to life and suspends its juridical and political status as a bearer of rights".[57] The result is that *homo sacer* is included in the juridical order solely in the form of its exclusion. This "relation of exception" involves the 'inclusive-exclusion' of the life which is excluded from the normal juridical order. As Stewart Motha describes:

> The question of whether a person is inside or outside the law is not only a question of law's 'application', but also a more complex case of being 'abandoned', 'inclusively excluded' by the law.[58]

It is not the decision to apply law, but the decision to abandon life that constitutes Agamben's juridical order. Motha reminds us that the etymological root of 'abandon' is 'bandon', which means 'jurisdiction and control'.[59] In his discussion of the *habeas corpus* case law arising from Guantanamo Bay, Motha argues that abandonment is not properly conceived as an instance of absolute sovereignty or the condition of being unmediated by law.[60] *Habeas corpus,* whether used to intern or free, is a "mode of binding subjects to the law".[61] So too with the abandoned being. To be banished from a particular jurisdictional order is also to be subject to that order. The abandoned life "lies at the limit-point of jurisdiction".[62] For Motha, nothing is closer to jurisdiction than the abandoned figure.

Yet the terminology of the 'limit-point of jurisdiction' is not the language used by Agamben. Despite its fixation on sovereignty and law, Agamben's theory does not name jurisdiction. Cormack suggests that theorists of sovereignty overlook jurisdiction as a site for theory because jurisdiction is too far inside the juridical order that they seek to counter, too implicated in its discourse and technology to be challenged, and too captive to an order past.[63] For Cormack, Agamben's reconceptualization of

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[55] Agamben takes this further, suggesting that as bare life moves from the margins to the centre of the political realm, it creates a "zone of irreducible distinction". See Agamben, *Homo Sacer, supra* note 11 at 9.
[56] *Ibid* at 6.
[57] Stewart Motha, "Guantanamo Bay, abandoned being and the constitution of jurisdiction" in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 63.
[58] *Ibid* at 74.
[59] *Ibid* at 79.
[60] *Ibid* at 79. See also the discussion in Kal Raustiala, "The Geography of Justice" (2005) 73 Fordham L Rev 2501.
[61] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Michigan: University of Michigan Press, 2003).
[62] Motha*, supra* note 57 at 79. It is worth pointing out that this dynamic is also true of law more generally: each legal decision *not* to regulate or reach an issue is also an act of state power.
[63] Cormack*, supra* note 1 at 7.

sovereignty — in which bare life is scarcely included in the political through juridical inclusion — is "far removed" from the threshold between areas of judicial competence.[64] I am not sure that this is quite right: jurisdiction is more than simply the *infrastructure* of the juridical order or *part of* the configuration of legal authority. It is the very extension of state power in the form of legal authority; it is how legal authority gets done — how it is extended, reconceived, and abbreviated. This makes jurisdiction a conceptual powerhouse with the capacity to remake legal categories. Conceived properly, jurisdiction is the political heart of the juridical order.

In order to be a life mediated by law, one must be within the jurisdiction of the sovereign. Indeed, as Hannah Arendt taught us, the quintessential measure of being a subject whose life is mediated by law depends on being a citizen (thus, within the jurisdiction) of a nation-state.[65] The other measure, of course, is territory. The state of exception occurs when the sovereign identifies and polices the threshold between inclusion and exclusion. When bare life is excluded, when the law refuses authority over *homo sacer*, this is properly understood as a jurisdictional act. Agamben, in other words, was partly theorizing the jurisdictional nature of the state of exception. The value of jurisdiction in this frame lies both in focusing the inquiry on the threshold and in the tools it offers for analyzing inclusion and exclusion.

Both Schmitt and Agamben neglect jurisdiction, but Schmitt's theory is the more helpful basis for understanding the politics of jurisdiction and its overlap with sovereignty. Due to Agamben's focus on the state of exception as the paradox of inclusion/exclusion, his theory is ultimately a theory of sovereign exclusion.[66] The sole purpose of the threshold for Agamben is to exclude. Jurisdiction, however, is not only the binary of inclusion/exclusion. Legal authority presumes a separation of the legal from the non-legal, but this encompasses other jurisdictional acts and technologies, such as categorization and delineation. In other words, Schmitt's theory takes jurisdiction beyond the binary of inclusion/exclusion to parse the additional terms of the jurisdictional threshold.

The value of jurisdiction for Schmitt's sovereignty is equally visible when we approach the matter from the direction of jurisdiction itself. Loughlin describes the relationship between sovereignty and jurisdiction succinctly:

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[64] *Ibid* at 7.
[65] Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1979).
[66] I am indebted to Jeremy Webber for this point.

> Jurisdictional questions of competence ultimately rest on political issues of capacity, the norm on the exception.[67]

By tying jurisdiction (competence, to use Loughlin's word) to Schmitt's concept of the exception, Loughlin pushes the political aspect of jurisdiction further, to the legal threshold where law speaks to itself about the limits of its authority. The politics of sovereignty both underlie *and* constitute metaphysical and quotidian jurisdictional decision making. It is not only that jurisdiction's primordial loyalties are to sovereignty[68], but also that jurisdiction is *itself* political. Attention to the political conjures a legal-political binding at the heart of jurisdictional analysis which moves this dissertation past the stalemate between sovereignty and jurisdiction as distinct spheres, which occupies dozens of legal texts, and jurisdiction as merely technical, which is the dominant projection. The conceptual centre of jurisdiction is a place where the legal is lashed to the political, and their uneasy coexistence is continually rearticulated in a jurisprudence of precedent.

The problem is that Loughlin is committed to a strict separation of political and legal sovereignty. For both Schmitt and Loughlin, sovereignty (or at least political sovereignty) is indivisible.[69] Loughlin explains this indivisibility by recourse to legal sovereignty, or jurisdictional competence, which may be divided or delegated. Yet Loughlin does not spend much time here, preferring to focus on the relationship between public law and political sovereignty. The result is that a robust account of political jurisdiction remains to be developed. This requires a shift from looking for law in the political to looking for the political in law, and it reveals that the lack of constitutional law or public law or specifications of competence does not mean the absence of jurisdiction.

The reformulation that jurisdiction allows, one in which the state of exception is about the scope of law's authority, shows the eternal imbrications of sovereignty and jurisdiction. Indeed, the juristic sovereignty that Schmitt and Loughlin describe is simultaneously sovereignty beholden to jurisdiction, which tells of the general norms which constitute the ordinary constitutional order, and jurisdiction beholden to sovereignty, which tells of the political machinations in the legal threshold, even the threshold of exception. Together, they provide a way to see that the state of exception is not

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[67] Loughlin, *supra* note 42 at 95.
[68] For Loughlin, establishing and maintaining the state is "the singular undertaking of public law": see *ibid* at 91.
[69] Schmitt, *supra* note 11 at 8; Loughlin follows Schmitt on this: see *ibid* at 84.

the eradication of law but rather a statement about the nature of law's authority. Indeed, Loughlin hints at the implications of Schmitt's conception when he argues in passing that, in the situation of exception, "law cannot work solely with the legal-illegal distinction".[70] Jurisdiction permits the possibility that the constitutional failure to enumerate the exception does not render the decision that produces it alegal. The legal suspension of law is a jurisdictional act. The abrogation of law, as much as the constitution and application of law, tells us about what lives in the jurisdictional threshold. This involves a shift away from the juridical relation between sovereign and exception to focus on their meaning, their place, and the modes of their relation to the law.

2.3.1.3 From Sovereign Exception to Jurisdictional Limit: Political-Legal Binding

The political-legal binding takes several forms. Jurisdiction is in many senses the ultimate manifestation of sovereignty, both in its original manifestation and as an ongoing recalibration of the limits and extent of sovereign power, as seen through the eyes of law. This is particularly true in an era where the use of force and the ability to declare war — those quintessentially sovereign acts — are highly regulated juridical acts. This is Robert Cover's point when he describes jurisdiction as the judicial articulation of the institutional privilege of force. For Cover, the texts of jurisdiction both conceal the 'naked jurispathic act' and apologize for the state and for its violence. [71] In other words, given the legal character of certain sovereign acts, jurisdiction often functions as the voice of sovereignty.

In another sense, as Douzinas explains, sovereignty is the *precondition* for jurisdiction. Every jurisdictional act implicates the state: its reach, its content, and its rules. Because jurisdiction is borne of sovereignty and continually dependent on it, even when it speaks past it or ignores it, it is nonetheless policing its limits, adding substance to its categories, and sorting its subjects and objects into legal orders. To some extent, every extension of jurisdiction is also an extension of sovereignty. This is what Loughlin means when he writes that jurisdictional questions ultimately depend upon issues of sovereign capacity. There is little space, then, to separate jurisdiction from sovereignty.

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[70] Loughlin, *supra* note 45 at 401.

[71] Robert M Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative" (1983) 97 Harvard L Rev 4. Although Cover discusses jurisdiction, his project differs from this one: first, he is concerned with adjudicatory jurisdiction, specifically the commitments implicit in assuming jurisdiction by judges; second, Cover is interested in the narrative aspect of jurisdiction (*i.e.* what stories do judges tell about their own authority? What stories do they rely upon? How do these stories empower and disempower communities and particularly *nomos*?); third, he suggests a redemptive vision in which judges consciously consider the violence at the root of their acts.

A final form is the role of the political in the jurisdiction calculus. By assembling the discourses of jurisdiction, as is done later in this chapter, it becomes clear that jurisdiction does not always see its authority as merely technical issues of scope. In some incarnations, the political-legal linking is crucial to the jurisdictional manoeuvre, and in others, it is essential to understanding contemporary jurisdictional arrangements. Consider, for example, the United Nations, whose jurisdiction over semi-sovereign territories is articulated in legal terms in Chapter XI of the UN Charter, but is constituted by international politics. This is one reason why the United Nations processes for East Timor, Kosovo, and Western Sahara have diverged so sharply. Or consider the right to French schooling in Canada, where the political sovereignty of founding peoples was manifested through the law of constitutional provisions and corollary minority language jurisdictions. These educational sites are a potent mix of politics and law, existing as legal exceptions for political purposes to the equality rights embodied in the constitutional text.[72] Law is a way of doing politics, too.

Cormack would probably agree that there is very little space between sovereignty and jurisdiction, and it is certainly my point that sovereignty and jurisdiction are intertwined in complex ways. But it is also the case that sovereignty is not entirely enacted through jurisdiction, which is a claim that Cormack sometimes seems to make.[73] Sovereignty is not only law; it is also bare power, politics, and autonomy. It is undoubtedly true that jurisdiction has a "formal, distributive function that returns the political to the administrative reality", but it is also true that the political does not stay in that administrative reality, nor is it completely defined by it.[74] The political, ever and always, escapes like steam under the doors of law.

So it is that sovereignty must nonetheless remain in the frame. This offers theoretical resolution on two levels. At the practical level, the political-juridical linking at the base of jurisdictional inauguration is the key to some of the theoretical confusion that surrounds jurisdiction. This will become more visible later in the chapter. It offers some congruence for the many meanings of

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[72] See, *infra*, Chapter 4, section 4.5.2.
[73] Indeed, Cormack's account suggests that sovereignty is, to some extent, coeval to jurisdiction; for example, in phrases such as "there is no sovereignty that is not enacted in the register of jurisdiction". This might be too sweeping — sovereignty is certainly enacted through legal limits and boundaries, but it is not *only* enacted this way. This divergent characterization may result in part because his task is different: Cormack is interested in the instability of law and the possibility that legal norms have more than one source. See Cormack, *supra* note 1 at 9.
[74] *Ibid*.

jurisdiction: some manifestations are more aligned with law-making, while others are closer to law-application; it figures into the meaning of territorial jurisdiction, which is a legal manifestation of political decision making; and it embodies the exclusionary aspect of jurisdiction by tracing issues of legal scope back to the original sovereign community. A significant amount of jurisdictional discourse refers back to this inaugural articulation. Moreover, it is an important piece of the methodology of this dissertation, which probes jurisdiction as both the authority of law *and* the attachment of law. In the end, it turns out that one of the main goals of getting legal jurisdiction is to explode political sovereignty.

At a more abstract level, paying attention to jurisdictional inauguration permits a radical reconsideration of the group. Lurking behind this project is an effort to think about the inaugural gestures of jurisdiction by paying attention to the antediluvian moment before Westphalia, before international law, before constitutions, and before multiculturalism. By occasionally casting back to the primordial jurisdiction that issued from sovereignty, it may be possible to bring new coherence, or at least new lenses, to the disparate body of jurisdictional discourse and to engage with a new kind of jurisdictional analysis. The goal throughout is to acknowledge jurisdiction as the sovereign inauguration of law, to explain some of the theoretical disjunctures in jurisdictional discourse, and to agree that jurisdiction often points back toward foundational questions of statehood and legitimacy, but all without being pulled into the theoretical quicksand that is the political theory of sovereignty.

To conclude on this point, both categories of inaugural gestures — the metaphysical and the conditions of law's attachment — share the underlying notion that jurisdiction expresses the domains of law, and that these domains must be produced originally and reproduced constantly. Jurisdiction shows us the work done at the legal threshold, and in so doing, reveals both the shape of sovereignty and the deep ideology embedded there. It actualizes the law through the process of defining boundaries and testing limits. This moves legal analysis away from questions about law's interiority — who has authority over whom and what specific rules this authority imposes — and toward the acts of separation and delineation themselves and their consequences.[75] Putting this theoretical insight into practice requires looking at instances of law's application and the negotiations that take place around its limits. To follow this analysis through the existing orders that connect "the very

[75] Drakopoulou, *supra* note 3.

possibility of legal authority and judgment"[76] in the context of territorialized group difference thus opens a window onto the distribution of authority and the entitlements to difference in those scaled legal orders. As Lorna Hurston writes, modes and categories of identity and relationship are continually produced at the boundaries of various jurisdictions.[77] After all, "jurisdiction is the language in which, all but impossibly, a juridical order encloses the world".[78]

2.3.2 Contemporary and Technical Jurisdiction

The content of jurisdiction barrels toward us from all sides: legal theory, public international law, conflicts of law, constitutional law, and administrative law. The literature on jurisdiction is itself sorted into scalar silos. There is the scant body of legal theory about jurisdiction, and then there are the public international law principles of jurisdiction, the national jurisdictional doctrines, and the private international law tests. A search for scholarship about jurisdiction reveals its primary location in the international law frame, which is replete with typologies, principles, and cases.[79] This section sets forth the relationship between these jurisdictional silos and tries to reconcile the content of public and private, international and national, in a way that lays the groundwork for theorizing jurisdiction.

This dissertation relies on a concept of jurisdiction that is inherently public in nature.[80] Jurisdiction is, first and foremost, an extension of sovereignty, an exercise of authority that emanates from a sovereign community. The sovereign is indisputably public. On the national scale, jurisdiction manifests itself through the three branches of government. Even when the subject matter is private, such as in the case of enforcement of a foreign arbitration award, the act of jurisdiction — whether executive, legislative, or adjudicative — is still public.[81] The public nature of jurisdiction is a

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[76] Bradin Cormack, "Locating The Comedy of Errors: Revels Jurisdiction at the Inns of Court" in Jayne Archer, Elizabeth Goldring & Sarah Knight, eds, *The Intellectual and Cultural World of the Early Modern Inns of Court* (Manchester: Manchester University Press, 2013).
[77] Hutson, *supra* note 21 at 509.
[78] Cormack, *supra* note 1 at 9.
[79] It is worth noting that the substance/theory aspect of jurisdiction is most considered in the United States in the frame of jurisdiction to adjudicate: see, *e.g.*, Mary Twitchell, "The Myth of General Jurisdiction" (1988) 101 Harvard L Rev 610.
[80] Teresa Scassa & Robert J Currie, "New First Principles? Assessing the Internet's Challenges to Jurisdiction" (2011) 42 Geo J Int'l L 1017.
[81] An exception might be where private parties agree to private arbitration, essentially contracting out of the public jurisdiction of the courts, although even these mechanisms are regulated by public law jurisdiction. For example, governments may choose to regulate access to them, or may set limits on the enforcement of private awards.

constant reminder that the state's capacity to exercise jurisdiction fundamentally implicates its ability to govern.

On the international scale, it is obvious that the public international law principles of jurisdiction derive from the public, state apparatus. International rules on jurisdiction relate to the exercise of national jurisdiction in the interstate arena. They are customary international law rules on the relations *between* states. These rules are about the reach of the state's legal authority.[82] In his treatise on international law, Ademola Abass writes:

> Jurisdiction is the foundation of the internal order of every State. It is the assertion of a State's sovereignty over the making of law, the enforcement of law, and the adjudication of legal issues. Since international law involves the operation of the internal orders of all States, jurisdiction plays the most fundamental role in shaping both orders.[83]

Private international law rules are similarly public in two distinct ways: first, they are best conceived as national laws emanating from the state apparatus: they are "civil procedure rules for cases with connections to more than one jurisdiction".[84] Second, as F.A. Mann has stated, they are themselves governed by public international law. International law does not prescribe the content of the rules, but it does prescribe the limits within which state rules of private international law may operate.

If jurisdiction is fundamentally public, then how should we understand the relationship between different scales or fields of law? For decades, jurisdiction literature has relied on the division of the state into three spheres for the purpose of exercising jurisdiction. These originate in the international law field but they refer back to the national unit and thus are a useful way to think about the channels through which jurisdiction travels.

There are three types of jurisdiction[85]:

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[82] The rules on *international* jurisdiction are very limited. They are based on state consent, Security Council authorization, and the adjudicatory jurisdiction of the International Court of Justice. See Lori Fisler Damrosch et al, *International Law: Cases and Materials*, 4th ed (St. Paul: West Group, 2001).
[83] Ademola Abass, *Complete International Law* (Oxford: Oxford University Press, 2011).
[84] Stephen Pitel & Nicholas Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010).
[85] See American Law Institute, *Restatement of the law, third, the foreign relations law of the United States* (St. Paul: American Law Institute Publishing, 1987). Damrosch et al, *supra* note 82. Brownlie, *supra* note 8. Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003).

> Prescriptive — the power to make rules. Prescriptive jurisdiction encompasses the fact that these rules may be made by legislatures, other government institutions, and courts. States have unlimited prescriptive jurisdiction. A legislature may make laws on any subject and covering any person. National courts derive their jurisdiction from these laws.
>
> Adjudicatory — the authority to subject persons and things to its legal process. Adjudicatory jurisdiction encompasses the judicial sphere and pertains to the power to hear and decide legal matters.
>
> Enforcement — the power to enforce laws. Enforcement jurisdiction refers to the use of government resources to induce or compel compliance. It is the purview of the executive branch.

Bowett explained the hierarchical relationship between these types of jurisdiction by noting that jurisdiction "hinges on the power to prescribe".[86] Prescriptive jurisdiction refers to state acts, usually in legislative form, wherein a state characterizes conduct as delictual, such as criminal, civil, commercial codes. Bowett argued that there could be no enforcement jurisdiction without prescriptive jurisdiction; yet there may be prescriptive jurisdiction without the possibility of enforcement jurisdiction.[87] Prescriptive jurisdiction, then, is fundamentally national.[88]

Prescriptive jurisdiction generally refers to state constitutions and legislation in which the state sets the parameters for law. As part of this exercise, the state parcels out jurisdiction to the entities, spheres, and locations set out therein. Enforcement jurisdiction refers to the coercive power of law, the ability to curtail liberty or otherwise rectify the situation. Adjudicatory jurisdiction is really a subset of enforcement jurisdiction, a way to enforce prescriptive jurisdiction or to settle contested claims about it. Yet even this dual typology is blurred because it is the prescriptive acts that authorize the coercion and violence of enforcement jurisdiction; or, if not stated, it is inherent to prescriptive jurisdiction that where enabling legislation does not delimit the powers of the legal actor, there is plenary or policing power.[89] There is, in other words, no clear division between prescription and enforcement.

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[86] DW Bowett, "Jurisdiction: Changing Patterns of Authority Over Activities and Resources" (1982) 53 Brit YB Int'l L 1.
[87] *Ibid.*
[88] Mann, *supra* note 6.
[89] Restatement, *supra* note 85.

This is a fundamental insight — that all jurisdiction is ultimately national — one which has been digested by international law, but not taken to its logical conclusion.[90] This is partly a function of conceiving jurisdiction as a function of sovereignty.[91] Indeed, in 1927, the Permanent Court of International Justice in *The Case of the S.S.* "*Lotus*" confirmed that:

> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places on its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty".[92]

However, the national origins of jurisdiction also refocus attention on the scalar legal orders which purport to separate conceptions of jurisdiction. The logical conclusion is that while the typology might help to categorize state acts and might even help to understand the different jurisdictional silos and spheres, it does not shed light on jurisdictional theory, nor does it offer a principled way to approach technical jurisdictional doctrine. It is a heuristic for both interstate and intrastate cases, but not more.

2.4 Mapping and Scaling Jurisdiction

In one sense, I am using jurisdiction as a motif, "a lens through which to ask more foundational questions" about law's relationship with group difference in various frames.[93] But I am also interested, at the conceptual level, in how jurisdiction is theorized. The few studies of conceptual jurisdiction that exist all describe the concept as overlooked and understudied. Certainly there is no shared discourse, no language of analysis, for jurisdiction. There are two predominant features of theories and formulations of jurisdiction to date: "the significance of the state and its sovereignty; and the means through which the attachments of jurisdiction proceed".[94] The result is a series of well-worn concepts: the nation-state, sovereignty, jurisdiction, and territory, which are measured against political theory's metrics of legitimacy and some version of the original social contract.

For both McVeigh and Cormack, separating jurisdiction from sovereignty and the nation-state renders the contours of the concept more visible. For this project, however, the sovereign state

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[90] See Damrosch et al, *supra* note 82. Abass, *supra* note 83.
[91] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2 J Int'l Crim Justice 735.
[92] *The Case of the S.S. "Lotus" (France v. Turkey)* (1927), Series A, No. 10 1927 5 (PCIJ).
[93] Annalise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011).
[94] Dorsett & McVeigh, *supra* note 10.

remains the axis upon which jurisdiction turns. As explained above, although the modern nation-state emerges as a particular form of jurisdictional organization, it is the dominant one and the most relevant to this project. This section begins with Boaventura de Sousa Santos' work on inter-legality, a piece that sits in the background of this dissertation, informing its method and approach, as well as its theoretical loyalties. It then surveys the limited set of theoretical contributions to jurisdictional theory, seeking to find their common insights and to locate the remaining gaps.

2.4.1 Mapping the Reach of the Law

The origins of this dissertation come partly from Boaventura de Sousa Santos' seminal work on inter-legality. It is worthwhile to dwell for a moment on the place for metaphor, both in the work of de Sousa Santos and in studies of law and space generally. When law meets space (or place or scale or geography *writ large*), the results are sometimes literal and sometimes metaphorical. These metaphorical representations highlight and reveal common aspects of both realms. In their best incarnations, metaphors are more than the sum of their parts, pointing the way for new ways of imagining and analyzing a subject. Thus, there is much to consider in de Sousa Santos' 'strong metaphor' that:

> Indeed, laws are maps; written laws are cartographic maps; customary, informal laws are mental maps.[95]

He draws out two points here: first, maps inevitably distort reality, and they must do so in order to fulfil their function; and second, maps and laws share a predilection toward abstraction and universality. The map is a springboard for his "symbolic cartography of law" marked by features of scale, projection, and symbolisation. This theory suggests that different kinds of juridical capital (state, private, sacred, profane) circulate within and across spaces, and that each kind of juridical capital carries specific kinds of actions and symbolic universes.

For the purpose for this project, it is the scale conception of law that matters most. De Sousa Santos describes three legal spaces with corresponding forms of law: local, national, and world. Local law is large-scale legality, national law is medium-scale legality, and world law is small-scale legality. He

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[95] Boaventura de Sousa Santos Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 JL & Soc'y 279.

suggests that the coexistence of these various legal systems is facilitated by their operation at different scales.

> This means that, since scale creates the phenomenon, the different forms of law create different legal objects upon eventually the same social objects. They use different criteria to determine the meaningful details and relevant features of the activity to be regulated. They establish different networks of facts. In sum, they create *different legal realities*.[96]

For de Sousa Santos, then, there are various legal orders operating on different scales. This poses a difficulty for analysis because these legal spaces operate simultaneously not only on different scales but also from different interpretative standpoints. This leads us into de Sousa Santos' concept of legal pluralism, a core concept in his postmodern view of law. This is legal pluralism not conceived as different legal orders "coexisting in the same political space but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions".[97]

> So much is this so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but rather of interlaw and interlegality. [...] Our legal life is constituted by an intersection of different legal orders, that is, by interlegality.[98]

Thus, legal orders, "each of which has its own scope, its own logic, and its own criteria for what is to be governed, as well as its own rules for how to govern", exist in a state of perpetual interaction.[99] This is interlegality. For the symbolic cartography of law, what follows from this vision of interlegality is that each scale of legality is associated with certain boundaries (de Sousa Santos calls these regulation patterns, action packages, and regulation thresholds). He is not describing boundaries as physical or even metaphorical borders, but rather as ways to demarcate scales of legality one from another. This is essentially jurisdictional discourse and, indeed, Valverde extends his analysis into the jurisdictional vernacular.

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[96] *Ibid*.
[97] *Ibid* at 298.
[98] *Ibid* at 288, 298.
[99] Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009) 18 Soc & Leg Stud 139.

For de Sousa Santos, it is more important to trace the relations among the legal orders than to identify the different legal orders themselves. Because this project has other work to do in crystallizing and applying the concept of jurisdiction, it starts with identifying, mapping, and analyzing the legal orders and only then cogitates about how they relate to each other. Several of the cases examined reveal the relations among legal orders: *Reference re: Secession of Quebec* seeks to answer the question of whether international law or Canadian constitutional law governs the case of Quebec, while *Advisory Opinion on Western Sahara* is an international case that seeks to distinguish the nature of sovereign, national characteristics from local forms of organization, using one to inform the other.[100]

De Sousa Santos is aiming toward a "new legal common sense", one that uncovers the latent or suppressed forms of legality, whether they are infra-state or supra-state. However, it is his penultimate observation about how different legal orders regulate the same social objects that this dissertation draws upon. He points out that the fragmentation of legality is not chaotic. It is a social construction built according to the rules of scale, projection, and symbolisation. This provides a launching point and a partial explanation for how and why groups look different from different vantage points. De Sousa Santos' base challenge is essentially to map the law, to lay bare how sometimes contradictory and sometimes incommensurable logics and rules coexist. There are many more layers to his symbolic cartography of law and postmodern legal pluralism, but it is his insights into the scales of legality that tip us into jurisdiction and group difference.

It is the work of Mariana Valverde that connects interlegality to jurisdiction, locating the implicit references to jurisdictional scale in de Sousa Santos' work and giving them theoretical mass. She studies how legal governance is accomplished through jurisdiction, and uses this to inform understandings of scale in social theory. For Valverde, questions about scale and jurisdiction can be "grouped together as questions about the *scope* of projects".[101] In this relationship, jurisdiction exceeds scale.

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[100] *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Western Sahara, Advisory Opinion*, [1975] ICJ Reports 12.
[101] Mariana Valverde, "Questions of security: A framework for research" (2011) 15 Theor Criminology 3.

Valverde builds on the concept of interlegality by deriving the unarticulated insight that legal powers and legal knowledges appear to us as *always already distinguished by scale*. She then describes the role that jurisdiction plays:

> Legal governance, in other words, is always already itself governed; and the governance of legal governance is the work of jurisdiction.

The details of Valverde's approach will be addressed later; the point at the outset is that de Sousa Santos and Valverde remind us of the importance of answering questions about how we are governed and about the legal forms of public power.[102] They draw attention to the effects or consequences of jurisdictional analysis. The international, national, and sub-national scales make up different jurisdictions that govern territorialized group difference. They share some features but not others. There are internal contradictions within each legal order as well as external contradictions between the legal orders.[103] Some features of one legal order are incommensurable with the features of another legal order.

These theoretical insights are mobilized in two ways. First, I make them operational by taking the social object of group difference and analyzing it using the tools of scale and jurisdiction. In a sense, I make the objects of legal governance into subjects, tracing their agency and resistance, as revealed through the common law.[104] This reveals the different legal orders that regulate group difference. It also maps the terrain of law and group difference. Second, I incorporate the spatial and temporal aspects of each order, which reveal the strict limits of legal ordering, the self-generative aspects of jurisdiction, and the deep challenges to the liberal state that both constitute and animate scalar jurisdictional pluralism. The following chapters endeavour to map the work that jurisdiction does in the setting of territorialized group difference, and to take seriously the interactive aspect of interlegality by focusing on relationships and overlaps.

In one sense, then, this dissertation is primarily genealogical and analytical, tracing the path of jurisdictional manoeuvres over instantiations of group difference. By applying the jurisdictional lens to this subject-matter, the dissertation reveals governing logics for each legal order and demonstrates

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[102] David Kennedy, International Law Course (Fall 2007), *Harvard Law School*, class notes on file with author.
[103] Valverde, *supra* note 99.
[104] Kevin Walby, "Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism" (2007) 16 Soc & Leg Stud 551.

how jurisdiction sorts difference through and into law. It reveals law's multivocality and traces the voices of the law and groups in each legal order. In so doing, however, it is necessary to interrogate and add to the scholarship on jurisdiction. In this additional sense, then, the dissertation is also conceptual and theoretical. It is impossible to engage with the nascent field of jurisdiction studies without discussion of foundational terms and concepts. Notions of jurisdiction and scale stemming from legal philosophy, law and society, sociology, and law and geography must be put into conversation with the existing legal frameworks of jurisdiction.

2.4.2 Scale, Shot Through with Power

De Sousa Santos' theory of interlegality relies on the concept of scale, a geographical concept that is commonly used to denote the size or level of a phenomenon. Social theorists often speak of the local, national and global scales, among others. There is, however, a raging debate in geography about the nature and utility of the concept of scale.[105] This dissertation uses scale as a description of and a method for analyzing different legal assemblages and orders. It defends the position that legal orders may be productively conceived and represented using scalar vocabulary. It also aligns itself with those scholars who believe that scale is an "organizing epistemology" and that insights may follow when we trace "how it is put to work and made real, under what conditions, and what work they perform".[106]

The issue turns on the ontological status of scale. The central fault line in the debate is between those for whom scale is a wholly social construction and those for whom scale is a series of spaces or spatial units or hierarchical domains.[107] The ontological view conceives scale as a structure or thing that exists in the world. This conception is criticized for seeing scales as given, rather than produced,

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[105] See, *e.g.*, Sallie A Marston, John Paul Jones III & Keith Woodward, "Human geography without scale" (2005) NS 30 Transactions of the Institute of British Geographers 416; Helga Leitner & Byron Miller, "Scale and the limitations of ontological debate: a commentary on Marston, Jones and Woodward" (2007) NS 32 Transactions of the Institute of British Geographers 116; Chris Collinge, "Flat ontology and the deconstruction of scale: a response to Marston, Jones and Woodward" (2006) NS 31 Transactions of the Institute of British Geographers 244; Arturo Escobar, "The 'ontological turn' in social theory. A Commentary on 'Human geography without scale', by Sallie Marston, John Paul Jones II and Keith Woodward" (2007) NS 32 Transactions of the Institute of British Geographers 106; John Paul Jones III, Keith Woodward & Sallie A Marston, "Situating Flatness" (2007) NS 32 Transactions of the Institute of British Geographers 264.

[106] Blomley, *supra* note 29.

[107] In addition to the references in fn 105, see also: Peter J Taylor, "A materialist framework for political geography" (1982) NS 7 Transactions of the Institute of British Geographers 15; John Agnew, "Representing space: space, scale and culture in social science" in James S Duncan & David Ley, eds, *Place/Culture/Representations* (London: Routledge-Cavendish, 1993) 251; Neil Smith, "Scale" in Ron Johnston et al, eds, *The Dictionary of Human Geography*, 4th ed (Oxford: Wiley Blackwell, 2000) 724.

as 'actually existing entities that constitute the spatial context for social action', as flattening difference, and as fitting the world into limited scalar categories.[108] The other views (and there is not only one) conceive scale as a category or heuristic that gestures toward notions of spatial hierarchy. Analysis and solutions range from proposals to incorporate actor network theory to proposals to abolish scale as a concept.[109] This dissertation cannot attend to the complexities of the debate but it can reclaim common points of agreement.[110]

The first of these points of agreement is that scale is an "epistemological organizing frame".[111] What follows from this is that scale is, as Katherine Jones describes, a "representational trope", which means it is a way of framing positions that is not neutral.[112] This turns out to be the way that de Sousa Santos and Valverde are using the term: to denote how processes of categorization, such as jurisdiction and scale, bear certain rhetorics.[113]

> The strategies of presentation (*how* they present — what is left in and what is left out) themselves construct a particular form of knowing. They both encourage certain meanings and constrain or limit other meanings (Norris, 1987); 'true' meaning can never simply pass through a trope, it is always shaped.[114]

This dissertation advances the epistemological sense of the concept of scale as "a mode for apprehending the world".[115] This opens the way to use scale as a kind of heuristic, a tool or a lens

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[108] Blomley, *supra* note 29.
[109] On actor network theory, see: Kevin R Cox, "Spaces of dependence, spaces of engagement and the politics of scale, or: looking for local politics" (1998) 17 Pol Geography 1; Peter J Taylor, "Is there a Europe of cities? World cities and the limitations of geographical scale analysis" in Eric Sheppard & Robert B McMaster, eds, *Scale and Geographic Inquiry: Nature, Society, and Method* (Oxford: Blackwell Publishers, 2004) 213; Helga Leitner, "The politics of scale and networks of spatial connectivity: transnational interurban networks and the rescaling of political governance in Europe" in Eric Sheppard & Robert B McMaster, eds, *Scale and Geographic Inquiry: Nature, Society, and Method* (Oxford: Blackwell Publishers, 2004) 236; On abolishing scale, see: Marston, Jones III & Woodward, *supra* note 105.
[110] Both lack of space and lack of expertise prevent explanations of, for example, networked scalar configurations.
[111] See: Katherine T Jones, "Scale as epistemology" (1998) 17 Pol Geography 25. Blomley, *supra* note 29. Marston, Jones III & Woodward, *supra* note 105.
[112] Jones, *supra* note 111.
[113] James S Duncan, "Me(trope)olis: Or Hayden White among the urbanists" in Anthony D King, ed, *Representing the City* (Basingstoke: Macmillan, 1994) 253.
[114] Jones, *supra* note 111.
[115] *Ibid*.

through which to tell the scalar narratives of law.[116] Whatever scale is not, it *is* an organizing representation of the world.

Once we see scale as a way of knowing or apprehending, we find a second point of agreement in the debate. This is the point made by Leitner and Miller, who argue that scale is not merely an epistemological framework or a representational practice: "it is, above all, a diverse array of material and representational practices, shot through with power".[117] It is not only, as Blomley and Jones agree, that scale is negotiated and constructed, deployed discursively in political struggles, but also that it can put down roots and become a part of an organizing framework. Or, put differently, that the technologies of power employed in the social production of scale deserve close attention.[118] One of those technologies of power is law. When it comes to law, scale is a key part of how law is known and apprehended. Part of finding the law (in terms of law on the books) is knowing where to look for it. Some legal issues are international; other legal issues are constitutional; still others are contested or between legal fields. The point is that at least some part of what is true or knowable about law is cast in the frame of scale.

Scale is part of the organizing architecture of law. It is not controversial that the law is divided according to scalar logic: international law, national constitutional law, national administrative law, and municipal codes are all organizing concepts in law. While it might not be accurate to speak of the international scale as a noun, as an ontological *thing*, it *is* accurate to speak of an international legal order or international law as a bounded body of law that can be apprehended.[119] Students take international law courses, lawyers work in the field of international law, there are international law judges and multiple international law courts and tribunals. Scale is a way to put different legal orders together, to conceive of their relationships, and to trace how they might regulate the same social objects in different ways. Both de Sousa Santos and Valverde tell us that law appears to us as already scaled. Jurisdictional scale "files down the contradictions" so that legal powers and legal knowledges appear to us as always already distinguished by scale".[120]

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[116] Mitch Chapura, "Scale, causality, complexity and emergence: rethinking scale's ontological significance" (2009) NS 34 Transactions of the Institute of British Geographers 462; Jones, *supra* note 111.
[117] Leitner & Miller, *supra* note 105.
[118] *Ibid*.
[119] For the sake of simplicity, this defense leaves aside issues of legal indeterminacy (see, *e.g.* David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987)).
[120] Valverde, *supra* note 99.

Of course, the logics and modes of each legal order are not static or stuck; logics and modalities are fluid, mutually informed, and mobile. The *Reference re Secession* case is a good example of this fluid mobility: the Supreme Court of Canada analyzed the international law on self-determination and secession and domestic constitutional law as both potentially applicable to the same facts (Quebec's secession from Canada) but clearly delineated the spheres of each legal order. In this process, legal arguments about jurisdiction are often attempts to produce or contain or jump or bend scale. These arguments are often competing characterizations and each characterization relies on scalar imagery and categories.

In fact, there are terms for this that come from the politics of scale pioneered by Neil Smith, such as *scale jumping* whereby 'political claims and power established at one geographical scale are expanded to another'[121] and *scale bending* in which 'entrenched assumptions about what kinds of social activities fit properly at which scales are being systematically challenged and upset".[122] These terms helpfully describe when logics move between legal orders and when incommensurabilities propel revision of legal categories. They also attune us to Marston et al.'s concern that scale smuggles in a variety of other binaries that keep scholarship from interrogating assumptions.[123] So, for example, "global" is affiliated with terms such as cosmopolitan, abstract, open, and produced, while "local" is aligned with place, difference, authenticity, and culture. Because this project does not *start from* scale, it is able to analyze how it is deployed and rejected in a variety of contexts of group difference without assuming it is there.

The problem for jurisdiction is, as Blomley points out, that it reifies scale. He describes a conception of jurisdiction that operates according to a scalar logic. For Blomley, law operates at different scales and each of those scales can be thought of as a jurisdiction. His jurisdiction is a "Russian doll-like conception of spatial order" in which one scale nests in the next, in an ordered hierarchy.[124] Each component of the hierarchy operates at a different analytical scale. Blomley agrees that it is impossible to abandon scale because of the powerful force it exerts in organizing legal practice,

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[121] Smith, *supra* note 107.
[122] Neil Smith, "Scale bending and the fate of the national" in Eric Sheppard & Robert B McMaster, eds, *Scale and Geographic Inquiry: Nature, Society, and Method* (Oxford: Blackwell Publishers, 2004) 192.
[123] Marston, Jones III & Woodward, *supra* note 105.
[124] Blomley, *supra* note 29.

particularly through technologies such as jurisdiction. He prefers to see scale and levels as rhetorical deployments. This project is, in part, an effort to show how jurisdictional practices embody scalar rhetorics, employ scalar imaginaries, and produce scalar results: how law as jurisdiction uses space and scale to sort group difference and what images of each are embedded there.

I employ the concept of scale to add to the resources of jurisdiction, to make jurisdictional analysis more robust. It is the construct of scale that is the pivotal basis for the sorting that jurisdiction performs. But jurisdiction is also more than scale. For Valverde, it includes not only hierarchy and levels, but also functionality, certain habits of seeing and governing, and legal doctrines.[125] At bottom, jurisdictional scale is the uniting of law and geography, of authority and space. Although scale is not a 'thing' out there in the world, jurisdiction puts scale to work in particular ways and that work generates real legal consequences. In this dissertation, scale is the handmaiden of jurisdiction: it works with existing legal orders to birth the phenomena — the legal objects and subjects — that jurisdiction is claiming to govern. This renders certain the legal categories of state and trust territory, province and nation.[126]

2.5 Theorizing Jurisdiction: Reconciling Three Conceptions

In this section, the chapter merges two tasks. On the one hand, it performs a critical literature review that assembles jurisdictional scholarship across disciplinary fields. On the other hand, it sorts and theorizes this literature to forge an organizing conceptual framework. It performs this exercise by locating the three conceptual cores of jurisdictional scholarship. The scholarship is sorted into these three modalities, which coincidentally are also temporally consecutive, appearing from oldest to newest. This permits the section to simultaneously survey the state of jurisdictional theory and unite the scholarship in a conceptual framework. By articulating the theoretical anatomy of jurisdictional thought and locating its three conceptual modes, this section integrates theoretical jurisdiction with the political-legal binding at the heart of jurisdiction. Having surveyed the state of jurisdictional scholarship, the next section of the chapter turns to the task of setting out a method that is both responsive to the scholarship and useful on its own terms.

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[125] Valverde, *supra* note 99.

[126] I owe a slightly different version of this formulation — that jurisdiction partially generates the phenomenon that it claims only to govern — to Josh Lepawsky. See: Josh Lepawsky, "Legal geographies of e-waste legislation in Canada and the US: Jurisdiction, responsibility and the taboo of production" (2012) 43 Geoforum 1194.

2.5.1 Law's Jurisdiction from the Beginning

It is logical to start at the beginning, chronologically, with the first investigations of jurisdiction, and to work forward to the state of jurisdictional theory today. Theoretical scholarship about jurisdiction has grown indirectly out of the law and geography movement, perhaps because the term 'jurisdiction' so clearly evokes the dual domains of space and law.[127]

The law and geography movement has evolved its relationship to both space and law, coming to rest on conceptions of "splicing", or on the mutually constitutive domains of space and law.[128] The legacy of critical legal studies is visible in much of this scholarship, which reveals contingent power relations in very different settings.[129] Law and geography scholarship has hinted at jurisdiction as a key construct that unites the socio-spatial and socio-legal but it has yet to deconstruct jurisdiction on its own terms.[130] Perhaps the exception to this statement is Richard Thompson Ford's lengthy piece in the Stanford Law Review titled "Law's Territory: A History of Jurisdiction".[131] This is a legal history of territorial jurisdiction premised on the emergence of cartography. It tells the story of the administrative state. Despite a lag period, this piece precipitated renewed interest in jurisdiction.[132]

Ford defines territorial jurisdiction as "rigidly mapped territories within which formally defined legal powers are exercised by formally organized government institutions".[133] He is interested in jurisdiction as a set of practices that create rules; it is these practices and rules that establish the lines on the map.[134] For Ford, the logic of government is the logic of jurisdiction. His central argument is that maps changed the organizing modality of the state so that "legal authority could follow

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[127] McVeigh, *supra* note 2; Valverde, *supra* note 99; Blomley, *supra* note 29.
[128] Nicholas Blomley, "From 'what?' to 'so what?': Law and Geography in retrospect" in Jane Holder & Carolyn Harrison, eds, *Law and Geography* (Oxford: Oxford University Press, 2003) 17.
[129] Note, *e.g.,* Nicholas Blomley's interest in how law is implicated in contingent power distributions; Richard Thompson Ford's refusal of neutral legal sites; and David Delaney's construction of nomosphericity, which repositions the spatial and legal as already constitutive of each other *and* constitutive of power relations.
[130] See, *e.g.*, David Delaney, *Territory: A Short Introduction* (Oxford: Wiley Blackwell, 2005).
[131] Richard Thompson Ford, "Law's Territory (A History of Jurisdiction)" (1999) 97 Mich L Rev 843.
[132] References to Ford, *ibid*, appear in Valverde, *supra* note 99; Blomley, *supra* note 29; McVeigh, *supra* note 2; Cormack, *supra* note 1.
[133] Ford, *supra* note 131.
[134] Although Ford contends that jurisdiction is only a set of practices, not a pre-existing thing in which practices occur or to which practices relate, I counter that it *is* a pre-existing concept, at least, that implicates the question of origins.

territory".[135] They facilitated the transition from status to jurisdiction so that authority was no longer defined by status relationships such as class or race but rather by territorial location.

Ford's vision of territorial rule is bound up with identities: "jurisdictions define the identity of the people that occupy them".[136] In this narrative, jurisdiction arose as a tool for instituting a modern subjectivity.[137] Although not always specified, Ford seems to mean that territorial jurisdiction constructs individual political subjectivity in a specific manner; namely, as citizen-subjects with particular orientations toward privatism and nationalism.[138] In all of this — from status to jurisdiction and then through to the ideological claims of jurisdiction[139] — Ford maintains that territory is the central feature of modern authority.

This focus on territory as the polestar leads us astray. To be fair, readers of Ford's work have noted the ideological concerns underlying the piece and that he "talks about jurisdiction more as mechanisms to legitimate the use of state power than as a matter of lines on the ground".[140] Moreover, Ford's territory is both a *medium* and an *object* of government power. There is, in other words, some distance between jurisdiction as territorial and Ford's actual analysis. Nonetheless, Ford sees territorial jurisdiction as prototypical in the sense that even when jurisdiction marks legal authority over a matter or object, *it will always be defined by an area*.[141] Thus, "authority over all oil, wherever found" would not be a jurisdiction, but rather an authority of another kind. This is a problem to the extent that "legal authority is not always modeled on or secondary to territorial authority".[142]

Ford also argues that there is a discursive opposition between organic/authentic communities and synthetic/convenient techniques that underlies jurisdictional practice.[143] Organic jurisdictions are those communities resulting from the natural outgrowth of circumstances, conditions and principles that pre-exist the state. Such representations range from the local town government to the "peoples"

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[135] Ford, *supra* note 131.
[136] *Ibid* at 844.
[137] Cormack, *supra* note 1.
[138] Ford, *supra* note 131.
[139] Cormack, *supra* note 1.
[140] Mariana Valverde, "Analyzing the governance of security: Jurisdiction and scale" (2008) 1 Behemoth 3; Cormack, *supra* note 1.
[141] Cormack, *supra* note 1.
[142] *Ibid*.
[143] Ford, *supra* note 131.

that make up the nation-state. In this conception, there is an inviolable link between the group and the territory it occupies and "non-jurisdictional means" of granting the group authority will not suffice.[144]

> Organic jurisdictions appear as matters of right and are defended against attack in terms of autonomy, self-determination and cultural preservation. ... Liberal societies cherish the principle that social groups should be allowed to exist and flourish, free of governmental interference. The conclusion seems inevitable: the jurisdictions that "house" and protect such social groups are natural and must be respected and preserved.[145]

Synthetic jurisdictions, on the other hand, are created by an institution in order to serve its purposes.[146] They are imposed on people, usually for the sake of administrative convenience, in order to collect taxes or gather statistics or weigh and tabulate votes. They are represented as a territorial container of individuals.

> There is no independent reason for their existence; hence no one speaks of rights when and if they are altered or eliminated. Nor can one object to them on the basis of rights. One may have a rights-based claim against the governmental institution that created or altered the jurisdiction, but such a claim would take the form of an attack on the policy or procedure by which subdivisions are created, not an attack on the existence or shape of a particular jurisdiction qua jurisdiction.[147]

For Ford, this opposition is important because it underlies presumptions that we should tolerate inequalities arising from organic jurisdictions while synthetic jurisdictions are neutral and thus not implicated in social divisions.

There is a tension here. It is difficult to align this distinction between organic and synthetic communities with the notion that territorial jurisdiction is about governmental legal power. Organic/authentic communities are not, in Ford's lexicon at least, jurisdictions. Jurisdictions are necessarily synthetic; it is inherent in the nature of the word "jurisdiction" that law and government

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[144] *Ibid* at 860. I dispute that such allocations are properly described as non-jurisdictional: although not linked to territory in a formal way, they are nonetheless extensions of the state's legal authority (e.g. religious tribunals). See: Ayelet Shachar, "The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority" (2000) 35 Harvard Civil Rights - Civil Liberties Law Review 387.
[145] Ford, *supra* note 131.
[146] *Ibid*. Ford himself admits this opposition is blurred when he points to electoral districts as embodying the notion that geography is a proxy for interest — there is no obvious reason why the salient interests for voting purposes would be arranged territorially.
[147] *Ibid*.

be involved. Ford's article never gets to the root of what is going on with group difference in law — through the lens of jurisdiction — because it fails to acknowledge that organic communities are not imbued with the power of law or government. Of course, there are so-called organic jurisdictions that law has claimed as its own, that are part of the governing apparatus, such as local governments and the nation-state, but this is not how he intends the term (see below). Moreover, organic jurisdictions stand at odds with the proposition that jurisdictions define the identities of the people inside them.

Ultimately, due in part to Ford's focus on territorial jurisdiction and government to the exclusion of generic-conceptual jurisdiction and law, he focuses on the relationships between national and sub-national territories, both of which are defined by jurisdiction. For him, jurisdiction generally, and the national project in particular, produce and erase local difference in equal measure. In his estimation, jurisdiction does its most important work by producing difference — by dividing society into distinctive local units that are imposed on groups and individuals. It is the discourse of organic jurisdiction that encourages minorities to seek out territorial autonomy. But, for Ford, this is a false promise since autonomy is not constitutionally protected.

Ford makes some sweeping claims. This dissertation argues against the notion that jurisdictions produce identities, at least some of the time, to suggest instead that sometimes identities produce, or try to produce, jurisdictions, or at least to trouble their boundaries. This is, after all, the theoretical characterization of the "nation" part of the nation-state, the basis of most claims of self-determination and autonomy, and the project of liberal nationalist philosophers. The relationship between identities and jurisdictions is complex, and rendered more so by the fact that jurisdiction partially generates the phenomena it claims only to govern, but it is nonetheless possible to sustain the argument that identities sometimes seek jurisdiction and that jurisdiction sometimes produces identities. This dissertation also takes issue with the suggestion that group autonomy is a false promise, one that always implicates hegemony and is incapable of bestowing real power or authority. Indeed, it is a *premise* of jurisdictional analysis that legal authority and power is disaggregated and parcelled out. This does not mean, as Ford rightly points out, that there is no hegemony (the state is clearly the axis upon which the legal world turns) or that territorial autonomy amounts to freedom, but rather that the discourses and practices of jurisdiction may contain emancipatory potential.

Law's Territory makes an enormous substantive contribution to the vernacular of jurisdictional theory and, perhaps most importantly, draws out the social implications of thinking jurisdictionally for identities, for communities, and for politics. There are two key aspects of Ford's analysis that inform this dissertation. First, inquiries into territorial jurisdiction turn the lens to the boundaries and definition of political community. This entails a focus on territory, boundaries, and exclusion, and thus helpfully provides a lens through which to examine group difference. Second, the organic/synthetic opposition usefully describes two conceptions of jurisdiction that are at play in this project and in the liberal-democratic state more generally. It is organic jurisdictions — identity groups — that manifest the type of difference this dissertation is concerned to analyze. Yet it is synthetic jurisdictions — electoral districts and provinces — that are commonly understood as territorial jurisdictions. While this opposition does not map neatly onto the Canadian state, which is the focus of Chapter 3, it nonetheless provides a useful heuristic for honing in on how law parcels out authority in particular ways.

2.5.1.1 The First Conception: Jurisdiction as Territory

Richard Thompson Ford's historical account of territorial jurisdiction in *Law's Territory* builds upon a more basic concept of jurisdiction as territorial. This is the first conception of jurisdiction in the scholarship, in the dual sense of being first in time and being foundational to other representations of jurisdiction. The key here is to examine territorial jurisdiction for clues about how the state parcels out jurisdiction, how the law is distributed through space and territory. In this section, I analyze jurisdiction as territory in broad conceptual terms and explain its crucial place in the landscapes of law. Jurisdiction as territory is the first conceptual modality. The contours of this first conception are broad:

> Pop quiz: New York City. The United Kingdom. The East Bay Area Municipal Utilities District. Kwazulu, South Africa. The Cathedral of Notre Dame. The State of California. Vatican City. Switzerland. The American Embassy in the U.S.S.R. What do the foregoing items have in common? Answer: they are, or were, all territorial jurisdictions.[148]

Territorial jurisdiction is both an orienting pole and a source of confusion for jurisdictional thought. It is an orienting pole because it is the foundation of modern understandings of the term, and because

[148] *Ibid*.

territorial jurisdictions structure the landscape of jurisdictional possibilities. It is a source of confusion because, first, "[t]erritorial jurisdiction ... is simultaneously a material technology, a built environment, and a discursive intervention"[149], and second, it can be difficult to reconcile instances of territorial jurisdiction with other theoretical references to jurisdiction. Jurisdiction is not only or always territorial.[150] However, territorial jurisdiction remains the most familiar and predominant form of jurisdiction. The juridical administration of authority is primarily territorial. For this reason, it is helpful to more closely examine the territorial foundations of jurisdiction and to posit the various ways that they play out in this project.

The ubiquitous starting point for territorial jurisdiction is sovereignty. Jurisdiction is a doctrine that emerged in the seventeenth century and came into its own in the nineteenth century. F.A. Mann's survey of this history reveals the unifying framework of "sovereignty and its territorial character".[151] He writes:

> International jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention — the difference is merely terminological): laws extend so far as, but no further than, the sovereignty of the State which puts them into force.... .[152]

According to the territorial theory of jurisdiction, each state enjoys plenary jurisdiction within and exclusive control over its territory. A state's plenary jurisdiction over its territory and every person or thing within it is a function of state sovereignty. The connection between sovereignty and jurisdiction is obvious, inevitable and "almost platitudinous"; to the extent of its sovereignty a state necessarily has jurisdiction.[153] Inside the state, there is a finer meaning to territorial jurisdiction, one which helps to sort out the work that the concept performs and provides a resting place for analysis. Intrinsic to the concept of jurisdiction is the general notion of venue or place — the location, the state, or the district where jurisdiction is said to exist. In *R. v. Lipohar,* the High Court of Australia noted that the term "jurisdiction" may be used to locate a particular territorial or "law area" or "law district".[154]

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[149] *Ibid*.
[150] See: Valverde, *supra* note 99; McVeigh, *supra* note 2; Cormack, *supra* note 1.
[151] Mann, *supra* note 6.
[152] FA Mann, "The Doctrine of Jurisdiction in International Law Revisited After 20 Years" in *Further Studies in International Law* (Oxford: Clarendon Press, 1990).
[153] Mann, *supra* note 6.
[154] Lipohar, *supra* note 8.

Jurisdiction, then, is given form through its location in space.[155] Here, territorial jurisdiction broadly refers to spaces imbued with the authority of law, and this is the most common modality through which persons or groups exercise the power to speak the law.

The territorial conception of jurisdiction matters for jurisdiction more generally. In the first place, the Westphalian state originally parcelled out jurisdiction along territorial lines. This is the unspoken *status quo*: territorial jurisdiction has mostly been parcelled out already. This claim relies on the overlap between territory and jurisdiction. It is *territory* that has been parcelled out; jurisdiction is theoretically infinite.[156] When combined as territorial jurisdiction, in the form of the nation-state or the province or the municipality, there is solidity and traction that makes jurisdictional allocations both difficult to repeal and significant for other jurisdictions. In Canada, there are many existing jurisdictional scales and spaces that inform and constrain legal analysis. Indeed, a constant in the background of this project is the presence of extant jurisdictions — provinces, school districts, and municipalities — that frame and constrain ongoing inquiries.

I call these constitutive jurisdictions because they inform the constitution of contested and future claims to jurisdiction. These are predominantly territorial jurisdictions and they define the landscape. This is particularly the case in federal states such as Canada, where jurisdictional powers often map onto territorial divides. For example, section 92 of Canada's *Constitution Act* maps provincial powers onto the territory of the province.[157] Moreover, as Chapter 3 will demonstrate, jurisdictional powers also map onto certain other kinds of groups located in territorial space such as French-speaking parents in an English-speaking community. That said, territorial jurisdictions are not simply contiguous silos. They overlap and conflict. Canada is a single jurisdiction for the purpose of federal laws but is made up of several sub-national provincial jurisdictions for the purpose of provincial laws. These are the same spaces, the same territories, repurposed and sorted differently.

In the second place, it turns out that territorial jurisdiction only gets us so far. Territorial jurisdiction reveals the often historical values of the law, the embedded types of jurisdiction in existing communities (synthetic/organic), and the types of groups and spaces that are granted some of law's authority. Yet, despite the focus of this dissertation on territorially manifested group difference and

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[155] McVeigh, *supra* note 2.
[156] I am grateful to Catherine Dauvergne for helping me clarify this point.
[157] *Constitution Act, 1982,* being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

its treatment by law, it is not possible to rely only on territorial jurisdiction. This is why Ford's example of territorial jurisdictions is provocative but does not seem to cover the field. It is clear that jurisdiction is more than territory; it is also concerned with the reach of a court's writ, the extraterritorial capacity of the state, and the subject-matter of court cases. Territorialized groups may come under law's jurisdiction in non-territorial ways. This is what Cormack describes as 'generic-conceptual jurisdiction'; it is the other to territorial jurisdiction.[158]

Having incorporated these insights, this dissertation works with two conceptions of territorial jurisdiction. First, territorial jurisdiction is already-existing political jurisdiction. These are geographical areas imbued with the authority to use or exercise the levers of law. These political jurisdictions are generally contained in constitutions and statutes; they draw electoral boundaries, set up the division of powers, and organize the structure of federalism. They, too, are made and remade by legal claims and decisions but they are part of the original governance apparatus of the state. Political jurisdiction is how the polis decided to parcel out authority; it shows the legal grounding of the polity and the political grounding of law. Second, territorial jurisdiction is jurisdictional acts or decisions with territorial effects. These are legal acts of jurisdiction. They are jurisdictional cases which bear upon the making and remaking of law's authority in the territorial frame.

This distinction comes from tracing jurisdiction back to the beginning. The inaugural gestures of jurisdiction reside in the linking of the political and the juridical. As Douzinas reminds us, the political attaches to law as the precondition for law coming into being. There are, therefore, both *general* law-*making* acts and *particular* acts of law's *application*.[159] It is easy to locate the general law in the constitution and statutes that lay down territorial jurisdiction and the division of powers. It is harder to analyze the work of jurisdiction in the particular acts of law's application. This is particularly true when those acts do not follow the neat lines of jurisdictional doctrine (*i.e.* when they are not questions about the division of powers). Territorial jurisdiction as political jurisdiction originates in general law-making acts such as the constitution and legislation but it is enacted through particular acts of law's application. This dissertation pays attention to both kinds of acts.

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[158] Cormack, *supra* note 1.
[159] Douzinas, *supra* note 11.

2.5.2 The Political Theory behind Jurisdiction

A second theoretical approach to jurisdiction looks behind technical jurisdictional doctrine to find the political theory lurking there. This method argues that legal doctrines and collections of technicalities reflect larger philosophical assumptions and values. The project is to extrapolate the political commitments and philosophical theories that animate and guide technical jurisdictional decisions. Lea Brilmayer began this project in the context of conflicts of law and extraterritoriality — two fields that have suffered from crises of opaqueness in technical doctrine in the United States in particular — and Paul Schiff Berman then picked up the project from a slightly different vantage point in the conflicts of law field.[160]

Brilmayer was concerned with the proper reach of domestic authority across state borders in interstate and international law.[161] Her insight is that the answer to *whether* the state exercises jurisdiction tells us the circumstances in which the state may exercise coercive authority and works us backwards to *why.* By asking *why,* we see what sorts of connections with a state are required for an assertion of state power and the facts responsible for the legitimacy of state power are laid bare.[162] Somewhat unexpectedly, then, Brilmayer's analysis connects to Valverde, who suggested that jurisdiction often determines the "what", "how", and "why" by answering the "where" and "who".

Brilmayer begins by asking the philosophical question "why is state power legitimate", arguing that the resulting set of reasons tells us the conditions necessary for the state to exercise its authority.[163]

> This allows us to start with our answers to the question of "whether" and work backwards to the "why." By examining some common intuitions about which factors seem to give a state a right to assert its authority, we can identify which elements of a fact pattern seem to be responsible for the legitimacy of state power.[164]

Each exercise of jurisdiction may be read for whether the state will reach *there.* This reading reveals the philosophical visions and commitments in the wings. Brilmayer advances two explanations for state authority in the international setting: community membership, which manifests as the

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[160] On opaqueness, see Annalise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities" (2005) 53 Buff L Rev 973; Lea Brilmayer, "Liberalism, Community, and State Borders" (1991) 41 Duke LJ 1; Paul Schiff Berman, "The Globalization of Jurisdiction" (2002) 151 U Pa L Rev 311.
[161] Brilmayer, *supra* note 160.
[162] *Ibid*.
[163] *Ibid*.
[164] *Ibid* at 2.

connection between the state and the individual (the citizenship, domicile, or residence criteria); and territorial impact, which manifests as the consequences of the acts in question. In turn, these two trigger factors are refracted through the theoretical duality of liberalism and communitarianism. It is difficult to say whether these two jurisdictional markers follow the theoretical implications of the individual and group in political philosophy. Regardless, while Brilmayer's investigation reveals what lies behind technical doctrine, it does not tackle theoretical jurisdiction as a category.

Paul Schiff Berman expanded the inquiry, examining conflicts of laws doctrine for the social core of its adjudication, while simultaneously arguing that there is no centre of gravity there. He explores the social meaning of jurisdiction, finding the notion of community membership at its base: "legal jurisdiction is both a symbolic assertion of community dominion and a way of demarcating community boundaries".[165] Jurisdictional doctrine is rooted in judgments about whether the individual, matter, or event *belongs to* the community at issue.

Berman's *cosmopolitan pluralist conception* of jurisdiction reconceives the locus of jurisdiction. For Berman, the community of the nation-state is arbitrary and ambiguous; it is neither the most logical nor the most practiced form of community in a globalized, transnational world. The concept of jurisdiction should be "the locus for debates about community definition, sovereignty, and legitimacy".[166] This is also Cover's vision for a "natural law of jurisdiction" that reclaims the redemptionist vision of resistance and frees jurisdiction from its "apologetic and statist orientation".[167] This is an enormously valuable insight — to conceive of jurisdiction decisions as implicating community memberships and boundaries — and Berman takes the reader through vast bodies of scholarship about the historical and social construction of space, communities, and borders. His project is, at bottom, not so different from Ford's: it is focused on the territory of the nation-state and it offers a peek behind jurisdiction to its ideology and its loyalties. Ultimately, however, Berman offers an indictment of the territorial nation-state as the central measure of community more than a survey of jurisdiction *writ large*. His is a plea to adjust the metric at the centre of interstate jurisdictional doctrine.

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[165] Berman, *supra* note 160.
[166] *Ibid*.
[167] Cover, *supra* note 71.

In his focus on the traditional conceptions of territory that upholster the nation-state and on jurisdiction as the embodiment of community, Berman's project is close to notions of jurisdictional scale and group difference.[168] But there is a problem with his notion of multiple communities and affiliations. Berman fails to see the implications of his alternative communities — whether sub-national, supranational, or transnational — as jurisdictions in the most basic sense of the term. Although he is arguing that these other communities *should* be conceptions of community undergirding jurisdictional decisions, he does not see that they have been sorted and scaled by jurisdiction and that they are, in most cases, *already* territorial jurisdictions. This complicates his vision in that they, too, are constructed and informed by legal jurisdiction and that they are in some sense nested rather than competing. So it is not that a person belongs to the town community *or* the national citizenry; it is rather that the town is conceived as part of the national. Although the literature on scale helps to illustrate this insight, it also warns against fixing this nested conception, which is invested with hierarchy. The town is also more than and different from a sub-national unit, simply conceived. This means that any jurisdictional map must consider both interrelationships between communities and jurisdictions and the workings of jurisdiction vertically as well as horizontally, overlapping and leaving gaps all along the way.

Berman's model returns us to the political theory models of democratic deliberation and public dialogue that advocate tossing jurisdictional claims and assertions into the ring.[169] In his discussion of how non-state jurisdictional claims might be incorporated into 'official law', Berman acknowledges that judgments must be enforced, both literally and figuratively, by some entity with coercive police powers. Thus, the question becomes not whether a community can assert jurisdiction, but whether other communities are willing to give deference to the judgment rendered and enforce it as if it were their own.[170]

This identifies the problem but it does not reach the deep implications of it. Berman is right to point out that jurisdictional assertions might develop and shape norms over time. The problem with jurisdictional pluralism, one which Berman tries to resolve by distinguishing between jurisdictional

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[168] I am not suggesting that Ford would disagree with Berman; only that his piece did not reach this far.
[169] See, *e.g.*, Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, 2nd ed (Basingstoke: Palgrave Macmillan, 2006); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002).
[170] Berman, *supra* note 160.

claims and enforcement, is that it fails to fully acknowledge the nature of jurisdiction. Jurisdiction necessarily implicates the state and, by extension, its sovereignty. There is no jurisdiction that is not state granted, approved, or tolerated. So it is not a model whereby communities make claims on the rhetorical sites of jurisdictional terrain and then see what shakes out. This might work out in a non-jurisdictional context, one in which law is not marking its metaphorical territory. But in cases where jurisdiction is at issue, the state is like a magnetic field that pulls on other communities and repels other states.

The lessons of Brilmayer and Berman are those of the legal technicalities scholarship, which reminds us to look for the politics and the social *inside* the law; in its attachments and disavowals, in its gaps and its gap-filling rules.[171] These efforts mark a simultaneously traditional and innovative approach to jurisdiction. The method of looking behind the law for first principles to unite the field or explain disparate threads of doctrine is practically as old as law itself. Yet the notion that jurisdiction might hold implicit reference points from which to derive values, ideologies, and gaps is a different project, one which implicates theories of citizenship and the liberal democratic nation-state. Their congruent conclusion is that jurisdictional decisions ultimately tell about the members and boundaries of community and it is a theoretical point that this dissertation relies upon. It is important nonetheless to clarify that this project is not theirs. Brilmayer and Berman do not speak to the governance function of jurisdiction — to the power configurations and distributions of authority that it establishes and maintains.[172] This project does not start from doctrine and derive theory; it looks at jurisdictional attachment and techniques — practices — to see what they tell us about law and groups, and it turns out that jurisdictional theory and practice is not nearly so agile or capacious as these political theorists might have hoped.

2.5.2.1 The Second Conception: Jurisdiction as Inclusion/Exclusion

Brilmayer and Berman both build upon the territorial aspect of jurisdiction to focus on how it is adjudicated and the implications of that adjudication for community membership. This is the second conception of jurisdiction in the scholarship. Jurisdiction is often seen in terms of boundaries, with reference to its limits. In this section, I analyze jurisdiction as inclusion/exclusion in broad

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[171] On legal technicalities, see: Riles, *supra* note 93 and *supra* note 160. On gaps and deriving gap-filling rules, see: Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harvard L Rev 1685.
[172] To be fair, Berman does point to the power configuration of the nation-state that jurisdictional doctrine sustains.

conceptual terms and the relationship between setting limits and constituting community. Jurisdiction as inclusion/exclusion is the second conceptual modality.

Part of theorizing jurisdiction requires theorizing its limits.[173] The identification of the state with a territorially enclosed nation has infused jurisdictional discourse with metaphors of space, inclusion, and exclusion.[174]

> The state is thus depicted as a realm to which one belongs or from which one is banned, whose interests one serves or one injures, and whose sovereignty should be respected but is persistently at risk.[175]

Jurisdiction is perhaps the foundational concept for operationalizing sovereignty's exclusions. If there is a distinction between sovereignty — the legal personhood of the nation — and jurisdiction — the rights and powers of the nation over its inhabitants — then jurisdiction embodies the nation-state's power to exclude.[176] Precisely what this means for the fate of group difference in each frame will be examined in individual chapters, but the larger point is that questions of jurisdiction involve determining the boundaries of law.

Jurisdiction is often seen in terms of boundaries, with reference to its limits. Jurisdiction can also be understood in terms of the area within the boundaries or even the subject matter of an institution.[177] Jurisdictional boundaries include those between nation states, between areas of law, and between levels of government.[178] Annalise Riles describes how the state is not just the expression of a set of political norms, or an institutionalized set of communities or economic interests. It is also a set of knowledge practices engaged in by state actors: of making distinctions, drawing lines, and setting limits. *These practices have long been defining acts of statehood*. This is what the mechanics of

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[173] Nan Seuffert, "Jurisdiction and nation-building: tall tales in nineteenth-century Aotearoa/New Zealand" in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 102.
[174] Note, "Constructing the State Extraterritorially: Jurisdictional Discourse, The National Interest, and Transnational Norms" (1990) 103 Harvard L Rev 1273.
[175] *Ibid*.
[176] *Heller v United States*, 776 F2d 92 (3d Circ. 1985).
[177] Brigham, *supra* note 4.
[178] Judy Fudge, "Global Care Chains, Employment Agencies and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) 23 CJWL 235.

jurisdiction mean: they are scripts or routines for cutting off, categorizing and compartmentalizing, and hence channeling politics.[179]

In delimiting the scope of legal authority, jurisdiction includes and excludes, permits and disallows, and thereby draws boundaries around all manner of entities. In so doing, jurisdictional rules tell us how we define the limits of our community and who should be within its dominion. Jurisdictional rules are not only about allocating governing authority, but are also part of the way societies demarcate space, delineate communities, and draw physical and symbolic boundaries. Thus, choice of jurisdiction rules often reflect the attitude of community members toward their geography, their physical space, and their own community definition.[180]

For Berman, this is the *social* meaning of jurisdiction.[181] The assertion of jurisdiction is a *meaning-producing cultural product* that informs the social construction of place and community. It has shifted from its original territorial conception to a test based on contacts with a sovereign entity to, according to Berman, concepts of community definition. He means that jurisdictional decisions and doctrine are actually adjudicating membership in the relevant community through tests such as "real and substantial connection". Jurisdiction is a symbolic extension of a form of community membership; it constructs a narrative whereby the outsider is somehow a member of that community and subject to its norms. This explains why jurisdiction is always fundamentally about inclusion and exclusion — about who or what or where is in, and who or what or where is out — but also why that can be difficult to articulate.

The exclusionary aspect of jurisdiction is perhaps the underlying reason why studying jurisdiction matters. The attachment of law to a person, place, thing, or event imbues it with the authority of law, with its institutions, its procedures, and most importantly, its powers. To be outside of the jurisdiction of a state, sub-state entity, institution, or court is to be without the power of law. This is not to say that attachment to the law is always or even mostly empowering or normatively positive for the

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[179] It is worth distinguishing this project from the work of Annelise Riles on legal technicalities. Although this inquiry is indebted to her path-breaking scholarship, it does not take up the call to legal technicalities. Jurisdiction is undoubtedly a legal technicality, and, when wearing its doctrinal garb, it is resolutely technical. But it may also be intensely theoretical, well-within the purview of high-level jurists when it is conceived metaphysically or internationally, and because of its location alongside the concepts of sovereignty and territory, it can also be a clear embodiment of political principles and commitments. See: Riles, *supra* note 160.
[180] Berman, *supra* note 160.
[181] *Ibid*.

individual, group, place, thing, or event. But it is impossible to deny that jurisdiction can be a source of power. Jurisdiction excludes not only by placing outside of the law, but also by invoking law's exception, by locating within the law but permitting the law to ignore itself.[182]

The force of this exclusion is underlined by Douzinas, who suggests that it is in the instances when jurisdiction is itself called into question that "the original difference between creating and stating the law returns". It is the moment of law's inception, the original performative *dictio*, which both establishes the law and takes the form of exclusion.[183]

> This originary force is entombed in every legal act as a residue or excess, as the force which created law by cutting off an outside and mirroring itself as the proper or inside, as the normative power or will of community to live together, speaking its own law. [184]

So it is that jurisdictional inquiries — whether technical or theoretical — invoke the horizons of the original jurisdictional moment. There is a tension between inclusion and exclusion woven through jurisdiction itself and the discourse that enacts it. Each jurisdictional decision is also a decision to include within a given category of law.

2.5.3 The Practice of Jurisdiction as a Technology

The third and most recent theoretical approach to jurisdiction takes on the entire assemblage of jurisdiction. It examines jurisdiction as practices of governance. Shaun McVeigh has written the most recent and comprehensive overview of law's fraught relationship with jurisdiction. From the standpoint of legal theory, he describes three dimensions of jurisdiction — metaphysical, technological, and symbolic — in an effort to forge a theoretical vocabulary for analysis. McVeigh is concerned with the conceptual role that questions of jurisdiction play in legal thought and how they order and limit the political and legal domains of the modern nation-state. Valverde is equally concerned with jurisdiction as practices of governance and resources for analysis. However, her emphasis is on how jurisdiction plays out in terms of social organization and the distribution of authority.

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[182] Agamben, *supra* note 11.
[183] Douzinas, *supra* note 11.
[184] *Ibid*.

It is the second dimension of McVeigh's typology — jurisdiction as a technology — that matters here; it seeks to bring out the materiality of jurisdictional questions. At the centre of jurisdictional practices are "devices, techniques, and technologies that enable the law".[185] The premise of this inquiry is that *it is through jurisdiction that the law is asserted*. The work of categorizing people, places, events, and things is accomplished through jurisdiction, and this work evidences the attachments of law. As a technology, jurisdiction institutes a relation to a life, a place, or an event though processes of coding and marking. Indeed, Ford describes territorial jurisdiction as the 'foundational technology of political liberalism'. The task, then, is to track the devices, techniques, and technologies (not only territorial) that make up the practices that extend law. Such technologies include categorization, judgments, government, and administration. The focus on jurisdiction as a technology is distinct from technical jurisdictional doctrine, which neglects the character of jurisdiction as an instrument of law and loses the notion of law as something that forms and configures.

Valverde approaches jurisdiction from a slightly different vantage point. She is also interested in jurisdiction as a technology, but she conceives of jurisdiction as "the governance of legal governance". Valverde suggests that jurisdiction generates scaled legal orders within which other legal practices are enacted. But what, exactly, is legal governance or governance more generally? The law as governance approach derives primarily from scholars interested in Michel Foucault. It seeks to sidestep the 'dreary debate about sovereignty versus discipline' that pervades scholarship about Foucault and law.[186] Although this dissertation thinks against Foucault — it is primarily concerned with the state and the law of the sovereign, not with discipline, nor with the extremities of power — it is nonetheless necessary to pause over the term "governance". For Foucault, "to govern ... is to structure the possible field of action of others".[187] The sociology of law as governance approach put forward by Alan Hunt and Gary Wickham describes governance as "any attempt to control or manage any known object".[188]

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[185] Dorsett & McVeigh, *supra* note 10.
[186] Nikolas Rose & Mariana Valverde, "Governed by Law?" (1998) 7 Soc & Leg Stud 541.
[187] Michel Foucault, "The Subject and the Power" in Hubert L Dreyfus & Paul Rabinow, eds, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd ed (Chicago: University of Chicago Press, 1982).
[188] Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

According to these definitions, all operations of law are instances of governance. Law as governance is intended to identify "what law is doing specifically and how social ordering is achieved generally".[189] The law as governance approach is chiefly concerned with process.[190] It is an interrogation of law as a mode of regulation. It asks what "a certain limited set of legal knowledges and legal powers *do*, how they work, rather than what they are... ".[191] Valverde mines this conceptual dimension of jurisdiction. She extends jurisdiction beyond territory to "jurisdictional assemblages" in which jurisdiction organizes more than territories (where) and authorities (who) to reach objects (what) and logics and capacities (how). This sorting follows a chain reaction in which answers to where or who tend to determine answers to the other questions. The framework looks like this:

> Where: territories;
> Who: authorities (whether sovereign, delegated, or private);
> What: the objects of governance (e.g. potholes are municipal, aboriginal reserves are federal);
> How: which in turn has two dimensions:
> Governing capacities, and
> Rationalities of governance.[192]

The allocation of jurisdiction organizes legal governance by sorting and separating. Jurisdiction is everywhere and nowhere; legal disputes are in plain view but the sorting and ordering work of jurisdiction is unnoticed. Jurisdiction does the work of sorting government processes, knowledges, and powers, it keeps them from clashing, and it sets up a chain whereby who governs where ends up deciding how governance will happen. For Valverde, these processes are themselves incommensurable, or at least their logics are incommensurable, and jurisdiction keeps them from clashing by assigning them to different authorities. These are "interlegality's games of scale and jurisdiction".

> Jurisdictions are characterized by 'certain habits of seeing and governing', and these can be broken down as scope, logic, criteria for what is to be governed, and rules for how to govern.[193]

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[189] Walby, *supra* note 104.
[190] *Ibid*.
[191] Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton: Princeton University Press, 2003).
[192] Valverde, *supra* note 99.
[193] *Ibid*.

Each legal order, or scale, has its own discourses, legal resources, and rationalities of legal governance. What makes one scale more or less suited to a particular governance task is not simply its size but its qualitative dimension: the kinds of priorities it sets as certain objects, rather than others, become visible on its particular field of vision. Thus, there is enormous resistance to employing constitutional rights to challenge municipal regulations or to applying the international law of self-determination to Quebec secession.

Valverde offers an example from the 1930s in which the Supreme Court of Canada was asked to decide whether the 'Eskimo' (now the Inuit) were or were not 'Indians'.[194] If the Eskimo were Indians, the federal government was responsible to provide for them during famines; otherwise they would be the responsibility of the provincial welfare apparatus. The Supreme Court found that the Eskimos were indeed Indians and thus under federal jurisdiction. This example is revealing: Valverde is not interested in formal jurisdictional disputes. The emphasis is on the machinery of jurisdiction, not on its doctrines or principles: "what jurisdiction did here was to determine how a certain group would subsequently be governed" without ever asking that question. Valverde is talking about jurisdiction itself — "as distinct from the legal doctrines deployed by courts in adjudicating jurisdiction cases".[195] She explains:

> The process by which *jurisdiction itself* — rather than the specific, substantive legal doctrines deployed by courts in adjudicating jurisdiction cases — acts to perform an ethnomethodological miracle by which incommensurable processes, or processes with incommensurable logics, are kept from clashing by being assigned to different authorities.[196]

Yet, when Valverde turns to marshal this theoretical vision for future work, she advises the reader to focus on the work of appellate courts and the technicalities of law. This seems inconsistent: either the focus is on jurisdiction itself, separate from the "substantive legal doctrines deployed by courts" or it is on those doctrines. The problem is that it is difficult to use "jurisdiction itself" in legal terms; it is hard to go beyond sweeping statements about how jurisdiction constitutes the state of law and society.

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[194] *Reference re: British North America Act, 1867 (U.K.) ("Re Eskimos")*, [1939] SCR 104.
[195] Valverde, *supra* note 99.
[196] Valverde, *supra* note 99.

A closer look reveals that Valverde's notion that jurisdiction is the governance of legal governance is essentially a two-fold notion. First, jurisdiction focuses the inquiry on scope and content to the exclusion of questions about legitimate authority and thus governance. This is one way that law "takes its more troubling ontologies out of discursive circulation"[197], and references the original and ordering functions of jurisdiction as a governance technology. Second, jurisdiction is conceived as the preliminary decision that ushers in a field of law and governance. Thus, the question of whether the matter, the individual, or the place is governed by administrative or constitutional law, by international law or domestic law, effectively decides how legal governance looks. It is a kind of *pre-sorting* mechanism that sidesteps questions about the constitution and governance of society.

2.5.3.1 The Third Conception: Jurisdiction as Governance

Shaun McVeigh and Mariana Valverde both examine jurisdiction as practices of governance, albeit from different positions. This is the third conception of jurisdiction in the scholarship. It builds upon earlier understandings of territorial jurisdictions and community membership by placing them in conversation with social theory. It takes jurisdiction beyond its two most common attributes (territory and nationality) and into the realm of governance and thus the distribution of authority. In this section, I analyze jurisdiction as governance in broad conceptual terms and the role of jurisdictional effects. It is here the gap between theoretical and technical jurisdiction, between theory and doctrine, becomes pronounced. Jurisdiction as governance is the third conceptual modality.

The real work of jurisdiction — the sorting and sifting of difference, the subtle and granular preferences of law — is being done in cases where acts or decisions have jurisdictional results. Jurisdiction transcends the relationship between people and geographical place; it is more than territorial sovereignty, more than an attribute of political authority that links the monarch or the government to the territory within which law is exercised. It is also more than a demarcation of community, a telling of who is in and who is out. Jurisdiction is the power to speak the law and is apprehended in "the unfolding of law in pivotal acts of separation, isolation and delineation".[198] This section will endeavour to articulate two forms of these jurisdictional acts and relate them to technical jurisdictional doctrine.

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[197] Richland, *supra* note 12.
[198] Drakopoulou, *supra* note 3.

Jurisdiction is the *process* or the *practice* by which law asserts or withdraws its authority. This is what jurisdiction means in specific cases and circumstances: it is the process by which law seizes the boat, tries the individual in court, or permits the pipeline as belonging to its bailiwick. These practices are marked by arguments employing jurisdictional doctrine to establish a superior connection to the thing in question. Jurisdiction in this sense, then, is about connection and attachment. The *results* of this attachment are what governance is about: the results of jurisdictional assertions — who or what has authority under what circumstances — structure the field of possibilities for other actors.[199] This characterization highlights the potential disconnect between the jurisdictional act or decision and its jurisdictional consequences.

Valverde propels us part of the way there when she points out that the "what" or "who" often determines the "how". The focus on the "what" aspect of the inquiry — what type of group is this or what are its legal protections — may turn out to be determinative. However, this insight does not help us to extract jurisdiction when it is not obviously there, to theorize jurisdiction *itself*. Jurisdictional theory and doctrine is generally silent on the 'what' — it is only the 'where' and the 'who' that get treated in jurisdictional work. The 'where' and the 'who', of course, parallel the doctrinal acceptance of territory and people as proxies for jurisdictional authority.

Scholarship about jurisdiction as a practice or technology tends to refer back to some sense of allocating authority but does not hone in on the specifics of that allocation. Moreover, jurisdictional theory and doctrine are *silent* on certain kinds of jurisdictional questions. Jurisdictional attachment does not always take place through technical doctrines or interpretations. It is possible to end up under a particular jurisdiction in a myriad of other ways, which have gone virtually unexamined and certainly un-theorized. This is the crux of the disconnect in jurisdictional discourse. In another context, Martii Koskenniemi has observed that, "beyond doctrine, there seems to exist no space for a specifically juristic discourse".[200] This bears repeating here because it highlights the lack of a vocabulary and even an apparatus for analyzing other modes of jurisdictionality, particularly those that recent scholarship has characterized as significant for governance.

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[199] I use 'structure' here to mean shape and constrain, not in the French structuralist theory sense of "determinative"; most actors have some measure of agency.
[200] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

Jurisdiction as governance — the sorting and categorizing it performs — underscores that the allocation of legal authority and its consequences is often only visible in the result. This begs the question of how to analyze an issue using a jurisdictional lens if the "what" or the "who" question does not involve technical doctrine. The first insight implicit in the jurisdiction as governance approach is to conceive of jurisdiction as a metaphorical space as much as a territorial one. It is in this sense that jurisdiction as practices of governance builds upon older theories about territorial jurisdiction. By emphasizing the sorting and categorizing features of jurisdiction, it recognizes jurisdiction as a type of metaphorical or abstract sphere: a space, a field, a type of competence, or a temporal realm. From the legal perspective, it is most often a legal field or sphere or body of law into which a person, act, object, or event may be sorted, and which carries real consequences for the governance of that person, act, object, or event. For example, a case might be governed by administrative law or by constitutional law; or a person might be governed by an informal tribunal or a state court.

The second insight to be gleaned from the jurisdiction as governance approach is that it can be difficult to see the work that jurisdiction does because sometimes the jurisdictional act is the *characterization*. Another way to comprehend this point is to observe that even where there is no explicit jurisdictional conflict or question, there may be jurisdictional *effects* or *consequences*. This tracks Valverde's use of the concept. For example, jurisdictional cases turn on how the bylaw is characterized — and this is nearly always the case — not whether it was technically permitted by the provincial act of delegated jurisdiction. This characterization is the jurisdictional act. Is secession a matter of international law? Is the practice religious? Is the group a "people"? This characterization is essentially a categorization which sorts between legal fields and scales with the result of locating the person, act, object, or event within a jurisdiction of some kind. Frequently, the nature of these questions is either/or: to use Valverde's earlier example of whether the Eskimos were Indians, the answer is that either they are Eskimos under provincial jurisdiction or they are Indians under federal jurisdiction. There is no opting-out of jurisdiction. The result does not depend on technical jurisdictional doctrine but it resolves who has legal authority over the Eskimo.

2.5.4 Mobilizing the Political Modalities of Jurisdiction

The preliminary observation to make about jurisdiction is that it is nearly impossible to think about it as a unified legal theory or even a unified set of legal rules because it resides in so many specialized

niches. The jurisdictional principles of international law are completely different from the constitutional doctrines for legislation. One speaks of territoriality, nationality, and passive personality, while the other speaks of pith and substance, inter-jurisdictional immunity, and federal paramountcy. What, then, do they have in common? What unites jurisdiction's many voices?

This dissertation both builds upon and reads against the accounts of jurisdiction provided by Ford, Brilmayer, Berman, Cormack, Valverde, McVeigh, and Blomley. These theorists have categorized and divided jurisdiction in a variety of ways, including: organic and synthetic; ideological and technical; metaphysical, technological, and semiotic; governance and technicalities; and territorial and generic-conceptual.[201] It is true that there are different axes of jurisdiction, but it is both useful and necessary to try to reconcile the typologies in some way. By putting jurisdiction *in theory* into conversation with jurisdiction *in law*, some of the different assumptions and registers are laid bare. This section compiles the work on jurisdiction and located its three conceptual cores. Once these three concepts of jurisdiction have been put into conversation, it becomes possible to see that their common referent is the political.

Let us take a step back. The three conceptual modalities of jurisdiction — territory, inclusion/exclusion, and governance — reveal a two-fold disconnect between the theoretical and technical approaches to jurisdiction. First, the existing body of scholarship describes jurisdiction in two different *registers*. The first register is abstract, while the second register is technical. Theorists generally posit some version of a distinction between disputes with jurisdictional elements or effects and formal jurisdictional disputes.[202] It is only in the latter that technical jurisdictional doctrines are deployed, yet it is the former that have piqued recent scholarly interest. Theory and technical doctrine are obviously related and efforts can be made to bolster technical doctrine with theory[203], but it is impossible to neatly align them. This is particularly true in reverse: it is very difficult to bolster theory with technical doctrine, especially since technical jurisdiction doctrine is fanned out across disciplinary as well as national fields. Second, the *type* or *form* of jurisdiction invoked matters for how it is conceptualized and deployed. Theorists tend to conflate the three concepts of jurisdiction: the spatial or territorial dimension (parcelling out of state authority), the community dimension

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[201] Ford, *supra* note 131; Cormack, *supra* note 1; McVeigh, *supra* note 2; Valverde, *supra* note 99.
[202] Valverde, *supra* note 99; Blomley, *supra* note 29.
[203] See, *e.g.*, Brilmayer, *supra* note 160; Lea Brilmayer, "Jurisdiction Due Process and Political Theory" (1987) 39 U Fla L Rev 293; Berman, *supra* note 160.

(resolving interstate disputes), and the governance dimension (theorizing power configurations). There are commonalities between these dimensions, but they involve different theories of the good, as well as different legal texts. By understanding which vision is at stake in jurisdictional decision-making, the jurisdictional aspect is rendered more clearly.

The three conceptions of jurisdiction illuminate the visions at stake but they also obscure the common political aspect of jurisdiction. Although they invoke on their very terms the political choices of inclusion, *polis*, and rule, they also make these choices appear both extra-legal and post-political by locating them in the purview of jurisdiction. They make decisions about the borders of the territory, the constitution of the community, and the terms of its rule appear as already decided and the body politic as already constituted. In fact, territorial borders, membership, and the terms of rule originate in the founding moment and are carried forward by *both* sovereign and jurisdictional manoeuvres: the one in its overt political capacity and the other in its covert political competence.

2.6 Thinking Jurisdictionally

One shortcoming of all of the work on jurisdiction to date is that it does not take us back *far enough*. It is in the founding moment that the political is so obvious. And it is from there that it is possible to explore what jurisdiction comes to mean when it is no longer floating freely among administrative units, empires and disaggregated authorities, but instead closely bound to sovereignty and territory. The challenge is to take this theoretical work on jurisdiction – its political aspect, its various emphases, its scalar performances – and to add rigour and specificity to the jurisdictional method. Jurisdiction is not analytically useful if the extent of its meaning lies in whether law attaches or not. The formulation of jurisdiction as the threshold of law can be *theoretically* fruitful, but it does not add much to legal *analysis* (or perhaps it would be more accurate to say that it adds too much — in such a formulation, jurisdiction points in all directions).

The political aspect of jurisdiction provides some analytical focus: there is always a referent to the people and its corollaries of sovereignty and territory somewhere in jurisdiction. This is similar to Berman-Schiff's point about technical jurisdictional decisions but it adds the dual insights of origins that redouble in each jurisdictional moment and attention to the political commitments of the legal order. The remainder of the analytical focus comes from attention to jurisdictional technologies. By examining the legal frameworks of political commitments, the criteria that law uses to sort, and the

results of that sorting, we can hone in on jurisdiction's relational aspect. Attention to the relation between law and the group in various settings reveals the work of categorization, which necessarily implicates jurisdiction and its techniques. The techniques of jurisdiction embody the values and commitments of law.

The precise contours of jurisdiction as a concept matter here and help to put into jurisdictional language the disarticulations that have been uncovered thus far. Jurisdiction is a valuable lens because it illuminates the *legal threshold* — the limits and bounds of law. Jurisdiction expresses the orders and limits of law. For Cormack, it is at the jurisdictional threshold where law speaks to itself.[204] This means that jurisdictional inquiries tell us how law contends with its own boundaries and limits, about what law is willing to let in and what it keeps out, and about how legal categories are guarded. As Cormack writes:

> The secret history of jurisdiction is that jurisdictional authority is produced as an ongoing, serial, ad hoc encounter with its own limits, and therefore depends on the virtual projection of its alternatives.[205]

This is what all jurisdiction has in common, and it has two aspects. First, jurisdiction is state power, contextualized and delimited. Jurisdiction's implication of state authority co-exists with its limits. Cormack describes it as "power produced under the administrative recognition of the geographical or conceptual limits that exactly order it as authority".[206] In other words, it is only by seeing its boundaries that jurisdiction knows its limits. This is the essential core of what separates jurisdiction from the mere invocation of power or authority. Second, because it is inherent in this notion of jurisdictional ordering that it projects the alternative, analyzing jurisdiction lays bare the finite world of legal categories. It reveals the scope of each legal field and scale, to the extent that the mobilization and acceptance of those categories tells us about their reach at that particular moment in time. Moreover, jurisdiction solidifies itself as a kind of metalegality in that it mirrors the exercise of categorization that is legal analysis: is this act tortious or contractual; is this a matter of trade or health; is this group international or sub-national?

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[204] Cormack, *supra* note 1.
[205] *Ibid*.
[206] *Ibid*.

2.6.1 On Categories, Technologies, and Territories

Before turning to the task of translating the three theoretical conceptions of jurisdiction into a methodological framework, it is necessary to consider the work of categories and technologies in jurisdictional thinking. This makes the concept of jurisdiction more robust and lays the foundation for marshalling a method. Jurisdiction is closely bound to, even intertwined with, legal categorization. Jurisdiction is actualized, as it were, and rendered authoritative through categories. This rendering becomes visible in the following chapters when jurisdictional manoeuvres are traced through scalar legal orders. It matters tremendously, for example, whether the group is categorized as a national minority or a religious minority and whether constitutional law or administrative law adjudicates its claim. In this section, I explain how jurisdiction is embodied in the work of legal categorization and how paying attention to how jurisdiction is actualized — considering its technologies — illuminates some aspects of the categorization act.

Categorization is part and parcel of the entirety of human thinking.[207] Fittingly, perhaps, there are numerous ways to categorize categories. The classic division is between Aristotelian classification and prototype classification.[208] The Aristotelian classification employs binary characteristics, which the object being classified either presents or does not present. Prototype theory understands classifications as fuzzier than the Aristotelian conception of binaries. Instead, objects are classified according to graded internal representations which are extended by metaphor and analogy when categorizing. This division is useful to frame law's formal and metaphorical modes of categorization. As I will explain in more detail below, some legal categories depend on sharp inside or outside distinctions (this is particularly true of some constitutional categories) while others rely on more prototypical modes where there are degrees of fit in a category.

Social institutions, including the law, have their own ways of dividing up and categorizing the world. Frederick Schauer explains:

> Law carves up the world. In a universe of almost infinite particulars, the law with its categories groups together particulars that are in important respects different, and separates particulars that are in important ways similar.[209]

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[207] Frederick Schauer, "Institutions as Legal and Constitutional Categories" (2007) 54 UCLA L Rev 1747.
[208] John Taylor, *Linguistic Categorization: Prototypes in Linguistic Theory*, 2d ed (New York: Oxford University Press, 1995).
[209] Schauer, *supra* note 207.

Legal categorization is the paradigmatic form of legal reasoning.[210] Lawyers examine facts to discern which categories they fall into and they do this through reasoning by principle, analogy, policy, or by other means. Categories, however, have a special prominence in legal reasoning "because effective reasoning by example requires the creation and use of categories through which the lessons of the past can be channeled into service as precedent for the problems of the future".[211] Law sometimes uses categories of its own creation and at other times relies upon the categories of the pre-legal and extra-legal world.[212]

Jurisdiction is an inquiry into whether the law, in any of its guises, reaches the person, place, or event at all. If law as an institutional category attaches to the thing, then the inquiry shifts to which category of law is applicable. The category of law question may be an issue of whose law applies or it may be a matter of which field of law applies. This prefigures the jurisdictional method, which is explained in the next section. For now, it is enough to approach jurisdiction as the concept that polices the boundaries and content of legal categories. The study of jurisdiction is the study of how law sorts and attaches to categories. This is not a study of categories in their entirety, but rather attention to the limits to legal categories and their terms of inclusion and exclusion. The point is to "read the categories" and this is the task of the subsequent chapters.[213]

Indeed, one of the concepts animating this dissertation — the enclave — is distinguished by the fact that it does not serve as a legal category. As subsequent chapters make out, the fact that the enclave does not serve as a legal category on its own terms underlies some of the significant conclusions of this thesis. This is because it hones in, by its very absence, on the power and content of legal categories. This permits the conclusion that some of the anxiety surrounding the enclave has to do with its unclear relationship with law and the sense of ungovernability that uncertainty conveys. Moreover, the method of reading the categories proves profoundly disruptive of legal categorization and reveals various incommensurate meanings of territory in each scalar legal order. In short, it is the

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[210] Leora Bilsky, "Naming and re-categorization in the law: child abuse as slavery" (1997) 5 Int'l J Child Rts 147.
[211] Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts" (1981) 34 Vanderbilt L Rev 265.
[212] Mary Jane Morrison, "Excursions into the Nature of Legal Language" (1989) 37 Clev St L Rev 271.
[213] Geoffrey C Bowker & Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge: MIT Press, 1999).

fact of the enclave as a non-legal category which underscores the significance of categorization in law in general, and in jurisdiction, in particular.

It is necessary though to pause for a moment on the *nature* of legal categories. This chapter advances a conception of legal categories as exhibiting a certain amount of rigidity to the extent that they shape the matters, persons, and places that law may deal with and then configure the terms of that dealing. So, for example, it is trite to note that certain matters in the private sphere fall outside of law's purview and that those claims will not sound in law.[214] Moreover, for those matters that law does reach, it establishes both jurisdictional and non-jurisdictional terms for its engagement such as standing, justiciability, and damages, which specify the conditions of law's entry. However, this does not mean that legal categories are entirely fixed or determinative. Law itself is a process of contesting precedent, each case is an attempt to push the limits of a legal category in one direction or another, and so it is necessarily the case that legal categories are sites of negotiation. Jeremy Webber describes the precise contours of this interaction between constraining and enabling by reference to a linguistic analogy:

> [L]anguages shape what can be said — they make some things straightforward, other things very difficult to say — but they do not determine everything that is said.[215]

When he explains the evolution of the grammar of law through debates that occur using its concepts, he acknowledges that the conceptual structure of law contains normative dispositions:

> [I]t makes some things much more easily affirmed than others, and the very way in which it states issues tends to define a privileged class of solutions... . But like any language, it also has a measure of flexibility, so that alternative arguments can be presented.[216]

This dissertation suggests a conception of legal categories and their limits which emphasizes their framing function, but it does not intend to suggest that legal categories are unyielding. Nonetheless,

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[214] For example, discrimination is permissible in some private settings.
[215] Webber is describing the processes and levels of normative determination in customary legal orders. His larger point is that it is human cooperation occurs through the "grammar of customary law", which sets the foundational concepts. It is his use of "grammar" in the Wittgensteinian sense – as referring to the way in which "a language's structure and terms enable and constrain what a competent speaker can say intelligibly" which is most apt here. See: Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579.
[216] *Ibid*.

and particularly in the context of entrenched constitutional categories that embody the political and legal compromises of a particular moment in time, it is strikingly difficult for an extra-legal group to access some legal categories. This applies in the Canadian context whether it is a cultural group trying to access religious freedom rights or a non-founding religious group seeking equivalent denominational schooling protections. It is of course true that legal categories are sometimes independent of pre-legal and extra-legal categories and sometimes reliant upon them, and so there is a certain amount of pliancy built into them.[217] All I want to suggest here is that law functions according to categories and that the jurisdictional method is one way to pay attention to the limits of those categories. Legal categories are a bit like water: sometimes solid and hard, sometimes liquid and fluid, and other times boiling and bubbling into other categories. They might appear to be firm at the constitutional moment and then fluid again in the hands of the court; simultaneously inviolable and negotiable. Throughout this dissertation, I hew to a definition of categories that understands them as contestable and fluid, but also as key parts of the legal infrastructure that can be limiting. It is simultaneously true that categories can be graded and that groups which do not fit into the constitutional vernacular face an uphill battle in terms of attracting law's jurisdiction.

This dissertation moves through three different scalar legal orders, extrapolating and mapping the legal categories of group difference across them. The performance of this task renders insights about how different orders of law conceive of group difference and purport to govern it, but it also lays bare certain outliers and discontinuities. So, for example, minority groups are a large category in the international legal order. They are placed in opposition to self-determination, located inside existing states, and the holders and subjects of different legal rights. Yet this category comes apart a bit as the legal orders come in closer, fragmenting into national minorities and ethnic groups in the national frame – neither of which category properly captures religious groups, although both loosely incorporate religion.[218] This occurs for various reasons, prominent among them the incapacity of the international legal order to reconcile immigration and the movement of people. The inside/outside dichotomy frames legal categories in the international order. In the national legal order, it is precisely the phenomenon of immigration that troubles the national categories of the group, which are

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[217] I am grateful to Jeremy Webber for drawing my attention to cases in the aboriginal law context where there have been recategorizations and categorical hybridity: see, *e.g.*, *R v Powley*, [2003] 2 SCR 207.

[218] Religious groups are incorporated into national minorities to the extent that Catholicism and Protestantism are contained in the constitutional text, and into ethnic groups to the extent that religion is part of constitutionalism's broad commitments to multiculturalism and diversity. Of course, religious freedom is also a stand-alone constitutional right. See Chapter 5.

sometimes distinguished on this basis, and this becomes patently obvious at the sub-national level, where immigrant group difference ultimately resides. The dislocations between the categories of scalar legal orders tell us something about the efforts to render law coherent and systemized, and also about the anxiety that the cultural enclave in the sub-national legal order provokes.

Categorization, then, is the base jurisdictional technology. The study of jurisdiction is the study of how law sorts and attaches to categories. There are other technologies, of course, and this dissertation understands jurisdictional technologies or techniques as mechanisms or tools for managing or manipulating group difference.[219] They are, in other words, modes of governance. The terms 'technology' and 'technique' are used interchangeably to refer to practices and strategies by which jurisdiction constitutes and reflects norms and actions. The focus is on the practices that law uses to sort groups out. These will be examined as they emerge from the case law. They include abstractions of meaning, legal techniques of principles and categorization, and reliance on the exigencies of political organization and authority.

One important jurisdictional technology that is also a technology of the state deserves further scrutiny. Territory is possibly the singular technology of jurisdiction. It is implicated in the legal definition and boundaries of the group, the application of law, the extent of the political, and the social identities and meanings contained in all of that. Territory is a constant in jurisdiction's contemplation. References back to community and governance — to the political — are always also references back to territory. The meanings attributed to territorial configurations are one way in which law characterizes people as pre-political or post-political, one test by which people may ascend to self-rule.

The important point here is that territory is relational. It is a construct, a manner of assembling and ordering power, people, and legal authority, and so by its very nature, it implicates something else. Territory is in a relationship with different legal orders, with the group unit, and with modes of governance. It works in tandem with the political commitments which underlie the order. Territory is

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[219] The terms 'techniques' or 'technologies' derive from Foucault's genealogical investigations. They allowed him to focus on the mechanisms of power that constitute us as subjects, rather than ideologies or discourses. See Daniel Sharpe, Foucault's Genealogical Method, *Berkeley Philosophy Forum* (2011), online: http://philforum.berkeley.edu/blog/2011/10/17/foucaults-genealogical-method/.

more than the physical substratum — the land component — of statehood; it is also a tool.[220] As a tool of the political, it carries the weight of power and how that power is configured depends upon who wields it within what constraints. This imbues it with the potential to exclude, to categorize, to bind sovereignty to government, and to assign authority.[221] As part of this core act of boundary-making, territory performs and produces identities as much as it is produced and performed by identities.[222] In all of these, territory only means something in relation to something else – be it an individual, an identity, a swath of land, or an ordering act. Sometimes, territory is the pivot upon which law turns, the basis for self-determination or language rights. Other times, territory is the pivot upon which the group turns, the basis for collective identity or battling the boundaries of exclusion. It exists *in relation* to these attributes and means little to nothing without them.

All of this can be taken even further: territory and territoriality inform the *logic* of jurisdiction. Territory is how scale is performed. It is how the enclave, the province, the nation-state, and the international appear simultaneously as nested territories and as the same territory. Not only does territory come to stand in for the political, but it also comes to inform jurisdiction itself. To the extent that jurisdictional techniques have shifted from absolute territorial models to generic-conceptual models — and to the extent that territorial jurisdiction is always itself "more multiple, distributed, and patchy than theory allows" — ruptures and displacements result.[223] Part of the difficulty of finding a vernacular to analyze jurisdiction in all of its modalities follows from these ruptures, and from the abiding logic of territoriality.

2.6.2 Methods of Jurisdiction

This reconciliation points toward jurisdiction as a phenomenon that sorts and orders, separate from but inextricably linked to sovereignty, and bound up with political theory and technicalities. It does not, however, move us past its disarticulations. The problem endures: jurisdiction cannot refer to every decision about allocation or sorting between legal fields and institutions. Cormack's notion of jurisdiction as authority within limits, of the legal threshold, is a useful guiding thought through this

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[220] Robert D Sack, "Human Territoriality: A Theory" (1983) 73 Annals Assoc Am Geographers 55; Stuart Elden, "Territory Part I" in John A Agnew & James S Duncan, eds, *The Wiley-Blackwell Companion to Human Geography*, 1st ed (Malden: Wiley-Blackwell, 2011); David Storey, *Territories: The Claiming of Space* (New York: Routledge, 2012); Delaney, *supra* note 130; Andrea Brighenti, "On Territory as Relationship and Law as Territory" (2006) 21 CJLS 65.
[221] Brighenti, *supra* note 220.
[222] I am grateful to Nick Blomley for this point.
[223] Lepawsky, *supra* note 126.

section and the next because it helps us remember what is at stake in each jurisdictional encounter: nothing less than an existence, a life, in law. And this legal attachment matters for the "constitution and configuration of meaning".[224] Jurisdiction draws boundaries around groups and territories. When jurisdiction is assumed or granted, we know that the person, place, or act has *a particular kind of legal meaning.* The jurisdictional inquiry legitimates the act, object, person, or place through its attachment to law. It is jurisdiction that decides whether the character of the thing is lawful or unlawful. Jurisdiction is a key part of *how* that decision is made; it determines which law is applied to determine if the act is lawful.

This section proposes to analyze jurisdiction as law's attachment by mapping and analyzing the forms that jurisdiction takes. Riles suggests that these forms are inseparable from the epistemology of jurisdiction.[225] This involves attention to both jurisdiction as a preliminary inquiry and jurisdiction as an embodiment of autonomy. These are described in the sections below as "the jurisdiction to determine jurisdiction" and "jurisdiction as autonomy". In the context of group difference and law, this requires further scrutiny of the legal categories of each legal order, as well as the forms that jurisdiction takes — as legal rights and principles, constitutions, statutes, common law doctrines, and analogies. This scrutiny in turn permits theoretical study of what kinds of subtle claims jurisdiction makes about what is true, what is real, for whom, and under what conditions. This exercise reminds us that characterizing facts as *belonging to* this or that jurisdiction invokes a number of unstated assumptions about the nature of the sovereign state, the proper reach of its authority, and the appropriate subjects of bodies of law.

The jurisdiction to determine jurisdiction inquiry seeks to identify the terms when law presupposes its power to decide generally (the law has some power, over some person, place, or thing). The jurisdiction as autonomy inquiry focuses on content, asking after the particular substance and limits of that power as it applies to the group at hand.[226] An example is illustrative here: in the hypothetical case of a Muslim group granted jurisdiction over its own personal law tribunals by a court of law, the answer to both of these inquiries would have been affirmative. The group is understood as a subject of state law and then granted some jurisdictional autonomy to adjudicate certain personal law claims.

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[224] Cormack, *supra* note 1.
[225] Riles, *supra* note 93.
[226] Richland, *supra* note 12.

2.6.2.1 The Jurisdiction to Determine Jurisdiction

The first question for any jurisdictional method is the nature of the inquiry. In jurisdictional doctrine, this query yields one of the more particular meanings of jurisdiction. This meaning of the term, colloquially as well as doctrinally, is the notion of a prior or preliminary inquiry. This inquiry asks whether the law may deal with this person, matter, or place at all. This is jurisdiction as a set of "meta-rules", technical legal hoops to jump through in order to get the dispute off the ground. Riles calls these "procedures for a prologue to the real action of the legal dispute".[227] Cormack describes this aspect of jurisdiction as the "delineation of a sphere that is a precondition for the juridical as such, for the very capacity for law to come into effect".[228] It is a kind of umbrella or chapeau to the substance of the jurisdictional inquiry. I refer to this conceptual jurisdictional method as the jurisdiction to determine jurisdiction and this is the manner in which this dissertation interrogates jurisdiction.

Does the law attach to this group? This is the core question of the inquiry and often the only one to be asked. The question is whether the law *takes authority over* the matter. Examples include the International Court of Justice's willingness to deal with Western Sahara or the Badinter Commission's exposition on borders in cases of state dissolution. This tells us the circumstances in which law will attach to the group and the terms of law's extension. It also tells us the practices or techniques or technologies of jurisdictional attachment (in other words, *how* does law attach). Does law attach to a group by characterizing it as a "people" for the purposes of the international law of self-determination? Does law attach to the group by engaging in legal analysis that ultimately places the group under another scale or type of governance (into another jurisdictional category, in other words)? Or, if the law does not attach, what does it tell us in *obiter* about the terms of attachment (most International Court of Justice cases go on at some length about the nature of the group without ruling directly on self-determination).

As a secondary matter, this analysis tells us "who speaks the law here". Almost invariably, in revealing *whether* the law attaches to the group, the cases also tell us *which* law attaches to the group. It is possible to read the cases for *where* they locate the group — into which jurisdictional category is the group sorted. This is the second part of the analysis: groups are sorted into jurisdictions.

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[227] Riles, *supra* note 160.
[228] Cormack, *supra* note 1.

Jurisdiction is both active, in the sense of law *attaching to* the group, and passive in that it relies on already-existing scalar jurisdictions *into which* it sorts. These conceptions are not so neatly delineated, though; they are all bound up together in law's jurisdictional imagery of spaces and exclusions.

In this analysis, jurisdiction has two meanings: the attachment of law's authority *and* metaphorical and territorial spaces. It relies on notions of legal scale when it parcels out its attachments. This is generally about access to particular jurisdictional scale, to a particular mode and apparatus of governance. For example: an Inuit is governed by the federal government and located in the national scale; a Protestant parent is governed by exceptional provisions in the federal Charter and located in the national scale; and a Muslim parent is governed by the province and by certain Charter provisions, straddling the national and sub-national scales. The method resides in rigorously reading the details of law's attachment to the group and paying attention to the appearance of particular jurisdictional practices, scales, and spaces.

This inquiry carries several threads of jurisdiction's loyalties. First, it amounts to a broad representation of the reach of the state, understood in part as its laws. Second, it communicates law's vision of the group and sets out which features qualify a group as one to which law will attach. Third, it tells us about jurisdictional scales and spaces: what they are, what they look like through the lens of law, and what kinds of groups may be sorted into them. Finally, it paints a picture of Valverde's "governance of legal governance" by showing us the preliminary decision that ushers in a field of law. In some circumstances, though, the law goes farther to *grant authority to* the group. This is jurisdiction as autonomy.

2.6.2.2 Jurisdiction as Autonomy

The second question for the jurisdictional method is the content of jurisdiction. This inquiry arises after a positive preliminary inquiry in which law attaches to the group; in these cases, the legal decision goes further to extend legal authority to group. The question is *whether the law makes the group into a jurisdiction* or grants the group some types of jurisdictional powers over its affairs. It is not enough to ask "does law attach here" — this only tells us if law will deal with this issue and maybe the standard scale of law. We must go on to ask if the group, all apart from falling under law's jurisdiction, is thus competent to exercise or enjoy jurisdiction understood as law's authority. This

second inquiry focuses on content, asking after the particular substance and limits of that power as it applies to the group at hand.[229] So, in the international law frame, the preliminary issue would be whether the self-determination claim of East Timor could be addressed by the International Court of Justice or by international law at all. The second inquiry, one that follows from a positive answer, is whether the group may access the jurisdictional apparatus. In the case of East Timor, the most obvious extension of jurisdictional authority would be access to the institutional mechanisms of self-determination.

Does the law grant jurisdiction to the group? The foundational question is whether the law *grants authority to* the group. This can occur in different ways. One way is for the law to exempt the group from some legal requirement so that the group retains authority to regulate that aspect of life for itself. Another way is for the law to create some opening for group jurisdiction over a certain subject area. Personal law tribunals are a good example of this. The penultimate grant of authority is for the law to grant the group legal authority over itself *as a jurisdiction*; as, for example, a province or a self-contained religious enclave exempt from the reach of most state law.[230] The ultimate grant of authority is found in the international law of self-determination, where the characterization of a group as "a people" with territory entails the authority to establish themselves as a sovereign nation-state among equals with full jurisdiction.

This is a different meaning of jurisdiction — it is concerned with parcelling out legal authority over people, places, subject-matters, or objects. It is often about territorial jurisdiction, about placing legal authority down, so that it may be simultaneously constrained and exercised. It requires sharing legal authority with the group so that it may decide certain things for itself. This tends to look like territorial jurisdiction in the sense that the group is marked off and bordered by the terms of law, even if those boundaries are not strictly territorial. This constitutes the ongoing dialectic between territorial jurisdiction and generic-conceptual jurisdiction; the latter focused on exemptions, parallel institutions, and "interlocking jurisdictional hierarchies".[231]

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[229] Richland, *supra* note 12.
[230] Consider, *e.g.,* the various cases Scotland, *Board of Education of Kiryas Joel Village School District v Grumet*, 512 US 687 (1994); and *Wisconsin v Yoder*, 406 US 205 (1972).
[231] Shachar, *supra* note 144.

It is significant that jurisdiction as autonomy is exceptional and does not appear in most of the cases. Most instances of groups with jurisdiction, vested with some of the authority of law, are already-existing historical groups. Indeed, this inquiry usually leads back to the mixed political and legal origins of jurisdiction and to territorial jurisdiction. Territorial jurisdiction has mostly been parcelled out already and a constant in the background of this inquiry is the presence of already-existing jurisdictions that frame and constrain the each inquiry.

2.7 Conclusion

All of this adds up to a kind of *scalar jurisdictional pluralism*. Jurisdiction is the site of sorting things out. There are various methods or techniques of jurisdictional sorting. Things get sorted into different legal orders which are themselves partly constituted by that sorting. In other words, jurisdiction partly generates the phenomenon it claims only to govern. This is what Josh Lepawsky refers to as the "ontologically generative role" of jurisdiction.[232] Indeed, this is one reason that the nation-state keeps reappearing in the frame: it generates jurisdiction and jurisdiction generates it.

Jurisdiction in this dissertation moves between two registers, sometimes theoretical and other times technical. In both registers, jurisdiction is the boundary of legal authority; it embodies the terms of inclusion and exclusion and is inscribed with the conditions for law's entry or retraction. In short, jurisdiction tells us the terms of law. In fact, close examination of group claims in different legal orders reveals the running together of rights claims and self-rule claims.[233] This depends upon a broad understanding of self-rule as keeping some matters within group control. By paying attention to the political aspect of jurisdiction, it is possible to see behind law's formalities to the substance of group treatment.

There are different legal orders at the international, national, and sub-national scales that govern territorialized group difference. In international law, the legal order is a combination of self-determination, minority rights, and indigenous rights. In national law, it is constitutional federalism which covers national minorities, aboriginal groups, and ethnic groups. In the sub-national order, the legal order is a mix of individual rights and liberalism. These legal orders share some features but not others. There are internal contradictions within each legal order as well as external contradictions

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[232] Lepawsky, *supra* note 126.
[233] See Chapter 5 at section 5.4.

between the legal orders.[234] Some features of one legal order are incommensurable with the features of another legal order.

This chapter has sought to both identify theoretical and methodological gaps and to offer up some kind of vocabulary and methodology for analyzing jurisdiction. The project is firstly an act of mapping — by mapping the law in situations of territorial group difference, it is possible to see sorting, scales, and the work of jurisdiction (as results or as characterizations). This is a bridging of de Sousa Santos' insight on interlegality and Valverde's insight on jurisdiction put into motion. Each chapter asks specific questions about how law's authority works in the context of the groups, with attention to how they are distinguished by orders of magnitude. As a lens which invokes the moment between law and non-law or between domains or scales of law, jurisdiction hones in on the liminal moment to elucidate the technologies and criteria that law uses to sort.

As a type of synoptic inquiry, each chapter will ask the question articulated by Blomley: who speaks the law here? This has the effect of locating the inquiry in the middle of the jurisdictional conflict. Temporally, it permits us to look back to history; spatially, it permits us to look around at other jurisdictional conflicts; and metaphorically, it permits us to consider the characterizations and imagery in the case. By structuring the chapter toward a view from the centre of each jurisdictional dispute, it is possible to see how the international community of states speaks in Bangladesh, but the International Court of Justice speaks in Western Sahara; how the Canadian *Constitution Act* speaks in Quebec, but provincial law speaks in the Hutterite colony of Alberta; and how Vancouver City Hall speaks in the Kerrisdale neighbourhood of Vancouver, but the law of groups is absent from the enclave of Richmond.[235]

By carrying the jurisdictional insights from this chapter forward, each subsequent chapter sets out to map and analyze the role of jurisdiction in treating group difference in each of three legal orders. This is examined through the lens of legal claims that are fundamentally about groupness, identity, and territory. The methodological structure of each chapter follows this order: first, the logic of the

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[234] Valverde, *supra* note 96.
[235] Compare Joshua Castellino, "The Bangladesh Secession in International Law: Setting New Standards?" in *Self-Determination and International Politics* (The Hague: Martinus Nijhoff, 2000); *Western Sahara, Advisory Opinion*, *supra* note 100; *Reference re Secession of Quebec*, *supra* note 100; *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567; David Ley, "Between Europe and Asia: The Case of the Missing Sequoias" (1995) 2 Cultural Geographies 185. See also Chapter 5, section 5.5.

particular legal order with respect to group difference is examined. Second, attention is paid to how jurisdiction is already parcelled out in the legal order. This invokes Douzina's jurisdiction as general lawmaking and these principles tend to be located in constitutional acts. Third, the case law on jurisdiction is examined from two perspectives. The first inquiry seeks the scope of law and the circumstances of law's attachment to or disavowal of the group. The second inquiry analyzes the content of jurisdiction: under what conditions did the law extend its authority or access? Together, these inquiries parse the particular acts of law's application. Fourth, jurisdiction is explored as a form of governance through listing the contradictions and incommensurabilities within the legal order. Finally, the focus is on the legal objects that are created and maintained by jurisdiction in each legal order. Each chapter will follow this structure as closely as possible with modifications based on the logic of each order where necessary.

In the end, this is a story about the jurisdiction of difference. It tells when law will attach to groups, the nature of the legal threshold in each case, the logic and criteria for attachment, and the consequences of law. This reveals how territorialized group difference is *already* governed by law, as well as how law contends with claims to extend or curtail its jurisdiction in this context. Ultimately, it is a narrative which orbits around the state and one in which jurisdiction is delimited by temporal and spatial horizons.

Chapter 3: The International Legal Order

A perfect state or community, therefore, … is one which is complete in itself, that is, which is not part of another community, but has its own laws and its own council and its own magistrates… .[1]

This chapter begins in a Portuguese outpost in the middle of the Indian Ocean, famous for its exports of sandalwood and honey. Following the wave of decolonization that swept the landscapes of empire, the group declared an independent communist state. Fearful of communism at the height of the Cold War, its neighbour attacked and annexed it. The United Nation's designation of the territory as a 'non-self-governing territory' persisted but little followed from this classification. The twenty-five year occupation continued to be marked by violence. The island houses several ethnic groups but none is bigger than 10 percent of the population. It is composed of administrative districts, sub-districts, villages, and hamlets. Finally, a referendum organized by the United Nations was held and the island ushered in the millennium as the twenty-first century's first new state.[2] The territory of the island, however, remains divided; the east is a sovereign state, while the west is a province of its neighbour.

This vignette of East Timor illustrates one group's long path to self-determination and the intersection of its various components: territory, people, minority groups, and statehood. The island inhabited the jurisdictional space between colonialism and self-determination for a fleeting moment until it entered the third space of occupation. The occupation then became a matter largely inside the fledging state and the territory fell into a conceptual categorical abyss. Independence was not a matter of decolonization from Portugal but of independence from Indonesia's occupation, taking the interim form of an international territorial administration.[3] As an illustrative case, it literally embodies the contest over jurisdiction, revealing the various forms of territorial rule along the road to statehood.

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[1] Francisco de Vittoria, *Francisci de Victoria De Indis et De Ivre Belli Relectiones*, Ernest Nys, ed. (Washington: Carnegie Institution of Washington, 1917).
[2] *Case Concerning East Timor (Portugal v. Australia)*, [1995] ICJ Reports 90.
[3] Jure Vidmar, "Kosovo: Unilateral Secession and Multilateral State-Making" in James Summers, ed, *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Human Rights* (Leiden: Martinus Nijhoff Publishers, 2011) 143.

In this chapter, I examine the state as the ultimate group in the international legal order with attention to the theoretical and practical repercussions of this conception for group difference. The focus is on self-determination as the paradigm for adjudicating groupness. Despite the winding down of the formal process of decolonization and the dissolution of the communist bloc, self-determination remains theoretically important as a site for examining and challenging the presentation of group difference on the international legal plane.[4] First, self-determination, which encapsulates the law of statehood, tells the dominant international narrative of the twentieth century: the doubling and redoubling of states. At the beginning of the century, there were 50 states; by mid-century, there were 75 states; today, there are 193 states.[5] The state is the singular form of the group in the international legal order. This has obvious consequences for the character of international law, the practice of international organizations, and the sources and outcomes of international conflict.[6] Second, self-determination is the only collective human right on the international legal plane with the semblance of universality and a legal-institutional basis. This makes it a robust paradigm for studying group difference. Third, self-determination carries enormous political and rhetorical weight as the basis for group claims to jump to the international law scale. This includes the Kurds, the Quebecois, the Basques, the Scots, the Palestinians, and the Tamils[7] (never mind the successful scale-jumpers, such as the East Timorese and the Bangladeshis). For these groups, the desire to map their collective identity onto territorial sovereignty is the ultimate liberation. Self-determination, then, envelopes several dimensions of group difference on the international plane but, as will be discussed below, it is fraught with contradictions.

The task of this chapter is to analyze the logic of group difference in international legal theory and jurisprudence. This requires attention to the conceptual categories of the group in the international legal order. The focus is on the principle and right of self-determination. It asks: what can we infer about the logic of self-determination and the nature of the international legal order from the law and politics of statehood? What happens at the legal threshold of statehood? How is the right to be a state

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[4] Surya P Sinha, "Is Self-Determination Passe?" (1973) 12 Colum J Transnat'l L 260.
[5] James Crawford, *The Creation of States in International Law*, 2nd ed (Oxford: Oxford University Press, 2006); for the most recent list, see United Nations member states at http://www.un.org/en/members/index.shtml. There are 193 UN member states (including the new state of South Sudan), two observer states (the Holy See and Palestine), six states with partial recognition (Taiwan, Western Sahara, Kosovo, South Ossetia, Abkhazia, and Northern Cyprus), and three unrecognized *de facto* independent states (Nagorno-Karabakh, Transnistria, and Somaliland).
[6] Crawford, *ibid*.
[7] See Gerry J Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age" 32 Stan J Int'l L 255.

negotiated and adjudicated? What forms does group difference take in the international legal order and what are the terms of its adjudication? How does territorial sovereignty relate to jurisdictional manoeuvres in this frame?

It is in the international frame that jurisdiction is most closely bound to the state as an entity. Theoretical jurisdiction is based on statehood — the state makes the community, the territory, and the terms of governance — while technical jurisdiction extends the authority of the state to cover an individual, act, or event. The political aspect of jurisdiction is equally at the forefront on the international legal plane. It is not controversial to note that outcomes of international law are intricately connected to the distribution of power in the international system.[8] The political plays out in the adjudication of the group as the balancing of conflicting principles. The categories have already been set — state or non-state — so the legal resolution pits self-determination against territorial integrity.[9] The implication of balancing is that the category is only the beginning of the adjudication; various weights and theories must be marshalled to make the case for balancing in one direction or the other. This is the internal political limitation of self-determination: that it is paired with territorial integrity. It is at this scale, more than any other, that the jurisdictional line between law and non-law or between laws places the group in relation to statehood: either the group *is* the state, or the group is *inside* the state.

3.1 Overview

The international legal system is divided into states, which remain the primary subjects of international law. Indeed, until quite recently, states were considered to be the only subjects of international law.[10] The reason for their continued primacy is that the international order is still governed by the construct of statehood and fundamental changes to that order can occur only through state action.[11] Most states are based on some mix of *demos* and *ethnos*, some sense that the state

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[8] Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011); Benedict Kingsbury, "Sovereignty and Inequality" (1998) 9 EJIL 599; Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall LJ 171.
[9] Koskenniemi, *ibid*.
[10] See Lassa Oppenheim, *International Law: A Treatise*, 8th ed, Hersch Lauterpacht, ed. (London: Longmans, 1955); Crawford, *supra* note 5; Lori Fisler Damrosch et al., *International Law: Cases and Materials*, 4th ed (St. Paul: West Group, 2001).
[11] Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003); Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964); Philip C Jessup, *A Modern Law of Nations* (New York: Macmillan Company, 1948).

embodies the will of its people as well as their particularity. Thus understood, states are the original groups in international law.

There may be more subjects of international law now, but it remains the case that groups have not achieved much traction in the international domain. The exception to this has been the principle and right of self-determination. Self-determination invokes the referents of independence and statehood. It embodies a potent mix of social life, political calculation, and legal rights. Perhaps for this reason, it is often held out as the emancipatory solution, one which recognizes and empowers the group by recategorizing it as a state. This is certainly the manner in which self-determination is conceived in political theory; the goal is to push the group onto the international plane so that it may invoke self-determination, establish statehood, and fulfil its destiny.[12]

It turns out, though, that self-determination is not so liberating after all. Self-determination is itself fraught with contradictions and incommensurabilities that include conflicting principles of international law, blurry definitional terms, category concerns, and existential issues. Moreover, it coexists with minority rights guarantees, which sit in the background informing and constraining its content and its scope. Finally, the broader context in which self-determination and minority rights guarantees are located – the international plane – is one where statehood governs, as a structure that is simultaneously repudiated and coveted, and which sets conceptual, political, and legal limits.

The scholarship on self-determination is profuse.[13] This chapter does not strive to retread this empirical and theoretical ground, although it relies heavily on the work of those who have gone before. The focus instead is two-fold: first, to try to make sense of the logic and results of self-determination cases using the new lens of jurisdiction; and second, to draw out the relationships, overlaps, and incommensurabilities that frequent the sites of self-determination and its corollaries in

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[12] See, *e.g.*, Avishai Margalit & Joseph Raz, "National Self-Determination" (1990) 87 J Phil 439; Yael Tamir, "The Right to National Self-Determination" (1991) 58 Soc Research 565; Harry Beran, "A Liberal Theory of Secession" (1984) 32 Pol Stud 21; Daniel Philpott, "In Defence of Self-Determination" (1995) 105 Ethics 352.

[13] See, *e.g.*, Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1982); Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002); Ian Brownlie, "The Rights of Peoples in Modern International Law" in James Crawford, ed, *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 1; Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997); Christian Tomuschat, ed, *Modern Law of Self-Determination* (London: Martinus Nijhoff Publishers, 1993).

the international realm. Together, this inquiry shows the jurisdictional moves that create and maintain international legal objects and orders.

This chapter maps the jurisdictional practice of self-determination claims. Jurisdiction is the way in which self-determination is managed, the concept that guards the gate, and the tool that sorts and delimits access. Turning the lens to jurisdiction reveals not only *whether* the group belongs to international law or not, but also the nature of the group, the state and of international law more generally. Legal attachment to the international legal order is rare for groups (factual attachment is as well) and jurisdiction is a repository of counter principles. Moreover, it is self-determination that shows us the inaugural properties of jurisdiction most clearly: to receive the full scope and content of jurisdiction is to become a sovereign state; to be refused jurisdiction, in part or in whole, is to be subject to the jurisdiction of another state. Self-determination, in other words, most starkly decides who has jurisdiction over the group.

The chapter begins with a review of the conceptual categories of the group in the international legal order. Then it turns to the basis of the international legal order: the principle of sovereign equality, the role of territory, and the orienting dichotomy of inside/outside. Next it turns to the logic of self-determination. It examines the primary international legal texts as well as the corollary political doctrines. Fourth, the case law on self-determination is analyzed with a view toward the jurisdictional threshold in each case. Finally, the chapter parses the contradictions and incommensurabilities of self-determination.

3.2 The Conceptual Categories of the International Group

The right of self-determination is part of a corpus of group-oriented rights in international law. These rights — including the right to development, the right to natural resources, and the right to peace — have been variously referred to as peoples' rights, third generation rights, and solidarity rights.[14] By analogy and extrapolation, hopeful internationalists argued for the creation of new collective rights and the entrenchment of old ones. These rights were collective in order to correlate the right-holder and realization. Self-determination, which notably pre-existed this categorization, is often described as the most important and most invoked of these rights.

[14] Philip Alston, *Peoples' Rights* (Oxford: Oxford University Press, 2001).

Now reined in by a differently divided post-Cold War world, the project of peoples' rights has fallen by the wayside. To a modified extent, the same is true of self-determination, which gathered steam during decolonization but has since struggled to establish its parameters. It has been variously criticized as too narrow, too broad, too political, and too legal.[15] Yet self-determination remains relevant, even if sometimes *ex post facto*, as states dissolve, fragment and redraw their borders (witness, Bangladesh, Yugoslavia, and South Sudan) and as sub-state groups vie for autonomy and independence in its name (witness, Quebec, the Basque, and Catalonia). In these contexts, it is both a technical legal tool to apply to political fragmentation and dissolution as well as an aspirational sword to categorize and adjudicate particular sub-state struggles.

The effort to situate self-determination conceptually, then, does not end with the retreat of collective rights in the international frame. Instead, it is better placed among rights that deal in groups *as groups* – concepts that deal in authenticity, collective self-realization, recognition and survival. These types of protections place the inquiry broadly under the umbrella of international human rights law. More specifically, however, there are three conceptual containers here: the right of self-determination is the most well-known; minority rights and human rights are the two other categories.[16] These categories both pre-existed and survived peoples' rights. Benedict Kingsbury has persuasively argued for the common conceptual structures in these orders.

In his work on non-state groups in international law, Kingsbury shows how there are different categories of international claims that share the same underlying goal. He sets out three general domains — self-determination, minority rights, and human rights claims — and two particular ones — claims based on historical arguments or prior occupation.[17] Ian Brownlie agrees that issues of self-determination, the treatment of minorities, and the status of indigenous populations are the same in principle but different in practice.[18] These are slightly different groupings but they highlight the common justificatory purposes of group claims in international law. Although Kingsbury does not explicitly say what this common purpose is, it is fair to assume he means the purpose of securing

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[15] Pomerance, *supra* note 13; Cassese, *supra* note13; Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" in Philip Alston, ed, *Peoples' Rights* (Oxford: Oxford University Press, 2001) 69; James Crawford, "The Right of Self-Determination in International Law: Its Development and Future" in Philip Alston, ed, *Peoples' Rights* (Oxford: Oxford University Press, 2001) 7.
[16] Benedict Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 Cornell Int'l LJ 481.
[17] *Ibid*.
[18] Brownlie, *supra* note 13.

some sort of authenticity, recognition, and/or autonomy for the group. His larger point is that the conceptual structure matters for the legal outcome.

In delineating these 'domains of discourse' and their corresponding styles of argument, historical canons, patterns of legitimation, discursive communities, and boundary markers, Kingsbury is in some sense tracing the jurisdictional encounters between them (although he does not state it this way).[19] This is enormously helpful as a conceptual touchpoint. Kingsbury is interested to develop a general international normative framework for these norms, one which deals in producing and maintaining legitimacy.[20] His project is expository; he is concerned to show their common ground and to reconcile the conflicts.[21] Ultimately, he is arguing with Michla Pomerance for a continuum of rights, with self-determination at one pole. This approach might add to its conceptual rigour but does nothing for its liberationist promise. This dissertation is focused instead on the way that the group is governed by law, how some groups come to belong to the law and others do not, across different legal scales. Rather than reconciliation, it sets out to map and expose, through the medium of jurisdiction, the contradictions and incommensurabilities. The manner in which this is accomplished has important ideological and political consequences.

Although it is undoubtedly true that these domains of discourse share common underlying purposes, they are nonetheless distinguished by some core attributes. Due to these attributes, minority rights and indigenous rights are not the subject of this chapter, although they are mentioned where relevant. Minority rights are not the focus of this chapter for three reasons. First, minority rights at the international scale are about individuals exercising their *individual* rights as members of a group. They are not group rights or peoples' rights, and thus they do not go to the heart of law's treatment of groups. Moreover, minority rights are a slim part of the corpus of international law, contained in only one binding instrument[22], and so while they have great rhetorical force, they are not themselves a key aspect of the international legal order. Second, minority rights guarantees tend to lead us from international law directly into the nation-state. In an inward turn that partly mirrors that of internal

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[19] Kingsbury, *supra* note 16.
[20] Kingsbury relies on Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1995).
[21] Kingsbury, *supra* note 16.
[22] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (Entry into force March 23, 1976) [*ICCPR*]; see also *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135*, 1992, UNGAOR, 47th Sess., UN Doc. A/47/135 [*Declaration on the Rights of Minorities*].

self-determination[23], minority rights are rights exercised by individuals *within* nation-states, to be provided and guaranteed by the state's liberal democratic structures of representation and thus national governments. They are, in other words, just another kind of human right that must be claimed by an individual against their own government. Third, due to the placement of minority rights guarantees alongside but separate from self-determination, it makes sense to deal with them in the chapter on the national legal order. Minority rights guarantees are closely bound to structures of autonomy and federalism, as well as representative democracy, in a way that makes them fit better there.

Nor does this chapter address indigenous peoples' rights, which it treats as *sui generis* in their ongoing relationship with international law, statehood, decolonization, and territory. Although there are cases of self-determination that closely mirror the historical claims to land that indigenous rights claims might raise, this dissertation does not directly address them for three reasons. First, some indigenous peoples have resisted the categories of existing international law and sought to establish themselves as separate from other types of groups.[24] To some extent, this separation was realized with the *United Nations Declaration on the Rights of Indigenous Peoples*.[25] In other words, part of the international legal strategy of indigenous groups has been to distinguish themselves from minority and national groups.[26] The second reason is that some nation-states treat indigenous groups differently in law and in practice than other groups. In the Canadian example, they are heavily governed by national law: there is a series of treaties that govern their relationship, as well as specific laws governing indigenous status, reserve territory, and constitutional protections.[27] Third, the history of indigenous peoples places them in a unique stance towards territory, colonization, and sovereignty. They are the original inhabitants of states, colonized but never decolonized, seeking capacity and often sovereignty. The bases for their claims of self-determination and autonomy are rooted in historical injustice and thus different in kind.

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[23] See, *infra,* section 3.6.1.
[24] Richard Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in James Crawford, ed, *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 17; Kingsbury, *supra* note 15; *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, 2000, Erika-Irene Daes & Asbjørn Eide, UN Sub-Commission on the Promotion and Protection of Human Rights 52nd Sess., UN Doc. E/CN4/Sub2/2000/10.
[25] *Declaration on the Rights of Indigenous Peoples, GA Res. 61/295*, 2007, UNGAOR, 61st Sess., UN Doc. A/RES/61/295 [*Declaration on the Rights of Indigenous Peoples*].
[26] Kingsbury, *supra* note 15; Crawford, *supra* note 15.
[27] See, *e.g.*, *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c11; *Indian Act*, RSC, 1985, c I-5.

The focus throughout the chapter is on self-determination. There is nonetheless an ongoing dialectic between the right of self-determination and minority rights guarantees in the international frame. The former is frequently excused and delimited by the latter, even though they pertain to different rights-holders and exist in different relationships with the state. Thus, minority rights guarantees figure prominently in the background.

In a framework that will repeat in subsequent chapters, this chapter begins by mapping the locations and interactions between international law and groups. The chapter then proceeds to analyze the work that jurisdiction performs in sorting and scaling. The focus in this chapter, and indeed throughout the dissertation, is on identity groups seeking recognition, rights, or accommodation. This is a five-part framework for analysis. In each case, two background questions will be asked: who speaks the law here and how does law speak to itself at the threshold.

The Conceptual Categories of the Group
How Jurisdiction is Parcelled Out
The Logic of the Legal Order
Particular Acts of Law's Application: Case Law
Jurisdictional Governance

The lens of jurisdiction shows how legal claims on the international plane are ferried up and down between legal orders and how the boundaries of statehood are guarded. Some of the governing logics of international law include a privileging for cases of oppression and a push toward the individual over the collective, democracy over independence, and insides of states over their outsides. It also reveals several contradictions between international legal principles, as well as base incommensurabilities in the international legal regime.

3.3 How Jurisdiction is Parcelled Out in the International Legal Order

This section explores the governing logic of the international legal order. It explores the theory that underlies the logic of statehood and sovereign equality, their constitution of the international legal order, and the relationship between sovereignty and jurisdiction in this sphere. These concepts — sovereignty, jurisdiction, and equality — are significant not only because they set the background rules, informing derivative principles and cases, but also because they function as determinative principles in their own right.

3.3.1 The Sovereign Equality of States

The foundation of international law is the state. The state rests upon the foundation of sovereignty. In international law, sovereignty is founded upon the fact of territory; "evidently, States are territorial entities".[28] Indeed, for Malcolm Shaw, *territory* is the fundamental concept of international law.[29] Without territory, Ambassador Jessup argued, a legal person cannot be a state, and it is well-accepted that a state cannot be "a kind of disembodied spirit".[30] This position on territory can be traced back to early theories of territorial sovereignty in the 16th century, which established that any political authority exercising control over territory was entitled to govern that territory without outside intervention.[31] The link between statehood and territory, then, is drawn by the notions of control and independence over that territory. The significance of territory for statehood and for the group plays through the cases on self-determination in interesting ways, sometimes sufficiently basing claims and other time requiring more indicia of statehood.

The logic of a legal order is closely related to its constitution.[32] It is a point of much contention that there is no actual constitution for the international legal order, but it is widely accepted that the sovereignty and equality of states represent the basic *constitutional doctrine* of international law.[33] The origins of this system of sovereign and equal states are generally dated to the Treaty of Westphalia in 1648, which built on the theory of territorial sovereignty developed by Francisco de Vitoria and Hugo Grotius by adding to it the notion of sovereign equality.[34] The Treaty of Westphalia ushered out the medieval system of overlapping loyalties and allegiances in Europe, and heralded a new system of political rule based on territoriality and absolute secular power.[35] It is worth noting

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[28] Crawford, *supra* note 5.
[29] Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003.
[30] UN Security Council Comments on Israel, SC Official Records, *UNSCOR*, 2 December 1948, 383d Mtg. (Comments of US Ambassador Jessup).
[31] Western Sahara would qualify under this definition.
[32] By constitution, I refer to both the make-up of the legal order and the hierarchical set of norms concerning the ground rules of authority there. Koskenniemi, *supra* note 8; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Martinus Nijhoff Publishers, 2009); Michael W Doyle, "Dialectics of a global constitution: The struggle over the UN Charter" (2012) 18 Eur J Int'l Rel 601; Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997) 1 Max Planck YB UN L 1.
[33] Brownlie, *supra* note 11; Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization" (1944) 53 Yale LJ 207; RP Anand, "Sovereign Equality of States in International Law" (1986) 197 Rec de Cours 9.
[34] Crawford, *supra* note 5; Paul Schiff Berman, "The Globalization of Jurisdiction" (2002) 151 U Pa L Rev 311.
[35] Kal Raustiala, "The Geography of Justice" (2005) 73 Fordham L Rev 2501.

that one accepted interpretation of the Peace of Westphalia is that it divorced international law from religion.[36] This is fascinating in that it inculcated one kind of group – the state – while excoriating another kind of the group – organized religion. Although it was not a singular moment, but rather a process, the Peace of Westphalia nonetheless decreed the nation-state as a category of social organization and understanding.[37] The sovereign state ascended as the primary political unit and control of territory became a central attribute of statehood.[38] Sovereign equality grants to all states the same *status* under international law.[39]

The two corollaries of the sovereign equality of states are: domestic jurisdiction *within* a state (defined by population and territory); and non-interference in the domestic jurisdiction of other states.[40] Sovereign equality thus manifests internally as jurisdiction over a reserved domain and externally as legal personhood in the international sphere (where part of legal personhood is freedom from interference in domestic affairs).[41] In both conceptions, the inner sanctum of the state is protected, albeit from different sides of the line. One explains that only the sovereign state has authority over its territory and people, while the other extrapolates that systemically to make this true for every state, so that interference outside of the sovereign state is prohibited. The state, once created and recognized, has full authority internally and internationally.

The concept of sovereignty, whether as theory, principle, or practice, is the subject of a voluminous body of scholarship. Sovereignty is decidedly both legal and political; the larger point is that international law treats sovereignty as pre-legal, as a matter of fact.[42] The concept of sovereignty underpins a concept of sovereign equality that has attained an almost ontological position in the

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[36] Leo Gross, "The Peace of Westphalia, 1648-1948" (1948) 42 AJIL 20.
[37] Crawford, among others, contests Westphalia as *the* pivotal date, suggesting instead: "the early law of nations had its origins in the European State-system, which existed long before its conventional date of origin in the Peace of Westphalia (1648), ending the Thirty Years' War. The effect of the Peace of Westphalia was to consolidate the existing States and principalities ... at the expense of the Empire, and ultimately at the expense of ... the universal community of mankind transcending the authority of States". See Crawford, *supra* note 5; see also Stuart Elden, "Territory Part I" in John A Agnew & James S Duncan, eds, The Wiley-Blackwell Companion to Human Geography, 1st ed (Malden, MA: Wiley-Blackwell, 2011).
[38] Berman, *supra* note 34.
[39] Kingsbury, *supra* note 8.
[40] Brownlie, *supra* note 11.
[41] *Heller v United States*, 776 F2d 92 (3d Circ. 1985).
[42] Benedict Kingsbury, "Whose International Law? Sovereignty and Non-State Groups" (1994) 88 Am Soc'y Int'l L Proc 1.

structure of the international legal system.[43] This makes obviously unequal states formally equal[44], and establishes the basis for international law to follow from consent. Sovereignty also makes several matters the responsibility of the state. Kingsbury makes this point in the context of inequality[45], but it is also true for almost all goods required for human flourishing. Finally, sovereignty smuggles in other foundational concepts that make group realization difficult on the international plane. Because the group is represented in international law as the state, because the sovereign state is the ultimate and appropriate basis for identity, the notion that sovereignty is not a matter for international law removes the group from its purview. The group that matters for international law – the state – is already constituted.

Westphalian sovereignty creates a system in which legal jurisdiction is congruent with sovereign territorial borders. Miles Kahler calls this jurisdictional congruence.[46] Sovereignty sets the background rules for jurisdictional encounters; it frames them and oversees them. Jurisdiction is parcelled out in the international legal order as and to sovereign statehood. The modern approach to jurisdictional issues is based largely on the international legal meta-principle of state sovereignty.[47] Paul Schiff Berman reminds us: "fixed territorial boundaries remain the primary way of differentiating jurisdictional space, and nation-states remain the primary jurisdictional community".[48] Existing configurations of territorial space are reinforced by the bedrock international principles of territorial integrity and *uti possidetis*.

There is such a thing as international jurisdiction proper but it is quite limited. The international law rules of jurisdiction take three forms: consent between states, Security Council authorization, and the adjudicatory jurisdiction of the International Court of Justice.[49] Usually, jurisdiction in international law piggybacks on national jurisdiction; it is derivative. The jurisdiction exercised always belongs to the state – it is national jurisdiction exercised in a sphere beyond the state's territory. Territory delimits the exercise of jurisdiction such that reaching beyond territorial borders is considered exceptional. Yet, it inheres in the very nature of an international exercise of jurisdiction that it is

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[43] Kingsbury, *supra* note 8.
[44] Such states are "obviously unequal" on the basis of several markers such as population, territory, wealth, power, and influence.
[45] Kingsbury, *supra* note 8.
[46] Raustiala, *supra* note 35.
[47] Brownlie, *supra* note 11.
[48] Berman, *supra* note 34.
[49] Damrosch et al, *supra* note 10.

beyond the state territory; this is what makes it controversial, that it bumps up against the outsides and even penetrates the insides of other states. The result is that the international plane is a real (conceptual) place in the legal hemisphere.[50]

In the international legal order, jurisdiction follows the state: it accompanies the creation of states and disappears with the dissolution of states. There is no residual jurisdiction left in Yugoslavia; it was repurposed and doled out to each surviving republic *cum* state. In each instance, jurisdiction attaches to the political authority that governs a territory, so that territorial fluidities and shifting borders change not only the lines on the ground and the name of the place, but also the nature of the jurisdiction that inheres there.

The logic of the international order is statehood, but it is a hierarchy of statehood as extant or statehood as exception. In other words, the international order may function as a system of existing sovereign and equal states but it is loathe to admit new members to the order. This logic of statehood has two implications for group difference in the international frame. First, states are the ultimate groups in the international legal order. States boast both territory and sovereignty, ergo groups without the markers of territory and political authority have a hard case to make for self-determination. Second, in cases where territorially placed sovereign groups seek self-determination, jurisdiction enters the frame and the law speaks to itself. The legal threshold deals in questions of peoples, territory, borders, and statehood. The law decides whether it reaches this group, in these circumstances, with these frontiers, based on consideration of what has gone before. At this threshold, international law's fundamental ambivalence about group difference is manifest through its manipulation of the concepts of peoples, internal self-determination, democracy, and minority rights. It is also at the jurisdictional threshold that the political appears, ready to referee self-determination according to the declaratory theory of recognition in cases where the law has not been consulted or where it will not reach.

3.3.2 Territory as International Infrastructure

Territory is the substratum of the international legal order as a whole. The international order is based on territorial states and territory is the basis of international subjectivity. "The distinctive feature of

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[50] See *Nottebohm Case (Liechtenstein v. Guatemala), Second Phase*, [1955] ICJ Reports 4 (ICJ); *Fisheries Case (United Kingdom v Norway)*, [1951] ICJ Reports 116 (ICJ); Brownlie, *supra* note 11.

the modern system of rule is that it has differentiated its subjects into territorially defined, fixed and exclusive enclaves of legitimate dominion".[51] Territory is the physical space upon which sovereignty is exercised.[52] Territory is so closely allied to state sovereignty that political power is conceived as inherently territorial.[53] Indeed, territory and the state are mutually constitutive: territory informed the space of the state while sovereignty increased territory's political significance.

Territory, then, connotes the idea of political jurisdiction and rule.[54] It demarcates the original basis of sovereignty and jurisdiction. Jurisdiction may be expanded or curtailed beyond territory to attach to acts or individuals, but its basis remains the territorial core of the state. In a formulation that speaks to this slippage between territory and jurisdiction, Ian Brownlie contends that "the word [territory] denotes a particular sphere of legal competence and not a geographical concept".[55] In fact, to geographers, territory *is* the extent of control; it is what authority and sovereignty are exercised *over*.[56] Properly understood, territory is the existential identity of state and the extent of its rule. It is territory that connects sovereignty to the people by bounding the political community, forges a national identity by reference to exclusive territorial membership, and makes jurisdiction finite.

On the international plane, law establishes four finite categories of territory: territorial sovereignty, territory not subject to sovereignty, *res nullius*, and *res communis*.[57] There is no other territory outside of these categories. International law parcels out jurisdiction according to territory, and states are how jurisdiction is parcelled out. In terms of jurisdiction over territory, then, international law has circled back on itself; there is no sovereignty without territory. "Questions of sovereignty are sooner or later territorial".[58] However, in a world in which all inhabitable territory is effectively already subject to sovereignty, it is difficult to access territory and derivatively difficult to access jurisdiction.

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[51] John Gerard Ruggie, "Territoriality and beyond: problematizing modernity in international relations" (1993) 47 Int'l Org 139.
[52] Nisha Shah, "The Territorial Trap of the Territorial Trap: Global Transformation and the Problem of the State's Two Territories" (2012) 6 Int'l Pol Soc 57.
[53] Derek Gregory, Ron Johnston & Geraldine Pratt, eds, *Dictionary of Human Geography*, 5th ed (New Jersey: Wiley-Blackwell, 2009); John Agnew, "The territorial trap: the geographical assumptions of international relations theory" (1994) 1 Rev Int'l Pol Econ 53.
[54] Shah, *supra* note 52.
[55] Brownlie, *supra* note 11.
[56] Elden, *supra* note 37.
[57] Brownlie, *supra* note 11.
[58] Harold S Johnston, *Self-Determination Within the Community of Nations* (Leyden: A.W. Sijthoff, 1967).

Territory matters for self-determination first because it is one of its touchstones. Self-determination simultaneously adjudicates territory as the source of the conflict and as the decisive factor in resolving it. Territory is the pivot upon which self-determination turns: what it means, how it is used, and who lives there. Here, territorial jurisdiction comes to the fore. Whether it is a matter of the nature of legal authority in *Western Sahara* or the distribution of legal authority in the former Yugoslavia or the innovative sub-state jurisdictional arrangements in *Åland Islands*, territorial jurisdiction describes the form of legal sovereignty, which becomes the basis for determinations about political sovereignty. As the pivot, territory is the concept that joins the population to sovereignty, the people to self-rule. International law clearly makes territory a marker of statehood, which is the end goal of self-determination. The group seeking self-determination must lay claim to some stretch of territory in order to present a case for statehood. Lea Brilmayer argues that self-determination should require both a distinct people and a territorial claim; the latter would encompass the history of the dispute and the basis for independent statehood.[59] However, the markers of people and territory have not been separated out like this and territory continues to function as both a proof of sovereignty and an implicit limit on it, depending on the characterization of the people. The result is that groups striving for statehood invariably suffer from an "obsession du territoire".[60]

As to the principles of international law, territory is the umbrella under which self-determination's key counter principles huddle. There are two physical aspects of international space — territory and borders — and both are represented by international legal principles. Territory is represented through the principle of territorial integrity while borders are represented through the principle of *uti possidetis*. Together, these principles stand against self-determination. Territorial integrity requires that the current configuration of state territory should not be disturbed and it appears in several safeguard clauses to counter the radical fragmentation of states. The point of territorial integrity is to preserve existing states within their borders; "to prevent the initial dissolution, rather than to prescribe its form".[61] *Uti possidetis*, on the other hand, is not necessarily a conflicting principle in the same register as sovereign equality or territorial integrity; rather, it is agnostic on secession and self-

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[59] Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation" (1991) 16 Yale J Int'l L 179.
[60] Georges Scelle, "Obsession du Territoire" in *Symbolae Verzijl* (The Hague: Nijhoff, 1958) 347.
[61] James Summers, "Kosovo: From Yugoslav Province to Disputed Independence" in James Summers, ed, *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Human Rights* (Leiden: Martinus Nijhoff Publishers, 2011) 3.

determination, positing only that the borders of new states should coincide with their former administrative borders.[62] In practice, *uti possidetis* freezes territorial title and stops the clock, thus intersecting with temporality. The effect of these territorial principles is to take the wind from the sails of self-determination. As a norm oriented toward sovereign statehood for groups, it is deflated by its territorial counterparts.[63] Its gesture toward universal sovereignty is recanted and it loses the force of law. It should not be surprising then that most of the adjudicatory cases of self-determination have interrogated some aspect of territory (borders, occupation and *terra nullius*).

Territory also carries more abstract theoretical weight in the law of self-determination. On the one hand, territory is the site for abstract authority while, on the other hand, territory is the site of difference. As a site for abstract authority, territory is the container for state power. Jurisdiction is defined as authority over territory and is thus linked to particular forms of political rule. Historically, once territory joined the state — by providing the spatial extent and limit of sovereignty — it was incorporated as a requirement of legitimate political authority.[64] Nisha Shah explains how territory becomes part of the state's existential identity:

> [T]erritory becomes more than a ''portion of the earth's surface''— a physical space onto which meaning is inscribed — but a normative convention about distinct jurisdictions as the basis of legitimate political authority. Through this, territory and state become inseparable not because the state occupies a (pre-given) territory, but because the state ''*is* a territory''.[65]

In other words, the state is a territorial organization such that a violation of its frontiers is inseparable from the idea of aggression against the state itself.

Conversely, as the site of difference, territory is the land historically belonging to the group and part of the basis for its claim to self-determination. It is used to mark the group's distinctiveness and its particular claim to the land is often the best evidence of their claim. Territory is the means through which the group may prove both its distinctiveness and its sovereignty. The group must present as a bounded social group with the potential for political rule; the basis for both forms is territory. This is the reason that territory in the international legal order is so fraught: it combines two incongruent

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[62] Steven R Ratner, "Drawing a Better Line: Uti Posseditis and the Borders of New States" (1996) 90 AJIL 590.
[63] See, *e.g.*, Cassese, *supra* note 13.
[64] Shah, *supra* note 52.
[65] *Ibid*.

ideas. There is the political, sovereign state and then there is the cultural, social nation, and both require territory to make their case. However, like law's relation with group difference *writ large*, territory cannot quite contain these dual notions. This is what makes territory into a category that performs legal work: cases often trade on territory as political and legal, bounding space and people, and territory as social, marking identities and groupness.

3.3.3 The Dichotomy of Inside/Outside

International law rarely probes the inside of states. It is true that the ascendance of international human rights law and humanitarian intervention have belied the sanctity of state borders in recent decades but it remains the case that states are generally free to organize their internal affairs as they see fit. The principle of sovereign equality means that countries as different as Ghana, Saudi Arabia, Norway, China, and Cambodia are considered to be the sovereign equals of each other, despite their very different "insides". Although it may be politics that motivates the equality, it is law that makes it so. Sovereign equality is the lodestar of the international legal system. Much ink has been spilled carving out exceptions to sovereign equality but, by and large, each state continues to possess hard borders.

In his book, *Inside/Outside: International Relations as Political Theory*, R.B.J. Walker explores the character and location of political life prescribed by modern accounts of sovereign statehood. He identifies a foundational discourse in international relations and political theory. This discourse is based on the "constitutive distinction between life within and between sovereign states".[66] It sharply delineates here and there, expressing the presence of political life inside the state and the absence of political life outside of it. The inside/outside dichotomy is meant to express the notion of a society of states without a central government. State sovereignty centers authority inside a given territory, enabling the development there of law, freedom, and social progress; but it is also the negation of such community outside the state.[67] For Walker, this is primarily a spatial discourse, which is realized in the claim to state sovereignty.[68] State sovereignty is the condition that permits and encourages this constitutive distinction.

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[66] RBJ Walker, *Inside/outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993).
[67] Kingsbury, *supra* note 42.
[68] Walker, *supra* note 66.

Walker acknowledges the ambiguous relationship between state sovereignty and concepts of power, authority, and legitimacy, and takes us through the historical variations.[69] First and foremost, sovereignty resolves the tension between the universalist claims of humanity and the particularist claims of community which exist in political and legal theory. This is the paradox that universal claims are in fact particularistic – they are limited to only some people, the citizens of the state. Sovereignty is the spatial reconciliation of the relationship between universality and particularity. Spatially, it fixes a clear line between life inside and outside the political community.

This story reifies an historically specific spatial ontology.[70] Problems of international law are framed in terms of legal space – the notion of territorial jurisdiction enables law within and provides the governing framework for law between (primarily based on consent). Terms such as sovereignty, state and nation are presumed interchangeable *and* give other crucial concepts much (most) of their contemporary meaning (power, authority, community). Walker's account reminds us that much theorizing about sovereignty, international relations, and political theory amounts to explaining "the nature, location, and possibilities of political identity and community".[71] On close reading, this tells us the limits of identity and community, and, by naming the terms of identity and community, these theories also matter implicitly for telling us what happens to its analog – difference.

The inside/outside dichotomy has implications for theorizing group difference in two respects. The first implication is perhaps best expressed as "a community within and an anarchy of difference without".[72] Individual and group difference, in this picture, has no role to play in international law. It is *inside* the state. Difference only makes it onto the international plane as statehood: this state is different – politically, ethnically, culturally, religiously – from that state. The state, on the other hand, "is taken as a given, so that the culture, ideas and internal structures that constitute it are not investigated".[73] The second implication is a corollary of the first: if difference is inside the state and untouchable on that basis, it generally falls within the purview of national jurisdiction. To paraphrase a point that Walker would have made if his focus had been on group difference: sovereignty is a

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[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*. See also: Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2008); Guyora Binder similarly points out that democracy is triumphantly endorsed by international law but the boundaries within which majorities rule are often ethically arbitrary: see Guyora Binder, "The Case for Self-Determination" (1992) 29 Stan J Int'l L 223.
[73] Kingsbury, *supra* note 42.

fiction seeking to fix and tame difference within the spatial coordinates of territorial jurisdictions.[74] Indeed, one interpretation of the international jurisprudence on self-determination is that groups may jump the national frame and enter the international legal order when the state inside which they find themselves has failed them in some obvious way. This can be by outright mistreatment, including oppression or discrimination, or by failing to guarantee their minority rights, including withholding certain measures of autonomy.[75]

Walker is ultimately advancing a radical post-modernist critique of sovereignty. He argues, alongside Michel Foucault and Jacques Derrida, that it is impossible to critique sovereignty based on the grounds that were used to advance sovereignty in the first place (*i.e.* universal claims about peace, justice, reason, humanity).[76] Walker is focused on the political, not the legal, and he is resolutely post-modern in his rigorous deconstruction of international categories and narratives. It is nonetheless possible to translate his insights to the legal sphere to great effect: political community is constituted and conditioned by the sovereign nation-state; it constrains the possibilities for political and legal life, it smuggles in concepts of legitimacy and authority, it is deeply exclusionary, and it institutes a form of spatial governance that reifies territorial jurisdiction the world over. Walker does not follow his insights through the trajectory of international law. If he had, he would have seen that the inside/outside dichotomy is also a justificatory *legal* structure. It is the basis of the bedrock legal principles of the international legal order: sovereign equality, territorial integrity, non-intervention in other states, and *uti possidetis*.

Sovereignty is the basis of the international legal order. It underpins the sovereign equality of states and entrenches a constitutive distinction between inside and outside. The possibility for community and identity reside inside state borders. The space outside and between states is a netherworld. International law exists there to tame the anarchy, but it does not contain the possibility of emancipatory politics, nor does this idea have any meaning in the void. Difference and its groups are located inside the state. Spatially and physically, this places responsibility with the state;

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[74] Walker, *supra* note 66.
[75] On the former, see *Åland Islands I*, 1920 LNOJ Sp Supp No 3 (Report of Commission of Jurists (Larnaude, Huber, Struycken)); *Åland Islands II*, 1921 LN Council Doct B7/2I/68/106 [VII] (Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens)); *Reference re Secession of Quebec*, [1998] 2 SCR 217.
[76] Walker, *supra* note 66.

conceptually, this confirms the base, defining concept of the group as statehood. The governance of legal governance, then, is the regime of statehood.

3.4 The Logic of Self-Determination

Self-determination represents the pinnacle of contemporary political theory[77], it boasts the institutional pedigree of decolonization[78], and it embodies a variety of state practices. As conceived by its historical architect, Woodrow Wilson, it meant something like self-government. It was infused with the notion of democracy and represented the political concepts of the will of the people and the consent of the governed.[79] Wilson intended self-determination and the principle of nationalities[80] to structure group claims in the new international legal order. It was directed toward the independence and popular sovereignty of groups (as peoples). The primary effect of self-determination is to *internationalize* the relationship between the people and the state.[81]

The classical international order was underpinned by the foundational concept of sovereign statehood, which left matters of statehood to politics.[82] The introduction of self-determination built on statehood; it marked the extension of international law to the constitution or reconstitution of states. It is relevant but not determinative of statehood; self-determination is only one avenue to becoming a state.[83] It is, however, significant because territorial sovereignty maps the world and territory is almost all parcelled out already.[84] This prior distribution shifts the inquiry to splitting existing nation-states. This notion of splitting and dividing reveals the other component of self-

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[77] See Cassese, *supra* note 13; Tamir, *supra* note 12; Margalit & Raz, *supra* note 12.
[78] I use the term "decolonization" to refer to the institutional apparatus of the post-WWII historical period, not to indicate that colonization is a relic of the past. Post-colonial studies posit the continuing material and psychological effects of colonialism and the ongoing constitution of informal empires of functions, if not territory, and this is entirely compatible with recognizing a period of international institutional formal decolonization after WWII. On informal empires, see Samuel Huntington, "Transnational Organizations in World Politics" (1973) 25 World Pol 333; on post-colonialism, see: Bill Ashcroft, Gareth Griffiths & Helen Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures*, 2d ed (New York: Routledge, 2002).
[79] Pomerance, *supra* note 13. Self-determination has other meanings besides, including a relationship to economic self-determination (*e.g.* sovereignty over natural resources) and to statehood (*e.g.* modifying a lack of criteria) and to the use of force (*e.g.* justifying self-determination movements or permitting intervention in another State), but these are not relevant here and are not categorically different from the base concept, but rather corollaries of it. See: Brownlie, *supra* note 11.
[80] Nathaniel Berman, "A Perilous Ambivalence: National Desire, Legal Autonomy, and the Limits of the Interwar Framework" (1992) 33 Harv Int'l LJ 353.
[81] James Crawford, ed, *The Rights of Peoples* (Oxford: Clarendon Press, 1988).
[82] Crawford, *supra* note 15.
[83] See, *infra*, at section 3.4.3, on international recognition.
[84] Moreover, in cases of non-sovereign territory such as Antarctica, this is attributable to the inability to sustain community there.

determination — nationalism — which embodies the notion of the right of a group to some form of autonomy.[85] It is this aspect which binds group difference to self-determination in the organization of international social life.

The law of self-determination sits hand in glove with nationalism, its socio-political analog.[86] It is the international embodiment of Ernest Gellner's definition of nationalism as the political principle that the political and the national unit should be congruent.[87] Self-determination is the ultimate expression and realization of the group only if the nation-state is the ideal political articulation of the group. In this conception, statehood is valuable because and to the extent that it represents the communal identity of the people it enjoins.[88] Nationalism, in turn, is a doctrine about statehood, about whether the state is legitimate and what form it should take.[89] Self-determination thus represents our core beliefs about the meaning and value of nationhood. Here, nationalism embodies the self-realization aspect of self-determination, expressing the "authentic self" through nationhood and fixing the 'people' at the root of the inquiry.

In its nationalist incarnations, self-determination both legitimizes the international legal order based on nation-states and simultaneously provides the basis for challenging it by making claims for statehood; it both supports and challenges statehood.[90] It supports statehood by reifying a norm about the authority of existing territorial rule and it challenges statehood by providing an exception where a territorial group requires its own state.

3.4.1 The Legal Texts of Self-Determination

The classic core texts of the international legal order – the UN Charter and the ICCPR and ICESC – do not say anything about groups as such, except for the right to self-determination. Rights were conceptualized as individual, and the assumption was that rights would be taken care of through the protection of the international human rights regime.[91] The principle of self-determination was

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[85] Binder, *supra* note 72.
[86] Kingsbury, *supra* note 16; James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden: Martinus Nijhoff Publishers, 2007).
[87] Ernest Gellner, *Nations and Nationalism*, 2d ed (Oxford: Blackwell Publishers, 2006).
[88] Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 ICLQ 241; Tamir, *supra* note 12; Binder, *supra* note 72.
[89] Summers, *supra* note 86.
[90] Koskenniemi, *supra* note 88.
[91] Brownlie, *supra* note 13.

applied tacitly to mandates under the League of Nations, and then it was maintained through the trusteeship system, and then it was expanded to all colonial territories under the UN Charter, Chapter XI.[92] These instruments articulate self-determination as a right of general application, beyond the colonial context.

The Charter of the United Nations makes two explicit references to self-determination. It is one of the purposes of United Nations set out in Article 1(2):

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.[93]

It also appears in the preamble to Article 55, which establishes international cooperation on issues of economic and social development and respect for universal human rights:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples …

These Articles refer to self-determination in a general sense, which is new and different from the League of Nations, which had viewed general self-determination as essentially political.[94] They also link human rights and self-determination. Then, Chapters XI and XII extended the *idea* of self-determination to colonial territories. They establish the *legal practice* without mentioning the term. These chapters set out the conditions for the trusteeship system and non-self-governing territories and their common goal of developing "self-government". These chapters formed the basis for the decolonization movement tilted toward full external self-determination.

The International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights share a common Article 1. Article 1(1) establishes the base right to self-determination for *all peoples* and it describes what that entails:

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[92] Crawford, *supra* note 15.
[93] *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Can TS 1945 No 7 [*UN Charter*].
[94] The self-determination that was actually applied to colonial territories was regulated by special instruments. See Crawford, *supra* note 15.

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 1(3) hems this in:

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[95]

Then there have been a number of General Assembly Resolutions, most of which pertain to the process of decolonization.[96] One of these resolutions is key. In 1970, the General Assembly adopted Resolution 2625 (XXV), titled The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States.[97] This Declaration took self-determination beyond the colonial context, gestured toward its universal application, and hinted at conditions justifying secession. Paragraph 1 states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

It clarifies that subjecting peoples to alien subjugation, domination and exploitation amounts to a violation of the principle of self-determination, of fundamental rights, and of the *UN Charter* itself. The notion of representative government appears as a counterweight to self-determination and secession. Where the government represents the governed without discrimination – "thus possessed of a government representing the whole people belonging to the territory without distinction"—there is no authorization to dismember or impair the territorial integrity or political unity of the state. Yet,

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[95] *ICCPR*, *supra* note 22; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (Entry into force January 3, 1976) [*ICESCR*].

[96] See, *e.g.*, *Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV)*, 1960, UNGAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 [*GA Resolution 1514*]; *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Res. 1541 (XV)*, 1960, UNGAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 [*GA Resolution 1541 (XV)*].

[97] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA. Res. 2625 (XXV)*, 1970, UNGAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 [*Friendly Relations Declaration*].

the flip side of this paragraph suggests that where there *is* misgovernment, it may be permissible to "dismember or impair, totally of in part, the territorial integrity or political unity" of sovereign states.[98] In other words, secession may be justified and the borders of the state may be rearticulated.

The other significant interpretative instrument for self-determination is the Helsinki Declaration from the Conference on Security and Co-operation in Europe.[99] It is significant as a 'code of conduct', rather than a legally binding international instrument that embodies the view of Western states that self-determination means the right of citizens inside a state to participate in a representative government.[100] It introduces the universality of the right to self-determination without referring to "all peoples" in the colonial context, the continuing nature of the right, the application of internal self-determination to even peoples living under non-racist regimes, and the significance of human rights for a genuine expression of self-determination.[101] Simultaneously, it delimits self-determination by reiterating the safeguard clause on maintaining territorial integrity and including a provision for minority rights.

Thus, the binding legal texts of the international order address groups only parenthetically through the right to self-determination. Indeed, the principle of self-determination is so widely recognized in international conventions that it may be considered a general principle of international law.[102] What, then, is the logic of group difference here? How does a group self-determine and thus access the international legal order? James Crawford summarizes the logical structure of the argument for statehood in a neat syllogism:

(a) We are a people;
(b) All peoples have the right of self-determination;
(c) Therefore, we have the right to self-determination.[103]

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[98] *Ibid*.
[99] *Helsinki Final Act*, 1975, 14 ILM 1292 (1975) [*Helsinki Final Act*].
[100] *Ibid*. See also: Cassese, *supra* note 13; Musgrave, *supra* note 13. The Helsinki Declaration has been refined in the *Charter of Paris for a New Europe*, 1990, 31 ILM 190 (1991) [*Paris Charter*].
[101] Antonio Cassese, "The Helsinki Declaration and Self-Determination" in Thomas Buergenthal, ed, *Human Rights, International Law, and the Helsinki Accord* (Montclair: Published for the American Society of International Law by Allenheld, Osmun & Co., 1977).
[102] Cassese, *supra* note 13.
[103] Crawford, *supra* note 15.

But, he asks rhetorically, what is to be done with it? It turns out that the first mode of defining and circumscribing self-determination appears in the syllogism itself. Who is the "self"? What is a people? What lies to be "determined"? What does the "right" to self-determination look like and against whom is it enforced?

3.4.2 The Indeterminate Content of the Legal

Who is the "self" in self-determination? The phrase "peoples" has been the subject of enormous controversy. This question lies at the very core of self-determination because it defines the category of bearers, the rightholders.[104] As early as the Versailles Peace Conference, Robert Lansing queried whether the unit was "a race, a territorial area or a community".[105] But, as Michla Pomerance points out, this is only the beginning of the inquiry: the core question is which population belongs to which territory.[106] In turn, this entails sub-questions about the boundaries of the area and its inhabitants: who are the members of the group?

If "peoples" are conceived as sociological entities, definitional problems abound. It is immediately apparent that there are gaping discrepancies between peoples accorded rights under international law and their sociological composition.[107] This was most obvious with decolonization, which maintained colonial borders regardless of the 'peoples' contained within them. Indeed, the working assumption of decolonization was that peoples were coeval to the colonial state, which became trust, mandate, or non-self-governing territories. It is clear, though, that peoples are not necessarily states, nor are states obviously peoples.[108] This is a category mistake. A people is a kind of collectivity, a group of human beings, while a state is a kind of governing apparatus.

The issue, of course, is that how a people is defined – what ties count – matters for the claims that can be made in its name. Categorizing the group according to selective socio-political criteria is determinative of the subsequent questions of the rights involved and their application. This is closely aligned to Valverde's insight that figuring out whether 'Eskimos' were indeed Indians had the effect

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[104] Kingsbury, *supra* note 16; David Makinson, "Rights of Peoples: A Logician's Point of View" in *The Rights of Peoples* (Oxford: Clarendon Press, 1988).
[105] Pomerance, *supra* note 13.
[106] *Ibid*.
[107] Knop, *supra* note 13; Summers, *supra* note 86.
[108] Makinson, *supra* note 104.

of determining a cascade of subsequent rights and benefits.[109] In this sense, qualifying as a 'people' is a threshold jurisdictional question that has tells whether the group will *become* a state or retreat *inside* its existing state. But the perennial problem is that 'the people cannot decide until someone decides who are the people'.[110]

Moreover, even qualifiers such as the notion that "peoples" must be subject to "colonial and alien domination" leave the indeterminacy intact. Gros Espiell defines it broadly:

> "Colonial and alien domination" means any kind of domination, whatever form it may take, which the people concerned freely regards as such.[111]

This is one way that the right is delimited – the potential claimants are characterized as not being under alien rule at all, but rather forming part of a larger non-colonial self which is entitled to its territorial integrity.[112] This points to the core indeterminacy: ultimately, it is a dispute about the boundaries of one self against another – *this* is the jurisdictional aspect. It is a dispute about the boundaries of the group.

The second issue is what is to be determined? According to the legal texts, that should be up to the people, so long as it falls under "political status" or "economic, social, and cultural development".[113] Subsequent legal texts delineated three options here: independent statehood, free association, and integration.[114] The establishment of a sovereign and independent state is the most common end referent of self-determination. This is independence and it is assumed to reflect the self-evident will of the people. It can be accomplished through war, revolution, elections, or agreement.[115] Then there are the options of free association or integration with an existing, independent state.

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[109] See Valverde, *supra* note 96. See also Chapter 2 at sections 2.4 and 2.5.
[110] Summers, *supra* note 86.
[111] Hector Gros Espiell, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination (Special Rapporteur)*, 20 June 1978, Commission of Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, 31st Sess., E/CN4/Sub2/405 (vol I).
[112] Pomerance, *supra* note 13.
[113] As set out in common Article 1 of the *ICCPR* and *ICESC, supra* notes 22 and 95.
[114] See *GA Resolution 1541 (XV)*, *supra* note 96; *Friendly Relations Declaration*, *supra* note 97.
[115] Summers, *supra* note 86.

History and precedent show that there are long stretches on the continuum between these options of what falls to be determined. Self-determination has been divided between its internal and external aspects, and it has been delimited by the concept of democracy. Even if a group qualifies as a people, there is no assurance that it will be entitled to more than non-discrimination and some minority guarantees. Jurisdiction here is the territorial sphere of the group as well as the state and the threshold inquiry into whether the law of self-determination reaches this group in these circumstances.

3.4.3 The Political Aspects of Self-Determination: Secession and Recognition

This section considers the relationship between secession, recognition, and statehood. These are the political aspects of self-determination. The legal criteria of statehood are laid down by law in the *Montevideo Convention on the Rights and Duties of States.*[116] Article 1 states:

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.

There are various paths to statehood, including through the United Nations decolonization process, through self-determination, and through secession or dissolution. Secession is usefully conceived as one means to effect self-determination. Secession implies self-determination, broadly conceived, of groups *within* states. It usually means that the seceding unit does not have the consent of the parent state.[117] Secession entails the splitting up and carving out of existing nation-states; it is concerned with "juridical, not physical, separation".[118] The underlying territory remains the same and, often, the borders remain intact. It is the rescaling of a territory to imbue it with different legal meaning.

In light of the international law principles of sovereign equality and territorial integrity which inhere to the existing state, secession is clearly a controversial posture, and one which has not been finally settled in international law. Indeed, secession highlights the non-legal aspects of statehood. International law tends to be seen as neutral on secession, which provides a political margin for states.[119] Cassese argues that international law does not prohibit secession:

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[116] Brownlie, *supra* note 11; *Montevideo Convention on the Rights and Duties of States*, 1933, 165 UNTS 61; 165 LNTS 19 (Entry into force December 12, 1934) [*Montevideo Convention*].
[117] Vidmar, *supra* note 3.
[118] Jeremy Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill LJ 281.
[119] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed (New York: Routledge, 1997).

> [T]he breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case... ."[120]

Crawford explains that self-determination practice is reluctant to recognize secession outside of the colonial context. Bangladesh was an exceptional case, "a fait accompli achieved by foreign military assistance", while Eritrea and the Baltic states involved consent.[121] Where central governments oppose secession, international recognition is difficult to muster. Indeed, the international community of states has a speckled history of extending recognition to secessionist movements: Bangladesh (Pakistan), and Eritrea (Ethiopia) succeeded, while Katanga (Congo), Biafra (Nigeria), Chechnya (Russia) failed.[122] Kosovo (Serbia), as discussed below, is ongoing, as are Tibet (China) and Aceh (Indonesia).

The point Crawford is making is that efforts to secede are generally discussed as matters within the domestic jurisdiction of the encompassing state until a very late stage in the process.[123] At that late stage, the inquiry shifts to recognition, and recognition is political. The legal paradigm of self-determination masks the fact that statehood rides on recognition.[124] Recognition is a method of accepting certain factual situations and endowing them with legal significance.[125] In the end, it is a matter of politics and facts; international relations, rather than law. Indeed, this dynamic mimics the original jurisdictional bind, in which the legal and the political are inextricably linked. The tug of war

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[120] Cassese, *supra* note 13.
[121] James Crawford, "State Practice and International Law in Relation to Secession" (1998) 69:1 Brit YB Int'l L 85.
[122] Summers, *supra* note 86. Both Ethiopia and Eritrea were Italian colonies. They were administered as a trusteeship and then dealt with by a Commission established by the UN General Assembly, which federated the two together. The federation devolved into a province and then an armed struggle. In 1993, after a referendum, Eritrea proclaimed independence.
[123] Crawford, *supra* note 15. Allen Buchanan is the leading proponent of secession as a remedial right where there is clear evidence of injustice: see Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991).
[124] Note the following cases of secession or dissolution, outside of the colonial setting *as well as* outside of the legal adjudicatory fora (*i.e.* the International Court of Justice, national courts), although the General Assembly was involved: Senegal (1960); Singapore (1965); Bangladesh (1971); Latvia, Lithuania, Estonia (1991); Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kirgizastan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan (1991); Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, Federal Republic of Yugoslavia (Serbia and Montenegro) (1991-2); Czech Republic and Slovakia (1993); and Eritrea (1993). This excludes the post-WWII divided states (Germany, Korea). Yet the political works in the other direction as well — there are twenty examples of failed secession attempts. See Crawford, *supra* note 5.
[125] Shaw, *supra* note 29.

between politics and law is encapsulated in the doctrinal debate between declaratory and constitutive recognition. Indeed, Hersch Lauterpacht, a proponent of recognition as a legal act, wrote:

> The true division of opinion is, it will be suggested, not between the constitutive and the declaratory but between the political and legal view of the nature of the function of recognition.[126]

Declaratory theory posits that statehood is independent of recognition; if a state exists, the legality of its creation or existence is irrelevant. The criterion is effectiveness. International law determines issues of statehood; recognition simply declares the legal fact of a state's existence. The state's existence is constituted by international law, meaning that recognition does not itself constitute statehood.[127] Constitutive theory posits that statehood depends in part on recognition and thus conditions of illegality may factor into the recognition. The criterion is legitimacy. Recognition turns a state into a subject of international law. Both come down to political decisions, but the political aspect is more apparent in constitutive theory. The prevailing contemporary view is that recognition is substantially declaratory, a status-confirming act rather than a status-creating one.[128]

The precise contours of the relationship between statehood and recognition have occupied international law scholars for years.[129] The *Montevideo Convention* criteria of statehood help to work out when recognition may be forthcoming. They use the notion of permanent population in association with territory to connote a bounded, stable community. The organized community needs a physical basis to establish existence as a state. The community must be *in control* of a certain geographical area.[130] These are the criteria of territory, people, and government. The capacity to enter relations with other states represents *independence.* For many jurists, this is the "decisive criterion" of statehood.[131] Guggenheim and Brownlie concur that the state must be the sole executive and legislative authority in a given area.[132] This means that the state must have sole jurisdiction. The

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[126] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947).
[127] Crawford, *supra* note 5.
[128] Lauterpacht, *supra* note 126; *Montevideo Convention*, *supra* note 116; *Charter of the Organization of African States*, 1948, 119 UNTS 3.
[129] Crawford is adamant that the creation of states is a matter of principle governed by international law, and not a question of fact: "a state is not a fact in the sense that a chair is a fact"; see: Crawford, *supra* note 5. For Cassese, recognition is arguably constitutive of the movement's international legal personality when it comes to recognizing the self in self-determination: see Cassese, *supra* note 13.
[130] Although the borders of that territory may be unsettled or under dispute.
[131] Brownlie, *supra* note 11; Shaw, *supra* note 29.
[132] Brownlie, *supra* note 11.

people and the territory may be somewhat contested but they must be justifiable; it is the criteria of government and independence which are the variables for recognition. It is the political act of recognition which confirms independent statehood and places the state on the international plane.[133] Recognition, in other words, means international legal personality.

Recognition has another role as well: the only enforcement machineries for self-determination are the countermeasures of sanctions and the refusal of legal recognition. Refusal of recognition has been employed in the cases of Namibia, Southern Rhodesia, the South Africa bantustans, the Arab territories occupied by Israel, and Kampuchea. In this, recognition is both political – communicating disapproval—and legal – refusing to endow the political units with international legal significance.

The point is that self-determination and its corollaries are legal and political amalgams, resembling the rest of international law in their principles and counter-principles. Jurisdiction is not only a good that statehood procures but also a vista onto that process with its weighing of sovereign imperatives and jurisdictional requirements.

3.5 The Case Law on Jurisdiction

There have been only a handful of decisions dealing with self-determination. Placing aside the South West Africa cases[134], the International Court of Justice consistently favours self-determination, although the pattern tends to be a general statement followed by ambiguous application.[135] There is a constant tension between the notion from the *Greco-Bulgarian Communities* opinion[136] — that the existence of a national community is a matter of fact, not law — and the notion that self-determination is precisely about the existence of a national community in law.

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[133] Stephen Tierney, "In a State of Flux: Self-Determination and the Collapse of Yugoslavia" (1999) 6 Int'l J Minority & Group Rts 197; Shaw, *supra* note 29.

[134] In 1966, the ICJ declined to answer whether South Africa's application of apartheid to South West Africa was inconsistent with its mandate, finding the question to involve "political judgment". Four years earlier, the majority had found jurisdiction, finding a rigid division between law and politics difficult to sustain. South Africa claimed to be implementing the principle of self-determination by creating Bantustans (the homelands of Transkei, Venda, and Bophuthatswana were declared independent). See: *South West Africa (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections*, [1962] ICJ Reports 319, 37 ILR 3. *South West Africa (Ethiopia v South Africa; Liberia v South Africa), Second Phase*, [1966] ICJ Reports 6, 37 ILR 243.

[135] Summers, *supra* note 86.

[136] *Greco-Bulgarian Communities, Advisory Opinion*, [1930] PCIJ (ser B) No. 17.

Each of the cases examined below is part of the canon of self-determination law. The point of this project is not to pull cases from the margins or to argue with the corpus (indeed, there are not that many cases to choose from), but rather to look at the established corpus through the lens of jurisdiction, to see what jurisdiction can tell us about what law does in these cases. In each case, jurisdiction functions in at least two ways. First, the territorial jurisdictional threshold *is* the problem: the impetus is that a group wants to shift the territorial border. Each case is a question about political jurisdiction and boundaries. Second, the ultimate placement of this limit also implicates broader jurisdictional theory about the legal threshold. There is a jurisdictional tension in each case and it is from this threshold that a legal norm may emerge. Thus, it falls to determine the jurisdictional threshold in each case. The question of legal permissions and disavowals is a problem of the threshold itself; the jurisdictional threshold is where law decides. Finally, it is important to note that most cases of self-determination and secession are not adjudicated in the legal sense; more often, wars of independence are fought and won, government is established, and recognition is sought and sometimes granted.

3.5.1 The Åland Islands (Commissions of League of Nations, 1920)

The Åland Islands, whose inhabitants were primarily Swedish speaking, wanted to break away from Finland and become part of Sweden. The dispute was between Sweden and Finland; the latter had only just been liberated from Russian control. The Åland Islands held a referendum in 1919, about secession from Finland and integration into Sweden. The majority of voters opted for secession. The claim was then turned over to the League of Nations, which appointed two commissions. This case is a fitting starting point because the first commission adjudicated a typically jurisdictional issue: whether the matter belonged to international law at all, or rather to Finland's domestic jurisdiction, while the second commission established the jurisdiction threshold and its repository of jurisdictional techniques. It reconfigured the jurisdictional threshold from self-determination to group flourishing, reorienting the inquiry from the political to the social.

On the jurisdictional question, the Commission of Jurists held that the matter fell within the domestic jurisdiction of the sovereign state that enclosed the group wishing to separate.[137] Tellingly, the Commission characterized the issue as "the right of disposing of national territory".[138] However, in

[137] *Åland Islands I*, *supra* note 75.
[138] *Ibid*.

this case, the matter could not be within Finland's jurisdiction because Finland was not itself definitively constituted as a state. Finland is characterized here as a new state, emerging from the under the yolk of Russia. Accordingly, the dispute fell to the jurisdiction of the League of Nations.

By the time of the merits of the claim, Finland's control was better established. The Committee of Rapporteurs found no right to self-determination; the principle of self-determination did not apply as of *right*.[139] Rather, the issue boiled down to the extent of Finland's sovereignty – was Finland sovereign after dissolving its ties to Russia and did that sovereignty extend to the Åland Islands? For the Committee, it was history that confirmed Finland as a sovereign state – its unity through time – as well as its political attributes (including a constitution) even if it had no independent foreign policy.[140] Finland was not a new state but a continuation of a former state.

The Commission of Jurists discussed the relationship between self-determination and the protection of minorities. Both principles share "a common ground and a common object", which is for the group to maintain and develop its "social, ethnical, or religious characteristics".[141] This ignores the political aspect of self-determination, which is categorically different from – even if it is related to – social recognition and authenticity. Regardless, the Committee sought to distinguish Finland as a people from the population of the Åland Islands as a minority. This is partly justified by reference to the opinions of non-Aland Swedish population of Finland; another opposing self.

There is no right of secession or self-determination for minorities. The commissions stated that "if ... incorporation with Sweden was the only means of preserving its Swedish language for Aland, we should not have hesitated to consider this solution. But such is not the case".[142] So instead, it offered the Alanders what would become a standard consolation: a sub-national regime of autonomy to respect their language and identity. There is a back-and-forth between two conceptions here: of self-determination as the realization of groupness — a political principle — and self-determination as freedom from oppression — a human right. These two images are tied to the group as requiring a political form and the group as requiring a social context for authenticity and survival.

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[139] *Åland Islands II*, *supra* note 75.
[140] *Ibid*.
[141] Cassese, *supra* note 13.
[142] *Åland Islands II*, *supra* note 75.

The Commission stated that in cases where self-determination is not a viable option, minority protection is a compromise solution. Both commissions agreed that in cases where the state abused its sovereign authority by oppressing or persecuting its members or was itself powerless to implement minority safeguards, minority protections might be insufficient. Crawford refers to this as a *carence de souverainete*: "in such cases, one must regard the dispute as no longer coming within the purview of domestic jurisdiction".[143] The Committee of Rapporteurs took this further, finding that this might admit the "altogether exceptional solution" of separation of the minority from the state.

The Åland Islands case is still invoked today because it laid the groundwork for delimiting self-determination. Åland Islands starkly reveals the Russian doll effect: the Ålanders want self-determination to secede from Finland, while Finland is exercising self-determination to separate from Russia. Finland was exercising the right of self-determination vis à vis Russia, yet the Ålanders could not exercise it vis à vis Finland.[144] The jurisdictional threshold had two parts in this case: first, the nature of the political unit as a sovereign state and its exclusive jurisdiction; and second, the characterization of the "self" and the implicit opposition of the "people" with the "minority". The Ålanders are set up as the other to Finland; the sovereign state is juxtaposed with the parochial group.

First, the cases turned on sovereignty: where the state is definitively constituted in terms of political authority, the separation of groups falls under its domestic jurisdiction. Then, assuming the congruence of the sovereign state and its jurisdiction over the group, there is no self-determination unless there are exceptional circumstances. This marks the distinction between regular minorities and those who are oppressed and persecuted. Second, the jurisdiction threshold in this case effectively turns minority guarantees into the compromise solution; minority guarantees are a substitute here *first*, and then they are codified and institutionalized in international law. By characterizing the "common goal" of self-determination and minority guarantees as group flourishing, the response can be autonomy but not independence. Minority rights appear in this case as a compromise but they eventually morph into both a substitute for and a version of self-determination. It is minority rights which modulate the tension between self-determination and territorial integrity.[145] The political-legal

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[143] Crawford, *supra* note 5.
[144] *Ibid.*
[145] Koskenniemi, *supra* note 88.

side of this modulation is that the categorization of a population as a 'minority' rather than a 'people' reduces their legal identity in a way that drastically alters their remedies.

At the jurisdictional threshold, law recognizes jurisdiction as an amalgam of territory and governance. Finland has jurisdiction over the Åland Islands. Yet, law also speaks a more complex language here, cognizant of multiple jurisdictions as communities but unwilling to extend its international hand except in abnormal circumstances. The sovereign state of Finland encloses the Åland Islands inside its borders, but the decisions also recognize internal jurisdictional measures for the Åland Islands. In one sense, then, group difference is accommodated and a distinct legal identity (autonomy) is granted, while in another sense, group difference is recast as requiring only national administrative measures in order to repress it on the international legal scale.

3.5.2 Western Sahara Advisory Opinion (International Court of Justice, 1975)

Western Sahara was colonized by Spain. In 1974, Spain initiated a referendum to begin the process of decolonization. Morocco and Mauritania protested that parts of the Western Saharan territory belonged to them. The case was brought to the International Court of Justice for an Advisory Opinion about the claims of Morocco and Mauritania to the territory. What emerged was a meditation on political theory and the nature of group identity. The Opinion turned on whether Morocco and Mauritania could demonstrate legal ties to the territory as indicative of sovereignty.

The first question asked whether Western Sahara was *terra nullius* (a territory belonging to no one) at the time of colonization by Spain. Spain proclaimed its protectorate in 1884, and so it was to be assessed by reference to the law in force then. State practice at that time was that territories inhabited by socially and politically organized tribes or peoples were not *terra nullius*. Western Sahara was inhabited by nomadic peoples who were organized in tribes under chiefs competent to represent them.[146] This is the way to obtain territorial sovereignty *before* self-determination – when sovereignty had to be established by establishing jurisdiction over territory (occupation) if there were no groups present or over people (by agreement) if groups already lived there.

[146] *Western Sahara, Advisory Opinion,* [1975] ICJ Reports 12.

If the answer to the first question was yes, the second question queried the nature of the legal ties of Western Sahara to the Kingdom of Morocco and the Mauritanian entity. The ICJ held that "legal ties" were not limited to ties to the territory and included the people who may be found on it.

> It is for the people to determine the destiny of the territory and not the territory the destiny of the people. ... [T]he existence of ancient 'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.[147]

The area was inhabited by nomadic tribes who traversed the desert on more or less regular routes. Morocco argued that it had a special state structure founded on "the common religious bond of Islam and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory".[148] Morocco manifested its sovereignty by demonstrating the allegiance of the caids to the Sultan, including the issuance of dahirs (decrees), the imposition of taxes, and acts of military resistance to foreign incursions. It also showed its international personality through the conclusion of treaties. The ICJ found that these did not amount to legal ties of territorial sovereignty because Morocco did not display any "effective and exclusive State activity".

The Mauritanian entity of the relevant period was the Bilad Shinguitti – a "distinct human unit" characterized by a common language, way of life, religion and system of laws, and featuring two types of political authority: emirates and tribal groups (which Mauritania acknowledged did not constitute a state, suggesting instead the vocabulary of nation or people). The ICJ found that the nomadic peoples possessed rights, including rights to land, but concluded that the tribes and emirates were independent of one another:

> [T]hey had no common institutions or organs. The Mauritanian entity therefore did not have the character of a personality or corporate entity distinct from the several emirates or tribes which comprised it.[149]

There was no tie of sovereignty or allegiance of tribes or inclusion in the same legal entity. The ICJ concluded that the emirates and tribes in the region did not constitute a "legal entity", but it accepted

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[147] *Ibid*.
[148] *Ibid*.
[149] *Ibid*.

that in certain conditions, a legal entity other than a state, 'enjoying some form of sovereignty', could exist distinct from the emirates and tribes which composed it. These conditions would be related to the existence of 'common institutions or organs' and an entity which possesses rights which it is entitled to ask members to respect.[150]

In short, the ICJ found legal ties for both groups, but not the sort of ties that would ground self-determination; not, in other words, ties sufficient to constitute territorial sovereignty. It is territory here that embodies jurisdiction and sovereignty – the group must *use* the territory in a certain manner. Territory is invoked as against nomadism: a group cannot have control of a territory, true political authority, if it is not fixed in place. Both Morocco and Mauritania stressed the overlapping character of the legal ties Western Sahara had with them at colonization. The ICJ noted this geographical overlapping was emblematic of the difficulty of disentangling the various relationships. Yet there is also a temporal aspect. It is possible to compare this case to the ICJ *Namibia Opinion*, where Judge Ammoun found that Namibia preceded and survived colonial rule.[151] Namibia presented as a continuous historical entity. There must be something resembling a state that the law of self-determination can point back to.

This case also highlights the political-legal content of the group. If a group sharing the common characteristics of language, culture, and a sense of identity can exist in various registers, how can the law distinguish nations and peoples from tribes? The answer lies in a trifecta of territory, peoples, and political authority. In terms of territory, the law could not interiorize the notion of ephemeral territory that is both temporally and physically contingent on the physical presence of tribes. [152] In law, territory and its boundaries are fixed, not shifting, and they do not change identities. In short, jurisdiction cannot attach to abstractions of territory itself. In terms of peoples, the *type* of group matters and it is this that jurisdiction adjudicates most clearly. After all, self-determination can be exceptionally dispensed with where there are no peoples.

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[150] *Ibid*; Brownlie, *supra* note 11.
[151] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion*, [1970] ICJ Reports 16.
[152] In a discussion of the Roma peoples in Eastern Europe, Andrzeg Migra describes how "their notion of territory did not correspond to a single geographical or administrative area, but rather to a set of spaces within which a given *tabor* [group of Roma] ... was or could be physically present at any given moment; it was conjured up whenever its members happened to be located and was thus a shifting or mobile zone". See Andrzeg Migra, "Roma territoriality and state policy: the case of the socialist countries of East Europe" in Michael Casimir & Aparna Rao, eds, *Mobility and territoriality: social and spatial boundaries among foragers, fishers, pastoralists, and peripatelics* (New York: Berg, 1992).

At the jurisdictional threshold between the people and the territory, only exclusive and stable manifestations of jurisdiction and authority matter. Both Morocco and the Bilad Shinguitti produced a maze of jurisdictional orders, replete with decrees, international capacity, and rights. But the law does not reach overlapping geographies or nomadic peoples. Sovereignty is produced at this jurisdictional threshold between state and non-state, and it cannot be shared. Two halves of territorial sovereignty do not make one whole. Jurisdiction functions as a springboard for political discourse about how boundaries are drawn and how authority works. *Western Sahara* unintentionally demonstrates how territorial jurisdiction does not, in and of itself, require the form of the sovereign state.

In the end, the ICJ passed the case back to the UN General Assembly, and thus back to the political realm. The postscript to this case continues. After years of armed conflict, the United Nations continues to strive to hold a referendum. An ongoing dilemma remains the so-called identification process: in order to hold a referendum, the UN must determine the electorate – effectively theorizing who belongs to the nation-state before the nation is constituted. Peoples must be placed on slices of territory in a setting of nomadic tribes. The talks remain ongoing.[153]

3.5.3 The Badinter Commission (European Community, 1992)

The state of Yugoslavia was created at the end of World War I to solve the problem of nationalism in the Balkans.[154] It was a federation of six republics with a population of 23 million people.[155] Following Josip Broz Tito's death in 1980, the federation was wracked by the nationalism and separatism of its republics, which havoc was cross-cut by the claims of the three major ethnic groups: Muslims, Croats, and Serbs. This precipitated the federation's breakup in 1991.[156] Several republics became independent states.[157] This process was overseen by the then-European Community (EC), which established the Conference on Yugoslavia and the Arbitration Commission in 1991. The

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[153] See BBC News, Western Sahara Profile, online: http://www.bbc.co.uk/news/world-africa-14115273.
[154] Tierney, *supra* note 133.
[155] Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 AJIL 569.
[156] Summers, *supra* note 61.
[157] Initially, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia were recognized as independent states with Yugoslavia reduced to Serbia and Montenegro. In 2006, Montenegro split from Serbia and in 2008, Kosovo seceded from Serbia.

disintegration of Yugoslavia continued apace, however, with violent conflict and ethnic cleansing erupting in Croatia, Bosnia-Herzegovina, and, later, Kosovo.[158]

The Arbitration Commission was composed of the presidents of the constitutional courts in France, Germany, Italy, Spain, and Belgium, and led by Robert Badinter from France.[159] The so-called Badinter Commission issued several Opinions about the disintegration of Yugoslavia. There was never any question that the European Commission governed the matter. The national constitutional expertise of the Badinter Commission would prove limiting, but this did not affect the legitimacy of the Commission itself.[160] Indeed, the Badinter Commission melded national legal expertise to the international scale of statehood. Their opinions shed light on the scope of the self-determination process, the relationship between self-determination and territorial integrity, and the role of an arbitration commission in such issues.[161] One of its first acts was to invite the republics to submit requests for recognition.

In Opinion No.1, the Arbitration Commission opined that Yugoslavia was in the process of *dissolution* with its constituent republics emerging as independent states.[162] The existence or disappearance of the state was a question of fact.[163] The lack of a federal government representing the entire population of Yugoslavia meant that there was no government with authority to prevent separation of the republics. In other words, it relied on the organizational form of the federal state to locate the lack of statehood. The Opinion does not mention self-determination or secession, preferring the language of dissolution and state succession, but duly noted the referendums in favour of independence in each republic. One consequence of dissolution was that it set clear limits on the political fragmentation, devolving an entitlement to statehood only to the republics.

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[158] In 1992, a UN peacekeeping mission was established. See *SC Res. 743*, 1992, UNSC, 3055th Mtg., UN Doc. S/RES/743. In 1995, NATO began limited airstrikes, resulting in the Dayton Accords. In 1999, NATO began a full-scale intervention. The Kosovo conflict would ultimately end with a peace agreement in June 1999.
[159] Summers, *supra* note 61. Badinter was the president of the Constitutional Council of France.
[160] Peter Radan, *The Break-up of Yugoslavia and International Law* (London: Routledge, 2002): "Against this background of conflict [in Slovenia and Croatia] management of the Yugoslav crisis at the international level passed, by general international consensus, to the EC".
[161] Alain Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples" (1992) 3 EJIL 178.
[162] *Opinion No. 1*, [1992] 92 ILR 162; 31 ILM 1494 (Badinter Commission).
[163] *Ibid*. This characterization was widely contested. See Summers, *supra* note 61: in Yugoslavia, "federal units had unilaterally declared independence and were forcibly resisted by federal institutions: a process much more like secession". See also: Yehuda Blum, "UN Membership of the 'New' Yugoslavia: Continuity or Break?" (1992) 86 AJIL 833.

Then the European Community issued *Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union* and a *Declaration on Yugoslavia*.[164] These documents, based on the Helsinki Final Act and the Charter of Paris, established preconditions for the recognition of new states including respect for minority rights, respect for democracy, and respect for existing borders.[165] Their criteria for recognition were far in excess of the traditional standards for statehood in the *Montevideo Convention*. Four republics applied for recognition (not Serbia-Montenegro), and the Badinter Commission issued an Opinion for each. The European Community and other states went ahead with recognition in the spring of 1992, without much regard for the nature of the community contained therein or its political structures for sovereignty and minority rights. Instead, it realized the political goal of statehood for four republics and later Serbia Montenegro.

In Opinion No. 2, the Arbitration Commission determined whether the Serbian population in Croatia and Bosnia-Herzegovina had the right to self-determination.[166] The Opinion characterized the Serb population as a minority and turned to the rights of minorities. The Serbs had no right to external self-determination but only the right to the full protection of the international law on minorities. The Commission went further, suggesting that members of minorities and ethnic groups should be provided the right to choose their nationality:

> [M]embers of the Serbian population of Bosnia-Herzegovina and Croatia could [obtain recognition of] the nationality of their choice with all the rights and obligations deriving therefrom in relation to all States concerned.

This disassociation of nationality and territory, such that a person could claim membership in the Serb community while retaining rights and duties in Bosnia-Herzegovina, would permit self-determination in the register of status, if not territorial borders. This effectively ascribed second-level content to the right of self-determination and left territorial borders intact.

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[164] *European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 1992, 31 ILM 1485.
[165] *Helsinki Final Act*, *supra* note 99; *Paris Charter*, *supra* note 100.
[166] *Opinion No. 2*, [1992] 92 ILR 167 (Badinter Commission). The Serbian population in Bosnia-Herzegovina, which made up approximately 35 percent of the republic's population, had established its own parliament, conducted a plebiscite, and proclaimed on January 9th the Republika Srpska. A similar situation arose with Kosovo, made up of 2 million inhabitants, 90 percent Albanian. It declared independence in 1991 but no one recognized it.

The third opinion addressed the question of international borders. In Opinion No. 3, the Commission was asked whether the internal boundaries between Croatia and Serbia and Bosnia and Herzegovina and Serbia could be regarded as frontiers in terms of public international law.[167] The Opinion held that former internal federal borders would become international borders for seceding entities once they received international recognition as states. It justified this result by reference to the principles of territorial integrity and *uti possidetis*, which latter principle "constitutes today a principle of general application".[168] In this way, the internal boundaries of the federation were transformed into the external boundaries of the state.[169] The Commission's use of *uti possidetis* reinforced the republic-centred approach to independence.

The case of Yugoslavia, although criticized for some of its positions on international law, still reveals much about jurisdictional boundaries and groups. It is federalism that scale bends here, transposing its national administrative borders onto the international plane. In the cases of the USSR and Yugoslavia, the internal boundaries of federal states were treated as establishing the international boundaries of statehood.[170] The problem is that there is a distinction between international borders and internal administrative boundaries: interstate boundaries are established to separate states and peoples, while internal borders are established to unify and govern a polity.[171] The assumption in turning the internal borders outwards is that a cosmopolitan democratic state can function within any borders. Thus, the conversion of administrative borders to international borders is considered as sensible as any other approach and far simpler. This reveals the deep-seated bias of self-determination toward democratic governance, which is one of its underlying presumptions. It is in territory and borders that the conservative undertow of the concept presents itself.

The Opinions exhibit the general fog surrounding self-determination and minority rights. On their reading, refocusing self-determination to serve human rights means reconceiving it as minority rights. Opinion No. 2 finds that the Serbs had minority rights (implying that they are not a people)

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[167] *Opinion No. 3*, [1992] 31 ILM 1488 (Badinter Commission).
[168] It relied on the *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, [1986] ICJ Reports 554 (ICJ)., but that decision used the principle in the context of colonization.
[169] Radan has argued that this result is incorrect: first, the principle of territorial integrity did not apply because the federal borders were not international borders; and second, there was no agreement that existing colonial boundaries would hold – a precondition of *uti possidetis*—as there was in Latin America and Africa. See: Peter Radan, "Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission" (2000) 24 Melbourne U L Rev 50.
[170] Kingsbury, *supra* note 16.
[171] Ratner, *supra* note 62.

but also that they had a right to self-determination (implying that they are a people). Summers explains this as *individual* self-determination, where Serbs are free to determine their political status as individuals.[172] This is persuasive but the better explanation lies in the distinction between choosing status and choosing territory. It is still true that questions of sovereignty are sooner or later questions of territory.[173] These states owe more to territorial coherence and *ex post facto* recognition than any other factor.[174] Self-determination applied only to those inhabiting a region whose territorial borders had been previously defined; it was not applicable to territorial enclaves where the minority formed a local majority (Kosovo and Krajina).[175]

The nature of the group is binary in these Opinions: ethnic groups or political units. The political units are pre-formed by the federal boundaries, while the ethnic groups are outside the frame of law. The decisions sought to construct a fiction that removed ethnicity from the situation.[176] Yet the violence that accompanied Yugoslavia's so-called dissolution reveals how each articulation of community is itself a symbol whose purpose is to invoke the boundary, the jurisdictional threshold between us and them.[177]

In these cases, the jurisdiction threshold is between the federal and the international. The jurisdictional technology is dissolution, which sidelined the issue of secession. The federal government was found to be impotent, leading to the dissolution of the republic, yet federal borders were viably recast as international borders. The law speaks to itself here about its fear of authorizing secession, its fear of moving borders, and its preference for stasis and precedent by allowing federalism to be the blueprint for statehood. In this way, one territorial jurisdictional arrangement retained form as it morphed into another territorial jurisdictional arrangement.

> Because they combined both 'territoriality and institutional structure [that is, the institutions of governmental power, public services, and in many cases, a constitutional

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[172] Summers, *supra* note 61.
[173] Johnston, *supra* note 58.
[174] Geoff Gilbert, "Autonomy and Minority Groups" (2001) 35 Cornell Int'l LJ 335.
[175] Weller, *supra* note 155.
[176] Radan, *supra* note 160.
[177] Elizabeth Frazer, *The Problem of Communitarian Politics: Unity and Conflict* (Oxford: Oxford University Press, 1999).

> document], the federal subunits were 'states in embryo' that were 'available for capture'.[178]

Yet in keeping the form, it drastically changed the substance. The state must contend differently with groups than with republics and vice versa. For the republics that fulfilled statehood as self-realization, realizing its nationalist component, the form was not contentious. But this option was not considered at the sub-state level for competing ethnic and minority groups. In Croatia, the EC disregarded its own requirements from the *Guidelines on Recognition,* leaving minority groups to their own devices.[179] Instead, the Commissions located the possibility of accommodation and resolution only in the threshold that produced the crisis: the existing borders.

Kosovo is a complicated coda to the breakup of Yugoslavia. It was the original site of Serbian nationalism, then later the subject of military intervention by the North Atlantic Treaty Organization (NATO) in 1999, and finally a territorial administration of the United Nations.[180] Kosovo was not a republic but one of two autonomous provinces.[181] In 2008, Kosovo unilaterally declared independence.[182] Costa Rica, the United States, France, Albania, the United Kingdom, and most other European countries recognized it immediately, but recognition stalled at just over a third of UN member states.[183] Serbia, which maintains a sovereignty claim over Kosovo, requested an Advisory Opinion from the ICJ concerning the legality of the declaration of independence. The ICJ rendered its opinion on July 22, 2010, finding that Kosovo's declaration of independence did not violate international law.[184] The opinion narrowly focused on the legality of *declaring* independence, not on the wider process of obtaining it. It did not examine the terms of secession, the attainment of statehood, or the effects of recognition. It remains unclear whether Kosovo is an independent state; several recognition texts refer to Kosovo as an internationally protected state and recognition is not

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[178] Carol Skalnik Leff, "Democratization and Disintegration in Multinational States: The Breakup of the Communist Federations" (1999) 51 World Pol 205.
[179] See Stephen Tierney, "The Long Intervention in Kosovo: A Self-Determination Imperative?" in *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Human Rights* (Leiden: Martinus Nijhoff Publishers, 2011) 249.
[180] Summers, *supra* note 61; *SC Res. 1244*, 1999, UNSC, 4011 Mtg., UN Doc. S/RES/1244.
[181] Tierney, *supra* note 179.
[182] Kosovo had first declared independence in September 1991, but that declaration was only recognized by Albania. It had also petitioned the Badinter Commission to no avail. See Summers, *supra* note 61. The lack of approval of the parent state is what renders the declaration unilateral.
[183] *Ibid*.
[184] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, [2010] ICJ Reports (ICJ).

universal.[185] For Summers, Kosovo was "something of a hybrid between secession and an international territorial administration".[186] What is clear is that, unlike international involvement in the dissolution Yugoslavia, which removed the claim to territorial integrity by the position that the parent state no longer existed, international involvement in Kosovo did not quite succeed in removing the encompassing claim of territory. Whether this is due to the constraints of the federal form or the timing of independence or something else entirely stands to be determined. Meanwhile, Kosovo remains in a complicated liminal space between independence and recognition, inhabiting the jurisdictional threshold between the legality of its declaration and its missing political weight.

3.5.4 Case Concerning East Timor (International Court of Justice, 1995)

This analysis of international case law ends where the chapter began: on a Portuguese outpost in the Indian Ocean. When East Timor declared independence from Portugal in 1975, it was promptly invaded and annexed by Indonesia. This annexation continued for twenty-five years, during which time East Timor maintained its designation as a non-self-governing territory administered by Portugal.[187] There followed several UN resolutions affirming the need for a peaceful solution.[188] In 1989, Australia and Indonesia concluded an agreement for the exploitation of oil on the continental shelf. The agreement created a 'zone of cooperation' in the Timor Gap between East Timor and Australia. In 1995, Portugal brought a case against Australia in the International Court of Justice based on the terms of that agreement.

The case of East Timor is significant for its direct jurisdictional implications; the majority found that the International Court of Justice did not have jurisdiction over the dispute. Portugal alleged that Australia had failed to observe its obligation to respect Portugal as the administering power of East Timor and the rights of the people of East Timor to self-determination.[189] Australia raised jurisdictional concerns about Indonesia's role as the appropriate counterparty. The parties agreed to link those concerns to the merits.

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[185] Vidmar, *supra* note 3.
[186] Summers, *supra* note 61.
[187] Ved Nanda, "Self-Determination and Secession under International Law" (2000) 29 Denv J Int'l L & Pol'y 322.
[188] See, *e.g.*, *GA Res. 3485 (XXX)*, 1975, UNGA, 30th Sess, UN Doc A/RES/3485(XXX); *SC Res. 384*, 1975, UNSC, 1869th Mtg, UN Doc S/RES/384; *SC Res. 389*, 1976, UNSC, 1014th Mtg, UN Doc S/RES/389.
[189] *East Timor*, *supra* note 2.

Australia argued that it had *de facto* recognized the incorporation of East Timor into Indonesia in 1978. The negotiations with Indonesia concerning the delimitation of the continental shelf marked *de jure* recognition by Australia.[190] In effect, even if Portugal had the exclusive power to conclude treaties on behalf of East Timor, that power could pass to another state under international law, and, Australia argued, it had so passed to Indonesia. The Australian pleading made the negative argument for nationalism: Portugal's rights were no longer identified with those of the people of East Timor.[191] The Court found that it could not adjudicate Australia's conduct in entering the agreement without first resolving whether Indonesia could have lawfully concluded the agreement and, for this, it required Indonesia's consent.[192]

Portugal responded that the rights breached by Australia were *erga omnes* (rights owed towards all); accordingly, it could require Australia to respect those rights regardless of the conduct of another state. The ICJ agreed that:

> [T]hat the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.[193]

Nonetheless, it found that the *ergo omnes* character of a norm and the rule of consent to jurisdiction were divisible. An ICJ ruling on the conduct of Australia would imply a determination of Indonesia's entry and presence in East Timor and its corollary treaty-making power. This was problematic since Indonesia was not a party to the dispute, nor had it accepted the Court's compulsory jurisdiction.[194]

This case turned on the capacity component of statehood, as embodied in the power to conclude international treaties. Jurisdiction here is the legal threshold of state capacity: East Timor lacked capacity despite possessing both people and territory; Portugal had the label of legal institutional capacity but lacked effective control over the territory and thus political power; Indonesia occupied the physical space and so undertook political negotiations. Indonesia scaled East Timor down to size, making it a province of its sovereign state. By employing the legal apparatus of statehood and its

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[190] *Ibid* at para. 17.
[191] Summers, *supra* note 86.
[192] *East Timor*, *supra* note 2.
[193] *Ibid* at para. 29.
[194] *Statute of the International Court of Justice*, 1946, United Nations, 59 Stat 1031; 33 UNTS 993; 39 AJIL Supp 215.

internal divisions (provinces), Indonesia's annexation resembled sovereignty closely enough that its jurisdiction over treaty-making followed.

The Court's discussion never addressed capacity of the East Timorese peoples and their territory that lay at the heart of the dispute. It focused instead on the administration of the territory (Portugal) and the annexation of the territory (Indonesia). It is control over territory that is determinative. Indeed, the case suggests that not only did East Timor lack capacity, but that there is no room in international law for a state which is an administering power to bring a claim on behalf of a separate entity – a people – amounting to a self-determination claim against a third state.[195] East Timor was in an impossible bind.

There is also a vacillation between the legal and non-legal that disempowers East Timor. Australia's position on East Timor underlined the powerful force of recognition as against the ongoing denunciations by the United Nations. Portugal argued that several UN resolutions had clearly established its role as the administering power of East Timor, and that the ICJ could simply rely on those resolutions. The ICJ, however, found that the resolutions did not intend "to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor".[196] Even apart from the resolutions, it is puzzling that East Timor could be designated a non-self-governing territory under Chapter XI of the UN Charter, but that this would hold no legal implications vis a vis other states. Against this backdrop, Australia's recognition of Indonesia was initially political but it became legal when Australia began negotiating with Indonesia over the Timor Gap. It became legal because it introduced the legal capacity of Indonesia as a state and thus implicated the legal referents of statehood. This is a slippage that is national —only Australia is implicated in the unilateral act of recognition — but the result is internationalized to the extent that a bilateral treaty exists on the international plane.

With Indonesia's consent, the UN undertook a "popular consultation process" in 1999. At the resulting referendum, the people of East Timor voted overwhelming in favour of independence. Indonesian forces responded with violence and the UN Security Council voted to establish a

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[195] Summers, *supra* note 86.
[196] *East Timor*, *supra* note 2.

transitional administration.[197] East Timor became a sovereign state in 2002. It was a colony of Portugal, yet its occupier, Indonesia, had until 1999, thwarted its independence. These historical ties intersected with the UN's involvement, which laid the groundwork for uncontested statehood.

3.6 Jurisdictional Governance: Relationships, Contradictions and Incommensurabilities

It might seem, at this juncture, that the only conclusion to draw is that self-determination is wildly indeterminate.[198] In fact, it is more nuanced than that. Jurisdiction is the site of this indeterminacy and attention to the jurisdictional threshold reveals some of the ways in which the group is hived off from law. This section sets out the work that jurisdiction does in concealing contradictions and separating incommensurabilities. The legal threshold is the place where jurisdiction toils away and these are the results of its hard work. This is how jurisdiction governs. These jurisdictional technologies: (a) reveal the political-legal binding that is at heart of jurisdiction; (b) show that at the legal threshold, the boundaries of the legal order are reinscribed using these tools; (c) confirm that law is inherently conservative when it comes to the group, that the international plane proffers only the form of statehood, and that scale is employed by law as a technology for relocating the group inside the state.

Martii Koskenniemi argues that it is not possible to understand self-determination in the abstract; the only way to make sense of it is to place each claim in context: which state or group is making the claim, what are they seeking, and what means will they use for that purpose.[199] It is true that it is difficult to discern a pattern of application without context, but this misses the point that the architecture of self-determination matters too. States decide, but in applying the framework of self-determination, they both reveal and demarcate the jurisdictional boundaries of statehood and groupness on the international plane. Jurisdiction acquires traction and perpetuates stasis because of the logic of precedent and the structure of international legal argument. The technologies that are available to jurisdiction are determined by the precedent-based international legal order and by the indeterminacy of international legal argument. Jurisdiction adjudicates in the context of "established state power as the persistent structuring element of international law and society".[200] Scholars have

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[197] Vidmar, *supra* note 3; *SC Res. 1264*, 1999, UNSC, 4045th Mtg, UN Doc S/RES/1264; *SC Res. 1272*, 1999, UNSC, 4057th Mtg, UN Doc S/RES/1272.
[198] Ivor Jennings, *Approach to Self-Government* (Cambridge: Cambridge University Press, 1956).
[199] Koskenniemi, *supra* note 88.
[200] Nathaniel Berman, "Book Review of Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights by Hurst Hannum" (1991) 85 AJIL 730.

already made the point that international law is bound to remain indeterminate; in a world of deep pluralism, legal norms must remain open-ended in order simply to function.[201] The point here builds on this insight, but it points in another direction as well: the norms may be indeterminate, each right matched by a counter-right, each sovereign assertion matched by a challenge — but there is an underlying directionality to it all. The jurisdictional threshold only sometimes decides the outcomes, but it always sorts and scales the cases so as to avoid fundamental collisions.

What are these deep incommensurabilities? There are three foundational incommensurabilities in self-determination logic. First, there is the base dynamic of self-determination which both supports and challenges statehood. On the one hand, the sovereign statehood of the group is exalted as the pinnacle of self-realization and recognition; on the other hand, the sovereign statehood of the original state is threatened. Each grant of the desired right to statehood is at the expense of an existing right of statehood; to recognize the rights of one "self" entails the denial of the rights of a competing "self".[202] Self-determination is both the basis for claims to statehood and a foundational threat to existing statehood. Cassese and Pomerance both describe this as the subversive aspect of self-determination: by threatening existing states, it threatens the very edifice upon which international law rests. This is related to the second postulate: every self-determination claim contains the potential to devolve. This is the image of the Russian doll of self-determination, in which every secessionist claim to self-determination opens onto the plateau of another one. The process of self-determination can be endless as the focus comes in ever closer and smaller and smaller sub-state groups seek to exercise the right.[203] In other words, there is no endpoint; the world knows many tiny states. Finally, whatever the nature of the claim, the logic of self-determination requires the repression of difference in order to realize itself. In order to demonstrate the basis for national self-determination, the group must deny difference in order to assert it.[204] Invariably, to present a persuasive picture of the self, the group must emphasize a singular national identity at the expense of smaller groups within its borders. These incommensurabilities play out in the case law through jurisdictional manoeuvres to characterize groups as different in kind as well as undergirding the jurisdictional thresholds and technologies which present in each case.

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[201] David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987); Koskenniemi, *supra* note 8.
[202] Pomerance, *supra* note 13.
[203] Koskenniemi, *supra* note 8.
[204] Simpson, *supra* note 7.

3.6.1 On External and Internal Self-Determination

Self-determination *itself* jumps scale – internally, it is national representation and externally, it is international independence. This is the distinction between external self-determination and internal self-determination. These types of self-determination have recently been conflated and employed together. But is internal self-determination really the same as external self-determination, scaled differently? The answer is no, partly because the legal scale changes the character of the entitlement.

External self-determination is well-described in the sections above: it is the right of a people to independence and statehood, the right of a people to choose "the sovereignty under which they shall live".[205] External self-determination determines the group's *international* status. In contrast, internal self-determination is the right of people to select its own form of government. It is the exercise of the right within an existing state, and it relies on liberal principles of democratic representation.[206] This is a right to determine *internal* status within the state, but not international status. The external version derives from nationalism, while the internal version derives from liberalism.[207] In effect, self-determination is governed by an ongoing effort to shift the focus from the existence of peoples to the nature and representativeness of political institutions; an attempt, in other words, to substitute liberalism for nationalism.

For Woodrow Wilson, external and internal self-determination were both linked to democracy: freedom from alien sovereignty was only meaningful if accompanied by a process of internal self-government.[208] However, this works in reverse as well: if there is meaningful democracy and rule of law – true self-government—then no special group rights or protections are required. Indeed, in its more recent form, external self-determination has given way to internal self-determination. The self-determination scholarship has focused on democracy, suggesting that a norm of democratic governance might obviate the need for self-determination at all. Thomas Franck is the most well-known proponent of this view.[209] The implication is that a democratic regime makes a claim for self-determination "much less compelling, if not redundant".[210] But it is important to remember that

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[205] Pomerance, *supra* note 13.
[206] Nanda, *supra* note 187.
[207] Summers, *supra* note 86.
[208] Pomerance, *supra* note 13.
[209] See Thomas Franck, "The Emerging Right to Democratic Governance" (1992) 86 AJIL 46; Franck, *supra* note 20.
[210] Alston, *supra* note 14.

democracy is not a legal criterion of self-determination and indeed, efforts to make it so were quickly rejected.[211] Democracy was not a requirement of the colonial model of self-determination.[212] The substantive nature of the regime is theoretically separate from self-determination.

The result is that internal and external self-determination are conflated and put into service as substitutes. The focus shifts from independence and self-government to democracy, representation, and non-discrimination. For some, this is a welcome realignment of self-determination with democracy and autonomy which relocates it alongside, if not within, human rights law.[213] The problem, however, lies in the inside/outside dichotomy. At the jurisdiction threshold, it becomes clear that internal self-determination determines external self-determination. A state governed by democratic representation makes external self-determination unnecessary and superfluous. Sub-national autonomy is sufficient for the group to flourish; a territorial sovereign state is not required. But the logic of self-rule is not the same as democratic representation, and this rescaling matters not only for what it prescribes for groups (a shift in the very centre of their groupness), but also for its interference with the state and its domestic politics. Here, it is permissible to shift the inside/outside dynamic because the movement is imperceptible.

3.6.2 On Minority Rights

Internal self-determination is related to but not coterminous with minority rights guarantees. The latter are internationally protected but nationally enforced, and not necessarily linked to democracy. Although minority rights were part of the edifice of group protection in international law, their place *inside* the self-determination regime was by no means preordained. Despite the erosion of the reserved domain of domestic jurisdiction that minority guarantees entail, they have thrived as an alternative to self-determination.[214] From the Åland Islands to Yugoslavia, the law relies upon minority rights to stem the core incommensurabilities of self-determination. It keeps the Russian doll from opening, it keeps the territorial frontiers intact, and it permits the semblance of sovereign choice.

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[211] Rupert Emerson, "Self-Determination" (1971) 65 AJIL 468.
[212] Tierney, *supra* note 133.
[213] Simpson, *supra* note 7.
[214] Brownlie, *supra* note 13.

There is a blurry legal line between minorities and peoples. It is not clear whether a minority is also a people, but it is accepted that a minority does not, in itself, have a right to self-determination under international law.[215] Self-determination law does not preclude the existence of peoples within states, and national constitutions often recognize as much, granting them rights. If a minority is a people, then it does not lose this status because of some demographic or territorial change which turns it into a majority; in other words, the status of a group as a people is separate from its status as a minority.[216] The category of 'minority' is relational: a group may be a minority within one grouping but a majority within another grouping, whereas whether a group is a people is a qualitative question, detached from other groups.[217] In short, a minority may be a people and a people may be a minority.

There are very limited provisions available to minorities under international law. Such protections used to be included in bilateral or multilateral agreements pertaining to particular territories[218], and took on a more general cast with the institutional system of minority protection under the League of Nations and the Permanent Court of International Justice. Nathaniel Berman has shown how these legal arrangements effectively domesticated nationalism's revolutionary potential into a problem of minority rights.[219] Under this interwar system, there were twenty-five treaties dealing with minorities in Europe.[220] The breakdown of the minority treaties in the 1930s tainted minority protections into the post-World War II era, and the United Nations Charter focused on the principle of universal human rights rather than particularized minority regimes.[221]

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[215] It is theoretically possible that the provisions (Article 1 and Article 27) are cumulative but the preparatory work compels opposite conclusion, instead suggesting that the limitations of Article 27 are to be read into Article 1. See Cassese, *supra* note 13.
[216] Crawford, *supra* note 5.
[217] Makinson, *supra* note 104. The best definition of a "minority" continues to be that provided by Francisco Capotorti in his role as *Special Rapporteur*: "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed toward preserving their culture, traditions, religion or language": see Francisco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities)*, 1977, UN Doc. E/CN4/Sub2/384/Rev1.
[218] Kingsbury, *supra* note 16.
[219] Nathaniel Berman, "A Perilous Ambivalence: National Desire, Legal Autonomy, and the Limits of the Interwar Framework" (1992) 33 Harv Int'l LJ 353.
[220] Kingsbury, *supra* note 16.
[221] Crawford, *supra* note 15; Kingsbury, *supra* note 16. This general bent did not preclude several local minority protection arrangements in the years following.

Article 27 of the *International Covenant on Civil and Political Rights* is still the only legally binding expression of minority rights protections of general application:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[222]

It is immediately apparent that Article 27 does not touch all aspects of ascriptive groups that might be making claims of law. It is, as Crawford writes, "pregnant with limitations".[223] All apart from its insistence on the individual nature of the right[224], it implies that there are states where minorities do not exist, it relies on the state to define the minority, it leaves out national minorities, it is not a right of the group, and it is a negative right which requires no positive action by the state. Moreover, it fails to protect minority group members against the group. Finally, Article 27 does not contemplate autonomy; the rights refer only to freedoms.[225] To that extent, minority rights are already protected in the *ICCPR* and elsewhere as human rights; the right to association and the right to freedom of expression protect all members of groups whatever the basis for association or expression.

At the jurisdictional threshold, minority rights guarantees fold into self-determination. The limits of law here are precisely the territorial borders of the sovereign state. To illustrate, several scholars have suggested that the best way to protect self-determination is to delimit it. This is a 'unified approach', which entails putting self-determination into a basket with autonomy, rights to language, culture, and participation, equality, and general human rights. In this conception, self-determination does not always require the option of separate statehood and indeed is often satisfied by internal self-determination measures and minority rights guarantees.[226] This means that self-determination should not be about independence most of the time, but rather about political and cultural options *within* the established state.[227]

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[222] *ICCPR*, *supra* note 22.
[223] Crawford, *supra* note 15.
[224] The Human Rights Committee has insisted on this formulation as well; see: *Lubicon Lake Band v Canada (Chief Bernard Ominayak)*, Communication No. 167/1984, 45 GAOR (1990) Supp. No. 40 (A/45/40).
[225] Louis B Sohn, "The Rights of Minorities" in Louis Henkin, ed, *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 270.
[226] Kingsbury, *supra* note 16.
[227] *Ibid* at 500.

The modulation between self-determination and territorial integrity is obvious in the unravelling of the Soviet Union and Yugoslavia. Self-determination was denied to some groups (sub-federal groups such as the Kurds, Kosovans, Checnyans, South Ossetians and Bosnian Serbs, who were offered various minority guarantees) but granted to other groups (federal units marked by internal administrative borders, such as Slovenia and Croatia). The groups are both already scaled as sub-federal or federal, and then re-scaled by the Badinter Opinions by shifting the frame for all units toward the larger scale. This relies on a notion of nested scales, the federal unit nestled inside the international legal order. But incommensurability is never fully contained: Koskenniemi reminds us that every minority turns into a majority when we take our focus in. If the focus is on Yugoslavia, there are several minorities, but if the focus is on Croatia, there is a majority population.[228] This highlights the significance of territory and borders for the minority status assessment: the fact of minority status depends on being located within a particular configuration of territorial boundaries. It is a relative status based on spatial referents, and the positing of the existence a minority group equally preserves the position of the dominant majority group.[229]

By locating minority rights inside internal self-determination, the law of self-determination has ceased to present minority rights and self-determination as substitutes. Instead, they appear as different ways to realize the same right. This is fundamentally jurisdictional in that the legal threshold shifts from law to non-law: it removes the claim from the international legal order and places it inside the state for domestic resolution.

3.7 Conclusion

There is something about the way that the international legal order came together, the way it is arranged, that makes group difference anathema to the international order. From the Peace of Westphalia to the Cold War, the narrative has always turned on statehood. In the international legal order, the only legal object that carries the possibility of emancipation is the state. Groups predicated on some kind of difference are encouraged to emulate the nation state as the only form of serious political expression or they are left to find some subordinate status within the nationalist state.[230] The

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[228] Koskenniemi, *supra* note 88.
[229] Akhil Gupta & James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference" (1992) 7 Cult Anthropology 6.
[230] RBJ Walker, "The Doubled Outsides of the Modern International" in RBJ Walker, Joao Nogueira & Nizar Messari, eds, *Displacing the International: Essays on the Legacy of Peripheral Politics* (London: Routledge, 2009).

ascendancy of statehood as the legal category of the international legal order has meant that the identity of the group is tightly bound to the model of the territorial sovereign state; it is both legalized and politicized.

International self-determination is a calibration of people versus territory. These are the two hallmarks of group claims, and they are also the two traditional markers of jurisdictional reach. Law does not like to conduct the inquiry in the category of the group and, in this respect, self-determination forces its hand. Law is much more comfortable with minority rights guarantees (in the register of the individual), decolonization (in the register of the finite historical wrong), and democracy (in the register of rights and participation). The jurisdictional threshold reveals the use of criteria such as territory and capacity to sidestep the group unit. In each case, the jurisdictional threshold implicates the political, the social, and the legal aspects of the group. Each indicium is used to different ends: sometimes the social group is not political and thus not deserving of self-determination; other times, the political group is not legal and thus not deserving of self-determination.

One result of these jurisdictional manoeuvres is the politicization of the group. The group cannot simply meet the legal criteria for statehood, but must also present as a unitary polity mobilized against past injustice and tied to a territory with transmutable frontiers. There is also a larger sense in which the group is politicized in the original sense of political: the group must be the appropriate mix of *demos* and *ethnos*, thus requiring some version of self-representation and autonomy to fulfil its destiny. The paradigmatic group is simultaneously organic and democratic, the *ethnos* mobilized by the *demos*. Self-determination in law has evolved – it is a right now, with post-colonial content – but it is still, at bottom, a political right of revolution.[231]

Ultimately, jurisdictional analysis takes us back to the sovereign equality of states. This principle erases difference and presents the international legal order as a set of solid states, with their insides omnipresent but verboten. The international legal order, resting on the inside/outside dichotomy, upholds "the equal sovereignty of very unequal and unlike actors".[232] This manifests initially through jurisdiction as it is already parcelled out – the starting point is unequal – and then it is perpetuated by

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[231] For the notion of self-determination as a right of revolution, see Pomerance, *supra* note 13.
[232] Kingsbury, *supra* note 42.

jurisdictional thresholds which always refer back to the existing state of affairs, to the current set of actors, to the present distribution of territory, and to the accepted definition of the group. This is the heavy jurisdictional tow of precedent as well as the weight of the political-legal binding. In the next chapter, the focus shifts from the outsides of states and international law to their insides: from within, the state is a creature of constitutional law.

Chapter 4: The National Legal Order

Constitutionalism ... is an index of how much conflict a society is able to suppress. This may be a highly controversial formulation ... But it captures something very important about how disagreement is channelled into constitutional solutions, what remains in excess of such channelling, to tempt, invoke or necessitate further constitutional responses.[1]

This chapter begins in a former colony that traversed the eastern parts of present-day Canada and the United States. Straddling Quebec, the Maritime provinces, and Maine, the community mixed French émigrés and members of the Wabanaki Confederacy. The French and British empires fought over the territory of these French speakers until the land ultimately passed into British hands.[2] Most of the community was expelled in the 18th century, only to be permitted to return and resettle years later. Some returned while others resettled in Louisiana, founding New Acadia and evolving into the social group known as the Cajuns.[3] Initially geographically and administratively distinct from Quebec, and later culturally and linguistically as well, this group is now dispersed across parts of the United States and Canada. Today, they make up about one-third of the population of New Brunswick.[4]

This brief sketch refers to the Acadians: people associated by land, ancestry, or culture to the region of the formerly French colony. Their multiple narratives — of aboriginal colonization and cohabitation, of return and recognition in the federal state, and of resettlement and reconstitution in Louisiana — embody the simultaneous fluidity and fixity of group identity in its interactions with the law. They represent a community that is a considered a minority in the Canadian state, partially covered by some constitutional protections, yet categorically different from the Québécois. The Acadians illustrate one group's life lived largely outside of the law yet residing perilously close to the determinants of legal protection: they are territorially concentrated in pockets, culturally distinct, and historically manifested. In this, they inhabit the jurisdictional threshold somewhere between constitutional category and group at large. With history on its side but the tight coincidence of

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[1] Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008).
[2] For the history of Acadia, see: Bona Arsenault, *History of the Acadians* (Saint-Laurent: Fides, 1994); James Laxer, *The Acadians: In Search of a Homeland* (Toronto: Doubleday Canada, 2006); Dean Jobb, *The Acadians: A People's Story of Exile and Triumph* (Mississauga: J. Wiley & Sons Canada, 2005).
[3] Carl A Brasseaux, *The Founding of New Acadia: The Beginnings of Acadian Life in Louisiana, 1765-1803* (Baton Rouge: Louisiana State University Press, 1987); Christopher Hodson, *The Acadian Diaspora: An Eighteenth-Century History* (Oxford: Oxford University Press, 2012).
[4] Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2006) at 70, fn 62.

population and territorial boundaries lacking, this community opens a window onto the vista of commitments and gaps for group difference in the Canadian legal order.

This chapter tells the story of the inside part of the inside/outside dichotomy examined in the last chapter. It aims to describe and analyze the jurisdictional arrangements that govern group difference in the national legal order, looking for the thresholds between groups as well as between groups and law. It focuses on the order of constitutional federalism as it is enacted through legal texts. The key questions to answer are: how are collective identities legally distributed in the national legal order? How are minorities defined and who defines them? How do groups figure in constitutional texts and how is their protection adjudicated? What, in short, is the limit of national law when it comes to the group?

This chapter is concerned with the nature of the higher order legal authority within the polity and the manner in which it empowers and constrains group difference, both at the level of entrenched norms and at the more quotidian level of group claims. It approaches constitutional federalism in terms of its role in constituting governance within the state. To a certain extent, then, it could be conceived as a project of public law. For Martin Loughlin, public law is defined by the singularity of its object, which is the activity of governing.[5] It must be conceived as a "vernacular language", an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing.[6] Loughlin's method in *The Idea of Public Law* is to isolate the practices of governing which shape public law, and those practices map onto the concepts marshalled in this chapter to explain the parameters of jurisdiction. So, for example, *The Idea of Public Law* includes chapters on politics, representation, sovereignty, constituent power, and rights.

In *Foundations of Public Law*, Loughlin harks back to a medieval distinction between law as an instrument of governing authority and law that establishes government authority.[7] He can be understood as arguing that modern public law has collapsed this distinction. Rather than treating public law as a subset of ordinary positive law, Loughlin argues that ordinary positive law presupposes the existence of a prior source of authority, namely, fundamental law (now public law).[8]

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[5] Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) at 30.
[6] *Ibid*.
[7] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).
[8] *Ibid*.

To the extent that public law is linked to both the constitution of authority *and* the exercise of that authority, this project falls within its purview.

By sequestering the idea of public law as an object of analysis, Loughlin provides the foundation for considering how the concept of jurisdiction fits into public law. More squarely, he provides the framework for jurisdictional manoeuvres, revealing how jurisdictional practices are implicated in the project of governing. As the extension of law's authority and the embodiment of its limits, jurisdiction hones in on the work that law performs and the concepts that bolster it and it highlights the dual nature of public law. Jurisdiction is both constitutive and regulative; the basis of sovereign legal authority and an instrument of governance. It is implicated in both the constitution of authority *and* in the ordinary exercise of that authority. This is significant for what follows because it suggests the relationship between original jurisdiction and its ongoing reconstitution. It is tempting in the national context to focus on the original establishment of jurisdiction, as articulated in the abstract foundational myth of the people and then laid down in their constitutional text(s). Indeed, this is the primary focus of this chapter. However, it also pays attention to the ongoing constitution of jurisdiction through jurisprudence as this is where jurisdictional gaps and discontinuities are revealed.

The analysis works at two levels. The conceptual and theoretical work that jurisdiction performs at the national level is universal to the extent that legal authority in federal constitutional states is contained within an authority structure. However, this partial universality is limited by the spatial containment represented by the state form; both the original moment and the authority structure look different in different states. Each nation-state has a different national logic of inclusion and exclusion and strikes a different balance between the individual and the collective. In this chapter, I apply the higher-level theoretical framework to Canada to flesh out the terms of group difference in the Canadian state. Constitutional federalism in Canada provides an excellent study of how a multinational and multiethnic state contends with group difference. The chapter thus moves between the register of general practices of governance and the register of particular Canadian examples. I try to indicate the general register with generic terms ("sub-state units") and the particular register with specific terms ("provinces").

It is useful to flag two characteristics of the national legal order at the outset. These distinctive characteristics place this chapter in conversation with the previous one, and distinguish it accordingly. First, what is immediately obvious from review of the Canadian constitutional text is that the emancipatory paradigm here is minority rights for the group. In the international legal order, minority rights were the distant second-best solution; in the national legal order, constitutional minority group rights are all that there is.[9] Each scalar devolution presents the limiting concept of the last order as the liberationist concept of the next one. Second, the motif of the national legal order is categorization. Adjudication of the group presents in a series of constitutional categories. The group either falls within the category or falls outside of it; there is no in-between, no analogizing, and no balancing. This kind of taxonomic categorization classifies things into predetermined categories.[10] The categories are various but finite: constitutional/non-constitutional, international/constitutional, French/English, and Catholic/Protestant. The consequence of this motif is that the political is shielded from view because the court does not have to articulate what the right is about or marshal a theory about why the group is included or excluded.[11]

4.1 Overview

At the core of each national legal order is an attempt to organize the legal and political institutions at the centre of collective life. This organization tends to crystallize in a constitutional moment in which the *demos* defines itself as such and sets out the terms of its coexistence. The resulting constitutional order is telling both for the history it carries forward, and for what is included in and excluded from its jurisdiction. Theoretically, this chapter seeks to elucidate the Canadian legal identity and its parameters of group subjectivity. It is in these parameters that the work of jurisdiction is visible.

At the outset, it is worth noting that there is a standard series of related terms that deal with group difference in the national frame. There is a stock set of challenges to the nation-state: identities, nationalities, minorities, and difference. These are followed by a set of proposed solutions:

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[9] It is possible to see federalism as a modality of "minority rights" to the extent that it is an accommodation of groupness. This is obviously a different paradigm from individual minority rights, one that is possibly more robust in content, but it does not change the fact that it is inside the nation-state. It is this placement inside which is the governing feature of minority rights in this scalar legal order because it removes the possibility of the category of statehood.

[10] Kathleen Sullivan, "Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing" (1991) 55 Albany L Rev 605.

[11] *Ibid*. Yet, despite the taxonomic mode at work in this scale, the notion of the group and its territory retains some fluidity. The minority group as a constitutional category shifts over time and territory as, for example, the number of minority language speaking parents settle and move.

constitutionalism, federalism, and multiculturalism. These terms are not only related by the problem-solution dyad, but also because they are all mixed up together. Federalism and multiculturalism, nationalities and minorities: they are all in the constitution, but they are not wholly contained within it. This chapter seeks to highlight these relationships by interrogating the theory and texts of constitutional federalism for the terms of the dialogue between group difference and law.

Formal jurisdiction in the national legal order is based on the constitution, statutes, and the allocation of powers.[12] This is the frame that most clearly shows the fault line allocations of legal authority and exposes the distribution of power in the polis. Much of this jurisdiction is doled out territorially, according to the terms of constitutional federalism. The terms of this distribution are both revealed and problematized by the project of locating the metaphorical and literal space for the group within it. Emilios Christodoulidis and Stephen Tierney describe how political theory "informs and undergirds" constitutional responses, directing the allocation of what is and what is not constitutionally negotiable; what is and is not open to constitutional question.[13] It is *those allocations and negotiations* which are the stuff of jurisdiction. By following jurisdiction, the overlapping spheres of political and constitutional, legal and spatial, norm and exception, come into view.

The chapter begins with a section about the conceptual categories of the group in the national legal order. Here, we see that the categories of constitutional federalism do not map neatly onto the categories of the group in the international sphere or in socio-political life. Then the chapter turns to the architecture of constitutional federalism, examining its foundations, its provisions, and its narrative form. This is a reconciliation of theory and legal texts, highlighting the sovereign/subject disarticulation that lies at the root of law's treatment of groups. Next, case law about the jurisdictional limits of the group is examined. These limits are sometimes scalar, sometimes territorial, sometimes historical, but always fixed by constitutional federalism. Federalism configures authority by provincial jurisdiction (territory), while constitutionalism delimits the inside of the state (the community) and the terms of membership (governance). The case law reveals that the enumerated constitutional categories for the group are delimited now, constrained by history and

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[12] American Law Institute, *Restatement of the law, third, the foreign relations law of the United States* (St. Paul: American Law Institute Publishing, 1987).
[13] Emilios Christodoulidis & Stephen Tierney, "Public Law and Politics: Rethinking the Debate" in Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) 1 at 12.

entrenched constitutional compromises. Finally, the chapter places the national legal order under the jurisdictional microscope to articulate its incommensurabilities and contradictions, to parse its sorting techniques, and to retrieve its intuitions about territory and the group.

4.2 The Conceptual Categories of the National Group

In the international legal order, there are three conceptual categories for group claims: self-determination, minority rights guarantees, and indigenous rights.[14] These are conceived as types of legal claims or rights. In the national legal order, there are also three conceptual categories. They map only loosely onto the international ones. These categories — the province of Quebec, ethnic groups, and aboriginal peoples — are distinguished by their cultural, ethnic, and/or political identities. It is these identities which ground their legal claims and rights. There are two important points about these categories which distinguish them from the international ones. First, they are identities first and types of group claims second. As such, they sometimes provide specificity at the expense of categorical and legal capacity. Second, they are originally derived from political philosophy scholarship about group rights, not from law. These were Will Kymlicka's original types of multicultural citizenship: national minorities, aboriginal peoples, and polyethnic groups.[15] He has since refined these into three distinct "silos", each bearing its own separate laws, constitutional provisions and government departments: ethnic groups are covered by multiculturalism; the 'French fact' is covered by federalism and bilingualism; and First Nations are covered by aboriginal rights.[16]

These three silos are organizing categories in the national legal order and they capture something essential about how the national frame conceives of group difference. It is in the act of trying to map these socio-political categories onto legal constitutional ones that the limitations of both sets of categories are revealed. The categories of the group that appear in the constitutional text are embodied quite differently. As groups, ethnic groups are covered only by the interpretative constitutional principle of multiculturalism, while aboriginal treaty rights are protected as rights, not self-government, and French and English minorities receive exceptional education and language rights.[17] The socio-political categories of the group cannot be neatly overlaid onto the legal

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[14] See Chapter 3, section 3.2. Note that Kingsbury characterized the third category as "human rights".
[15] Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).
[16] Will Kymlicka, "Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)" in Keith Banting, Thomas Courchene & Leslie Seidle, eds, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research on Public Policy, 1997) 39.
[17] See, *infra*, section 4.4.3, for the precise provisions.

categories of the group in this order because the relationship between identities and legal claims in a constitutional order is particularized. In the international legal order, treaties refer to the general responsibilities of states to ensure that minorities may enjoy their own culture and use their own language.[18] In the national legal order, these abstractions are laid down; they are contested and then entrenched in the name of finding and uniting the people. They are enumerated as identity groups. In short, the lines of categorical division fracture differently in the national frame. For example, the term "national minority" has a specific meaning in the Canadian context, which is the reason that the category of minority rights has to be fragmented: national minorities are distinguished from ethnic and cultural minorities, which are distinguished from religious minorities.

This mapping of categories with its gaps and caveats prefigures the fate of group difference in the national frame. The constitutional categories (including federalism and the provinces) are embedded in an entrenched constitutional text, which endows them with a certain amount of legal force. This does not preclude their dynamism or fluidity. Constitutional categories are not singular; they admit of reconfigurations of identity and expansions of rights-holders. Groups may sometimes manifest as religious and other times linguistic, and new groups may demonstrate how the category properly includes them.[19] For example, French-Canadian identity has been variously expressed over time as religious (French-Catholic), linguistic (French), and civic (province of Quebec). However, categories also constrain, enable, and sustain the logic of entrenched constitutionalism and jurisprudential precedent through the use of different kinds of legal categories.

Some legal categories are gradients and harmonize well with reasoning by analogy. These kinds of prototypical categories include fundamental rights such as religious freedom. To make a legal claim to religious freedom, group identity is secondary to the freedom itself; it is evidence of the claim. Other kinds of legal categories, though, are more taxonomic and diagnostic. These kinds of bright-line categories include exceptional rights and statuses such as denominational education or provincial territory. To make a legal claim for denominational education rights, group identity is a criterion of the right itself. Enumerated identities are part of the legal category. So, for example, the category of

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[18] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (Entry into force March 23, 1976) at Article 27.

[19] See, *e.g.*, the Manitoba education dispute in Frances Russell, *Canadian Crucible: Manitoba's Role in Canada's Great Divide* (Winnipeg: Heartland Associates, 2003) and the ongoing legal battle over the categorization of the Metis peoples and non-status Indians as "Indians" within the meaning of section 91(24) of the *Constitution Act* in *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, 2013 FCJ 4 (Fed Ct).

aboriginal rights may expand to encompass different rights or more aboriginal groups, but its capacity is not infinite — there is no admitting a Muslim immigrant from Pakistan to the category on any basis. For groups that are precluded by the terms of these exceptional national categories — non-Christian religious immigrants, cultural collectivities, and other linguistic minorities — resort must be had to individual rights.[20]

The categories, then, are more complicated than Kymlicka's tripartite structure. It is nonetheless worthwhile to consider the three silos in more detail for their sociological veracity and how that translates into legal meaning. Both the province of Quebec and aboriginal peoples are generally considered national minorities.[21] This is partly because they share the ambition of sovereignty and partly because they constitute pre-existing, territorially-concentrated cultures. In this conception, culture is synonymous with 'nation' or 'people', and thus such groups are frequently referred to as nationalities with societal cultures. They make up a multinational state. Ethnic groups are conceived as loose cultural associations and they are considered different in kind. This is because they are composed of immigrants who bear the burden of their voluntary settlement and are disparately located in space. Here, culture means a "loosely aggregated" ethnic subculture, subordinate to the societal culture, and consigned to the private sphere.[22] These ethnic groups make up a polyethnic state.[23] Canada is one of the few countries to recognize both the multinational and polyethnic character of the state, either or both of which may inaugurate the multicultural state.[24]

In *Multicultural Citizenship*, Kymlicka argued that these categories were theoretically distinct.[25] This theoretical separation is based on moral justification: whereas minority nations were coerced into assimilation by conquest or colonization, immigrant groups voluntarily decided to emigrate. Having

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[20] These constitutional categories do not preclude constitutional amendments or policy solutions or any number of other resolutions to accommodate group difference but they invariably frame those resolutions.
[21] See Kymlicka, *supra* note 15; Will Kymlicka, "Federalism and Secession: At Home and Abroad" (2000) 13 Canadian Journal of Law & Jurisprudence 207.
[22] Kymlicka, *supra* note 15.
[23] Choudhry argues that the category of "ethnic group" has been further refined in the Canadian constitutional law to mean religious groups (note that this argument leaves a vacuum with respect to cultural or ethnic groups that are not religious). See: Sujit Choudhry, "Group Rights in Comparative Constitutional Law: Culture, Economics or Political Power" in Michel Rosenfeld & Andras Sajo, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1099.
[24] "A state is multicultural if its members either belong to different nations (a multination state) or have emigrated from different nations (a polyethnic state), and if this fact is an important aspect of personal identity and political life." See: Kymlicka, *supra* note 15.
[25] *Ibid*.; Claus Offe, "'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts Through Group Rights" (1998) 6 J Pol Phil 113.

thus uprooted themselves from the societal culture of their homelands, immigrant groups understand that integration is expected of them. The voluntary decision to emigrate affects the legitimacy of their claims and provides no basis to claim self-government rights. In short, national minorities have societal, institutionally embodied, cultures and immigrant groups do not.[26] This stands in contrast to Benedict Kingsbury, who argued on the international plane that the international categories of group difference share the same underlying principle of self-realization or autonomy for the group. Indeed, Kymlicka's suggestion of theoretical separation has been roundly criticized both for what it obscures and for what it assumes.

James Tully, in keeping with Kingsbury, notes that the common thread running through the conceptual categories is the aspiration to self-rule:

> The call for forms of self-rule, the oldest political good in the world, has been obscured by the redescription and adjudication of the various claims in terms of nationalism, self determination, the rights of individuals, minorities and majorities, liberalism versus communitarianism, localism versus globalism, the politics of identity and the like.[27]

In his later work, Kymlicka has acknowledged this base commonality, arguing that the international *Declaration on the Rights of Minorities* renders minority claims for autonomy invisible.[28] He refers to Steven Wheatley:

> There is no objective distinction that can be made between groups recognized as minorities, national minorities, indigenous peoples, and peoples. What distinguishes these groups is the nature of their political demands: simply put, minorities and national minorities demand cultural security; peoples demand recognition of their right to self-determination, or self-government.[29]

The base concern with self-rule is also brought to bear in the criticisms of Sujit Choudhry and Seyla Benhabib. Choudhry argues that these categories rely on a fundamental contradiction over the value

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[26] The difference between societal cultures and (ethnic) subcultures is largely one of scope and institutional embodiment: Sujit Choudhry, "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology" (2002) 10 J Pol Phil 54.
[27] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 5.
[28] *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135*, 1992, UNGAOR, 47th Sess., UN Doc. A/47/135 [*Declaration on the Rights of Minorities*].
[29] Steven Wheatley, *Democracy, Minorities, and International Law* (Cambridge: Cambridge University Press, 2006) at 114.

of one's own culture.[30] The standard liberal nationalist account of culture invokes culture as a social good that provides a context of choice for individuals.[31] Kymlicka contends that people have an interest not only in cultural membership *per* se, but in membership in their *own* cultures. Choudhry points out that, on its very terms, such a fundamental interest should apply equally to all persons. Yet Kymlicka maintains that only national minorities are entitled to such access, and that this restriction is based on consent. It is not that immigrants possess a lesser interest in cultural membership, but rather that they waived that right through their decision to immigrate. As Choudhry emphasizes, if one's own culture does matter as a context of choice, then the category distinction between national minority groups and polyethnic groups does not hold, and there is no reason to stop at polyethnic rights.

This point is echoed by Seyla Benhabib, who notes that if culture is valuable for liberalism because it enables a meaningful range of choices, then there is no basis to privilege national cultures over immigrant ones.[32] She begins by reading the distinction between national minorities and ethnic groups as descriptive, countering it with examples of the fluid and dynamic nature of identity groups that conflate and confound the description. There are national minorities who resemble ethnic groups such as the Puerto Ricans in the United States and there are ethnic groups which look a lot like national minorities such as the German-speaking minority in the East European, Baltic, and Russian territories. Then she identifies the philosophical slippage from claims about the distinctiveness of societal cultures to claims about justice — about democratic inclusion and exclusion — that actually undergird the disparate treatment of groups.[33] Finally, Benhabib points out that these claims depend upon a certain historical genealogy, a certain temporality, that fixes the nature of the cultural group based on the mode and moment of incorporation. Following Joseph Carens, she queries the missing normative principles for Kymlicka's category distinction and argues that it cannot be correct that voluntary as opposed to forced integration generates distinct rights. Kymlicka's typology falls short,

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[30] Choudhry, *supra* note 26.
[31] See: Kymlicka, *supra* note 15; Avishai Margalit & Joseph Raz, "National Self-Determination" (1990) 87 J Phil 439; Yael Tamir, "The Right to National Self-Determination" (1991) 58 Soc Research 565.
[32] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002) at 60-63 (charging cultural essentialism and sociological confusion about the concept of societal culture).
[33] *Ibid* at 63.

Benhabib contends, because it stresses the genealogical and territorial features of group formation, rather than their political features.[34]

The utility of grouping the categories together is to show how the jurisdictional boundaries between national minorities and immigrant groups extol certain traits, support certain politics, enable certain legal protections, and generally provide a category foil for other group rights. Constitutional federalism establishes the initial allocation of political and legal power in the national state and sets the basic terms for adjudicating future allocation claims. Because of this, it structures claims and incentives on a going forward basis. This highlights the orthodoxy of incompatible and incommensurable claims at the national scale, and this is the very orthodoxy that jurisdictional techniques manage and sort in scalar and interpretative ways. It turns out that a legal framework designed to further nation-building and to accommodate diversity sidelines the latter by reinforcing territorial jurisdiction above all.

4.3 How Jurisdiction is Parcelled Out in the National Legal Order

As in the international legal order, where the terms of governance are established by principles set farther back than plain view (such as inside/outside) yet powerful in their modulating function, so too are the terms of governance in the national legal order more difficult to ascertain than the law. The background terms of governance establish how the polity is bounded and united, and then how authority is constituted within that polity. These are the concepts of nation-ness and constitutive power. They are the political foundations of the legal framework of constitutional federalism and they establish the terms of jurisdiction: original, territorial, and statal.

4.3.1 The Constitution of Authority

In the original moment, Costas Douzinas showed how the group associates into a self-governing polity and then gives itself the law.[35] It is at this point that we must query the locus of authority: where does it lie and what is its source? This question, which might otherwise be described as the question of constituted power, causes enormous consternation in constitutional theory. It is important here because it portends the potential exclusion of the group in the current constitutional order. As well, it flags the constitutional moment as a jurisdictional moment, one in which legal authority is

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[34] *Ibid* at fn 5.
[35] See Chapter 2 at 2.3.1.

parcelled out and constitutional loyalties are laid bare, and it foreshadows the work that is done in constituting the jurisdictional threshold in each case. For David Dyzenhaus, the question of constitutive power presents an ambiguity about whether authority is located inside or outside the legal order.[36] This characterization cannot help but intimate the terms of jurisdiction.

It begins with the foundations of constitutionalism, and of authority more generally, which is a complicated pyramid of legality, legitimacy, and democracy. One basic premise upon which constitutionalism and constitutions rest is a concept of democracy generated from the claim that 'we the people' are the authorizing agents of the constitutional scheme.[37] This is related to legitimacy, which concerns the claims of authority that constitutional law can make "to justify its legal supremacy in a society that calls itself self-governing".[38] Governments that are legitimate have the right to rule.[39] Popular sovereignty is the notion that the constitution is a product of "democratic self-lawgiving".[40] The constitution provides the foundation of legal order and the basic terms of law-making, "establishing itself as the pivot on which the legitimacy of legality turns".[41]

Within this pyramid lie the elements of constituent and constituted power. Neil Walker and Martin Loughlin, drawing on Abbé Sieyès, describe the three aspects of a modern polity: the people as a community make up the constituent power, the government apparatus is the constituted power, and the terms of its functioning are the constitution.[42] The meaning and location of the constituent power are the riddle of legal theory. Perhaps this is because the constituted power and its constitution presuppose the existence of what Joseph H.H. Weiler calls a "constitutional *demos*":

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[36] David Dyzenhaus, "Constitutionalism in an old key: Legality and constituent power" (2012) 1 Global Constitutionalism 229.
[37] Petra Dobner & Martin Loughlin, "Introduction" in Petra Dobner & Martin Loughlin, eds, *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) xi.
[38] Jeb Rubenfeld, "The Paradigm Case Method" (2006) 115 Yale LJ 1977.
[39] Richard E Flathman, "Legitimacy" in Robert E Goodin, Philip Pettit & Thomas W Pogge, eds, *A Companion to Contemporary Political Philosophy*, 2d ed (Maldon: Blackwell Publishers, 2012) 678.
[40] Rubenfeld, *supra* note 38.
[41] Loughlin, *supra* note 7.
[42] Martin Loughlin & Neil Walker, "Introduction" in Martin Loughlin & Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 1.

> [A] single pouvoir constituant made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted.[43]

A constitution is said to require a *demos* because it must be created by some kind of constituent power.[44] It is fallacy, though, to conflate the juridical presupposition of a constitutional *demos* with political and social reality. History shows that constitutional doctrine frequently presupposes the existence of that which it creates: "the *demos* which is called upon to accept the constitution is constituted, legally, by that very constitution".[45]

This underscores an abiding tension between constituent power (the democratic power of the sovereign people) and the constituted power of the state (the fundamental constitutional norms, consecrated in the constitution's foundational moment, elevated beyond the reach of temporal majorities).[46] Constituent power is vested in the people; constituted authority is vested in the government. The people and the government coexist, the one subject to the other's authority. Yet a people cannot be simultaneously sovereign over the rules and subject to them. James Tully, following Joseph de Maistre, calls this is a coincident demand to be both sovereign and subject.[47] Dyzenhaus refers to it as the paradox of authorship: to act as author of the legal forms of constituted power, it must already exist as an author – an entity capable of authorizing.[48]

This is the sovereign/subject disarticulation that haunts constitutional theory.[49] I want to sidestep the resulting theoretical morass about constituent power to concentrate instead on the issues of identifying the people that make up the constituent power and the concept of representation contained within it. The gap implied by the sovereign/subject disarticulation – the moment between the people and the constitution, between subject and ruler – relates to the question of constituent

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[43] JHH Weiler, "Federalism without Constitutionalism: Europe's Sonderweg" in Kalypso Nicolaidis & Robert Howse, eds, *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001) 54 at 57.
[44] Mark Tushnet, "Constitution" in Michel Rosenfeld & Andras Sajo, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 217 at 218-19.
[45] See, *e.g.*, the United States. Weiler, *supra* note 43.
[46] Stephen Tierney, "Sovereignty and the Idea of Public Law" in Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) 15 at 17-18; Loughlin & Walker, *supra* note 42.
[47] James Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy" (2002) 65 Mod L Rev 204; Jack Lively, ed, *The Works of Joseph de Maistre* (London: Allen & Unwin, 1965).
[48] Dyzenhaus, *supra* note 36 at 233-34.
[49] Tully, *supra* note 47.

power in a particular way. This is because constituent power not only involves the exercise of power by the people but also constitutes the people. The people who enjoy ultimate political authority must be somehow both a collective nation and a collection of individuals, abstract and universal.[50] The focus on the disarticulation thus limits the democratic potential of constitutionalism. There is no constant renewal of authority when it comes to constitutional rules, no revisiting of the original moment, and thus no room for difference to fragment the constituent power and its embodied constitution. Dyzenhaus asks, almost rhetorically, does constituent power disappear at the moment it turns into authority or does it hang around, threatening to disrupt its creation?[51] The response must be that it may well linger beyond the founding moment(s) but it is largely ineffectual after that point because of the entrenchment of the constitution and its terms of representation. This requires some further explanation.

When we ask what the constituent power represents, we are able to probe the terms of that representation, to ask what is included and excluded, and to query how representation constitutes authority.

> We should be conscious not only of the way in which the king or the crown assumed a role as representative of 'the community of the realm', or parliament as representative of 'the people', or the third estate as representative of 'the nation', or the state as representation of the totality of 'citizens', but also of the way in which all the nouns in such formulations are representations. Politics functions through the art of representation.[52]

Martin Loughlin argues that the roots of representation lie much deeper than the arrangements for political representation.[53] I argue that the concept of representation permits the linkage of the constituent power and the constitution. Representation introduces an element of distance and indirectness into the governing relationship: self-government through representation does not actually mean that the people govern themselves; rather, they elect others to represent their interests.

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[50] Margaret Canovan, "The People" in John S Dryzek, Bonnie Honig & Anne Phillips, eds, *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2008) 349.
[51] David Dyzenhaus, "The Politics of the Question of Constituent Power" in Martin Loughlin & Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 129 at 131.
[52] Loughlin, *supra* note 5 at 157.
[53] *Ibid*.

In other words, "the constituent power of the people is effectively delegated".[54] This abstraction is part of what forecloses the reconstitution of the people. Symbolically, constituent power must present as expression of unity in the foundational moment.[55] Efforts to come to terms with constituent power always invoke the past, the "genesis of constitutional ordering", and so legal theory ends up mired in history rather than exploring present discontinuities in the make-up of the people.[56] More than this, though, representation misses something important about what constituent power constitutes: namely, the constitution, an entrenched set of laws. This is why the original constitutional moment is often difficult to overcome or alter. Representation highlights the disconnect between changing representatives and changing either the terms of governance (the constitution) or the makeup of constituent power (the people). The capacity to change the former, which is politics, does not have much to do with the capacity to change the latter, which is law, or at least constituted by law. Representation glosses over what it cannot do.

Despite the different scale and altogether different legal order, then, the question from the law of self-determination repeats itself here: who are the people? In constitutionalism, this question matters because the constitution supposedly derives its legal force from the people, and thus its answer is commensurate with a finding that the constitution is legally binding.[57] The concern, in other words, is that some groups or individuals may be left out of the people and are thus not fairly or properly bound to the terms of the constitution. In *Strange Multiplicity,* James Tully describes how each theoretical narrative of popular sovereignty is built upon the edifice of a homogeneous sovereign people: liberalism assumes a society of undifferentiated individuals; communitarianism assumes a community held together by the common good; nationalism assumes a culturally defined nation.[58] The effect of these narratives is to deprioritize "identity claims other than those which correspond with and reinforce the boundaries of the constitutional polity in question".[59] The challenge is to take proper account of difference in the foundational moment of the state *and* in continuing constitutional

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[54] Martin Loughlin, *The Concept of Constituent Power* (University of Victoria Colloquium, 2012) at 15.
[55] *Ibid*. Loughlin would argue that constituent power "continues to function within an established regime as an expression of the open, provisional, and dynamic aspects of constitutional ordering".
[56] *Ibid*.
[57] Nicholas Aroney, "Formation, Representation and Amendment in Federal Constitutions" (2006) 54 Am J Comp L 277.
[58] Tully, *supra* note 27.
[59] Neil Walker, "The Idea of Constitutionalism" (2002) 65 Mod L Rev 317 at 331.

interpretation.[60] By binding present and future generations to the constitutional text, constitutionalism ensures the entrenchment of the constitution but does not fulfil its democratic potential.

There is another layer to this disarticulation, though, that has to do with federalism. Federalism complicates enormously the problem of locating the people. It combines territoriality and institutional structure. This has the effect of creating constituent units that bear the key attributes of statehood: territory, population, and government institutions. This makes federal sub-state units a confusing juridical construct. In the Canadian case, because the constituent units of federalism were previously colonies, and because provinces roughly map onto them, the *colonies* could arguably make up the people.[61] This dynamic is heightened by the logic of subsidiarity that propels the theory of federalism.[62] Constitutionalism seeks to overcome this by situating federalism in a constitutional order, hopeful that the process of validation by the constitutional *demos* bestows it with some measure of legitimate authority.[63] It also relies upon a theoretical construct of singular sovereignty. While federations may "persistently resist analysis in terms of sovereignty", it is nonetheless true that they rely implicitly on the metaphor of one sovereign, one people.[64] The political association is the state and sovereignty is concerned with the negotiations between its authorities and subjects, not those of its subunits.

Jurisdiction is part of the panoply of legal technologies that emerge from the constitutive moment of sovereignty. It is tied to the mast of the constitutional order that emerges. In spatial terms, it is generally contemporaneous with territorial jurisdictions. In legal terms, it is bound by the limits and thresholds set out in the constitutional text. In theoretical terms, it draws its power from the political relationship between the people and the state. In symbolic terms, it constitutes the ongoing process of how norms do or do not adhere to group difference. Robert Schertzer, following Tully, has noted that conflicts are "not struggles *for* recognition, but rather, are struggles *over* the way norms recognize

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[60] Tully, *supra* note 27.
[61] James Madison makes this point about the compactual nature of the federation: James Madison, *The Federalist No. 39* (1788); see also Carol Skalnik Leff, "Democratization and Disintegration in Multinational States: The Breakup of the Communist Federations" (1999) 51 World Pol 205.
[62] See*, infra*, section 4.4.2.
[63] Weiler, *supra* note 43.
[64] Aroney, *supra* note 57 at 44 (discussing the nationalist and compactual accounts of federalism, as well as the idea of a division of powers). This is not the place to discuss indigenous sovereignty claims or processes of treaty federalism, but it is worth remarking that even those claims and processes are negotiated under the theoretical umbrella of a singular sovereign, which may share its jurisdiction (its "legal sovereignty", in Martin Loughlin's words) but is loathe to divide its political sovereignty.

identities and distribute power".[65] Stated this way, the value of the jurisdictional lens is clear: attention to the legal threshold is also attention to the manner in which law associates or disassociates itself, and thus to the way that group difference is recognized and empowered or not.

There is another stratum to the constituent/constitutive power dichotomy and that is the ambiguity it presents about whether authority is located inside or outside the legal order.[66] Dyzenhaus argues that the idea of constitutive power is unhelpful to an understanding of law's authority, but this point is important here for the light it sheds on jurisdiction. The ambiguity permits jurisdiction to present as firmly legal while embodying political commitments. Jurisdiction is both tied to the original moment, and then free to roam within those established parameters, extending or curtailing its reach. It does not directly deal in democracy but its terms are always underwritten by democracy's original bargain.

In the international legal order, as discussed in the previous chapter, the construct of statehood and the tenet of sovereign equality result in the logic of inside/outside which governs group difference on the international scale. In the national legal order, it is the construct of federalism and the tenet of constitutionalism which establish the logic of constituted power which governs group difference on the national scale. Ultimately, the categories of constitutional federalism are as persistent as statehood. Not only is territorial jurisdiction mostly parcelled out already, but the paradigm for jurisdictional attachment is also institutionalized. The sweeping nature of the constitution obscures the political work performed by its representations of the group. This political work includes the work of sustaining the nation, preventing tumultuous devolutions of power to the group, and limiting the modes in which group difference may legally perform.

4.3.2 The Authority of Nation

The objective of this section is to compare the nation to the group to show how the former organizes and governs the latter. As set out in the Introduction, groups are fluid yet real social collectivities. Some groups sometimes aspire to nationhood; other groups organize some aspects of social life. The constitution of a group goes hand in glove with the formation of its governing arrangements.[67]

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[65] Robert J Schertzer, *Judging the Nation: The Supreme Court of Canada, federalism and managing diversity* (PhD Dissertation, London School of Economics, 2012) [unpublished]; James Tully, "Recognition and Dialogue: The Emergence of a New Field" (2004) 7 Crit Rev Int'l Soc & Pol Phil 84 at 87-88.
[66] Dyzenhaus, *supra* note 36.
[67] Loughlin, *supra* note 5 at 5.

Sometimes, these arrangements amount to statehood. The nation is a particular kind of group; legally, it is the most powerful organizing category of groupness. The category of a nation means that the group has full jurisdiction over its territory and its members. Thus, the nation-state is the ultimate institutional form of the group. There is no necessary congruence between being a group and being a nation. Nonetheless, "nation-ness", to use Benedict Anderson's term, is a rich site of information about the referents of the nation-state and the derivative terms of its governance of groups in the national legal order.

Nationalism is a kind of "governing principle for the organisation of modern sociality".[68] Most social theorists describe nationalism as an ideology, akin to liberalism, but others, particularly Benedict Anderson, maintain that it is better conceived as a cultural artefact, alongside kinship or religion.[69] Most would agree with Anderson that nation-ness "is the most universally legitimate value in the political life of our time".[70] This is because we live in:

> [A] world in which nationhood is pervasively institutionalized in the practice of states and the workings of the state system. It is a world in which nation is widely, if unevenly, available and resonant as a category of social vision and division.[71]

For this work in particular, nationalism matters for how it informs and transforms group solidarities and identities, and thus for how it liaises with legal authority.[72] This is true regardless of which side one finds themselves in the debates over nations and nationalism. Indeed, this is the point: even if the state generates national identity — even if the nation is imposed — it makes claims of priority which matter for law and groups.[73] These claims of priority are mobilized to make rationality out the logic of exclusion thereby reinforcing the group identity of the nation-state and foreclosing others. The category of the nation-state upholds a powerful set of derivative concepts and corollaries which matter both on their own terms and for what they mean for other groups.

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[68] Vincent Geoghegan & Rick Wilford, eds, *Political Ideologies: An Introduction*, 4th ed (London: Routledge, 2011) at 101; Craig Calhoun, *Nations Matter: Culture, History, and the Cosmopolitan Dream* (London: Routledge, 2007) at 39 (nationalism is the use of the category "nation" to organize social groups).
[69] Compare: Elie Kedourie, *Nationalism*, 4th ed (Oxford: Blackwell Publishers, 1993) and Anthony D Smith, *National Identity* (New York: Penguin Books, 1991) to Benedict Anderson, *Imagined Communities* (New York: Verso, 1983).
[70] Anderson, *supra* note 69 at 3.
[71] Rogers Brubaker, *Nationalism Reframed: Nationhood and the national question in the new Europe* (Cambridge: Cambridge University Press, 1996) at 21.
[72] Calhoun, *supra* note 68 at 29.
[73] I am grateful to Catherine Dauvergne for helping me rethink this point.

The origins of nationalism, "the most enduring political movement of the modern era", are most often traced to the 18th century revolutions in France and America, when it was employed to weld citizens to the political unit of the state.[74] This binds it closely with ideas of popular sovereignty and democracy, as well as with a territory-based conception of nationhood. There is consensus around the significance of nations and nationalism, but scholars sharply diverge when it comes to the origins and meanings of nationhood. One way of framing this debate is to ask whether nations are properly conceived as pre-political, cultural units or as associations of citizens.[75] The former describes ethnic nationalism; the latter describes civic nationalism. Another way of framing the debate is to ask whether nationalism is subjective, something that exists when a group of people think that it does, or objective, a condition characterized by certain social facts such as a shared language or historical events.[76] Primordialist theories see ethnocultural nations as natural entities which have existed since the pre-modern period.[77] Modernist theories see the nation as either real albeit political inventions created to order capitalist societies or as imagined constructions.[78] Anthony D. Smith has suggested an "ethnosymbolic" compromise view which conceives of nations as artichokes with a lot of unimportant leaves but also a heart.[79]

The important point here is that one can believe that the nation is a predestined ethnic state or one can believe that the nation is constituted by political-legal imagining; from both sides, the nation tells the same story about the group and faces the same jurisdictional limits. This is because there is consensus around the work of nation: the construction and maintenance of the nation-state. Whether this work is performed in a pre-national era before nation-state realization or in a post-national era after nation-state realization, the work is more or less the same. At some point, the nation-state must

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[74] Tierney, *supra* note 4 at 22; On the 18th century origins of nationalism, see: Anthony D Smith, *Nationalism and Modernism: A Critical Survey of Recent Theories of Nations and Nationalism* (London: Routledge, 1998); Kedourie, *supra* note 69. There are alternative views which place nationalism in 16th century England or even farther in the past. Settling this debate is not consequential for the analysis here.
[75] Anthony D Smith, "Book Review: Nations Matter: Culture, History, and the Cosmopolitan Dream" (2008) 14 Nations & Nationalism 613.
[76] Geoghegan & Wilford, *supra* note 68 at 102.
[77] See, *e.g.*, Adrian Hastings, *The Construction of Nationhood: Ethnicity, Religion and Nationalism* (Cambridge: Cambridge University Press, 1997).
[78] On the former, see: Ernest Gellner, *Nations and Nationalism*, 2d ed (Oxford: Blackwell Publishers, 2006); Eric J Hobsbawm, *Nations and Nationalism since 1780* (Cambridge: Cambridge University Press, 1990). On the latter, see: Anderson, *supra* note 69.
[79] See: Umut Ozkirimli, "The nation as an artichoke? A critique of ethnosymbolist interpretations of nationalism" (2003) 9 Nations & Nationalism 339; Anthony D Smith, "The Poverty of Anti-Nationalist Modernism" (2003) 9 Nations & Nationalism 357.

be imagined. Anderson defines the nation as "an imagined political community – and imagined as both inherently limited and sovereign".[80] Etienne Balibar reminds us of the work that imagination performs: the external borders of the state are constantly imagined as a "projection ... of an internal collective personality".[81] In other words, the boundaries of the nation set the parameters of imagination. Whatever its temporality, the stuff of this imagining includes some approximation of "an historic territory, common myths and historical memories".[82]

Moreover, I am not concerned with the nature of attachment to the nation, which is the core of what divides the nationalism debates. I am instead concerned with how nation-ness is conceived, mobilized, and narrated by jurisdiction. For this purpose, nation-ness may be taken as it is found: as a legal and political category that constructs and embodies something about identity and something about groups. Everywhere, political and legal authority is configured along national lines. To the extent that nationalism represents an attempt to map the domain of social groups onto the domain of political organization, it tells us something about the parcelling out of jurisdiction to groups.[83] Jurisdictional allocations are an important part of the constitution of the nation; they try to map onto the nation-state but this is imperfect. It is helpful to sort out the work that nation performs here.

The most significant work of nation for this project is the abiding conception of the nation as pre-political. Despite the onslaught of theories that counter this notion and despite massive variation among nation-states on this front, the nation is narrated as pre-political. By this, I mean that the national narrative describes the present form of the nation as somehow indebted to some pre-political community, at least to the extent that the political community at issue was not the present one. In this way, some communities may remain pre-political, while others move through this phase, mapping some parts of their *ethnos* onto a *demos*, merging nation and state. This permits a certain disparity in national governing arrangements since they are based a set of original politics which may have included aboriginals and duelling colonies.

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[80] Anderson, *supra* note 69 at 6.
[81] Etienne Balibar & Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (New York: Verso, 1991).
[82] Anthony D Smith, *The Ethnic Origin of Nations* (Oxford: Blackwell Publishers, 1986) at 14: "a named human population sharing an historic territory, common myths and historical memories".
[83] Nenad Miscevic, *Nationalism*, Stanford Encyclopedia of Philosophy, (2010), online: http://plato.stanford.edu/archives/sum2010/entries/nationalism/.

Craig Calhoun has argued that liberalism grasped the social overwhelming as the national.[84] It conflated society with nation to posit the pre-political basis for social order, the people to whom a democratic government must respond in order to be legitimate. In this way, nationalism comes into the frame when theorists question the basis of solidarity in democracies: the definition of 'the people' who are to be sovereign comes back to one or other form of constructed nationhood.[85] It is, in other words, fundamentally linked to the ideas of popular sovereignty and democracy. A nation's constitution constitutes the nation's people in the sense that it ratifies the identification of the *demos* or *ethnos* with a state.[86] Nationalism, then, legitimatizes the authority of the sovereign.[87] The result is the naturalization of the dynamic of inclusion/exclusion which underwrites the territorial terms of the nation-state.

In Canada, the narrative of two founding nations means that the nationalist account of nations as formed from pre-existing bits and pieces prevails. As Ernest Gellner writes:

> [N]ationalism is not the awakening and assertion of these mythical, supposedly natural given units. It is, on the contrary, the crystallization of new unit, suitable for the conditions now prevailing, though admittedly using as their raw material the cultural, historical and other inheritances from the pre-nationalist world.[88]

The nations of Quebec and English Canada are thus conceived to draw from their pre-existing suitcases of raw nationalist material. This nationalist material is different in kind from what is in the suitcases of other groups, who could not possibly match their historical depth and cultural uniqueness.[89] The Gellner/Smith narrative of nations as based on some measure of cultural raw material has never been dislodged in Canada and it continues to set the stakes and direction of constitutional federalism. The category of nation is useful in a general sense and acute in the case of Canada because it embodies the duality of the nation-state as both pre-existing and imagined.

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[84] Craig Calhoun, "'Belonging' in the Cosmopolitan Imaginary" (2003) 3 Ethnicities 531 at 535.
[85] Smith, *supra* note 75.
[86] Tushnet, *supra* note 44.
[87] The "people" need to survive the political-legal authority structure in order to truly wield power – it is the notion that the "nation" pre-existed the "state" which permits this gloss.
[88] Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell Publishers, 1983) at 49.
[89] The exception is obviously aboriginal groups, although it is worth noting that their invocation of the category of nation is typically exhausted before statehood or sovereignty achieves any traction.

The nation-state makes a claim of priority on the loyalties of those within its borders. This priority claim powerfully renders other groups in the shadow of the nation and suggests that the ultimate realization of the group is legal. The nation helps to explain some of the parameters that constrain jurisdictional technologies as well as some of the commitments that live in the jurisdictional threshold. However, it cannot disguise the fact that there are groups all the way up and all the way down the scalar constructs of law. It is nation-ness which organizes group claims, positing a "distinct mode of understanding and constituting the phenomenon of belonging together".[90] From the outside, the encompassing nation-state pushes down, asserting national identity. From the outside and inside, the construct of the nation weighs in as political sociology, conveying an image of legal groups as state-like.

The nation plays out in three particular ways in this chapter. First, nation and the doctrine of nationalism are entwined with the conceptual pyramid of legality, legitimacy, and democracy. Nation is a particular way of claiming legitimate authority in a democracy based on the idea of "the people". Nation here is a discursive formation that underwrites the constitution of authority.[91] Second, it acts as an undertow on the legal decision making about group difference. The narration of the national identity is always positioned alongside discussions about bilingualism, multiculturalism, and groups. This goes some distance toward rendering the sovereign-subject disarticulation opaque. Third, nation highlights the similarities and differences between nation and other groups, revealing the work of binding the group to the state. This is Anderson's point when he describes nationalism as modular: he wanted to show how the administrative state could narrate and constitute nation.[92] The result is a complex narrative in which the nation is somehow both a pre-political social group *and* a post-political state.

4.4 The Logic of Constitutional Federalism

The principles and texts of constitutionalism and federalism are the basis of the political-legal order in Canada. These are the constructs that allocate and administer jurisdiction and that assign and adjudicate group difference on the national scale. In other words, constitutional federalism *is* a jurisdictional technology in this frame. There are general principles as well as specific provisions

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[90] Calhoun, *supra* note 68 at 72.
[91] *Ibid* at 27, 48.
[92] Anderson, *supra* note 69 at 4 (describing various historical models of nationalism which are modified and adapted, including popular-linguistic nationalisms, official nationalisms, colonial nationalisms).

referring to group difference in the *Constitution Act, 1867*, and it is this act that establishes the federal state.[93] Yet the precise contours of the relationship between constitutionalism and federalism, particularly through a theoretical juridical lens, are neither fully set out nor thoroughly examined by scholars.[94] The relationship between them is partly the subject of this chapter, at least insofar as they establish the jurisdictional field, particularly with respect to how they contend with group difference.

Constitutionalism refers to the constitutional practice surrounding the entrenched ground rules of socio-political organization, while federalism is the institutional modality of those rules, which are generally aimed toward accommodating diversity. It is typically the case that the institutions of a federal state are situated in a constitutional framework. Federal forms are constitutional arrangements.[95] In Canada, the written constitution articulates the division of powers and allocates the scope and content of each federal subunit. It sets out a federal system of government by dividing legislative and administrative powers between the federal and provincial levels of government. The precise shape of federalism is partly historically determined and has partly evolved through jurisdictional parrying. It is the constitution that establishes membership by telling who should be included, but it is federalism that tells us how.[96]

This section describes the legal architecture for group difference in the national legal order – the enumerated groups; the sources and scope of group rights; and the interpretative principles – as set out in the Canadian system of constitutional federalism. The focus of the jurisdictional inquiry is in two parts. First, what jurisdictional apparatuses (territorial units, legal spheres) do these constructs establish generally and for groups specifically? Here, we find the federal centre, the provinces, special educational and language provisions, and robust jurisdictional capacity for provincial delegations of legal authority ranging from municipalities to family law tribunals. Second, how do ongoing jurisdictional allotments and decisions affect constitutionalism, federalism, and existing

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[93] *Constitution Act, 1867*, 30 & 31 Victoria c 3 (UK) [*Constitution Act, 1867*].
[94] Sujit Choudhry, "Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies" in Sujit Choudhry, ed, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008) 3; Sujit Choudhry, "Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory" in Sujit Choudhry, ed, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008) 141; Sujit Choudhry & Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 Cdn J L & Juris 143 at 144-45.
[95] Daniel Halberstam, "Federalism: Theory, Policy, Law" in Michel Rosenfeld & Andras Sajo, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 576.
[96] This is perhaps too simplistic, since constitutionalism also sets out graduated rights and protections for members.

categories? Here, the nationalist logic is pervasive. This analysis – of examining the relationship between constitutionalism and federalism and of examining constitutional federalism through the lens of its jurisdictional reach – takes this chapter beyond existing scholarship on either subject.

There is a larger theme in the background, relevant on its own terms and as a factor that affects group difference, which is that the constitution reflects the ongoing dialectic between state and society.[97] Society's institutions, procedures, and laws reflect competing conceptions of values. The legal institutions and protections for groups "reflects and projects a conception of the very nature of the constitutional order itself".[98] Sujit Choudhry paraphrases Jeremy Waldron's comments on these institutions and legal protections:

> [B]y determining which individuals and communities can participate in political decision making, and what role those individuals and communities may play, decisional rules reflect substantive judgments about the locus of political sovereignty and, by extension, the very identity of a political community.[99]

In short, the order of constitutional federalism is not only about structuring the powers of government and the relationships between the state and others, but also about fundamental values and collective identity. Moreover, because constitutional laws are laws meant to control all other lawmaking, the commitments of the constitutional order matter in terms of structuring derivative constitutional inquiries, decisions, and logics.[100] These institutions, procedures, and laws – whether procedural or substantive – *are* jurisdiction. They establish who or what may exercise legal authority and under what conditions. The rules of constitutional federalism are jurisdictional at their core in the sense that they allocate both territorial and generic conceptual authority. Because of this, the jurisdictional lens embodies judgments about the locus of sovereignty and the boundaries of community.

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[97] Alan Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change - Selected Essays* (Toronto: McClelland & Stewart, 1995) at 9.
[98] Choudhry, *supra* note 23..
[99] Choudhry, *supra* note 94 at 167, referring to Jeremy Waldron, "Judicial Review and the Conditions of Democracy" (1998) 6 J Pol Phil 335.
[100] Frank Michelman, "Constitutions and the Public/Private Divide" in Michel Rosenfeld & Andras Sajo, eds, (Oxford: Oxford University Press, 2012) 298.

4.4.1 Constitutionalism

Constitutionalism is a set of beliefs associated with the idea of constitutional government.[101] Broadly stated, it is the commonly shared set of principles, norms, and expectations concerning the ground rules of political and social organization. Narrowly stated, it is the idea that the powers of government should be legally limited.[102] It is this narrow definition that is sometimes used interchangeably with the concept of the rule of law, although the rule of law incorporates the additional notion that government authority depends upon observing those limits. The narrow construction fails to comprehend that constitutions do not only limit state power; they also constitute and enable it.[103] There is also a thicker, cultural view which conceives constitutionalism as "an overarching ideology of politics, community, citizenship, and the state".[104] Petra Dobner and Martin Loughlin provide a helpful account:

> Constitutionalism is a modern phenomenon, a feature of political life over the last 250 or so years, but one which in recent decades has been enjoying a greater influence in public discourse than ever before. Under its influence, modern constitutions have established a set of governmental institutions that provide the necessary conditions for the realisation of a democratic Rechtsstaat. Such constitutions constrain politics by legal means, structure power relations comprehensively, help normatively to integrate societies, and offer a practical account of legitimate democratic rule within the state.[105]

As Stephen Holmes reminds us, the original meaning of "to constitute" is "neither to constrain political power ... nor to force government to obey certain universal moral norms".[106] What it signifies, in this first instance, is *to set up*, and it is this aspect of the constitution that matters most for the jurisdiction of group difference.

A constitution is the textual underpinning of constitutionalism. The constitution establishes the authority structure of the state. It identifies fundamental legal and institutional arrangements, usually dealing with the distribution of political power, that are more entrenched than is ordinary law.[107] The

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[101] Neil Walker, "European Constitutionalism and European Integration" (1996) Public Law 266.
[102] Michel Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity" in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994) 3.
[103] Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes" (2009) 16 Indiana J Global Leg Stud 621 at 627.
[104] *Ibid* at 628.
[105] Dobner & Loughlin, *supra* note 37.
[106] Stephen Holmes, "Constitutions and Constitutionalism" in Michel Rosenfeld & Andras Sajo, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 189 at 194.
[107] Tushnet, *supra* note 44 at 218.

object of reference for state constitutional law is the framework of public authority.[108] Definitions of constitutions often refer to principles of sovereignty and authority and to the location and exercise of sovereign power, giving them a somewhat circular character.[109] Loughlin calls the constitution an "explication" of sovereignty.[110]

In addition to establishing the arrangements for governance, constitutions also frequently set out the rights and freedoms of individuals and sometimes groups. They also contain a variety of constitutional limits on government acts. These can take several forms, including the scope of authority (in a federal system, provinces may have authority over health care and education while the federal government's jurisdiction extends to national defence), the mechanisms used in order to exercise the relevant power (procedural requirements); and civil rights.[111]

In Canada, the *Constitution Act* divides jurisdiction between the federal and provincial government and thus provides the legal basis for federalism. The constitutional basis for federalism is found in sections 91 and 92. Section 91establishes the heads of power under federal jurisdiction, which include trade and commerce, taxation and spending powers, criminal law[112], interprovincial and international transportation and communication, and treaty-making powers. Section 91 also establishes residual federal jurisdiction to make laws "for the Peace, Order, and good Government of Canada" in all matters not assigned exclusively to the provinces by terms of section 92.[113] This is widely referred to as the peace, order and good government ("POGG") power.[114] Section 92 allocates "property and civil rights" as well as health care, education, social assistance, and most natural resources to the provinces. Similarly, section 92(16) grants residual jurisdiction to the provinces over all "matters of a merely local or private nature".[115] Both levels of government derive their authority

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[108] Neil Walker, "Beyond the Unitary Conception of the United Kingdom Constitution?" (2000) Public Law 384 at 399.
[109] For definitions referring to sovereignty, see: Tushnet, *supra* note 44 at 217.
[110] Loughlin, *supra* note 5 at 70.
[111] Wil Waluchow, *Constitutionalism*, Stanford Encyclopedia of Philosophy (2012), online: http://plato.stanford.edu/archives/win2012/entries/constitutionalism.
[112] While criminal law is federal, provinces have their own system of private law, with the province of Quebec using a civil rather than a common law system.
[113] *Constitution Act, 1867*, *supra* note 93 at section 91.
[114] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007).
[115] See generally, *Constitution Act, 1867*, *supra* note 93 at sections 92(13) and 92(16).

from the *Constitution*. The competences of the provinces and the federal government are both enumerated and residual, and the limits of their authority are judicially enforceable.[116]

Like the principle of sovereign equality on the international plane, constitutionalism establishes the members of the club and the treatment that follows from membership. For the international scale, it was black-box equality; for the national scale, it is autonomy and rights. The *Constitution* recognizes as members: individual citizens, minorities, corporations, territories, indigenous peoples, provinces, courts, the federation and its institutions, and democratic society as a whole.[117] The groups that are recognized within the Constitution are also members: French and English language speakers, Protestant and Catholic parents, Quebec, New Brunswick, indigenous peoples, and society as a whole. There is also the unwritten constitutional principle of minority rights but it only pertains to recognized groups or to individuals exercising individual rights based on group membership. All of the recognized constitutional groups have some sort of territorial manifestation, whether relational (such as the sliding scale measure of territorial concentration), or fixed (such as New Brunswick or society as whole). The effect of federalism, however, means that the provinces have additional scope to delegate authority or recognition to other groups.

An important component of constitutional federalism is to create or maintain a sense of common allegiance and a common identity.[118] This common identity is generally presumed to be political; whether in the form of civic nationalism or political liberalism or constitutional patriotism, scholars ranging from Michael Ignatieff to John Rawls to Jurgen Habermas have posited that constitutional discipline – including the rule of law and individual rights – directs existing or generates new citizen loyalty.[119] This acts as a counterweight to the disaggregating aspects of federalism.

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[116] See Aroney, *supra* note 57.
[117] James Tully, "Struggles over Recognition and Distribution" (2000) 7 Constellations 469.
[118] Samuel V Laselva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996) at chapter 8.
[119] Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (New York: Farrar, Straus and Giroux, 1993); Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996); John Rawls, *Political Liberalism*, 2d ed (New York: Columbia University Press, 2005).

4.4.2 Federalism

Federalism has united previously separate entities and devolved previously unitary states, enveloping fifty percent of the world's population into federal states.[120] It is a means of organizing a state by mandating institutional arrangements that couple the search for unity with respect for autonomy.[121] It is necessary for jurisdictional analysis both to unpack this definition and to add to it. Federalism is a political and legal philosophy as well as a territorially-based form of governance.[122] As a term of art, federalism is an element of constitutional design. In the *Constitution*, however, the concept of federalism appears only once, in the preamble reference to the colonies' "desire to be federally united into one Dominion".[123] It united three British colonies into a federation made up of four provinces and then divided legislative powers between them.[124] The division of powers in sections 91 and 92 is the primary textual expression of the principle of federalism in Canada, but its force is equally visible in the creation of "a political unit within which a linguistically distinct national minority would form a majority and govern itself".[125] The point of entrenching federalism in the constitutional order is precisely so that its structure cannot be arbitrarily revised.[126]

Federalism is usefully conceived as a response to pluralism. This response takes the form of territorial allocations of authority. In this sense, federalism is a response to groups. The simplest conception of federalism is Daniel Elazar's definition of "a combination of self-rule and shared rule".[127] The rationale of federalism is to preserve the autonomy and character of constituent parts, and in this it links back to philosophical notions of self-determination. When it is used in this sense, it describes an institutional design to accommodate diversity. It is often expressed as a balance between unity and diversity, but Elazar reminds us that unity and diversity are not opposites: unity

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[120] Examples of so-called "integrative" federalism include the uniting of the United States' thirteen colonies and the Swiss cantons; examples of so-called "devolutionary" federalism include the devolutions of power in India, Spain, and Belgium. See: Halberstam, *supra* note 95; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009) at 2.
[121] Pierre Pescatore, "Preface" in Terrance Sandalow & Eric Stein, eds, *Courts and Free Markets: Perspectives from the United States and Europe* (New York: Clarendon Press, 1982) at ix-x.
[122] *Ibid*.
[123] Marc Chevrier, "The Idea of Federalism Among the Founding Fathers of the United States and Canada" in Alain-G Gagnon, ed, *Contemporary Canadian Federalism* (Toronto: University of Toronto Press, 2009) 11.
[124] It united Canada, Nova Scotia and New Brunswick into Canada with the provinces of Ontario, Quebec, Nova Scotia, and New Brunswick.
[125] Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998) at 2; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 47.
[126] William H Riker, "Federalism" in Robert E Goodin, Philip Pettit & Thomas W Pogge, eds, *A Companion to Contemporary Political Philosophy*, 2d ed (Maldon: Blackwell Publishers, 2012) at 613.
[127] Daniel J Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 12, 33-79.

should be contrasted with disunity and diversity with homogeneity.[128] By pairing unity and diversity, the fact of diversity is wrongly contrasted to the normative nationalist objective of unity. This conflation underscores the instability of the nation-state.

As a form of *governance*, federalism is political, legal, and territorial. As a strategy for managing diversity and as the basis of power relations within the state, federalism extends limited territorial autonomy to constituent units.[129] Canada's pluralist federation produces a territorial version of autonomy. William Riker has described how federalism presents two levels of government ruling the same territory and the same people.[130] While the nature of this rule is divided by subject and scope, the result is still overlap and conflict. In this way, federalism comes to mediate between constitutionalism and groups, holding out the power of the national and the diversity of the sub-state unit in the same hand.

Daniel Halberstam urges scholars to consider the "analytic structure of federalism theory as a whole".[131] The key theoretical premise here is subsidiarity. This concept is familiar from scholarship about the supranational arrangements of the European Union, but it is also the foundation of federalism theory.[132] Subsidiarity is a principle by which the power to act should belong to the actor closest to the problem to be solved.[133]

> This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.[134]

Theoretically, then, it includes a preference for smaller entities and communities. It derives from the political philosophy of reformed Protestantism and the social theory of Catholic Church in which the

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[128] *Ibid* at 64.
[129] Michael Burgess, "Managing Diversity in Federal States: Conceptual Lenses and Comparative Perspectives" in *Contemporary Canadian Federalism* (Toronto: University of Toronto Press, 2009) 428. There is also non-territorial federalism, in which policy areas are linked to ethnic identities. Choudhry, *supra* note 94 at 20.
[130] William H Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964) at 11.
[131] Halberstam, *supra* note 95 at 12.
[132] For the position that subsidiarity is derived from or implicit in the unwritten constitutional principle of federalism, see: *Quebec (Attorney General) v Lacombe*, [2010] 2 SCR 453 (SCC) at para. 119 (Deschamps J, dissent).
[133] Eugenie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should we Open Pandora's Box?" (2011) 54 SCLR 601.
[134] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241 (SCC).

social order is made up of multiple communities which mediate between the individual and the state.[135] The principle of subsidiarity is said to improve representation, encourage community, foster expertise, and reduce risk.[136] It is difficult to say whether federalism accomplishes these ends, and if so, whether that accomplishment offsets the supposed benefits of centralized power. In *Reference re Secession*, the Court summarized the principle:

> The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.[137]

The larger point is that subsidiarity acts as a kind of logic, pushing toward the local community. Alain-G. Gagnon writes that the principle of subsidiarity takes on its full meaning in context of diversity.[138] In this, it embodies the same nature of logic as inside/outside on the international plane. Whereas the inside/outside dichotomy located the group *inside* the state — thereby making the state and the group congruent, or making the group the responsibility of the state — subsidiarity locates the group inside the federal state, making it the responsibility of a federal sub-unit.[139] In other words, federalism pushes difference down.

Subsidiarity matters, both at the original moment of founding the federal state, to sort out the distribution of powers, and as an operative principle of constitutional law to interpret the original jurisdictional provisions.[140] First, subsidiarity is closely related to some conceptions of scale: it encompasses the concepts of levels and hierarchy, as well as the assumptions about larger, local scales as more authentic.[141] Second, by combining the presumption about local authenticity with the institutional weight of pushing toward it, subsidiarity carries the notion that the people are already 'down there', waiting to exercise the levers of power. In other words, by combining the

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[135] Nicholas Aroney, "Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire" (2007) 26 L & Phil 161.
[136] Halberstam, *supra* note 95 at 14-16.
[137] *Reference re Secession of Quebec*, *supra* note 125 at para. 58.
[138] Alain-G Gagnon, "Taking Stock of Asymmetrical Federalism in an Era of Exacerbated Centralization" in Alain-G Gagnon, ed, *Contemporary Canadian Federalism* (Toronto: University of Toronto Press, 2009) 255.
[139] The two historical exceptions are the national minority categories – Quebec and aboriginal peoples – which are not under the jurisdiction of a federal sub-unit, but a Province and a federal responsibility, respectively.
[140] Halberstam, *supra* note 95 at 22-23.
[141] See: Sallie A Marston, John Paul Jones III & Keith Woodward, "Human geography without scale" (2005) NS 30 Transactions of the Institute of British Geographers 416.

sovereign/subject disarticulation with the logic of subsidiarity, law is able to sidestep the disarticulation by pointing toward the local. In these ways, subsidiarity is a jurisdictional technology.

The group is built into the Canadian legal order, but it is also delimited by it. The constitutional state protects some group rights on an exceptional basis, as well as several individual rights which can be used to further various aspects of group membership. Then, layered on top of this, constitutionalism enables the extension of groupness – understood as the protection of elements essential to group autonomy and survival – through institutional arrangements such as federalism. Yet it remains a great paradox of constitutional federalism, itself based on pluralism and the autonomy of constituent units, that it leaves little other room for group difference and no room for new or changed groups.

4.4.3 The Legal Texts of Group Difference

The primary legal texts of group difference in the national legal order are the *Constitution Acts*. These acts deal with the federal division of powers and the *Canadian Charter of Rights and Freedoms*. They contain exceptional provisions on groups in reference to aboriginals, language rights, and religious education rights. Leaving aside aboriginal rights as *sui generis*, these rights are properly conceived as minority rights. They are only granted when the group difference manifests as geographically and numerically in the minority. In other words, it is the minority rights paradigm which is the emancipatory paradigm here. It was the delimiting concept on the international plane. In the constitutional texts, minority rights are exceptionally group rights.[142] There is also a provision related to multiculturalism but it is a principle of constitutional interpretation, not a constitutional principle like the protection of minority rights. The *Canadian Multiculturalism Act* forms a secondary legal text of group difference but it is of limited effect since it cannot ground a legal claim, exercising only interpretative sway.

4.4.3.1 The Constitution Act, 1982

The written part of Canada's constitution consists of statutes of the British Parliament, the Parliament of Canada, and the legislatures of the Canadian provinces, as well as prerogative instruments of the Crown in the right of the United Kingdom and of Canada. The primary constitutional document is the *British North America Act, 1867,* a statute of the United Kingdom Parliament, which inaugurated the

[142] They are also individual rights exercised on behalf of group membership. See, *infra,* Chapter 5.

Dominion of Canada as a federal state.[143] It is key because it establishes the distribution of powers. Then there are unwritten constitutional conventions and unwritten constitutional principles.[144] The former derive from customary practices; the latter from the "history, value and culture of the nation", the written text of the constitution and the nation's international commitments.[145] So the *Constitution Act* is not limited to its written components.[146]

In the early 1980s, Canada sought to end British responsibility for its constitutional matters by patriating the Canadian Constitution. As a statute of the United Kingdom, the *British North America Act, 1867* (later renamed the *Constitution Act, 1867*) could only be amended by the British Parliament. Following a Supreme Court reference, and intense negotiations with the provinces, Prime Minister Pierre Trudeau finally patriated the Constitution in 1982. The *Canada Act, 1982*, ended the imperial power of the British Parliament and enacted the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms*.[147] The *Charter* was the culmination of a "rights revolution" that recalibrated the balance between state institutions and between the individual/group and the state.[148] Moreover, Trudeau conceived of the *Charter* as establishing a national, trans-Canadian culture, unified under a single rights umbrella.[149] Symbolically and theoretically, these legal texts represent the acquisition of full sovereignty, and the reinforcement of the national order.

As discussed above, sections 91 and 92 divide legislative powers between the federal government and the provinces. The peace, order, and good government clause is a residual clause in favour of central power.[150] The provisions which deal with group difference, however, appear almost

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[143] Joseph E Magnet, *Constitutional Law of Canada*, 9th ed (Edmonton: Juriliber, 2007) at 5.
[144] Beverley Chief Justice McLachlin, *Unwritten Constitutional Principles: What is Going On?* Lord Cooke Lecture (Wellington, New Zealand, 2005).
[145] There are no judicial remedies for breaches of constitutional conventions or principles. See: Magnet, *supra* note 143 at 50-51; McLachlin, *supra* note 144.
[146] *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c11 [*Constitution Act, 1982*] at section 52(2); *Harvey v New Brunswick (A-G)*, [1996] 2 SCR 876 (SCC); *Reference re Provincial Judges*, [1997] 3 SCR 3 (SCC).
[147] *Constitution Act, 1982*, *supra* note 146.
[148] Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2008).
[149] Peter H Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Cdn Bar Rev 30; Robert Vipond, "The Civil Rights Movement Comes to Winnipeg: American Influence on Rights Talk in Canada, 1968-71" in Stephen L Newman, ed, *Constitutional Politics in Canada and the United States* (Albany: State University of New York Press, 2004) 89 at 90-91.
[150] Aroney, *supra* note 57.

exclusively in the *Charter*.[151] Before launching into those provisions, it is helpful to consider the role of section 15, which deals with equality rights.

> **15. (**1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The right to equality in section 15 is an individual right, which is asserted based on group difference. Section 15 is about personal characteristics — enumerated or analogous grounds of discrimination — which are linked to membership in a group. The group does not figure in the language of section 15(1), but it is implicit in the enumerated grounds that the characteristics pertain to membership in a group.

The language of equality rights in Canada sounds in the same register as the language of group rights in this chapter, so it is necessary to distinguish them. This project uses the notion of legally recognized group categories to mean something similar to groups enumerated by law. However, the logic of group difference is theoretically and legally different. It is theoretically different because the right to equality is a substantive claim to be treated the same as other members of society, whereas I am concerned with group difference that seeks to be treated differently. Indeed, the group rights which are the subject of this chapter are widely understood to be exceptions to section 15 because their members are treated differently from other groups and individuals in society. It is legally different because there is no logic of analogy that applies to the constitutional categories; they are delimited categories and the group is left to individual rights claims.[152] Section 15, in other words, is

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[151] But note, section 35 of the *Constitution Act*, *1982*, recognizes aboriginal and treaty rights, and section 93 of the *Constitution Act, 1867*, sets out the rights and privileges of denominational schools.

[152] However, it is worth noting Colleen Sheppard's work on rights theory, suggesting a shift from evaluating the treatment of the group to evaluating the process of group regulation (*i.e.* did the group participate in determining their regulation). The turn to judging process by reference to the group shifts the individual right [of equality] toward being a group-based right. See: Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010). I am grateful to Jeremy Webber for this point.

not about group difference *as difference*, but rather about making sure group difference is treated equally.

The group rights which are the main concern of this chapter fall into two overlapping categories: language rights and education rights. Section 23 provides for minority language education rights in French and English, while section 29 guarantees special educational rights previously granted to "denominational, separate or dissentient schools", specifically the Protestants in Quebec and the Roman Catholics in Ontario.[153] The protection for Aboriginal rights in section 35 of the *Constitution Act, 1982* (reaffirmed in section 25 of the *Charter*) also recognizes one category of group difference.[154] Only these official minorities are guaranteed cultural rights.

Sections 16 to 22 make French and English the official languages of Canada and New Brunswick; the latter the only extensively bilingual province in Canada.[155] Section 23 sets out the terms of minority language educational rights in Canada.

> **23**. (1) Citizens of Canada
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

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[153] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canadian Charter*]. Note that some other provinces have included such protections in their acts of accession to confederation.
[154] *Reference re Secession of Quebec*, *supra* note 125 at para. 82. However, Aboriginal protections may be better examined in their own right, as suggested by the Court, for reasons explained in other parts of this dissertation.
[155] Section 16.1 was added to the *Charter* in 1993. It is concerned with institutional capacity and equality. The provincial government *constitutionalized* the provincial legislation to protect it from shifting governmental majorities.

(b) includes, where the number of children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Then, finally, there are denominational, separate, or dissentient education rights. Section 29 protects these rights by reaffirming section 93 of the *Constitution Act, 1867*. This section affirms special rights for Catholic and Protestant education.[156]

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Section 93 of *Constitution Act, 1867*, which no longer applies to Quebec by virtue of section 93A, reads:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--
(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
(2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

In addition to these *Charter* rights, there is section 27, which refers to multiculturalism.

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[156] These special rights are in addition to sections 2 and 15 of the *Charter*, which protect religious freedom and religious equality, respectively.

> **27**. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Multiculturalism has evolved from policy to legislation to constitutional provision, appearing in section 27 of the *Charter* as well as in the *Canadian Multiculturalism Act* of 1988, which acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.[157] The introduction of multiculturalism is framed by the battle for identity and sovereignty between French and English Canada, and that battle has rendered the meaning of minority rights under section 27 more limited and specific: "the natural nexus between s. 27's cultural protections and linguistic, educational and religious rights is artificially severed".[158] That legacy of tension and conflict precluded the emergence of a bi-cultural nation or a melting pot ideal.[159] Since multiculturalism functions as a principle of construction, it effectively either piggybacks on or conflicts with specific rights such as freedom of religion. Courts have considered the interpretative scope of section 27 to be the source of important principles that define the scope of other *Charter* rights.[160] Section 27 is properly considered here because it deals in group difference, but it is limited in purview because it is an interpretative principle only.

4.4.3.2 The Legal Architecture of Minority Nationalism

Constitutional rights are widely seen as a solution to difference within political spaces.[161] The constitutional instruments used in Canada to recognize and institutionalize difference are threefold: multinational federalism; national minority rights; and representation quotas.[162] There is also the

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[157] *Canadian Charter of Rights and Freedoms*, *supra* note 153; *Canadian Multiculturalism Act*, RSC, 1985, c 24 (4th Supp) [*Canadian Multiculturalism Act*].

[158] Vern W DaRe, "Beyond General Pronouncements: A Judicial Approach to Section 27 of the Charter [forthcoming?]" (1995) 33 Alta L Rev 551 at 552.

[159] Will Kymlicka, "Multicultural Citizenship" in Gershon Shafir, ed, *The Citizenship Debates: A Reader* (Minneapolis: University of Minnesota, 1998).

[160] Faisal Bhabha, "Navigating the Spheres of Multiculturalism, Bilingualism and Federalism: Theoretical, Doctrinal and Constitutional Perspectives on the 'Reasonable Accommodation' Debate" (2008) 43 SCLR 499 at 502. See, *e.g.*, *R v Big M Drug Mart*, [1985] 1 SCR 295 (employing section 27 to find that Parliament could not compel universal observance of Sunday as the day of rest preferred by only one religion because of multiculturalism); *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 2006 SCC 6 (invoking multiculturalism to bolster religious freedom by upholding the right of a Sikh student to wear a kirpan); and *Bruker v Marcovitz*, [2007] 3 SCR 607, 2007 SCC 54 (qualifying multiculturalism by requiring differences to be compatible with Canada's fundamental values).

[161] Choudhry, *supra* note 94; Walker, *supra* note 59.

[162] See: *Constitution Act, 1867*, *supra* note 93 at sections 91 and 92; *Canadian Charter of Rights and Freedoms*, *supra* note 153 at sections 23 and 29; *Constitution Act, 1867*, *supra* note 93 at section 22; and *Supreme Court Act*, RSC 1985, c S-26 [*Supreme Court Act*] at section 6, respectively. Representation quotas are limited to the extent they apply only to the unit of a province, and then only to the single province manifesting minority nationalism.

interpretative principle of multiculturalism. Finally, some provinces have established personal law tribunals within the ambit of their autonomy.[163] Nevertheless, Canada's constitutional paradigm remains soaked in the concept of national minorities. The pull of nationalism is felt in the unifying work that the constitutional text performs in its assembly of an apex federal order but also more subtly in the jurisdictional limits of difference it embodies. Its architecture posits the group as national (as nation itself or national minority) and the individual as difference (as endowed with freedom to be part of a group).

It is useful here to recall Richard Ford's distinction between organic and synthetic territorial jurisdictions.[164] In the Canadian legal order, jurisdiction is always wrestling with this distinction, alternating between legal authority as coterminous with group identity and thus organic jurisdiction (the province of Quebec) and legal authority as coterminous with or constitutive of political identity and thus synthetic jurisdiction (the other provinces). This distinction is too simplistic to transpose directly onto the Canadian landscape — the province of Quebec encompasses multiple group identities, not only French-Canadians or francophones, and some Quebeckers would claim Anglo-Quebeckers as their own — and organic jurisdictions are not ignored as they are in the United States. It is nonetheless a useful organizing heuristic for considering the terms upon which legal authority is doled out.

The *Constitution Act* creates a federation in which Quebec and other provinces have some measure of jurisdiction over policy areas such as language and education to the extent that they fall within the subjects enumerated in section 92. These are the domains commonly understood by social theorists to mark off the spheres required for cultural preservation. There is room for variation among all the provinces: only three provinces have constitutionally protected rights to official bilingualism and only four provinces give Catholics and Protestants the right to confessional instruction in public schools.[165] However, it is only Quebec's territorial boundaries which track the boundaries of the francophone majority inside. In this tracking, Quebec distinctly represents a national minority but this should not suggest that its territory bounds a homogeneous minority; there are aboriginals and

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[163] See, *e.g.*, Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) 9 Theor Inq L 573 (describing the former tribunals of Ontario).
[164] Richard Thompson Ford, "Law's Territory (A History of Jurisdiction)" (1999) 97 Mich L Rev 843.
[165] See: Quebec, Manitoba, New Brunswick for the former, and Ontario, Saskatchewan, Alberta, and the Northwest Territories for the latter.

Anglo-Quebecers and immigrant minorities inside as well. Quebec has taken its powers in the language, education, and immigration spheres the farthest, harmonizing them by agreement and exercising a greater role. [166]

It is, therefore, most accurate to call Canada a mixed federation with one nationality-based subunit and several territory-based subunits.[167] The Confederation process shaped the constitutional architecture of contemporary Canadian state. Although Quebec was the only province with a majority francophone population, the narrative of two founding peoples does not appear in the constitutional text. Quebec became the territorial representative of the "French fact" in Canada and the incipient "Canadien" identity, as well as the link between the sociopolitical reality of French Canada and institutional dynamics of federal constitutional system.[168]

It is important to take a moment to integrate the theoretical machinery of constitutional federalism with its legal texts before moving on to examine the case law. Federal states generally have a constitution that assigns competences to different units and this means that conflicts over the interpretation of that constitution are a regular feature of life. Accordingly, constitutional federalism requires a referee. Typically, it is the courts which decide these conflicts.[169] The division of powers is adjudicated through the mechanism of judicial review. The institution of judicial review refers to the judiciary's role of interpreting and enforcing the constitution. It seeks to ensure that all legal norms conform to the higher law of the constitutional system. The scholarship on the role and legitimacy of judicial review is enormous.[170] The point here is that it reinforces the tendency toward judicializing and litigating disagreements. Indeed, it is well-remarked that group claims, among others, have shifted their focus from the political to the constitutional arena.[171] This is partly the reason that

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[166] See, *e.g.*, *Canada–Québec Accord relating to Immigration and Temporary Admission of Aliens*, 5 February 1991 [*Canada–Québec Accord relating to Immigration and Temporary Admission of Aliens*].
[167] Choudhry, *supra* note 94 at 165-66; Both Kymlicka and Gagnon have described this as a dually multinational federation and territorial federation. See: Kymlicka, *supra* note 125; Gagnon, *supra* note 138. Today, we might consider adding Nunavut as a nationality-based subunit.
[168] Tierney, *supra* note 4 at 69.
[169] Robert J Sharpe, "The Constitutional Legacy of Chief Brian Dickson" (2000) 38 Osgoode Hall LJ 189; Schertzer, *supra* note 65 at 14-15.
[170] See, *e.g.,* Waldron, *supra* note 99; Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996); Michael Mandel, *The Charter of Rights and Freedoms and the Legalization of Politics in Canada*, 2d ed (Toronto: Wall & Thompson, 1994).
[171] Tierney, *supra* note 4; Choudhry, *supra* note 94; Michael Ignatieff, "Challenges for the Future" (2001) 80 Cdn Bar Rev 209.

national case law is such a fruitful site of analysis: it is where the jurisdictional lines of the group are drawn.

4.5 The Case Law on Jurisdiction

The objective in this section is not to review cases about constitutional federalism *per se*, but rather to examine cases that look at the territorial manifestations of group difference that are protected by national law in and through the regime of constitutionalism. These are the constitutional minorities that receive protection *as groups* when certain criteria are met. Thus, although there are cases specifically about the jurisdiction of the federal and provincial orders (with a corresponding set of constitutional theories and doctrines for their adjudication)[172], those are not the subject of this examination unless and until they impinge upon the inquiry into group difference.

These cases take place in the 1990s. This timing represents the lag between the implementation of *Charter* and the time for cases to wind their way to the Supreme Court of Canada. These are the seminal cases in each issue area; they define the terms of the constitutional categories. The cases are selected because they definitively resolve the issue at hand (*i.e.* unilateral secession) or they establish a paradigmatic approach to the group.[173] Most importantly, these cases confirm that these constitutional categories of the group have been adjudicated now. This does not preclude provincial amendments to expand these categories, nor does it discount some degree of movement within them.[174] However, there is little room for reasoning by analogy to reopen the group, and certainly not beyond its enumerated parameters. After these cases, then, recourse for the group that does not fall into these categories is limited to individual rights claims. In this way, these cases define the terms for the group *as a group* in the national legal order.

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[172] See, e.g., the theories of the implicit ancillary power, federal preponderance, residual jurisdiction, national dimensions, and state of emergency and the doctrines of pith and substance, double aspect, federal paramountcy inter-jurisdictional immunity, etc. It has also been remarked that the tendency of the Judicial Committee of the Privy Council, the highest court of appeal over Canada until 1949, was to elevate the provinces to coordinate status with the federal government, while the tendency after that time has been centralising. See: Hogg, *supra* note 114; Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 UTLJ 47 (on the classical paradigm vs. the modern paradigm); Monahan also echoes Paul Weiler in seeing "a set of contradictory theories proceeding from radically different assumptions about the nature of the Canadian political community... The opposing theories could be characterized as matching principles and counter principle" at 70.

[173] These criteria are preferable to using the most recent cases because they focus on jurisdictional techniques.

[174] I am indebted to Jeremy Webber for the nuance and precision of this point, both here and throughout the dissertation.

Because this inquiry is located at the national scale, most of the law surrounding groups, at least the key cases, consist of general acts of lawmaking rather than particular acts of law's application. In each case, the jurisdictional threshold is intense as the law confronts its extension to an instance that will define the category itself. In the following section, the jurisdictional threshold in specific cases is examined to reveal the ongoing construction of the house of group difference. In each case, the jurisdictional technology of constitutional federalism is examined to show the implications for territory and law, and how they manage the group. This jurisdictional analysis offers a new lens on old cases: it allows us to consider categories and thresholds in the context of law's political commitments.

4.5.1 Reference re Secession of Quebec (Supreme Court of Canada, 1998)

The *Reference re Secession of Quebec* ("*Reference re Secession*") is an exceptional case that straddles the threshold between the international and national legal orders, and thus presents an excellent site for jurisdictional analysis.[175] It contends with the possible secession of the province of Quebec from the nation-state of Canada. The case has a lengthy and fraught history concerning Quebec's search for a more pronounced place, both real and symbolic, in the Canadian order, culminating in a provincial referendum in 1995, in which Quebec came precipitously close to voting to secede.[176] The federal government invoked the Supreme Court of Canada's special jurisdiction to request an advisory opinion about the legality of such unilateral secession. It posed three questions:

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
>
> In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[177]

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[175] *Reference re Secession of Quebec*, *supra* note 125.
[176] This included the constitutional negotiation processes of Charlottetown and Meech Lake, which dealt with issues of constitutional recognition and asymmetrical powers, but ultimately failed. See: Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994); Schertzer, *supra* note 65 at 92-94.
[177] *Order in Council PC 1996-1497*, 30 September 1996.

The case has been described as laying down a "roadmap to referendum and secession".[178] In the result, the Supreme Court identified constitutional conventions *against* unilateral secession and *for* a duty to negotiate the terms of secession in good faith. While there is no right to unilateral secession as a matter of law (international or constitutional), a clear majority vote by Quebec in favour of secession would oblige good faith negotiations by other members of Confederation.

This case has been the subject of considerable thoughtful analysis, so it is worth setting out the value added by the jurisdictional lens.[179] First, the case reveals the stance of the national legal order toward group difference when it manifests as a competing nationalist group with both territory and people. The jurisdictional lens focuses on the framing of the issue as vertical, hierarchical and nested: it is the claim of the *province* of Quebec, a piece of the nation-state, not a horizontal or equivalent claim. Second, it literally embodies the jurisdictional threshold in its sorting techniques. It classifies into the legal categories of political and legal, national and international, federal and provincial, and province and minority group. Here, the jurisdictional technique emerges as unwritten constitutional principles that manage diversity. Third, there is a technical jurisdiction issue that speaks directly to the terms of law's extension to this case.

The technical jurisdiction question has theoretical implications beyond the interpretation of judicial competence because its result is to have determined the decision maker. In other words, the disagreement was not only about the respective powers of the federal unit and the sub-unit, but also about which institution had the power, if any, to determine the jurisdictional question.[180] Quebec rejected the role for federal institutions in their entirety, arguing that "the only judge and the only jury of the future of the Quebec people will be the people of Quebec themselves", refusing to follow constitutional rules for dispute settlement and amendment, and ultimately withdrawing from the

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[178] Choudhry & Howse, *supra* note 94.
[179] Anne Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000); David Schneiderman, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company, 1999); Choudhry & Howse, *supra* note 94. For pre-decision scholarship, see: Jeremy Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill LJ 281; Patrick Monahan, "The Law and Politics of Quebec Secession" (1995) 33 Osgoode Hall LJ 1.
[180] Tierney, *supra* note 4 at 106.

case.[181] The Court defended its jurisdiction to decide the reference questions as strictly limited to aspects of the legal framework of secession, not to the democratic decision to secede itself. In other words, it invoked the threshold between law and politics, placing the democratic decision of the people of Quebec squarely in the political realm. The judgment vests primary responsibility for contextualizing the constitutional rules about secession with political actors and eschews a supervisory role for the courts.[182] Yet the concept of democracy that the Court invokes is broader than the notion of majority rule and thus beyond popular sovereignty.[183] Instead, the Court tempers the democratic will of the people that a Quebec referendum would represent by the principle of constitutionalism: "it is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented".[184] This literally creates a threshold between law and politics.

The result is clearly the pan-Canadian arbiter deciding the legal rules for secession from the larger body politic. The Court positions Quebec as a *part of* the national legal order, not as contending for its own version of that national order. Quebec is not seen to present its own equivalent claim to be the final arbiter of the decision, or to be determined by some other tribunal on a 'higher' scale that might govern both as nation-states. Quebec cannot access the international apparatus. It is worth emphasizing that the entire constitution was *rejected* by one of the parties in the dispute and so the core technical jurisdictional aspect of the case was to bind Quebec to the judgement, to the law of Canada, and to its constitution.

Yet the Court also finds itself competent to pronounce on that international apparatus. For Quebec, its referendum capacity was part of the principle of self-determination, grounded in the 'immanent sovereignty' of the people of the territory.[185] Here, the shadow of statehood is visible in a political strategy driven by statal dynamics.[186] The goal of Quebec was to join the club of states. For the Court, there is a distinction between the international right to self-determination and the constitutional right to secession. The right to external self-determination is inapplicable in Quebec. Secession means that the group removes itself and a piece of territory from the jurisdiction of the

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[181] Bayefsky, *supra* note 179 at 12; Tierney, *supra* note 4 at 106-7. On the constitutional pathways, see: *Constitution Act, 1982*, *supra* note 146 at section 52(1) and Part V amendment procedure.
[182] Choudhry & Howse, *supra* note 94.
[183] *R v Oakes*, [1986] 1 SCR 103; *Reference re Secession of Quebec*, *supra* note 125 at para. 76.
[184] *Ibid* at paras. 67, 76, 77.
[185] Tierney, *supra* note 4 at 107.
[186] *Ibid* at 85.

state. In this sense, secession is a restriction on the state's power. It challenges notions of perpetuity as a structural element of the constitution and sovereignty as strictly indivisible; "it thus blurs the line between international and constitutional law".[187] In all of this, the Court is passing judgment on Quebec and on international law, having found itself competent to consider international law as it affects national actors, and that the institutions at issue "exist as part of the Canadian order".[188]

Scale is a helpful analytical lens here because it highlights the way that law mobilizes scalar narratives and arguments. Secession is an effort to jump scales, to "rescale" a province as a state. It carries the imagery of physical separation, of a piece of territory excising itself from the larger state, for the purposes of self-rule. But this physicality is incorrect: the province of Quebec is a juridical entity in the context of secession and it is seeking a different juridical status.[189] This status would entail different legal meaning of its territory, borders, and government without any of those components changing territorial form.

The remarkable jurisdictional technique in this case is the articulation at the outset of four unwritten constitutional principles. These "fundamental and organizing" principles are federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[190] They are used to determine the rules of secession and to reframe the locus of the national.[191] One striking feature of these principles is the extent to which the Court derives them from a national historical narrative about the nation-state. The constitutional principles reflect the underlying political theory of the constitution. This political theory is premised on the fact of diversity, yet the potentiality of group difference is never realized in this decision for two reasons. First, diversity is primarily conceived as the provinces. The overlap of nation and province that Quebec represents comes to stand in for all of the provinces as sites of diversity with their boundaries mapping group difference. But the provinces – certainly the other nine of them – are primarily juridical entities. These provinces appear as a "monolithic block".[192] Second, this diversity exists in equipoise with unity, where unity is embodied by the

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[187] Susanna Mancini, "Secession and Self-Determination" in Michel Rosenfeld & Andras Sajo, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 481.
[188] *Reference re Secession of Quebec*, *supra* note 125 at paras. 18-23.
[189] Webber, *supra* note 179.
[190] *Reference re Secession of Quebec*, *supra* note 125 at para. 32. These principles have full legal force – see: Robin Elliot, "References, Structural Argumentation & the Organizing Principles of Canada's Constitution" (2001) 80 Cdn Bar Rev 67.
[191] *Ibid* at 94.
[192] Schertzer, *supra* note 65 at 130.

federal power. Robin Elliot describes the dance between federal unity and provincial diversity.[193] This conceptualization has two repercussions. First, where diversity signals provincial autonomy and unity signals federal power, true, deep diversity is sidelined. Second, as Daniel Elazar has pointed out, the true binary of diversity is homogeneity; the true binary of unity is disunity. The result of framing diversity as the opposite of unity is that a push away from a diversity is simultaneously a push toward federal power and thus toward the national scale. The national ends up reinforced at the expense of both deep diversity and provincial autonomy.

For the Court, each of the four unwritten principles is, in some sense, said to recognize or accommodate diversity. The principle of federalism is both a legal response to the diversity of communities and a political mechanism to reconcile diversity with unity.[194]

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province.[195]

This makes clear that diversity follows provincial boundaries and federalism is a devolution of power only to the provinces. The principle of the protection of minorities most obviously recognizes diversity since minorities embody difference. The principle of democracy aims toward diversity as well:

> Democracy is not simply concerned with the process of government. Democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities.[196]

The principle of constitutionalism explicitly protects diversity since the point of entrenchment is to put rights and freedoms beyond reach, to protect minority groups with institutions and rights, and to provide for a division of power that cannot be easily modified.[197]

How can all of these principles point in the same direction, toward recognizing and accommodating diversity, and yet at the last moment veer away from it? One reason is because these principles are all

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[193] Elliot, *supra* note 190 at 103-5.
[194] *Reference re Secession of Quebec*, *supra* note 125 at para. 43.
[195] *Ibid* at para. 59.
[196] *Ibid* at para. 64.
[197] *Ibid* at para. 74.

implicitly bound to the nation in its originary moments. Indeed, the narrative that the Court tells about the history of Confederation focuses on Quebec's distinctiveness, and Canada's structural accommodation of this fact. Temporally, this suggests that Quebec's concerns have *already* been accommodated. The Court describes the "Quebec Resolutions":

> These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.[198]

The values that the constitutional principles protect are historical and national – bilingual and bicultural, not multilingual and multicultural – and fixed. The Court described these principles without once mentioning the constitutionally enshrined reference to multiculturalism. Another reason lies in jurisdictional sorting techniques. The law cannot apply to all groups the same way or the nation-state would devolve *ad infinitum.* The constitutional principles turn out to be different sorting techniques: federalism is a different form of accommodating diversity from protection of minorities and from democracy. The group cannot access all of these modes at once: it may a province, an immigrant minority group, a people entitled to self-government, or an enumerated constitutional category.[199] They are presented as symbiotic, even synergetic, but in fact they are disarticulated and disjoined. Only the nation-state gets to present them as a unity and, even in this decision, they are played off one against another. Democracy is limited by constitutionalism so that self-rule does not follow. Not only do these principles ignore the extra-legal group, but they also work together to hem in the legal group of Quebec, that original site of group difference, with provincial borders drawn around it and authority vested within it. What emerges is a meditation on diversity in a nation-state that redoubles on itself, paying lip service to group difference but closing off the portal to authority.

The decision comes down to a balancing act between democratic rights and constitutional obligations.[200] In this, it repeats the interminable sovereign/subject disarticulation. It is the internal logic of the constitutional text that governs here, binding Quebec to the nation-state. On the unwritten

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[198] *Ibid* at para. 38. On the minor changes made to these resolutions, see para. 41.
[199] Of course, the confluence of historical and political factors as well as an identity which may be characterized to emphasize different aspects have allowed French-Canadians to claim variously the province of Quebec, language rights, and religious education rights.
[200] *Reference re Secession of Quebec*, *supra* note 125 at para. 151. This characterization is complicated by the suggestion of competing democratic majorities.

principles themselves, Sujit Choudhry and Robert Howse describe how the principles derive not so much from the text itself but rather from their place in a larger liberal democratic regime and that reference to *those* principles permitted the Court to step over Quebec's rejection of the constitutional text.[201]

4.5.2 Minority Language Rights

In addition to the *Charter*'s general guarantees for freedom of expression and equality, it protects two language groups directly.[202] French and English-speaking citizens enjoy the rights, even where they are in the minority, to use their languages in some courts and legislatures, to have legislation enacted in their languages, to receive federal government services in those languages, and to have their children educated in their mother tongue.[203] It is this last right — to education in a particular language — which is the focus of several Supreme Court cases. It is also this provision which is the most interesting for jurisdictional analysis and group difference because it enumerates a constitutional minority and bestows it with a certain measure of self-rule "where numbers warrant".

Section 23 of the *Charter* is designed to preserve and promote the two official languages of Canada by ensuring that each flourishes in provinces where it is not spoken by the majority of the population. It grants minority language educational rights to minority language parents throughout Canada according to a sliding scale where there is a sufficient minority population. In *Mahe v. Alberta,* a francophone father sued the province of Alberta for refusing to establish an independent francophone school board pursuant to section 23.[204] The Court determined that French Canadians in Alberta were entitled to be represented on the school board.

The judgment is notable in three respects: it establishes the minority language rights regime as an exception; it confirms language as a collective and social good; and it establishes a uniquely calibrated approach to the group exercising the right. First, the Court confirmed that language rights in section 23 are "a novel form of legal right" both in genesis and form.[205] Section 23 "confers upon a group a right which places a positive obligation on government to alter or develop major institutional

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[201] Choudhry & Howse, *supra* note 94 at 150.
[202] Denise G Reaume & Leslie Green, "Education and Linguistic Security in the Charter" (1989) 34 McGill LJ 777.
[203] *Canadian Charter of Rights and Freedoms*, *supra* note 153 at sections 18, 19, 20, and 23.
[204] *R v Mahe*, [1990] 1 SCR 342.
[205] *Ibid* at para. 37.

structures".[206] The form is unusual because most rights are not differentiated by group identity, nor are they subject to a numbers constraint.[207] The Court then carves out section 23 as an exceptional "comprehensive code" for minority language education rights, thus insulating it from the application of sections 15 and 27. Section 23 is, "if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada".[208] The conflation of sections 15 and 27 ignores that section 15 is a substantive right while section 27 is an interpretative provision that speaks to the value of group culture, making it rationally applicable to a discussion about language as a group attribute that is coterminous with culture. In constructing the language provisions as a comprehensive code separate from other *Charter* obligations, the Court insulates them from review, restricts them to the two recognized groups, and reinforces the nation as a composite of French and English.

Second, Chief Justice Dickson focused on the role of schools as community centres "where the promotion and preservation of minority language culture can occur"; as locations where the language community can meet and express its culture.[209] He confirmed that the purpose of section 23 is to preserve and promote the official languages of Canada and their respective cultures:

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.[210]

This dual approach highlights the universality of language as an aspect of group identity and culture, yet particularizes its protection by the referring back to the unique political compromise.[211] This is a jurisdictional technique, holding the universal and particular in equipoise, and then finding resolution through politics. Even though section 23 is legal, contained in the constitutional text, it is also political and historical; immune from the constitution's other rights requirements.

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[206] *Ibid*.
[207] Reaume & Green, *supra* note 202.
[208] *R v Mahe*, *supra* note 204 at para. 45.
[209] *Ibid*.
[210] *Ibid* at para. 362.
[211] On language rights as political compromise, see: *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549.

Third, the Court broadly interpreted the criterion of "where numbers warrant", opting for a sliding scale approach that correlates the level of rights and services appropriate to the number of students involved. In cases where the numbers warrant, minority language parents acquire a right to management and control over the educational facilities in which their children are taught. Section 23 speaks of "wherever in the province" the "numbers warrant". "This means that the calculation of the relevant numbers is not restricted to existing school boundaries. The numbers test should be applied on a local basis throughout the province.[212] This is a significant territorial delimitation. The *degree* of management and control ranges from an independent school board to guaranteed representation on a shared school board. The purpose is to give the group control over those aspects of education which pertain to or affect their language and culture.[213] The result is that these parents are entitled to a certain level of self-rule over their children's schools.

The group here is the minority language parent-child dyad. This case shows how group rights are still held collectively even when individuals have standing to enforce them.[214] The right to minority language education is legally enforceable by individuals, but it only operates when a critical mass of minority students makes such an institution viable, and it entails a collective territorial right by a minority linguistic community to manage and control the facilities.[215]

It is in this important sense that Choudhry reminds us that group rights have both regulative and constitutive functions; they both make and oversee the legal world that deals with them.[216] In these cases, we see that the group is constitutionally identified as a constituent element of the national legal order itself. This group right constitutes the group by drawing its ambit loosely around school boundaries *and* by defining the nature and content of its right according to a sliding scale. But this constitution is fluid: the majority-minority characterization is evasive, appearing and disappearing depending upon where one stands and how many others stand there, too. Where the boundaries are drawn determines whether the group is a minority. Despite its references to minority language rights and provincial accommodation, section 23 is distinctly nationalist in orientation.

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[212] *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148.
[213] *R v Mahe*, *supra* note 204 at para. 57.
[214] Choudhry, *supra* note 23 at 1103.
[215] Allen Buchanan, "Liberalism and Group Rights" in *In Harm's Way Essays in Honor of Joel Feinberg* (Cambridge: Cambridge University Press, 1994) 1.
[216] Choudhry, *supra* note 94 at 6.

The combined effect of the national scope of the right and the mobility rights of individuals is the erosion of the provincial jurisdictional threshold. Provincial jurisdiction over education is delimited by the exceptionality of section 23, in which jurisdiction attaches to the family, not the province. Minority language rights travel across provincial borders with the family.[217] This is the jurisdictional threshold in motion, only crystallizing when the family relocates to a province where the language of instruction is discontinuous with their children's former education, thus triggering law's application. It is also a jurisdictional threshold imbued with the national and its bilingual commitments, embodying the principle of subsidiarity, and transposing them to the community level. Put differently, it is possible to imagine a bilingual nation-state in which provinces or regions speak different languages; it is more difficult to conjure this scheme of spatial language pockets and moving minority/majority designations.

There are other jurisdictional thresholds here too (between control and nothing, based on numbers; between section 23 and other Charter rights, based on exception) but there are two in particular to highlight. First, there is the threshold between the social and the legal. There are language communities – social collectives – on the one hand, and then legal rights on the other hand. Law touches and protects the social collective as a group when it is historical and political; it protects the social collective as a composite of individuals in all other circumstances. Second, there is the relationship between individuals and groups, not only in the constitutional text but also in political theory. In *Mahe,* this relationship is bridged by the technology of culture. Language and culture were conceived as coterminous and used as referents to locate the group and its boundaries. The *Mahe* decision did not treat culture as a concept nor as a fact requiring evidence, but rather simply assumed that the minority language parents belonged to a culture.[218] In Chief Justice Dickson's hands, culture seems to broaden the lens, signifying the social and collective nature of language and identity.[219] Yet this is abruptly contained by reference to the special nature of section 23. The same criticism that Choudhry leveled at Kymlicka's version of societal culture holds here: if language is part of culture and identity, how can it only matter for official language minorities? The response may be practical –

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[217] *Solski (Tutor of) v Quebec (Attorney General)*, [2005] 1 SCR 201, 2005 SCC 14 at para. 10.
[218] Neil Vallance, "The Misuse of Culture by the Supreme Court of Canada" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97 at 109.
[219] See also: *Société des Acadiens v Association of Parents*, *supra* note 211 (Dickson, C.J., dissent: "though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social").

the nation-state needs to have a language (or two) in common, law encourages unity as well as protects diversity – but it is not well-defended against the claims of multiculturalism.

4.5.3 Minority Religious Education Rights

In the *Reference re Secession*, the Supreme Court derived the unwritten constitutional principle of the protection of minorities from the protections granted to minority religious groups, minority language rights, and minority language education rights.[220] The protections for minority religious groups are contained in section 93 of the *Constitution Act*, which guaranteed school funding by Ontario and Quebec to their respective Roman Catholic and Protestant minorities. Section 29 of the *Charter* reaffirmed this exceptional protection.[221]

In *Adler v. Ontario*, the appellants sought a declaration that the non-funding of Jewish and Christian schools in Ontario was unconstitutional pursuant to sections 2(a) and 15(1) of the *Charter*.[222] Historically, minority religious education rights were central to the negotiations leading to Confederation.[223] The minorities in what were then Canada East and Canada West feared submersion and assimilation. The Court found that the appellants could not bring themselves within the terms of section 93 and so they had no claim to public funding for their schools. Section 93 was a historical compromise and, like section 23, a comprehensive code.

Section 93 grants to provinces the power to legislate with respect to education. Section 93(1) protects certain classes of persons, "granting them rights which are denied to others".[224]

> While it may be rooted in notions of tolerance and diversity, the exception in s. 93 is not a blanket affirmation of freedom of religion or freedom of conscience ... [and] should not be construed as a Charter human right or freedom or, to use the expression of Professor Peter Hogg, a "small bill of rights for the protection of minority religious groups".[225]

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[220] *Reference re Secession of Quebec*, *supra* note 125.
[221] See section 4.4.3, *supra,* noting that section 93 no longer applies to Quebec by virtue to Section 93A.
[222] *Adler v Ontario*, [1996] 3 SCR 609.
[223] *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, *supra* note 212 at 1173; *Reference re Education Act (Que.)*, [1993] 2 SCR 511 at 529-30; *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [1989] 2 SCR 167 at 401-2.
[224] *Adler v Ontario*, *supra* note 222 at para. 25.
[225] *Greater Montreal Protestant School Board v Quebec (Attorney General)*, *supra* note 223 at 401.

Section 2(a) of the *Charter* cannot be used to enlarge the comprehensive code set out by section 93. As to the section 15 claim, the majority found that public schools were part of section 93's comprehensive code and thus insulated from the *Charter.* This argument relied on the concept "constitutionalization mechanism", whereby section 93 elevated denominational education rights, which were created by pre-Confederation statutes, to the status of constitutional norms.[226] The majority found that those statutes gave separate schools the same rights enjoyed by public schools, making them part of section 93.[227] It is the province's plenary education power to legislate that is constitutionally entrenched and thus protected from *Charter* scrutiny. Ultimately, the majority found that there was no violation of section 15 for two reasons: first, Ontario's decision is squarely protected by the terms of section 29 which exempts Charter challenges; second, it was made pursuant to the plenary power regarding education granted to the provinces as part of Confederation. This notion that section 93 ousts the operation of the Charter divided the Court, with Sopinka, Major, McLachlin, and L'Heureux-Dubé finding in their concurring or dissenting judgments that it did not.

Justice McLachlin, dissenting in part, found that section 93 was a not a code "ousting the operation of the Charter". She found that section 2(a) was not violated, and that section 15 was infringed, but that was justified under section 1.[228] Justice L'Heureux-Dubé found a violation of section 15. The group to which the appellants belong constituted minorities-within-minorities: small, insular religious communities seeking to protect their adherents from assimilation. These are dissentient minority religious groups, vulnerable to disadvantage and marginalization.[229] Section 27 – the interpretative provision on multiculturalism – supports the idea that recognition and continuation of these communities were interests relevant to the purposes of the Charter.[230] She held that the non-recognition of these groups denied them the most fundamental interest: their very survival as a community.

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[226] *Adler v Ontario*, *supra* note 222 at para. 44.
[227] In a concurring judgment, Sopinka and Major JJ. argued that those statutes made the rights and privileges of public schools a *benchmark* for ascertaining the rights and privileges of separate schools. The statutes themselves were not given constitutional status; only the rights and privileges of separate schools were given constitutional protection. Based on this, they found legislation funding public schools subject to *Charter* scrutiny. *Ibid* at paras. 142, 165.
[228] *Ibid* at paras. 195-225.
[229] *Ibid* at paras. 79-81.
[230] *Ibid* at para. 84

Taken together, these judgments illuminate the difficulties posed by the group for nation-state. On the one hand, the group is delimited, historical, and distinctly national, coloured by its special inclusion in the constitution. On the other hand, the group can be infinitely devolved, constantly revised, and constitutively non-national. In *Adler,* the appellants comprised this latter type of group, a sub-minority defined against the frame of its more mainstream religious adherents and based on the fear of assimilation and a desire *not* to belong to the national. As the subjects of two distinct codes of rights, they destabilize legal doctrine by carving out exceptions to the universal and by opting out of some aspects of the secular national, respectively.

Scale operates here to construct the province as, first, obliged to follow the national constitution, and second, plenary within its borders. The judgment moves between scalar constructs, shifting from the province as nested within and subject to the national, to the province as an autonomous whole with full (read: plenary) jurisdiction over education, to the religious group as eternally present, nested within and subject to the province. As a jurisdictional technology, scale does the work of reconciling the province as ancillary to comprehensive codes of exceptionality and historical compromises agreed to at the national level to the province as a juridical entity endowed with full legal authority which is so robust in the education domain so as to be immune from *Charter* scrutiny. The concept of plenary power provides the basis for this, allowing the threshold to move from sandwiched between section 93 and other constitutional rights guarantees to parsing the nature of provincial plenary power.

This case implicates the sovereign/subject disarticulation because the Jewish and Christian parents are seeking inclusion in the constitutional text. They are using the individual rights in the *Charter* to make a larger claim for governmental power; they are seeking to exercise some measure of jurisdiction over education. Their claim is for government funding for religious instructional content *on an equal basis* with other religions in Canada. They are seeking to revise the original constitutional moment to include other religions in accordance with the norms contained in the constitutional text. In other words, not only are they probing the disarticulation and asking to be a constituent power included in the legal text as a group, but they are also holding the state to account based on the terms of its own *Charter*. The terms of the constitution may delimit the scope of minority religious groups as exceptional and exhaustive, but the norms of freedom and equality which appear alongside those special provisions bring the disarticulation into sharp relief.

4.6 Jurisdictional Governance: Relationships, Contradictions, Incommensurabilities

4.6.1 The Work that Territory Does

In the national legal order, territory enacts political theory. It is the basis of how the nation-state is divided (territorial federalism) and also what holds it all together (territorial sovereignty). Territory carries assumptions about the scope, sites, and sources of authority.[231] One of these assumptions is a "normative convention about distinct jurisdictions as the basis of legitimate political authority".[232] The result is that jurisdiction — as an aspect of rule — and territory are mutually constitutive in the national frame. It would be overstating the point to say that jurisdiction *is* territory, mostly because jurisdiction does not only follow the territory of the state but also carves it up and parcels it out, but not by much. Territorial jurisdiction is the dominant presentation in the national legal order.

The national legal order shares the conceit of the international legal order: legal authority is predominantly distributed and represented in territorial terms and territorial jurisdiction is mostly parceled out already. On the international plane, legal authority corresponds to statehood and territory belongs to states. On the national plane, legal authority corresponds to constitutional categories and territory belongs to federal constitutional units. In both orders, territorial jurisdiction carries continuing normative authority.[233] In the national order, though, there are discontinuities: there are groups in the national order who may be territorial but are not legally manifested. The provincial territorial form does not come close to exhausting the groups in this frame. Territory is temporally bound in the sense that territorial jurisdiction was essentially handed out in the making of constitutional order of the state. In this, territory did the bidding of politics, not law, securing the agreement of the colonies in exchange for some measure of autonomy.

It is here that the nested aspect of territory becomes visible.[234] This is the notion that there are larger and smaller spaces – state, province, city, neighbourhood — and that they are somehow vertically nested so that the city is not only inside the state but also on the same territory as the state. For example, the territory of a province is also the territory of nation-state. The danger of conceiving of

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[231] Nisha Shah, "The Territorial Trap of the Territorial Trap: Global Transformation and the Problem of the State's Two Territories" (2012) 6 Int'l Pol Soc 57 at 60.
[232] *Ibid*.
[233] Tierney, *supra* note 4 at 88, writing in the context of the state.
[234] David Delaney, *Territory: A Short Introduction* (Oxford: Wiley Blackwell, 2005).

territory in this scalar fashion is that it presents the province and the nation-state as ontological things rather than constructs. Indeed, the very fact that territory tends to be conceived in this way — that the underlying territory is the same across scales and that it is nested like a Russian doll, from small to big — is inherently nationalist.[235] The possibility for territory to belong to a group that is not institutionalized in the form of the state, to break out of the shadow of statehood, depends on territory *not* being conceived as vertically nested. If it all culminates in the biggest Russian doll, then the smaller ones cannot *mean* differently.

How are so-called nested territories connected? This is the work that law does. Jurisdiction connects them in a way that constructs them as the same territory scaled in different forms, yet keeps this from becoming wildly incommensurable. This construction does not mean that that they are all, in fact, the same territory, nor that there is any reason that various territories could not overlap without the spectre of collapse. It is, however, how jurisdiction can maintain the weight of the state in a contest between groups for similar types of power. The result is that territory *means* differently in each scalar conception. It takes on different legal forms and carries different legal consequences. The meanings of territory may conflict and this causes literal or metaphorical boundary disputes. These are *jurisdictional* disputes.

How does constitutional federalism specifically intersect with territory? Territory underpins both by restricting political membership. Territory figures here as the common land of the nation-state and as the basis for federal divisions; it is both organic and identity-based on the one hand, and functional and administrative-based on the other. It is still more complicated, though, because federal divisions are intended to allay the danger of diversity. Thus, the territorial and juridical boundaries of the Province of Quebec were organized with attention to its status as an identity group, representing a so-called national minority, even if those boundaries trap other identities as well. So another thing that constitutional federalism does is to jam together these two meanings of territory.

The relationship between constitutionalism and federalism is one in which the entrenched constitution establishes federalism as a modality for governing the state. Constitutionalism relies on territory as the constant over time – the basis for binding future generations and for justifying the division as it was done. It is territory that provides some resolution of the sovereign-subject

[235] I am indebted to Catherine Dauvergne for this point.

disarticulation, enabling the constitution to carry forward without mass dislocation. This is partly because territory steadfastly binds sovereignty to government and to the people. It is also because territory forges a narrative of Canadian identity. Michael Ignatieff commented that land was the defining feature of Canadian identity, at least until the Charter, and then what was distinctive about Canada was how we ruled the land.[236] Geographers have taught us that when the land is territorialized – constructed, politicized, and legalized – these are the same thing.

Constitutionalism only touches upon territory whereas federalism relies upon it. Constitutionalism entrenches the notion of shifting minority groups depending on the co-factors of concentration and territory. It does not construct a spatial inside and outside, certainly not one that could be represented as a contiguous territorial group on a map. The references to minorities and their spatial concentration are abstract and fluid – the minority group can shift over time and, indeed, over space (it can shift laterally to another town). The constitutional groups are undoubtedly ensconced in the territorial boundaries of the nation-state but then the framework takes groups and individuals where it finds them.

For federalism, in comparison, territory is the "preponderant basis" for the management of diversity and the basis of power relations within the state.[237] Territory has two faces in federalism. On the one hand, territory is the basis for autonomy, permitting diversity, and dividing the state into sub-state units. On the other hand, this division is in service of the state maintaining its territorial integrity and ultimately its existence.[238] While territorial boundaries can be drawn to correspond with minority groups *or* to outnumber minority groups within that unit, both sets of boundaries seek to maintain the state.[239] Both faces of federalism use territorial jurisdiction as a mechanism of governance.

Federalism both *requires* territory to intelligibly divide the state into sub-jurisdictions, and it *creates* territories by drawing boundaries around embodied power. One consequence of these historical jurisdictions is that territory comes to stand in for the people in that territory. This is partly about how territory becomes opaque; how territory comes to do the governing itself. Having drawn the line of

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[236] Ignatieff, *supra* note 171.
[237] Burgess, *supra* note 129 at 435.
[238] David Storey, *Territories: The Claiming of Space* (New York: Routledge, 2012) at 7.
[239] See, *e.g.*, the United States, which ensured that Hispanic groups and Indian tribes were outnumbered within the state. Kymlicka, *supra* note 21 at 13.

exclusion, the insides of the territory — namely, the people — come to be temporally stuck as well. They are static and unchanging. In this way, diversity need only be accommodated once – in the founding moment.

Territory is a tremendously powerful construct. It is the source of secessionist aspiration – Quebec sought the territory of the province, not only the French people on it – and because it is coeval to rule, it embodies the aspiration of self-rule. The result is that territory that is part of the framework constitutional federalism is conceptually and qualitatively different from what is not. A province is categorically distinct from Chinatown or Brampton. What underwrites the distinction is not nature or function (although there is undoubtedly an element of administrative function to federal units) but territorial jurisdiction. It is incredibly difficult to challenge law's empire of already doled out jurisdiction.

4.6.2 Group Difference All the Way Down

There are contradictions and incommensurabilities within constitutional federalism which require jurisdictional sorting. Federalism is presented as a solution to diversity. Sub-state groups are granted some measure of self-rule and the logic of subsidiarity reinforces their autonomy. This can be conceived as a kind of "devolutionary self-determination" in which sub-state legal and institutional arrangements perform the function of fulfilling the group by self-rule or by recognition.[240] Federalism often emerges as an alternative to external self-determination, a means to keep the group from escaping the national scale.[241] In other words, it is bargain in the service of the nation-state. The problem is that there might be groups all the way down, but subsidiarity does not reach that far. Federalism only empowers groups who happen to also be provinces or territories. It is in this sense that federalism, like jurisdiction itself, both needs and erases difference in equal measure.

The effect of constitutional federalism is determinate categories of group difference. The way groups are regulated in the national legal order is by the constitutional framework, and this framework establishes categories. These are predetermined classifications that preclude the possibility of inclusion in the category. It is not possible to argue by analogy that the territorially-based Jewish

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[240] Gerry J Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age" 32 Stan J Int'l L 255 at 258.
[241] Juan J Linz, "Democracy, Multinationalism and Federalism" in Wolfgang Merkel & Andreas Busch, eds, *Demokratie in Ost und West* (Frankfurt: Suhrkamp, 1999) 382.

community in North Toronto is similar in kind to the Catholic community in Toronto because the category is finite with clear-cut boundaries. The result feels artificially limited because there is no necessary discontinuity between the Catholics and the Jews, or between the Mandarin speakers and the French speakers. This is furthered because the categories are established, so the Court does not even need to articulate what the right is about or offer some kind of theory that might permit inclusion by analogy down the road.[242] This means that analysis is unaffected by the interpretative principle of multiculturalism in section 27 and the substantive right of equality in section 15.[243] In *Reference re Secession,* despite telling the narrative of the Canadian state and emphasizing diversity, the Court does not mention multiculturalism even once. The logic of the constitution is exceptional protection for recognized minority groups. This is in opposition to the logic of multiculturalism, which is basic protection for minority groups as individuals, but always subject to the trump of equality.

Patrick Monahan describes two competing conceptions of the nature of the Canadian political community that sit at each pole of a continuum: provincialism and nationalism.[244] The thing about federalism and groups is that where nationalism acts as a magnetic lodestar, pulling some groups closer to statehood and repelling others, putting it onto a continuum with provincialism at the other end makes the room for group difference finite. But the fact is that group difference does not only present as a nation or a province. The parcelling out jurisdiction on the national scale has the effect of making the group into a non-legal entity. Federalism theoretically pushes down, not in a vertical sense, but in a directional sense of pushing away from national law. If the group is not constitutionalized (enumerated) and not federalized (juridical), it does not exist as a *legal* entity in the national scale. The result is a yawning gap because neither the constitution nor federalism tells what happens at this extra-legal level.

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[242] Sullivan, *supra* note 10. This does not preclude the expansion of categories through the political or non-constitutional process, as occurred with the Province of Newfoundland's educational categorizations. See: David Seljak, "Education, Multiculturalism, and Religion" in Paul Bramadat & David Seljak, eds, *Religion and Ethnicity in Canada* (Toronto: Toronto University Press, 2005) 178.
[243] See: Elliot, *supra* note 190 at 118; *R v Mahe*, *supra* note 204 (arguing that section 23 is a self-contained set of rights); *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, *supra* note 212 at 30 and *Adler v Ontario*, *supra* note 222 (refusing to extend similar protections to other religious minorities).
[244] Monahan, *supra* note 172 at 84-85.

4.6.3 Constitutional Logics of Identity

There is a contradictory logic *within* constitutional federalism when it comes to groups. The point of federalism is to accommodate diversity. Constitutions embody group rights or group commitments to that end, whether in the letter of law or in interpretative principles. In several contemporary constitutions, including Canada, group rights appear alongside individual rights. The latter encompass the traditional liberal freedoms, rights to bodily integrity and process, rights to democratic participation, and equality.[245] This produces incommensurability between different elements of the constitution. Sujit Choudhry argues that these embody competing constitutional logics; one institutionalizing group identity and the other eclipsing it.[246]

> Group rights institutionalize ethnic identity in the very design of the constitutional order, whereas individual rights are guaranteed irrespective of ethnic identity and are hostile to the institutionalization of ethnic difference.[247]

For example, equality and non-discrimination prohibit the use of ethnic identity as *the basis for* distributing entitlements. Individual rights call on citizens *to abstract away from* identity markers such as race, religion, ethnicity, and language. The incommensurability arises from the intersection between group and individual rights, where the former often grant the group the legal authority to impose obligations that conflict with individual rights. Indeed, the special education rights and denominational school rights conflict with the right to individual equality. In *Mahe*, the Court had to emphasize that the section 23 group language rights were exceptional and carved out from the right to equality and others.[248] This issue has confounded political philosophers concerned with illiberal minority practices, particularly when the practices rise to illegality.[249]

There is also the disconnect that results from the very act of constitutionalizing a group right, and this is the disconnect between the fixing of the group in law and the political sociology of the group. In the context of consociational power-sharing arrangements, Arend Lijphart contrasts the constitutional strategies of pre-determination with self-determination of groups. Pre-determination suggests that the group categories are those of the state, while self-determination suggests that the categories are

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[245] Choudhry, *supra* note 23.
[246] *Ibid*.
[247] *Ibid* at 1100.
[248] *R v Mahe*, *supra* note 204.
[249] See: Kymlicka, *supra* note 159; Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000).

determined by the group.[250] Constitutional rules which predetermine which groups are to be the beneficiaries of group rights carry assumptions about the political sociology of group membership: that the boundaries between groups are clear, that groups are internally homogenous, and that group membership is immutable.[251] Attention to the political sociology of the group also illuminates the political theory behind constitutionalism and the different conceptions of the self at play in the constitutional text. Some individuals are culturally bounded, territorially fixed, and constitutionally protected as groups, concerned only to preserve the group. Other individuals are autonomous shape shifters who embody the fluidity of group membership, concerned only to retain the freedom to change.

4.7 Conclusion

In the usual arrangements of states with constitutions that divide and allocate jurisdictional authority, the role of ultimate guardian can only be performed by a more abstract representative figure such as the people or the nation. In the case law, the Supreme Court is trying to articulate and reinforce a national identity. This is part of its political work. But what is not oft acknowledged is that this is theoretically necessary in a state where jurisdictional authority is divided along spatial and institutional lines. Constitutional federalism requires someone to articulate the nation; otherwise there is only mass disagreement over land and status, rights and self-rule.

In the national legal order, then, the legal architecture of group difference is firmly placed down. Diversity is accommodated through constitutionally enumerated groups and federalism. They refer to founding nations and to bilingual and bicultural values. The categories are provinces, French and English, Catholic and Protestant, and minorities of each. Federalism uses scale to resolve diversity. It divides jurisdiction among provinces, but this division does not intersect with the myriad forms of group difference which present themselves in the nation-state. Constitutional federalism establishes the categories of the group and they are both historical and national. These categories do not finally resolve the problem of diversity; they seem instead to speak past it. The mapping of socio-political categories onto legal constitutional ones reveals the limitations of constitutional categories for group

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[250] Arend Lijphart, "Self-determination versus Pre-determination of Ethnic Minorities in a Power-Sharing System" in Will Kymlicka, ed, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 275.
[251] Choudhry, *supra* note 23 at 1117 (noting that privileging ascriptive identities also *creates* political incentives to mobilize on that basis, and disincentives to mobilize on another basis, such as class, and that these rules empower existing group leaders).

difference. It is very difficult to attract legal protection for a group *as a group* outside of these categories and values. These insights take us some distance toward the work of jurisdiction in signalling the national even in cases about constitutional group categories. Part of the reason that the constitution configures group difference in this way is attributable to a kind of capture, wherein options are reframed through the prism of existing constitutional arrangements, political claims are formulated as constitutional rights claims, and democratic rights become judicial process.[252]

More than this, though, it is the *logic* of the national legal order — a logic which includes the sovereign/subject disarticulation — which is revealing. Much resides in the sovereign/subject disarticulation. Each claim to self-rule is a claim to have surmounted the disarticulation, to have resolved the space between constituent power and constituted power. This is why the push to federalism, to subsidiarity, to the local, seems to hold greater promise – because the space for the disarticulation seems smaller, the possibilities for true democratic expression seem heightened, and thus the representation and authenticity of the constituted power seem truer.

That it should be difficult for struggles for recognition and self-rule to succeed should not surprise us. James Tully has explained how each struggle to alter identity norms will affect the distribution of power and access among all citizens.[253] What *is* surprising is how the terms of that struggle are managed by jurisdictional techniques and thus the extent to which members do not have a say over the rules of recognition and self-rule in the first place. The point is that the sovereign/subject disarticulation plays in a loop, over and over, fixing the political community and its territorial boundaries in time and space, even while individuals and groups are in motion.

The underlying issue is whether the lack of coincidence between territorial or jurisdictional boundaries and group boundaries is part of the problem.[254] The strength of territorial jurisdiction is to match pockets of self-rule with identity groups. Its weakness, however, is precisely in channelling the same form again and again. Non-territorial forms of jurisdiction offer another possibility. For some, the solution to deep societal pluralism is radical decentralized federalism in which the

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[252] By "capture", I am alluding to the new institutionalist school of political science concept of 'institutional capture'. See: Tierney, *supra* note 4 at 95.
[253] Tully, *supra* note 117.
[254] Martha Minow, "Putting up and putting down: tolerance reconsidered" in Mark Tushnet, ed, *Comparative Constitutional Federalism: Europe and America* (New York: Greenwood, 1990) 77 at 95

constituent units delegate a certain cadre of powers to the federal government and keep the remaining powers for themselves.[255] The salient question is whether more or different jurisdiction is somehow better for group difference. Are smaller political-legal units or more decentralized institutional frameworks more adept at accommodating pluralism? Putting aside questions about whether this jurisdiction would be horizontal or vertical, territorial or functional, the base inquiry is two-fold: what does jurisdiction add to the group and is it always or necessarily empowering? Accordingly, it is to this question of extra-legal groups and their interactions with jurisdiction that the next chapter turns.

[255] Tully, *supra* note 27.

Chapter 5: The Sub-National Legal Order

And yet ungovernability is precisely what difference threatens us with. To take difference – and not just identity – seriously in democratic theory is to affirm the inescapability of conflict and the ineradicability of resistance to the political and moral projects of ordering subjects, institutions and values. ... It is to give up on the dream of a place called home, a place free of power, conflict, and struggle, a place – an identity, a form of life, a group vision – unmarked or unriven by difference and untouched by the power brought to bear upon it by the identities that strive to ground themselves in its place.[1]

This chapter starts in a suburb, the satellite city of a major metropolis in Canada. The landscape is dotted with English language training centres and bubble tea stores. Store signage is frequently Mandarin or Cantonese. The Golden Village section of the city contains a number of malls that provide exclusively Asian goods and services. Some foodies claim that its restaurants create some of the best dim sum in the world. Traditional markers of wealth abound, with parking lots full of luxury vehicles and large subdivision houses built to the outer edges of their lots. In the early morning hours, the mall is full of Tai Chi practitioners. At dusk in the summertime, the Night Market opens at the city's perimeter and crowds appear to sample Taiwanese tea and browse the booths of cheap consumer goods.

The majority of the city's population, 65 percent according to the last census, comes from a visible minority background.[2] The predominant visible minority group in the suburb is Chinese, who are estimated to account for 44 percent of the population, the highest proportion in any municipality in Canada. The majority of residents have a mother tongue that is neither English nor French, with the Chinese languages together making up almost 38 percent. Although these numbers mask considerable internal diversity — for example, immigrants arrived from Hong Kong, Taiwan, and the People's Republic of China — there is also the counterpoint that further sub-selection has created several census tracts that are so densely populated that up to 80 percent of their residents are Chinese.

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[1] Bonnie Honig, "Difference, Dilemmas, and the Politics of Home" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) 257 at 258.
[2] *City of Richmond Census Profile* (2006). available at: http://www.richmond.ca/discover/about/demographics/Census2006.htm.

The suburb described above is Richmond, a city located south of Vancouver, in the province of British Columbia. It has many reincarnations across North America; so many, in fact, that scholars have coined a new term: ethnoburb. The term ethnoburb is intended to capture the phenomenon of suburban ethnic clusters of residential areas and business districts outside metropolitan areas.[3] These ethnoburbs, including Richmond, are the harbingers of a new paradigm of immigrant settlement and residential segregation. Enclaves, and specifically ethnoburbs, are voluntary, affluent, suburban and potentially permanent spaces inside the liberal democratic state. They represent contested sites of diversity, a point of convergence for concerns about group difference, national identity, and liberal democratic values.

This chapter asks questions about group difference in the sub-national legal order. How does law manage group difference "all the way down"? What strategies and technologies govern the group at the sub-national level? How does territory work in this context where the nation-state is an abiding, ordering presence, but exists at several degrees of remove from the group? What are the categories of the group in this frame? What does the jurisdictional lens tell us about the kinds of group difference that law reaches?

It is in this chapter that jurisdiction comes to rest. Its conceptual baggage is revealed, its discontinuities are brought to the fore, and the political theory underneath it all becomes visible. The emancipatory mode of this legal order is individual rights, the counter to minority group rights in the national legal order. There are no group rights here. As the legal orders seem to shrink and nest, so too the legal paradigms for group flourishing seem to devolve in equal measure. This chapter builds on the work of the previous chapters to show how the motif of the sub-national legal order casts the dynamic of the previous legal orders into stark relief: group difference represents a move away from law and the state and toward some measure of opting out and self-rule. The enclave magnifies this dynamic because it is a partial opting out but it does not require the extension of law to effect its excision. This is part of what makes it so disquieting for the liberal multicultural state. Finally, one of the most important ways that the group matters in the sub-national order is through the technique of reflecting the image of the group formalized in other legal orders. At the jurisdictional threshold, notions of territory and enclave simultaneously emulate statehood and threaten it with their

[3] Wei Li, "Anatomy of a New Ethnic Settlement: The Chinese Ethnoburb in Los Angeles" (1998) 35 Urban Stud 479 at 482.

reflection. This is similar to the dynamic in self-determination. The nation-state, then, casts a long shadow over group difference.

5.1 Overview

In the previous two chapters, the dyad of territory and people met law in the forms of self-determination in the international order and constitutionalism in the national order. In the sub-national order, the conceptual framework is more complex. This chapter explores this framework by shifting entirely to the perspective of the group. Whereas it is possible to examine the international law of self-determination both from the systemic perspective of its place in the international legal order and from the personal perspective of the group invoking the right in case law, the systemic perspective is not available at the sub-national level. This is because legal authority is not parcelled out to the group as such. Instead, the group must make claims of law as the individual member of a group. These are individual rights claims – to be equal, not to be discriminated against, to freedom – and they coalesce around freedom of religion, which is protected in Canada by the *Charter*, and elsewhere by similar national and international human rights infrastructure.

The picture is complicated, however, by two aspects. First, the philosophy of liberal multiculturalism orbits the adjudication of the group and informs the requirements of freedom and equality. Second, the territorial aspect of the group is obfuscated; territory is not the basis for individual members to claim group rights in law but it is nonetheless an aspect of groupness. This chapter places the liberal rights regime in conversation with law's approach to territory and multiculturalism. What is revealed is jurisdictional traction: the weight of the nation-state pervades this sphere too, and jurisdiction's technologies remain beholden to that form. Law does not like to acknowledge territory despite its tight grip over notions of the group. Territory, it seems, embodies some of law's anxieties over the collective.

The international and national legal frameworks directly regulate groups *as groups* through self-determination and constitutional federalism. The basis for law's regulation at the international and national level is the coincidence of the group, territory, and law. There are other groups which are not enumerated under these frameworks yet sometimes interact with the law. In the sub-national legal order, the coincidence of the group and territory — which is so essential to international and national legal recognition and protection — appears as the enclave. The term "sub-national" denotes a legal

order "below" the international and national legal orders in the sense that the terms of those legal orders do not reach the group here.

By taking the perspective of the group as enclave, this chapter looks to how the extra-legal group interacts with territory and law. I use the term "extra-legal" to refer to groups that are not regulated *as groups* by law. The method is to take enclaves and examine their intersection with law. This will tell us: which rights and protections are invoked and how; which jurisdictional technologies are used; and what coincidence of attributes attracts jurisdictional inclusion as a group under law's umbrella. It becomes clear that enclaves appear as threatening to the liberal multicultural state in part because of the nature of their claims not to belong and in part because they are located outside of the law's reach. Anxiety about the enclave, in other words, is attributable to its perceived ungovernability.

5.2 The Conceptual Categories of the Sub-National Group

This is the scale where the discontinuities of law's relationship with groups come to the fore. In previous chapters, the group was regulated directly as a group according to certain legal frameworks. Implicit or explicit in that model of direct regulation was the image of the group as territorial, political, and collective identity-based. In this legal order, the group is not regulated as a group at all. This is the group as *extra-legal* – as external to law's regulation *as a group*. The conceptual taxonomy from the international and national legal orders breaks down in this chapter. There are aboriginal groups, national minorities, and polyethnic immigrant groups here, too. In fact, this is where they live – in neighbourhoods and on reserves – but they are not regulated by the terms of the sub-national legal order.[4] Indeed, the work of scale suggests that the micro-patterns of residential settlement would not fall within the purview of the national legal order, but this is belied by existing legal categories. The sub-national scale is still largely an order in which constitutional allocations and protections govern. At this level, groups are primarily regulated according to the individual rights of their members. The group is simply the sum of its individual parts. This section follows the path laid down by law's regulation at the international and national level, which is the coincidence of the group, territory, and law, through its manifestation at this level.

The specific type of group difference that is examined in this project is territorial and placed down. It is not group difference *writ large.* The confluence of group and territory is the framework that law

[4] They are regulated by many other laws, including federal laws and zoning laws, but not by the law of groups.

uses to adjudicate the group and this plays out in different directions. The role of territory has been examined in each chapter, and it continues to be relevant here, albeit from the opposite perspective. In this legal order, territory presents an adjudication problem for law precisely because law is often not in full regulatory mode in these cases. It may have the capacity for partial regulation, where the rest falls to the group, or it may not reach the group at all. This chapter uses the term enclave to embody this confluence of group difference and territory. The term "enclave" has a specific geographical meaning, described below, as well as a more colloquial one. This chapter moves between these meanings, but it always maintains the enclave as referring to the territorial concentration of the group. The conceptual touch points of both definitions are the same. This heuristic opens up the debate about the social and legal meanings of territorial groupness and it provides a vocabulary for understanding law's hesitations.

This section starts from the perspective of the group, with the confluence of group and territory and then goes in search of the law. Sometimes this manifests through the legal claims of individual group members, other times through battles waged in the legal vernacular, and still other times, the law is conspicuous in its absence. Each case study in this chapter begins in an enclave, and then the various forms that law takes are examined from there. Whether in its presence or absence, there is a rich legal discourse that lives in these studies. Quite often the claim is for jurisdiction itself — for authority over something — and this joins the inquiries. There is a real sense in which these enclaves are wholly or partially outside of law's reach and this is the source of jurisdictional uneasiness. So, where the task of this section in previous chapters was to show that the conceptual categories were the same in principle, united by the desire for some form of self-rule or recognition, the task of this section is instead to show how those categories are lost in their translation to the sub-national legal order. The desire for some form of self-rule remains, but the categories themselves do not have legal meaning in this order.

There is, however, one form of the group in this legal order that deserves attention for what it reveals about territorial jurisdiction. This is the form of the municipality. In Canada, the municipality is a delegated entity, existing entirely at the discretion of the provinces, as per the terms of the *Constitution Act*.[5] There has been a long battle waged by municipalities across the country for more power and more resources, and this has often been framed as a battle with the federal government for

[5] *Constitution Act, 1867*, 30 & 31 Victoria c 3 (UK) at section 92(8).

funds, but their status as delegated juridical entities has always been a hurdle. The exclusive jurisdiction of the provinces means that they act as unitary states in their relationships with their municipalities.[6] The municipality is a juridical creature of statute, never empowered, as Gerald Frug reminds us, to embody groupness. Sometimes, group identities based on language or Indian status have been relevant in drawing municipal boundaries, but that has not carried over into an understanding of cities as associations or communities. Despite the historical record, which shows some alignment between municipal *boundaries* and group identities, municipalities themselves have not evolved into sites of group difference: the city is a place where groups live, not a group itself.[7] They are conceived as units of territorial administration — synthetic jurisdictions, in Richard T. Ford's terminology — and aligned with the apparatus of the administrative state.

The form that group difference takes 'down here' is the enclave. In geography, enclaves refer to a space where a particular ethnic group numerically dominates and has spawned corresponding services and institutions.[8] This geographical meaning has translated into public discourse, and it is this meaning that permeates concerns about group difference in the liberal democratic state. There are various definitions; agreement coalesces around a type of neighbourhood with a high proportion of visible minority groups where one group is at least twice the size of any other.[9] Statistics Canada formally defines enclaves as census tracts in which at least 30 percent of the population belongs to a minority group.[10] The 2006 census shows a marked increase in enclaves from 6 in 1981, to over 260

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[6] Albert Breton, *Supplementary Statement*, Royal Commission on the Economic Union and Development Prospects for Canada (Ottawa, 1985).

[7] Gerald E Frug, "The City as a Legal Concept" (1980) 93 Harvard Law Review 1057 at 1120.

[8] Mohammed Qadeer & Sandeep Kumar, "Ethnic Enclaves and Social Cohesion" (2006) 15 Canadian Journal of Urban Research 1; Peter Marcuse, "Enclaves yes, Ghettos no: Segregation and State" in David P Varady, ed, *Desegregating the City: Ghettos, Enclaves, and Inequality* (Albany: State University of New York Press, 2005) 15; Ceri Peach, "The Ghetto and the Ethnic Enclave" in David P Varady, ed, *Desegregating the City: Ghettos, Enclaves, and Inequality* (Albany: State University of New York Press, 2005) 31; Mohammed Qadeer, "Ethnic Segregation in a Multicultural City" in David P Varady, ed, *Desegregating the City: Ghettos, Enclaves, and Inequality* (Albany: State University of New York Press, 2005) 49.

[9] Alan R Walks & Larry S Bourne, "Ghetto's in Canada's Cities? Racial Segregation, Ethnic Enclaves and Poverty Concentration in Canadian Urban Areas" (2006) 50 Canadian Geographer 273 (referring to this as a 'polarized enclave'). This terminology is adopted by Daniel Hiebert as 'minority group enclaves'. See Daniel Hiebert, *Exploring Minority Enclave Areas in Montreal, Toronto, and Vancouver*, Research Paper (Citizenship & Immigration Canada, 2009) at 10.

[10] Census tracts are small, relatively stable geographic areas that usually have a population of 2,500 to 8,000. See: Statistics Canada, *Census Tracts*, online: http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?lang=eng&catno=92-597-X; *Recent immigration and the formation of visible minority neighbourhoods in Canadian cities* (Ottawa: Statistics Canada (Business and Labour Market Analysis Division), 2004).

in 2006.[11] Daniel Hiebert describes this as a 'new residential order' in which well over one quarter of the visible minority population in both Vancouver and Toronto live in enclave settings.[12]

Enclaves have emerged as a paradigmatic symbol of cultural and religious diversity in modern liberal democracies because they represent migrant self-selection into concentrated plots of group difference. Their innovation lies in the confluence of voluntary separation, potential permanence, and group difference. Historically, enclaves were considered part of a broader theoretical debate on immigrant integration, where integration typically functioned as a proxy for socio-economic success. The Chicago School pioneered the spatial assimilation theory as the traditional model of immigrant residential integration.[13] In this theory, enclaves may have been voluntary but they were considered temporary resting places on the path to full spatial and socio-economic inclusion. The Chicago School model projected a trajectory of 'upward and outward' mobility over time.[14] Young immigrants arrived with limited resources and clustered together in lower-income immigrant urban enclaves for socio-economic reasons.[15] As they acquired greater economic, social, and cultural resources, they moved away from the enclaves of the city into higher quality housing and neighbourhoods in the suburbs.

> As social status rises ... minorities attempt to convert their socioeconomic achievements into an improved spatial position, which usually implies assimilation with majority groups.[16]

This model has been contested from several directions as the trajectory of assimilation has been cast into doubt.[17] The core challenge in Canada, where ghettos are not as entrenched as in the United

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[11] Douglas Todd, "Mapping our Ethnicity Series", *Vancouver Sun* (May 2012).
[12] Hiebert, *supra* note 9 at 4.
[13] This model was pioneered by the Chicago School of Urban Sociology. See: Robert E Park, Ernest Burgess & Roderick D McKenzie, *The City*, 4th ed (Chicago: Chicago University Press, 1967).
[14] Hiebert, *supra* note 9; Abdolmohammad Kazemipur & Shiva Halli, *The New Poverty in Canada: Ethnic Groups and Ghetto Neighbourhoods* (Toronto: Thompson Educational Publishing, 2001).
[15] John Logan, Richard Alba & Wenquan Zhang, "Immigrant Enclaves and Ethnic Communities in New York and Los Angeles" (2002) 67 Am Soc Rev 299.
[16] Douglas Massey & Nancy Denton, "Spatial assimilation as a socio-economic outcome" (1985) 50 Am Soc Rev 94 at 94.
[17] See, *e.g.*, John Myles & Feng Hou, "Changing Colours: Spatial Assimilation and the New Racial Minority Immigrants" (2004) 29 Cdn J Soc 29; T R Balakrishnan & Feng Hou, "Socioeconomic integration and spatial residential patterns of immigrant groups in Canada" (1999) 18 Pop Research & Pol'y Rev 201; Logan, Alba & Zhang, *supra* note 15; Douglas S Massey & Nancy A Denton, *American Apartheid* (Cambridge: Harvard University Press, 1993).

States, has been the rise of so-called "ethnoburbs".[18] Ethnoburbs are a new conceptual model of ethnic settlement: suburban ethnic clusters of residential areas and business districts. They are characterized by settlement in the suburbs, either directly or through urban enclaves. Wei Li describes ethnoburbs as combinations of ethnic community and global outposts.[19] They are marked by the combination of voluntary separation and high levels of socio-economic attainment.[20]

In the ethnoburb, suburbanization is no longer automatically equivalent to dispersal and socio-economic success appears unrelated to socio-spatial assimilation.[21] Pablo Mendez calls this *decentralization,* a pattern in which recent immigrants move out of urban same-group clusters only to re-concentrate in the suburbs or move directly into suburban same-group neighbourhoods upon arrival. This dynamic has produced a narrative of ethno-cultural isolation, where such isolation follows from voluntary choice. Choice is the pivot upon which such separation turns into a failure of integration (because enclave members do not want to be integrated), a failure of multiculturalism (because enclave members are exploiting their right to difference at the expense of social cohesion), and even sometimes a failure of liberal democracy (because enclave members engage in illiberal practices).[22]

While enclaves are potent sites of group difference for their visible minority concentrations, which correlate to immigration patterns, they are not without their complexities.[23] Hiebert notes that, for all groups, there is a mixture of concentration and dispersion dynamics.[24] Moreover, the axes of difference are multivalent: an enclave may be distinctive based on language, but not based on home ownership. Finally, enclaves are not typically monocultural but rather sites where various groups intermingle and one is dominant. Nonetheless, enclaves reveal the resilience of the 'difference' part

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[18] Li, *supra* note 3; Robert Murdie, *Recent Immigrants in Toronto's Inner Suburbs: Settlement Patterns, Challenges and Prospects for Integration*, Metropolis Conference (Vancouver, 2011).
[19] Li, *supra* note 3.
[20] Logan, Alba & Zhang, *supra* note 15; Walks & Bourne, *supra* note 9.
[21] Pablo Mendez, *Immigrant Residential Geographies and the "Spatial Assimilation" Debate in Canada, 1997-2006*, Working Paper No. 08-07 (Vancouver: Metropolis British Columbia, 2008) at 16.
[22] Daniel Hiebert, Nadine Schuurman & Heather Smith, *Multiculturalism "on the Ground": The Social Geography of Immigrant and Visible Minority Populations in Montreal, Toronto, and Vancouver, Projected to 2017*, Working Paper No. 07-12 (Vancouver: Metropolis British Columbia, 2007) at 12.
[23] Enclaves are internally stratified by country of nationality, stream of entry, economic status, language, and even by legal status — members include new citizens, permanent residents, temporary residents and undocumented migrants. Enclave members define their common identities differently, and those identities are contested and fluid.
[24] Daniel Hiebert, *Emerging Social Geographies of Ethnocultural Concentration and Diversity in Vancouver: Projections to 2031*, Metropolis Conference (Vancouver, 2011).

of group difference and show how it can trigger discursive anxiety when it becomes a defining feature of neighbourhoods.

These neighbourhood pockets of visible group concentration have taken hold of the country's socio-political imagination. The media discourse has been anxious and alarmist, referring frequently to a purported relationship between enclaves and a deficit in belonging and integration. In 2006, Allan Gregg wrote in *The Walrus* magazine: "national unity in Canada is threatened by the growing atomization of our society along ethnic lines".[25] One year later, Marina Jimenez wrote in the *Globe & Mail* newspaper that "Canada's famed multicultural mosaic has morphed into a series of monocultural neighbourhoods".[26] She went on to observe "disturbing signs of cracks in the mosaic. While many newcomers disappear willingly into ethnic silos, some Canadians are starting to reject diversity".[27] In 2012, the *Vancouver Sun* newspaper launched a multi-part "Mapping Our Ethnicity" series to explore the 110 ethnic enclaves in Metro Vancouver. In its concluding article, the headline asked "will residents' trust hold" and the article noted that:

> [S]uspicion often comes out in whispers — over which ethnic group is making housing unaffordable, why schools are so ruthlessly competitive, how store signs are often appearing in languages other than English and whether employers, white or Asian, are willing to hire outside their ethnic group.[28]

An *Access to Information* request in 2012, yielded 212 pages of presentations and research papers for Citizenship & Immigration Canada about enclaves in Canada, most of them by academic scholars analyzing the conditions and meaning of enclaves.[29] The most recent article on the subject refutes this anxiety but its title, "Why do so many Canadians see ethnic enclaves as a threat?", belies the undercurrent of public concern.[30] The liberal democratic state, in other words, is uneasy about the rise of enclaves and their corollary narratives of parallel lives, self-segregation, and illiberal practices. From the wearing of niqab to the language of retail signage, enclaves have become the

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[25] Allan Gregg, *Identity Crisis: Multiculturalism: A Twentieth-Century Dream Becomes a Twenty-First Century Conundrum* (2006).
[26] Marina Jimenez, "Do ethnic enclaves impede integration?", *Globe & Mail* (8 February 2007) A8.
[27] *Ibid*.
[28] Douglas Todd, "As Metro's ethnic enclaves expand, will residents' trust hold?", *Vancouver Sun* (20 October 2011), online: <http://www.vancouversun.com/sports/Mapping+ethnicity+Part+Metro+ethnic+enclaves+expand+will+residents+trust/5577155/story.html>.
[29] Access to Information & Privacy (ATIP) response (25 May 2012), on file with author.
[30] Stephen Quinn, "Why do so many Canadians see ethnic enclaves as a threat", *Globe & Mail* (1 June 2012).

locus for concerns about immigration patterns, religion in the public sphere, fundamentalism, and difference *writ large*. Yet there is no consensus about whether the concentration of visible minorities in enclaves is leading to their increased isolation from Canadian society. Studies point in both directions.[31] It is not the task of this dissertation to resolve the terms of the enclave debate about social solidarities and national belonging. Instead, this chapter joins the terms of that debate with law's treatment of enclave groups to see which visions of the group linger in the jurisdictional threshold. It looks to see how law intersects with the enclave and to uncover what that intersection explains about the unease that the liberal multicultural state projects onto the enclave.

Law plays several potential roles in the enclave. Historically, law created enclaves. The ghettos of the United States wrought by segregation, the townships of South Africa constituted by apartheid, and the ghettos of Germany created by Nazism, are all examples of territorial separation and demarcation based on group difference. These are all forcible and now discredited boundary-drawing exercises. Today, there are the enduring religious enclaves of the Amish, Hutterites, and Doukhobors, which stand apart from law and society but enlist law's assistance in facilitating their segregation. There are also the cultural and socio-economic enclaves, formerly urban but now primarily ethnoburbs, which seem to stand outside of law. Both of these modern enclaves are voluntary, self-sufficient, and potentially permanent. They are no longer the express design of law, but they are nonetheless a rich site of law's intersection with territorialized group difference. This chapter explores both religious and cultural enclaves to see what they might teach us about the law, territory, and difference.

5.3 How Jurisdiction is Parcelled Out in the Sub-National Legal Order

5.3.1 Liberalism

Liberalism is a philosophy that comes in many varieties, all of which share the common priority of liberty.[32] If liberty is the prerogative of liberalism, then the individual is the primordial bearer of that liberty. The fundamental value of liberalism is a life of individual autonomy, where autonomy is the

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[31] Compare: Qadeer & Kumar, *supra* note 8 at 13, 15; Feng Hou & Zheng Wu, "Racial Diversity, Minority Concentration, and Trust in Canadian Urban Neighbourhoods" (2009) 38 Soc Sci Research 693; Alexander M Danzer & Firat Yaman, "Do Ethnic Enclaves Impede Immigrants' Integration? Evidence from a Quasi-experimental and Social-interaction Approach" (2013) 21 Rev Int'l Econ 311.

[32] In light of the subject-matter of this dissertation (groups and law), the variant of neo-liberalism is not the focus of this section. Neo-liberalism generally describes a set of laissez-faire economic policies and their resulting dislocations for social and political life. Although relevant, neo-liberalism does not set the terms of law's dealings with groups and individuals.

ability of each individual to determine for him or herself a conception of the good life. For liberalism, society is made up of individuals and does not amount to more than the totality of these individuals and their relationships.[33] Bhikhu Parekh describes this as:

> [T]he view that the individual is conceptually and ontologically prior to society and can in principle be conceptualized and defined independently of society.[34]

Liberalism is fundamentally about the relationship between the individual and the state. In enfolding the state, liberalism builds in notions of justice and equality. The state exists to secure the freedom of individuals on an equal basis by creating and maintaining a system of rights. In this system of rights-based liberalism, individual rights are a restraint on the state.[35] Charles Taylor characterizes the ethics of liberalism as both individualist and universalist; the latter seeks to protect a certain human sameness under the rubric of 'equal dignity'.[36]

Alongside this triumvirate of liberty, individualism, and rights sits the notion of liberalism as a philosophy about self-determination. This is a broad concept of self-rule that runs along a continuum from the individual to the polity. The self-government aspect of liberalism takes a particular form in the twentieth century when it joins up with democracy. Liberal democracy is "democracy defined and structured within the limits set by liberalism".[37] Liberal democracy is marked by the recognition of a set of basic liberties that take priority over popular rule and democratic decision making.[38] Parekh describes how the liberal polity required an instrument through which the people could give their consent and confer authority upon the government to govern them and also some mechanism to ensure that the government does not violate the resulting system of rights.[39] Liberal democracy is then delimited by these mechanisms: it is not a form of collective existence but rather a mode of

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[33] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, James H Burns & Herbert LA Hart, eds. (Oxford: Clarendon Press, 1996) at 1.5: "The community is a fictitious body composed of the individual persons who are considered as constituting its members. The interest of the community then is, what? – the sum of the interests of the several members who compose it".
[34] Bhikhu Parekh, "The Cultural Particularity of Liberal Democracy" (1992) 40 Pol Stud 160.
[35] Mark Tushnet, "Legal Scholarship: Its Causes and Cures" (1981) 90 Yale LJ 1205.
[36] Benedict Kingsbury, "Whose International Law? Sovereignty and Non-State Groups" (1994) 88 American Society of International Law Proceedings 1.
[37] Parekh, *supra* note 34 at 161.
[38] Amy Gutmann, "Democracy" in Robert E Goodin, Philip Pettit & Thomas W Pogge, eds, *A Companion to Contemporary Political Philosophy* (Malden: Blackwell Publishers) 521.
[39] Parekh, *supra* note 34 at 165.

constituting and controlling public authority; not a way of life, but a theory of government.[40] Then, once this liberal democratic apparatus is put into motion, its mode of governing difference is toleration or mutual respect.[41]

This makes liberalism into an expansive theory about matters of government, the organization of society, and the nature of the good life. It also liaises the priority of individual liberty with the form of political legitimacy. As we saw in Chapter 4, this raises the perennial question of identifying the people who rule – as individuals, as groups, or as sub-state units. It makes explicit the seesaw between the limits of liberty and the nature of democratic government. More than this, however, it reveals the pre-political nature of liberty and rights.[42] Liberal democracy places pre-political rights into precarious balance with democracy, the one always threatening the other.

One of the most influential contemporary theorists of liberalism, John Rawls, argued for the "priority of the right over the good".[43] He meant that the moral obligations of individuals to one another are complete once everyone has their rights, "their share of 'manna'", and then individuals should be left alone to autonomously pursue their own ends.[44] Many have argued, though, that it is wrong to suppose that people choose or pursue their vision of the good autonomously. Guyora Binder suggests:

> They do not so much choose ends as choose cultural identities through which they can participate in collective decision and action.[45]

This is the communitarian problem with liberalism: it neglects the dependence of human beings on society, the extent to which individual freedom and well-being are possible only within community.[46]

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[40] *Ibid*.
[41] *Ibid* at 162*;* Martha Minow, "Putting up and putting down: tolerance reconsidered" in Mark Tushnet, ed, *Comparative Constitutional Federalism: Europe and America* (New York: Greenwood, 1990) 77.
[42] Harald Borgebund, *Liberal Constitutionalism: Re-thinking the Relationship between Justice and Democracy* University of York (Department of Politics), 2010) [unpublished].
[43] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 31.
[44] Bruce A Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).
[45] Guyora Binder, "The Case for Self-Determination" (1992) 29 Stan J Int'l L 223 at 249.
[46] This can be distinguished as three sorts of claims: methodological claims about the importance of social context for moral and political reasoning, ontological claims about the social nature of the self, and normative claims about the value of community. See: Daniel Bell, *Communitarianism and Its Critics* (Oxford: Clarendon Press, 1993).

This takes us onto the terrain of the constitution of the self that undergirds liberal theory, and thus onto the vista of the group.[47] Yet the dominant image of the group in liberalism is that of the statal society. So, for Rawls, "a democratic society, like any political society, is to be viewed as a complete and closed social system".[48] These are the bookends — the individual and the state — and other groups figure as intermediaries.

Given the breadth of liberalism theory, it is helpful to pause to distill the tenets that inform this particular analysis. When the scalar categories that law uses to contend directly with groups (self-determination, constitutional federalism) fall away, what is left standing is liberalism. Liberalism comes into its own in the sub-national order. Although it is an omnipotent ideology, informing all scales and legal orders (the international order is one of liberal internationalism and the national order is a liberal democratic state), its loyalties are clearest at the sub-national level, where it comes to land.

First, liberalism touts individual autonomy. This two-part foundation makes the individual the relevant unit of society and the bearer of rights *and* sets out autonomy as the essence of the good. Second, liberalism is the basis upon which liberal democratic societies strike a balance between the individual and the collective. Third, the marriage of liberalism with democracy strains this balance by raising the spectre of political legitimacy and consequently the place of the group. This implicates the place of multiculturalism in the political-legal order. It is to the place of the group, and its uneasy position amongst individual rights and the good, that I now turn.

There are several layers to liberalism's relationship with groups. Liberalism is firstly a relation between the individual and the state. The group intervenes in this relation at its peril. Then, liberalism takes the individual as the "ultimate and irreducible unit of society" and explains the latter in terms of it.[49] In this, contemporary liberalism offers an inadequate account of society and community.[50] Finally, the individual-state dyad makes the collective into the state or society, rather than various intermediary communities and groups, and then draws the individual as the site of universality and the collective as the site of particularity.

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[47] See, *infra*, section 5.6.3.
[48] John Rawls, *Political Liberalism*, 2d ed (New York: Columbia University Press, 2005) at 41.
[49] Parekh, *supra* note 34 at 161.
[50] Michael J Sandel, *Liberalism and the Limits of Justice*, 2d ed (Cambridge: Cambridge University Press, 1998).

Gerald Frug describes the liberal response to intermediary groups — those between the state and the individual — in the slightly different context of cities.[51] He contends that the city has been rendered powerless through legal doctrine, and that the legal form of these decisions hides their foundations in liberal social theory. It is Frug's historical exposition of liberalism that matters for groups:

> With the development of liberalism, "[the] Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy."[52]

Liberalism evolved, then, as "an undermining" of the vitality of intermediary groups; those located between the individual and the state.[53] Liberal theorists have reworked this duality in different ways. Today, it is possible to suggest that liberalism tells at least three stories about groups. In most accounts, liberalism values groups only for their instrumental contributions to individual well-being and other goods. Will Kymlicka tells the story of culture as pre-political. It matters for giving us the context of choice, but then individuals ought to move past their culture and it is liberalism which is responsible for protecting their capacity (read: autonomy) to do so. Binder counters that "cultures are not reducible to the shared backgrounds or experiences of individuals; cultures also commit individuals to shared conceptions of the good".[54] Since we cannot distinguish individual ends from the cultures that constitute them, we cannot describe cultures as shared resources for individual ends. Kymlicka says that the value of culture to the group is exhausted by its ability to enhance the autonomy and individual choice of group members. He limits his definition of culture to "common history rather than common ends".[55] This is the group as hollow.

For some theorists, however, culture is not this fungible and cannot be so easily removed from the individual calculus of future decisions. Culture, or more accurately, community, has intrinsic worth.[56] Charles Taylor and Michael Sandel, both resistant to their redescription as communitarians, describe

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[51] Frug, *supra* note 7.
[52] *Ibid* at 1088.
[53] *Ibid* at 1088.
[54] Binder, *supra* note 45 at 250.
[55] *Ibid* at 252.
[56] Monique Deveaux, *Cultural Pluralism and the Dilemmas of Justice* (Ithaca: Cornell University Press, 2000); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, 2nd ed (Basingstoke: Palgrave Macmillan, 2006).

cultures as constitutive of our selves.[57] Here, the self is inter-subjective and forms its identity in community with others. The individual is embedded in shared social practices and autonomy can only be developed and exercised in social conditions. In this understanding, the right is not prior to the good; the conception of the good is always mediated by some community.[58] The important role of the group in self-realization takes it far beyond instrumentalism and into moral theory. The group ought to be figured into politics and law in an express and continuous manner. This is the group as constitutive.

Finally, there is a contingent of liberal nationalist scholars who take this notion of the collective even further. For them, the group, when it is more or less neatly bounded, somewhat politicized, and coincides with territory, is fully realized in the form a nation-state.[59] The nation is a "unique social group" and a particular type of cultural community.[60] Yael Tamir suggests that nations are communities imagined through culture, acknowledging that it is impossible to use this definition to distinguish between nations and other cultural groups.[61] David Miller argues that nationality is a primary form of identity for citizens.[62] In some circumstances, then, the group is so constitutive of the self and its interactions with others that it ought to be politically consecrated as a nation-state. The nation succeeds because it goes beyond the "mere sharing of universal political principles" but does not require citizens to share some conception of the good.[63] This is the group as sovereign.

These narratives of the group diverge, moving the group along a continuum of importance to the self, but they remain inherently wedded to the unit of the individual. They seek to accommodate group difference to the extent required. What is that extent? Wendy Brown describes multiculturalism as a response to a crisis of political legitimacy. She argues:

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[57] See: Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism* (Princeton: Princeton University Press, 1994) 25; Sandel, *supra* note 49; Alisdair McIntyre, *After Virtue*, 2d ed (Notre Dame: Notre Dame University Press, 1984).
[58] Charles Taylor, *Philosophical Papers, Volume 2* (Cambridge: Cambridge University Press, 1985). Binder, *supra* note 45 at 268.
[59] David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); Yael Tamir, "The Right to National Self-Determination" (1991) 58 Soc Research 565; Avishai Margalit & Joseph Raz, "National Self-Determination" (1990) 87 J Phil 439.
[60] Tamir, *supra* note 59.
[61] *Ibid* at 579.
[62] David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000).
[63] Will Kymlicka, "Community and Multiculturalism" in Robert E Goodin, Philip Pettit & Thomas W Pogge, eds, *A Companion to Contemporary Political Philosophy* (Malden: Blackwell Publishers, 2012) 463 at 474.

> The liberal state, whether libertarian or social democratic, is required to represent itself as universalist, that is, as the collective representative of a nation's people.[64]

Time — carrying the tides of immigration, shifting social mores, and new modes of transnational being — has complicated this representation. The ideology of multiculturalism "responds to this crisis of universality without resolving it".[65] From the perspective of liberalism, the concern is the vulnerability of the state wrought by its status as the locus of political legitimacy. From the perspective of multiculturalism, the problem lies in liberalism's internal commitments.

5.3.2 Multiculturalism

If liberalism posits a particular conception of the relationship between the individual and the state, then multiculturalism marks an intervention in that relationship. This intervention is in two parts: first, it speaks to the nature of the individual self as culturally and socially encumbered; and second, it carries mildly prescriptive implications for the state's modes of governance. There are various reasons why liberal democratic states may seek to preserve or protect some measure of group diversity: for democracy — diversity protects against absolutism and enhances participation; for the sake of diversity itself — tolerance and equality depend upon preserving the differences that could become their subjects; and for self-realization and respect — individuals define themselves at least in part in terms of group identity, an identity that "as much chosen as found".[66]

Liberal democracy posits a dual commitment to individual liberty and rights and to democracy and popular sovereignty. This duality comes apart when it comes to the political claims of groups. Like the very premise of the theoretical work that remakes liberalism to include the instrumental group, multiculturalism is a philosophy or policy about groups only insofar as it recognizes the value of the group for the individual. The group — cultural, religious, ethnic — may provide the context of meaning for the individual. Multiculturalism stops short, however, of legally recognizing the group as such. It is, in other words, a variant on traditional liberalism, not a deviation from it.

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[64] Wendy Brown, "Power After Foucault" in John S Dryzek, Bonnie Honig & Anne Phillips, eds, *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2006) 65.
[65] *Ibid*.
[66] For the first and third point, see: Minow, *supra* note 41; Sandel, *supra* note 50; for the second point, see: Joseph Raz, "Multiculturalism: A Liberal Perspective" in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) 155; Jane Mansbridge, "Using Power/Fighting Power" (1994) 1 Constellations 53.

The meaning of multiculturalism depends on the country and discipline from which it is viewed. In this chapter, it refers to a mode of governing the collective.[67] As an approach to dealing with the fact of cultural diversity, it is an endorsement of difference. In Canada, multiculturalism was originally propounded in the 1970s.[68] It was an important acknowledgment of a differently constituted society, one which was no longer distinguished only by French and English, but also by Ukrainian, Polish, Indian, and Chinese. It was a way out of the thorny language issue — bilingual *and* multicultural – but it left several unresolved issues.[69] As discussed in Chapter 4, it is legally embodied in the *Canadian Charter,* as well as in the *Multiculturalism Act,* which is itself a complex dialectic between cultural expression and social integration.[70] In Canada, multiculturalism itself does not confer rights but is used to interpret other rights and freedoms. Multiculturalism has been a powerful discursive force, simultaneously expanding the contours of difference as present and allowable, but also delimiting difference as less than positive rights.[71] It is when the depths of difference have been brought to bear on the liberal state that the imbrications of multiculturalism and liberalism reveal themselves: what, for example, do they have to say about forced marriage?

The limitations of multiculturalism are partly due to the hegemony of liberal modes and categories, and partly due to its conceptual limits. Charles Taylor described the politics of universalism, based on the equal dignity of citizens, which he juxtaposed it to the politics of difference, based on the particular identities of citizens.[72] He explained how the principle of universal equality works within the politics of difference, creating a dynamic of incommensurability:

> But once inside, as it were, its [the principle of universal equality] demands are hard to assimilate to that politics. For it asks that we give acknowledgment and status to something that is not universally shared. ... The universal demand powers an acknowledgment of specificity.[73]

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[67] Andrew Heywood, "Multiculturalism, Identity and Diversity" (2011) e-book, online: <http://ebookbrowsee.net/multiculturalism-identity-and-diversity-doc-d15605888>.
[68] See Chapter 4, section 4.4.3.
[69] A Davidson Dunton & Andre Laurendeau, *Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1969). Some unresolved issues include: what is the meaning of culture without language and what is the role for religion in multiculturalism?
[70] *Canadian Multiculturalism Act*, RSC, 1985, c 24 (4th Supp) [*Canadian Multiculturalism Act*].
[71] Multiculturalism has informed equality jurisprudence in Canada so that it may be linked to the right not to be discriminated against, and it has overlapped with religious freedoms as well. However, there is no right to multiculturalism or to culture.
[72] Taylor, *supra* note 57 at 37-38.
[73] *Ibid* at 39.

Taylor is concerned to trace this incommensurability through liberalism's preference for individual rights and its antagonism toward collective rights. I am more concerned to show how this dynamic animates multiculturalism by delimiting the potential of multiculturalism for particular identities. In the legal context, multiculturalism permits law to adjudicate group difference based on a paradigm of universalized particularity. The value of particular cultures is held out, but the terms of this valuing must be extended equally and applied universally. This means that particular cultures should receive equal play in the public sphere, but it works in the other direction as well, ensuring that no culture should receive more play than any other. The concepts of universality and equality are built into the framework of multiculturalism, and this means that it adjudicates claims about groups in a specific manner.[74] Since every extension of the state in support of groupness risks attracting similar claims, such extensions are delimited. In the jurisdictional threshold, universalized particularity casts a shadow over claims of difference. For Wendy Brown, multiculturalism is a response to liberalism's universality. I think this is accurate — multiculturalism responds to liberalism's universality by extending the possibility of particularity — but that it should be pressed to reveal the abiding weight of universality.

At the jurisdictional threshold, multiculturalism is ostensibly neutral; it may be the basis for upholding the claim or the basis for striking it down. This is its work as an interpretative constitutional principle. However, its universalized particularity is constantly at play, keeping particularity in the symbolic realm and maintaining equality as a trump.[75]

5.4 The Logic of Individual Rights

In legal liberalism, the relationship between the individual and the state is mediated by rights. Rights are entitlements to perform actions and to hold beliefs or entitlements that others refrain from doing so. Most rights entitle their holders to some version of freedom – either freedom to or freedom from: "a legal system can be seen as a distribution of all of these varieties of freedom".[76] The law establishes the rules specifying the terms of these freedoms. The constitution is a framework of rights that distributes authority and freedoms in a particular way.

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[74] The *Multiculturalism Act* preamble begins with a reference to equality and is one of the objectives of the Act: see *Canadian Multiculturalism Act*, *supra* note 70 at Preamble, section 3(e).
[75] On symbolic particularity, see: *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 2006 SCC 6; on trump of equality, see: *Bruker v Marcovitz*, [2007] 3 SCR 607, 2007 SCC 54.
[76] Leif Wenar, *Rights*, Stanford Encyclopedia of Philosophy (2011), online: http://plato.stanford.edu/archives/fall2011/entries/rights/.

> Rights dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived. To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done.[77]

Due to their shaping function, rights matter enormously for embodying values such as liberty, equality, and the rule of law – and thus for empowering individuals and taming the state. This section is not concerned with the critique of rights in its various forms, but rather with some of the limitations of rights for groups as they are constitutionalized and adjudicated.

This chapter explores how rights rule, especially with respect to groups. Despite its attention to the political aspect, it is not concerned with how rights constitute the public sphere, nor with how rights empower individuals. Rather, it is concerned with how rights *as a modality* regulate groups in their interactions with law. This produces particular imbrications of liberal democracy and rights that place the individual at the forefront and end up producing "the subjects they pretend only to presuppose".[78] There are three modalities here: first, rights are categories about both rights holders and rights actions or beliefs. For example, the right to freedom of religion is the right of individuals to believe or act to further their religious belief in certain delimited ways. They tell us who may be a subject of law and they set the permissible scope of behaviour. In other words, rights are already bounded and delimited. Perhaps the most important thing about rights is their claim to exist beyond the political system; they claim to set a limit on what may be legislated.[79] The second modality, then, is that rights are not wholly outside the political after all. "Rights conflict, and the conflict can be not resolved by appeals to rights".[80] The overlap and conflict is resolved instead by recourse to politics and policy. For example, equality regularly conflicts with religious freedom in cases of religious gender inequality. Third, rights run together and point in various directions. They do not cohere into a framework of discrete categories, but sometimes contradict each other at the deep level of both

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[77] *Ibid*.
[78] Wendy Brown, "Revaluing Critique: A Response to Kenneth Baynes" (2000) 28 Pol Theory 469.
[79] Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011).
[80] Robert Gordon, "Some Critical Theories of Law and Their Critics" in David Kairys, ed, *The Politics of Law* (New York: Basic Books, 1998) 647; Mark Tushnet, "The Critique of Rights" (1993) 47 SMU L Rev 23; Kenneth Baynes, "Rights as Critique and the Critique of Rights" (2000) 28 Pol Theory 451. For a measured defense of rights, see: Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell: Cornell University Press, 1990) at 306-11; Patricia Williams, "Alchemical Notes: Reconstructed Ideals from Deconstructed Rights" (1987) 22 Harv Civil Rts - Civil Lib L Rev 401.

logic and results.[81] Theories of rights wrap together issues about morality, freedom, and constraint with law. These elements of rights are always latent, informing rights analysis and application. Questions about whose freedom and whose morality are the substance of conflicting rights adjudication.

The rights at issue in this chapter are individual constitutional rights: rights against the government within our constitutional system. Constitutional rights limit the power of government and are designed to protect individuals against the incursions and overreach of the state.[82] In light of the commitments of liberalism, these rights are granted almost exclusively to the individual. However, legal rights are not only a limit upon the state; they are also a form of state power. As set out above, they are properly conceived as a form of public policy and therefore of regulation.[83] They "channel energies and shape perceptions about what is important, necessary, and good in life".[84]

As a form of state power, rights are a powerful jurisdictional technology. The ability to claim rights depends itself on the jurisdictional inquiry, which is one way jurisdiction adjudicates access to rights, and then jurisdiction adjudicates the extension of the right by reference to the familiar tropes of legal analogy. Every case about rights applies or retracts, extends or restricts, adds or subtracts to the meaning and reach of the right in question. More than this, the act of application or retraction, extension or restriction, occurs in the jurisdictional threshold. Thinking jurisdictionally about rights means recognizing that rights empower but they also constrain. The legal paradigm of individual rights hampers group rights by cutting off the category of right-holders and the content of rights. As a jurisdictional technology, rights always invoke the limits of freedom and it is in this jurisdictional threshold that the allegiances of the liberal democratic state reside.

For the group, rights exist in a complicated relationship with self-rule. The law's treatment of groups expresses a deeper opposition between rights and social solidarities. To John Rawls's claim that justice is "the first virtue of social institutions", Michael Sandel responded that justice ought not to be

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[81] Sujit Choudhry, "Group Rights in Comparative Constitutional Law: Culture, Economics or Political Power" in Michel Rosenfeld & Andras Sajo, eds, *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1099 (on contradictory constitutional rights logic). On contradictory results, see, *infra*, section 5.6.
[82] Richard H Fallon, "Individual Rights and the Power of Government" (1993) 27 Georgia L Rev 343.
[83] Richard Thompson Ford, *Racial Culture: A Critique* (Princeton: Princeton University Press, 2006).
[84] *Ibid*.

valued for its own sake, but is better conceived as a 'remedial' virtue, remedying a flaw in social life.[85] Sandel argued that justice is only necessary where there is an absence of benevolence or solidarity: "if people responded spontaneously to the needs of others out of love or shared goals, then there would be no need to claim one's rights".[86] In other words, rights only enter the picture when social solidarities have failed us. Rights are a remedy for the failures of solidarity. Charles Taylor worried that stressing rights over collective decisions would ultimately undermine the legitimacy of the democratic order.[87] The nature of rights, in other words, is oppositional to collective solidarities.

5.4.1 The Right Not to Belong

This opposition is visible in two theoretical aspects of groups and the rights that they claim. The weight of previous chapters is brought to bear here: by isolating the nature of the group claim in other legal orders, the core of such a claim is revealed in this scale. These theoretical insights take us some distance toward understanding law's hesitation toward groups.

The problem that this framework raises for group difference lies in the nature of the rights claimed by the group. The background norm of *belonging* does not point in only one direction, namely, toward inclusion into mainstream society and the terms of state law. Nor, to be fair, is belonging some kind of absolute category; it is possible to belong in some respects and not others. Indeed, most of the recent scholarship on multiple and fluid identities would posit that it is only ever possible to belong to any group, whether a religious group or the nation-state, in a patchy, uneven, and particular way.

The larger point here is that group difference is often pulled between two conflicting claims of belonging: to belong to the group or to belong to the state. The premise of Quebec's referenda and the federal government's request for an advisory opinion on unilateral independence was precisely the question of whether Quebec wanted to or had to belong to the nation-state of Canada.[88] If claims are analyzed based on whether they posit belonging to the state or not belonging to the state, then it is becomes apparent that almost all jurisdictional assertions are claims to not belong in some sense.

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[85] See: Rawls, *supra* note 43 at 3; Sandel, *supra* note 50; Kymlicka, *supra* note 63 at 465.
[86] Kymlicka, *supra* note 63 at 465.
[87] Taylor, *supra* note 57 at chapter 7.
[88] I do not mean to be dismissive of the complexity of this question and I am indebted to Jeremy Webber for pointing out that some (most?) Quebeckers likely wanted and want some kind of more nuanced, composite, two-level belonging. The issue may nonetheless be characterized as belonging, particularly since it has not been given such a robust and nuanced exposition in national politics or law.

The cases in this chapter reveal how the underlying group claim may point away from the state as a plea *not* to belong. In such cases, the limit of law lies in permitting the group's partial excision from law. This is not only the case in the sub-national realm, but it is most powerful here because these groups are not expressly recognized as groups by law and yet they use the law to seek exemption; in other words, they seek law's attachment in order to be excepted from its reach. Properly conceived, this presents as a contest over who regulates the act. Both the state and the group must be understood as regulatory entities. Jeremy Waldron writes: "[t]he culture side presents itself in some sense as *law* for those who live by it".[89] For example, a claim to regulate family law matters according to religious edicts is equally a claim not to governed by the apparatus of state family law.

Charles Taylor wrote that the self is made in dialogue with others, and that the value of the self is furthered by recognition of its collective commitments.[90] The deep implications of this are something the multicultural state has not understood. He offers the example of Quebec's language legislation, which aims at the survival and flourishing of French culture and language.[91] From the perspective of the group that is Quebec, the legislation represents the claim not to belong to English Canada, at least with respect to culture and language. There are several similar examples, including the desire of Jehovah's Witnesses to make their own health decisions for their minor children, the desire of Sikhs to wear their kirpans in public places, including schools, and the desire of some religious groups to regulate their own family law issues according to personal law tribunals.[92] This desire to be recognized as something else or to be exempted from the reach of a particular aspect of state power may be characterized as the demand not to belong. This incongruity – that the best way to treat the group, to recognize it, is to exempt or excise it from state law – is at the root of the impasse in political theory and law on groups.[93]

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[89] Jeremy Waldron, "One Law for All? The Logic of Cultural Accommodation" (2002) 59 Wash & Lee L Rev 3; Parekh, *supra* note 56 at 156.
[90] Taylor, *supra* note 810.
[91] *Charter of the French Language (Bill 101)*, 1977, RSQ, c C-11 [*Bill 101*].
[92] See, *e.g.*, *B.(R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181; *Multani v Commission scolaire Marguerite-Bourgeoys*, *supra* note 75; *Bruker v Marcovitz*, *supra* note 75.
[93] Will Kymlicka characterizes these polyethnic rights as non-threatening because they aim toward inclusion in the broader polity (he cites the Sikh turban of the RCMP officer), but this ignores the alternative characterization, which is that the Sikh insists on regulating his own religious dress. See: Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

Stated in jurisdictional terms, what the group is seeking is some kind of jurisdictional entitlement: either self-rule or some measure of sovereignty or a rights claim not to belong. These entitlements may be limited by matter, by subject, by territory, or by innumerable other conditions. The request is simply for some measure of jurisdiction over some aspect of group life. These are what Tully refers to together as "aspirations to self-rule".[94] The core of this jurisdictional entitlement is to *not* be part of the national legal order in some respect. Following Agamben, the legal limit here lies in law's exception. The subject is still regulated by the law and indeed must be so governed in order that law might have the power to except him or her. However, unlike Agamben's exception, this state of affairs is both sought after and potentially powerful for the group.

For the past two decades, theorists of multiculturalism and group rights have been fixated on the illiberality of group beliefs and practices.[95] There is tacit agreement that some measure of groupness may be valuable, but there is no agreement about how much autonomy the state should provide or which group practices should be tolerated. There seems to be no principled way to draw the line between the requirements of liberal equality and the demands of groupness and their internal regulations. I suggest that the stumbling block lies in the clash itself. It is difficult for law to adjudicate the terms of its own withdrawal, to acknowledge the alternative regulatory orders of groups. This is partly because these claims implicate liberalism in a particular way: they are claims that the full extent of the group's vision of the good cannot be pursued under the liberal-constitutional state. As claims to not to be governed by state law, they request the extension of jurisdiction in service of abnegation. It is also partly because the exercise of group rights, as a claim to opt out of some aspect of state law, acts as a negation of the state itself. This negation is hard for jurisdiction to digest because jurisdiction originates with the state. This is why the focus on jurisdiction brings the discontinuity to light and reveals clearly the complex terms of its extension.

5.4.2 Where Rights Blend Into Sovereignty

If the claims of groups are most often claims *not* to belong, then the corollary is that they are also claims to some sort of self-regulation. It is worthwhile to pause on the distinction between rights and

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[94] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

[95] Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000); Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2009); Kymlicka, *supra* note 93.

self-rule. The shift in perspective to the legal claims that groups make highlights the complicated distinction between rights and exemptions, on the one hand, and self-government and autonomy, on the other. This distinction, in turn, redounds on the meaning of jurisdiction: generic-conceptual jurisdiction falls under the umbrella of rights, while self-rule tends to generate some measure of territorial jurisdiction. Rights are adjudicated by the jurisdictional framework but claims for governmental power fall to the machinations of sovereignty. Stated differently, the distinction between scope and content, between a preliminary inquiry and the merits, might collapse into each other when it comes to groups.

This oppositional characterization seems relatively straightforward, but in fact rights and self-rule blend into one another. As the section on conceptual categories of the group in each chapter has demonstrated, classifications of the group and its corollary rights and remedies are generally presented as self-evident, even if the bases for the distinctions are contested. Yet, it has been a constant precept of this dissertation that groups are *not* obviously legally differentiated one from another. Groups are mobilized politically toward different ends and they are legally protected in different ways but they are not naturally or necessarily that way. They respond to a variety of incentives and constraints and operate in a particular context with a finite number of forms.

Nonetheless, it is widely understood that there is a bright line between rights claims and claims for governmental power, and this is where the aspiration to self-rule fragments. The right to some form of internal self-regulation, sanctioned and extended by the state, is posited as different in kind from the claim to self-government, understood as self-originating jurisdiction and authority similar to that exercised by other governments.

> But the politics of "identity/difference", emerging out of the experience of new social movements in liberal capitalist democracies and the politics of racial, ethnic, linguistic, and religious difference in former communist countries, North Africa, and the Middle East are radically different. Whereas the former kind of identity/difference politics focuses on the negotiation, contestation, and representation of difference within the public sphere of liberal democracies, the politics of ethnonationalisms seek to redefine the constituents of the body politic, and aim at creating new politically sovereign bodies.[96]

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[96] Seyla Benhabib, "The Democratic Moment and the Problem of Difference" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) 3 at 4.

This is how Seyla Benhabib describes the distinction but I am not sure that it is quite right. Identity politics and other kinds of rights claims also seek a space for difference *away* from the public sphere, autonomy over some aspects of the group, a certain measure of self-regulation — and this is the *same in kind* as the redefinition of the body politic.[97] They are the same in kind because they both seek to redefine the *scope* of the body politic – which practices it may regulate and which it may not – and the *composition* of the body politic – who is included as a member for which purposes (*i.e.* everyone votes but only some are subject to civil family law). Benhabib's first conception contends that the sub-group wants some measure of authority to regulate themselves in respect of certain spheres; her second conception argues that the nation-state as a unity does not rule legitimately, and so more polities are required. Both dispute the legitimacy of the state's rule and both seek to exercise a piece of the state's authority for themselves.

This dynamic is equally visible in Benhabib's statements about the 'constitutional minimums' accepted by groups living in a liberal-constitutional and democratic states. She contends that these basic rule of law norms are not contentious; rather, debates arise around:

> [W]hether certain cultural and religious practices do or do not contradict these constitutional minimums *or* whether they can be considered matters of the religious and cultural autonomy of a group.[98]

In other words, groups are not concerned about the content of these constitutional rights and norms, but about being governed by them at all. Phrased in this way, it is possible to see the running together of rights and autonomy – the practices either contradict constitutional rights *or* they are matters within the autonomy of the group. Practices that contradict rights may be saved because they are conceived as properly within the group's authority. These are the same practices, but they are characterized differently. Certainly a practice could both contradict a right and be considered a matter of group autonomy. This will often take the form of an exemption from a right – a group will be

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[97] Identity politics as practiced and studied in the United States focus on multicultural curricula and other aspects of representations of difference in the public sphere. In this respect, Benhabib's characterization is unassailable. However, they also seek autonomy over their so-called difference: see, *e.g.*, *Wisconsin v Yoder*, 1972 406 US 205; Minow, *supra* note 80.

[98] Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) 67 at 90, fn 14 [Emphasis added].

exempt from the application of the right because it is properly within their sphere of autonomy. The basis for an exemption is that the group can regulate the matter for the individual.

Rights claims and self-rule claims do exist in opposition: where, for example, a right is claimed against a sovereign. However, they also run along a continuum. Rights claims for autonomy or exemptions blend into claims for self-rule. Moreover, most rights claims of behalf of groups are religious (primarily because this is a protected constitutional right) and most of these are for an exemption or for some kind of autonomy.[99] Let us return to Charles Taylor's case for the recognition of Quebec. He bases this case on the foundational importance of recognition for forging identity and full realization of the self.[100] He then suggests that Quebec ought to be accorded some sovereign powers. Taylor is careful to distinguish between fundamental liberties and important privileges and immunities.[101] But his point is that Quebec is seeking survival as a people – a collective society – and its consequent demands are for "some autonomy in their self-government" and to "adopt certain kinds of legislation deemed necessary for survival".[102] These are properly considered measures of self-rule over language and culture. This is how the right to recognition on an individual level can ground a claim for some measure of sovereign power on a group level, and how rights and self-rule blur together.

5.4.3 The Legal Texts of Group Difference: The Charter

The *Charter* contains some provisions about collectivities, such as education rights, which were described in the previous chapter. Here, it is the defined set of individual rights that matter. Groups in this context do not benefit from group-based rights, particularly constitutional ones. The legal texts of group difference in the sub-national legal order are primarily individual human rights provisions.

In Canada, these are contained in the *Charter* and in human rights codes.[103] They consist of the four fundamental freedoms and the right to equality. Of the four fundamental freedoms, freedom of

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[99] *Multani v Commission scolaire Marguerite-Bourgeoys*, *supra* note 75; *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567; *Bruker v Marcovitz*, *supra* note 75 (note that this was a plea for the state to override the autonomy previously granted).
[100] Taylor, *supra* note 57 at 66.
[101] *Ibid* at 59.
[102] *Ibid* at 52.
[103] Provincial human rights legislation overlaps with the *Canadian Charter* although there are important differences: see: Nancy Holmes, *Human Rights Legislation and the Charter: A Comparative Guide*, MR-102E (Parliamentary Research Branch, 1997).

religion is the most frequently invoked group-based right because it tracks a recognized marker of group identity. There is no right to culture. In addition to these individual human rights, there are other laws that may peripherally apply to cases of group difference such as zoning bylaws, but for cases where group difference is directly adjudicated, where the terms of difference are pitted against the terms of the polity, it is the *Charter*'s fundamental freedoms which matter.

Religion is protected in the two ways that constitutions protect liberty: as a right and as a ground of equality. Section 2 sets out the fundamental freedoms of everyone inside of the Canadian state.

> **2.** Everyone has the following fundamental freedoms:
> (*a*) freedom of conscience and religion;
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (*c*) freedom of peaceful assembly; and
> (*d*) freedom of association.

Section 15 establishes the right to equality. It enumerates a non-exhaustive list of grounds of discrimination. This list may be expanded to include analogous grounds. The grounds are notable for delineating markers or bases of *group* identity. In other words, the equality guarantee disallows discriminatory treatment on a group basis; for example, based on belonging to an ethnic or religious group. However, the right not to be discriminated against does not quite encompass the extent of claims of group difference. The latter are claims to be different, not claims to be the same. As discussed above, these claims often implicate some measure of self-rule.

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There is no right to culture or protection of culture as a ground of discrimination in the *Charter.* It appears in section 27 as an interpretative principle.

> **27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Since multiculturalism functions as a principle of construction, it effectively either piggybacks on or conflicts with specific rights such as freedom of religion. Courts have considered the interpretative scope of section 27 to be the source of important principles that define the scope of other Charter rights.[104]

5.5 The Case Law and Case Studies on Jurisdiction

These cases examine groups with the attributes of jurisdiction – the coincidence of territory and group and law – but without jurisdiction itself. The way that territorial group difference presents in these contexts is as the enclave. These cases focus on the intersection of enclaves and law. The difference in these cases is not contentious; it is either the basis of the group's claim or manifested by the group's form of settlement. These cases were selected based on the territorial group at their core, and it turns out that this criterion was narrow enough to delimit the data set.[105] Moreover, these cases speak particularly to the intersection between territorial concentration and groupness that lies at the heart of this project. For all of these groups, territory is one basis of groupness. I compare two cases based on religion, since religion is protected by law, to two cases based on culture, which is not. The cases selected partly express law in different locations: for example, the Supreme Court of Canada, the Quebec Superior Court, and Vancouver zoning by-laws. However, they are not scalar because they are all adjudicating group difference *within* a provincial territory; in other words, they are all adjudicating the sub-national scale. The theoretical intersection between these groups and law is interesting not only for what it tells us about their positions and stances in relation to law, but also for its larger theoretical insights into the places where law does not reach.

5.5.1 Alberta v. Hutterian Brethren of Wilson Colony (Supreme Court of Canada, 2009)

In *Alberta v. Hutterian Brethren of Wilson Colony,* the Wilson Colony challenged the requirement for driver's licenses to include a mandatory photo of the license holder, on the basis that the Second Commandment prohibited them from having their photo taken.[106] The photo requirement, in their

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[104] Faisal Bhabha, "Navigating the Spheres of Multiculturalism, Bilingualism and Federalism: Theoretical, Doctrinal and Constitutional Perspectives on the 'Reasonable Accommodation' Debate" (2008) 43 SCLR 499 at 502.
[105] This does not mean that there are no other cases that deal with territorial groups; rather, it means that these cases best illustrate the intersection of group, territory, and law that I am trying to explore.
[106] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99.

words, violated their religious freedom and threatened their communal lifestyle. The former claim is based on their interpretation of the Second Commandment, which prohibits idolatry.[107] The latter claim is based on their rural community and the assignment of specific responsibilities among members. The Colony attempts to be self-sufficient but some of its members are required to travel outside the colony to obtain medical care, and for commercial activity. The Colony argued that Alberta was forcing the Hutterian Brethren to make a choice between two religious beliefs: obeying the Second Commandment or adhering to their rural, communal lifestyle.[108]

Since 1974, all motor vehicle licenses in Alberta had to bear a photograph of the license holder, subject to exemptions for people who objected on religious grounds. In 2003, Alberta passed a regulation that made the photo requirement universally mandatory, with the objective of reducing the risk of identity theft. This effectively redefined the license as "an identity measure rather than a simple attestation of the capacity to drive".[109] The Province proposed two measures to accommodate the claimants: first, that the license display a photo but that it be carried in a sealed envelope marked as the property of the Province and a digital photo be placed in the central photo bank; or second, that a digital photo be placed in the central photo bank with no photo accompanying the driver's license.[110]

The parties agreed that the photo requirement violated the religious freedom of the members of the Wilson Colony, so the question was whether the measure was justified as a reasonable limit demonstrably justified in a free and democratic society under section 1 of the *Charter*. The majority found that the photo requirement was indeed justified by the goal of minimizing identity fraud in the driver's licensing system. In two separate dissents, Justices Abella, Lebel and Fish, concluded that the measure was not justified, taking into account the impact on the life of the community.

The majority prefaced its judgment by noting that the bulk of modern regulation could be claimed to interfere with religious belief and, given the enormous array of potential interferences, courts must be

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[107] Exodus 20:4: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth". See *King James Bible* (Cambridge: Cambridge University Press, 2010).
[108] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 8.
[109] Nathalie Des Rosiers, "Freedom of Religion at the Supreme Court in 2009: Multiculturalism at a Crossroads?" (2010) 51 SCLR 73 at 86.
[110] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 12.

deferential to the choices of the legislatures.[111] Writing for the majority, McLachlin C.J. offered a new approach to the proportionality component of the *Oakes* test.[112] She took a "more deferential posture toward the minimal impairment test", and suggested that the justification of the limit on a right falls to be decided at the stage of proportionality of effects.[113] The first three stages of *Oakes* are anchored in assessing the law's purpose; only the fourth branch of proportionality takes full account of its deleterious effects. Such deleterious effects are considered in terms of *Charter* values, such as "liberty, human dignity, equality, autonomy, and the enhancement of democracy".[114] For the Hutterian Brethren, it turned on liberty: religious freedom "revolves around the notion of personal choice and individual autonomy and freedom".[115] This lays bare the imbrications of liberalism and religious freedom, and highlights law's protection of religion when it is a matter of autonomy and choice.[116]

Ultimately, for the majority, the cost of not being able to drive did not rise to the level of depriving Colony members of a meaningful choice to follow their religion.[117] Driving was not a right, but a privilege. Arranging alternative means of transport had not been shown to end their rural way of life. They could hire drivers or arrange for third party transport. This would go against their "traditional self-sufficiency" but it would not destroy it.[118]

In dissent, Abella J. set the individual and collective harm to the Hutterites against the benefits to the province of including the photographs of 250 Hutterites despite the glaring absence of 700,000 unlicensed Albertans from the photo bank. She emphasized that the principle of proportionality guides the *Oakes* analysis at each step.[119] It is at the minimal impairment stage of the analysis that she parted company with the majority, finding that the photo requirement "completely extinguishes" the right to religious freedom since the photo is the very act that offends them. She then turned to the

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[111] *Ibid*.
[112] The Oakes test is a proportionality test to assess the reasonableness of limits on Charter rights. See: Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR 501.
[113] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 61; Benjamin Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of Alberta v Hutterian Brethren of Wilson Colony" (2010) 51 SCLR 25.
[114] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 88.
[115] *Ibid* at para. 88.
[116] Benjamin Berger, "Law's Religion: Rendering Culture" (2007) 45 Osgoode Hall LJ 277.
[117] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 96.
[118] *Ibid* at para. 97.
[119] *Ibid* at para. 134.

proportionality stage and found the salutary effects to be speculative since there was no evidence that the past exemption caused any harm and given the large number of unlicensed Albertans with no photo in the bank anyway. For Abella J., the alternative of third party transportation failed to address "the significance of their self-sufficiency to the autonomous integrity of their religious community".[120] This fundamentally breached their freedom from interference with religious observance, the first strand of freedom of religion, and rendered their choice coerced.[121]

Justices Lebel and Fish agreed with Justice Abella. Justice Lebel emphasized that the majority had neglected the communal aspect of freedom of religion:

> Religion is about religious beliefs, but also about religious relationships. … It raises issues about belief, but also about the maintenance of communities of faith. [122]

For Lebel, J., the crux of the *Oakes* test lay in the core of proportionality analysis: the minimal impairment test and the balancing of effects. He challenged the majority opinion for treating the law's objective "as if it were unassailable once the courts engage in the proportionality analysis", and recommended the *Charkaoui* judgment for its superior understanding of proportionality analysis.[123]

There are a few different jurisdictional dynamics in this case. The first is the law's effort to come to terms with a way of life – the balance between the individual and the collective — where religion is simultaneously cast as neither and both. Second, there is the underlying culture/religion distinction, where the messy, collective aspects of religious life are redescribed as cultural. The third is the powerful jurisdictional technology of the legal test itself: the reining in of reasonable accommodation analysis to cases of actions or practices.

The judgments agree that religion has both individual and collective aspects.[124] For the majority, however, the collective element of religion weighs only at certain stages of the section 1 analysis;

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[120] *Ibid* at para. 167.
[121] *Ibid* at paras. 167-169, citing Jeremy Webber, "Understanding the Religion in Freedom of Religion" in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 26. See also *R v Big M Drug Mart*, 1985 1 SCR 295 at paras. 94-95.
[122] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 182.
[123] *Ibid* at paras. 197-98.
[124] *Ibid* at para. 31.

namely, community matters at the proportionality stage for the weighing the salutary and deleterious effects. McLachlin C.J. notes:

> Community impact does not, however, transform the essential claim – that of individual claimants for photo-free licenses – into an assertion of a group right.[125]

This does not seem quite accurate. The right to religious freedom in this case is being exercised based on belonging to the group of the Hutterian Brethren. If not for this group membership, then there would be no claim. More than this, however, one of the bases of the claim is the impact on *group life*, which the Hutterian Brethren argue is part and parcel of their religion. It is difficult to see how this is not claim about individuals exercising a right about their groupness. This is particularly true where there is no constitutional or other mode of claiming this as a group right proper. Indeed, Abella J. refers to Justice Wilson's partial dissent in *Edward Books*, noting that "the assertion of a group right is based on the claim of an individual or a group of individuals *because* of membership in a particular identifiable group".[126]

Moreover, the majority mischaracterizes the singularity of the claim. The first part of the claim is the right to be exempt from the photo requirement for licenses. The second part of the claim speaks to the purpose of the exemption – to maintain licenses in order to continue the Hutterite way of life. Alternatively characterized, the Hutterian Brethren believe that they should not to be photographed and they believe that they must maintain their rural, separate lifestyle. This is what the Hutterian Brethren meant when they characterized the issue as a matter of competing religious beliefs: the current regulation forced them to choose between obeying the Second Commandment or adhering to their communal lifestyle.[127] In other words, the collective way of life aspect is equally a part of their religion. Benjamin Berger describes the majority opinion this way:

> [O]ne is left with the sense of a failure to grapple with what it *means* to the traditional life of this religious community to lose the self-sufficiency that it enjoyed by having members that are able to drive.[128]

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[125] *Ibid* at para. 31.
[126] *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 808-9.
[127] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 8.
[128] Berger, *supra* note 113 at 40.

At the jurisdictional threshold, the Hutterian Brethren religion is marked by individuality and autonomy. The claim is characterized as the individual belief not to be photographed, and, despite some treading on the collective aspect of life, the choice to be a member of the Hutterian Brethren is not violated by the result of relinquishing the ability to drive. There is another layer to this. Part of what this judgment shows is how constitutional categories matter for group claims themselves and for their resolution.

The second layer of analysis lies in the underlying distinction between religion and culture that permeates the judgment. The notion of the Hutterian 'way of life' goes some distance toward explaining what falls into the category of culture. The difficulty lies in the Hutterian Brethren's lived religion; theirs is not only a belief system but a way of life. The Supreme Court has a difficult time adjudicating this way of life, ultimately aligning communal life with culture. In dissent, Abella J. referred to the 1970 cases of *Hofer v. Hofer*:

> [T]he Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony. To a Hutterian, the whole life is the Church… . The tangible evidence of this spiritual community is the secondary or material community around them. They are not just farming to be farming – it is the type of livelihood that allows the greatest assurance of independence from the surrounding world.[129]

Part of the Supreme Court's difficulty in contending with the communal aspect lies in the nature of the Hutterian Brethren and their claims. Theirs is a group which does not want to belong. They employ their right to religious freedom for the purpose of ensuring their continued separation. They are "a community that has historically preserved its religious autonomy through its communal independence".[130] Their communal independence, then, is the basis for their religious autonomy. This "standing apart from the mainstream of Canadian society" may be the underlying reason for the failure of their claim.[131]

The way that the majority judgment handles this dissonance is to align the community aspect of religion with culture. Chief Justice McLachlin writes: "religion is a matter of faith, intermingled with

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[129] *Hofer et al. v. Hofer et al.*, 1970 SCR 958.
[130] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para.170.
[131] Morris Davis & Joseph F Krauter, *The Other Canadians, Profiles of Six Minorities* (Toronto: Methuen, 1971).

culture. It is individual, yet profoundly communitarian".[132] In the end, though, it is the culture part which absorbs the communal parts of religion. A "way of life", even if it is "a way of living that faith and of passing it on to future generations", falls under the banner of culture.[133] It is within the capacious category of culture that there is room for change, for costs to tradition and self-sufficiency, and for third party drivers. Religion, that stalwart of freedom, defends uncompromising belief in the Second Commandment. The cultural consequences of that belief fall to be less protected. Indeed, culture and religion are differently constituted jurisdictional identities; one is constitutional, the other is outside of the reach of law.

Finally, the majority judgment ruled out the use of reasonable accommodation analysis to rule on the validity of a law or a regulation. Chief Justice McLachlin set out a refinement of the minimal impairment test underwritten by a conceptual distinction between section 1 analysis and reasonable accommodation analysis. Where, she wrote, "the validity of a *law* is at stake, the appropriate approach is a s.1 *Oakes* analysis".[134] However, where a "government *action* or administrative *practice* is alleged to violate the claimant's *Charter* rights", the duty to accommodate may be helpful "to explain the burden resulting from the minimal impairment test with respect to a particular individual".[135] This distinction is supported by the different relationships that the analyses govern. Reasonable accommodation comes from human rights statutes. It envisions a dynamic process where the parties, usually an employer and an employee, adjust their relationship up to the point of undue hardship. In contrast, section 1 analysis refers to the relationship between a legislature and the people subject to its laws. Laws of general application cannot be tailored to the needs of an individual; instead, the measure is whether the law addresses an important objective and is proportional.

This is an important jurisdictional technology. It manages to reorder both the appropriate referent and the mode of analysis. For reasonable accommodation, the referent is the employee and the mode is dialogic.[136] It is an individualized remedy. For section 1 analysis, the referent is societal and the mode is justificatory.[137] It is a social remedy to the extent that the legislation is struck down. This

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[132] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 89.
[133] *Ibid* at para. 182.
[134] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para. 66 [Emphasis added].
[135] *Ibid* at para. 67, citing *Multani v Commission scolaire Marguerite-Bourgeoys*, *supra* note 75 at para. 53 [Emphasis in original].
[136] See: *Multani, ibid* at para. 131.
[137] *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99 at para 69.

differential approach, in turn, is based on the distinction between a law and an action or practice, and their distinct remedies (sections 52 and 24 of the *Charter*, respectively). The result is that when a law is in question, the possibility of an exemption to it is now harder to come by. The larger loss is the obligation to consult, the tacit procedural component, to section 1 analysis, which ensures that section 1 is somewhat responsive to the people.[138]

5.5.2 Rosenberg v. Outremont (Quebec Superior Court, 2001)

An 'eruv' is a symbolic enclosure of space by means of a boundary made up of string or fishing line. The line is strung between fences, buildings, hydro poles, and other structures to create a symbolic extension of the walls of the Jewish home.[139] This extension brings the private Jewish home into the public domain so that observant Jews can carry and push certain items, such as strollers and wheelchairs, on Shabbat. Otherwise, according to rabbinical law, observant Jews are not allowed to carry anything outside of their own private domain.[140] Eruvs encircle portions of most major cities in North America, including Vancouver, Toronto, Washington, New York, Los Angeles, and Chicago, as well as in France, Australia, and Germany, and they have been the subject of several court cases in the United States, the United Kingdom, and, as will be examined here, Canada.[141]

The city of Outremont, in Quebec, was the locus of an eruv dispute and a court challenge in 2001.[142] The neighbourhood became contested territory. The petitioners represented Hasidic Jews, a group stratified across several congregations in Outremont.[143] They sought a declaration that they were entitled to put up an eruv and that the City of Outremont had no basis or right to pull it down. The City had, of late, been dismantling the eruv in response to residential complaints. The opponents of

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[138] Des Rosiers, *supra* note 109 at 89.
[139] Valerie Stoker, "Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec" (2003) 43 History of Religions 18; Davina Cooper, "Talmudic Territory? Space, Law, and Modernist Discourse" (1996) 23 J L & Soc'y 529; Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge: Cambridge University Press, 2004); Barry Smith, "On Place and Space: The Ontology of the Eruv" in Christian Kanzian, ed, *Cultures: Conflict-Analysis-Dialogue* (Frankfurt: Ontos Verlag, 2007).
[140] Stoker, *supra* note 139.
[141] *Rosenberg v Outremont (City)*, [2001] RJQ 1556 at para. 10; Cooper, *supra* note 139; Smith, *supra* note 139 at 403-4; *Tenafly Eruv Association, Inc. v Borough of Tenafly*, 2001 155 F Supp 2d 142 (DNJ 2001); *Smith v Community Board No. 14*, 1987 128 Misc 2d 944, 491 NYS 2d 584, 587 (Sup 1984), aff'd, 518 NYS2d 356 (NY AppDiv 1987).
[142] At the time of the dispute, Outremont was an independent municipality; in 2002, it was incorporated into the city of Montreal.
[143] There were seven different Hasidic congregations in Outremont at the time. See: Stoker, *supra* note 139 at 28.

the eruv were primarily French-Canadian.[144] At a City Council meeting about this practice, the Mayor defended a position of neutrality, stating that the City "did not have jurisdiction" to permit any religious actions.[145]

The City argued that the restriction that the petitioners sought to alleviate was imposed by Jewish law and not by Outremont, that the location for the exercise of freedom of religion is not part of the constitutional guarantee, and that any violation is justified by the City's duty to maintain the public domain equally for all residents.[146] In the result, Justice Hilton permitted the eruv and required the City to cooperate. The judgment turned on demonstrating that the eruv tainted public space in a way that harmed other Outremont residents. He found no evidence of taint, and the argument of psychological damage to non-Jewish individuals was offset by the religious necessity of the eruv for Orthodox Jews.

There was an interim injunction in place from two months earlier to prevent the City of Outremont from dismantling the eruv. The judge noted that such dismantling would "*prima facie* constitute a violation of their fundamental freedom of conscience and religion".[147] Justice Hilton found that there had been no evidence of hardship or inconvenience to Outremont residents since that injunction, and then proceeded to analyze the case law on religious freedom, finding the concept of accommodation integral to the exercise of guaranteed freedoms.

The issue of religious freedom is usefully disentangled as two issues: one to do with the extent of religious freedom; and the other to do with the requirements of neutrality in a secular society.[148] Justice Hilton found that the erection of an eruv was "essential for the attendance of Orthodox Jews at Sabbath services, and their participation in related activities upon the completion of the services".[149] The eruv is a squarely religious practice and an exercise of religious freedom. With respect to neutrality, Canada does not have explicit constitutional provisions about establishment or the separation of church and state, but state neutrality toward religions is a widely accepted tenet of

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[144] *Ibid* at 24.
[145] *Rosenberg v Outremont (City)*, *supra* note 141 at para. 12.
[146] *Ibid* at para. 4.
[147] *Ibid* at para. 21.
[148] Gerard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation*, (Quebec: Consultation Commission on Accommodation Practices Related to Cultural Differences, 2008).
[149] *Rosenberg v Outremont (City)*, *supra* note 141 at para. 36.

religious freedom. Where neutrality is in some tension with freedom, Justice Hilton confirmed that this was to be modulated by a bent toward accommodation. In this case, the religious neutrality query asked about the detriment caused by the eruv to other Outremont residents. Justice Hilton found that the accommodation of the eruv did not amount to endorsement or even association by the City of Outremont, but rather *toleration*.[150] The City's obligation was to accommodate religious practices that do not impose undue hardship.

This decision has been the subject of significant commentary[151], but none of it has focused on its jurisdictional representations. Davina Cooper accurately notes that the eruv carries implications about liberalism's public/private divide, which is embedded in the religious/secular threshold, but it is also a battleground for jurisdictional commentary about who is governed by which laws. It is, literally, the act of drawing the line — erecting the eruv boundary — that is the locus of the controversy. This line is alternately a threshold between spheres of law (municipal, constitutional, religious), between secularism and religiosity, and between concepts of space and territory (symbolic or material, absolute or multivalent).

The eruv is a boundary that mixes and integrates types of space, bringing its territorial aspect to the fore. The eruv symbolically turned public property private and Jewish for religious believers. Under rabbinical law, those living within the eruv are symbolically living in one domain. It prompted public characterizations of space that convey the political and legal aspects of territory. Territory, even in the public vernacular, became not simply a piece of land, but the capacity of a religious group to *control* the space. Opponents argued the religious aspect of public property that the eruv connoted was threatening to the nature of the shared territory. The Hasidic goal was characterized as creating "a religious territory in our public and secular streets".[152]

> It's never been done before, that on public property a religion, whatever it is, Muslim, Catholic, whatever, *that they could make a territory out of it*.[153]

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[150] *Ibid* at para. 44.
[151] See sources in footnote 139.
[152] Celine Forget, *On a besoin de vous!* (2001).
[153] Pierre Laserre, "Outremont not to appeal eruv decision", *CBC* (10 July 2001).[Emphasis added].

At bottom was a fear of making sections of Outremont into religious enclaves. This territorial argument culminated in a claim to freedom *from* religion. Opponents argued that the space was religious in character and that they felt excluded from it.[154]

The eruv took the form of a contest over reordering and redefining spaces. The material space was essentially the same for non-Orthodox Jews, except for a string of fishing line wound across buildings, but symbolically, the eruv "stained" the wider space with religious meaning.[155] Opponents propagated a zero-sum view of space in which the eruv detracted from claims to the same space by other community members.[156] The public space of Outremont could not be both Hasidic and non-Hasidic; it had to be one or the other. Barry Smith has argued that the protests triggered by the eruv result from the ontological running together of space and place, which "presupposes that multiple *places* cannot be associated with a single region of *space*".[157] Eruv creation somehow implied exclusivity. These visions — of singular space and of the territorialising quality of group claims to space — are bound to the governing model of territorial jurisdiction. This standard relies on hierarchical nesting: where countries divide into states, states divide into sub-state units, and those units into cities and towns. Although these spaces overlap, they are also singular. More than this, they are hierarchical in terms of law and politics. This governing conception of space and territory delimits the horizons of territory. Hasidic Jews were arguing against this singularity for a "multivalent conception of space in which different, subjective perspectives could coexist", and this vision was ultimately upheld by Judge Hilton: "the area within an eruv is only a religious zone for those who believe it to be one".[158]

These contrasting notions of space enveloped a contest between governing laws. Justice Hilton characterized the issue as a matter of religious freedom to be measured against the extent of accommodation. For the parties, and particularly the opponents, the matter was one of who was governed by which laws. The eruv was considered a requirement of rabbinical law: the Sabbath "like all other aspects of life, is defined by a complete set of legal guidelines".[159] Indeed, this was what made it a matter of religious freedom, and thus a matter of constitutional law. Opponents framed the

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[154] Stoker, *supra* note 139 at 41.
[155] Cooper, *supra* note 139 at 534.
[156] *Ibid* at 535.
[157] Smith, *supra* note 139 at 415.
[158] *Rosenberg v Outremont (City)*, *supra* note 141 at para. 44; Stoker, *supra* note 139 at 25.
[159] *Rosenberg v Outremont (City)*, *supra* note 141.

case as a contest between Hasidic religious laws and Outremont's civil code.[160] This argument was based on the contention that the eruv would govern *them*: the eruv placed non-members within a religious territory with which they do not wish to be associated. Céline Forget, a municipal councillor and one of the most vocal opponents of the eruv, said of the string in front of her home:

> [It is] a constant reminder of a religious boundary across public space. Against my will, because of the location of my apartment, I find myself living in a territory identified with a religion that is not my own.[161]

A declaratory judgment would create an "officially recognized religious territory" that would regulate non-believers too.[162] For eruv opponents, religious neutrality was "an inviolable end" in itself.[163] Alongside this suggestion, they also argued that the eruv compromised multiculturalism by granting one group a privileged claim on the public space and opened the door to other groups making similar demands. This undermined universalism and prioritized one group over others. The nature of this claim implicitly endorses a version of universalized particularity.

Throughout the case, a dialectic of inclusion/exclusion operated in different directions. It is a central concern of Hasidic communities is to prevent assimilation into the larger societies in which they find themselves.[164] Many of their social practices are intended to create a wall between themselves and their non-Hasidic neighbors.[165] This is a kind of self-imposed segregation and it challenges the dominant conception of pluralism as co-existence. Yet, the very act of making a legal demand for the eruv indicates both a measure of integration and a measure of entitlement to their legal rights and claims.[166] The claiming of rights represents a certain form of belonging to the state. Moreover, the eruv is itself oriented toward inclusion of persons in Shabbat. It means all members of the community, including women with young children, the elderly, and the handicapped – can participate in Sabbath-day activities.[167] The eruv, in other words, represents the community's internal commitment to equality. It is also about inclusion in the sense of 'normalizing' orthodox Hasidic Jews by making them more like their societal others (most of whom may always carry things). Yet

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[160] Stoker, *supra* note 139, citing Celine Forget.
[161] Graeme Hamilton, "Montreal enclave, Hasidic residents fight 'turf war'", *National Post* (7 June 2001).
[162] *Rosenberg v Outremont (City)*, *supra* note 141 at para. 18.
[163] Stoker, *supra* note 139 at 43.
[164] *Ibid* at 19.
[165] *Ibid* at 19.
[166] *Ibid* at 25.
[167] *Ibid* at 25.

this too is complicated because although the eruv permits adherents to engage in mainstream behaviours, it also gives their essential 'otherness' public expression.[168] On the one hand, the eruv is a construct of inclusion within the group and of inclusion within the broader polity based on common rights; on the other hand, it is a form of exclusion from the broader polity, literally drawing the boundary between the group and larger society.

As a meditation on the distribution of authority, this case permits overlapping authorities just as it permits multivalent space. Orthodox Jews may be a self-regulating group for the purposes of their eruv. They may require the state to tolerate the physical presence of their beliefs strung across the public space of buildings. The court does not deny the nature of Hasidic Jews as a territorial collective — an enclave — of sorts. However, this jurisdictional result is partly mitigated by both the directionality of the eruv claim towards the liberal values of inclusion and equality for all members, and by the proven lack of hardship. It is not hard to see how the judgment might have been different if the point of the eruv was to keep women, children, the elderly, and the disabled at home. At the jurisdictional threshold, there is a contest over who rules that can only be understood as a cogitation about forms of jurisdictional authority.

5.5.3 Shaughnessy and Kerrisdale (British Columbia, 1990s)

These two case studies represent a baseline shift to culture. When the lens shifts to cases where the law is invoked secondarily or not at all, the threat of group concentration is heightened precisely because law does not directly reach it. This is the foregrounding of the eventual jurisdictional moment. It brings to bear the weight of the jurisprudence of group difference in cases that are not about jurisprudence at all. If we read these enclaves for their intersections between group and law, then it becomes possible to trace liberal discontent with the enclave to its distance from the legal order. In these cases, the pressure that territorial group difference exerts on the commitments of the liberal legal order is almost palpable.

The "monster homes debate" is shorthand for a series of a controversial housing and development debates that peaked in the west-side neighbourhoods of Vancouver in the early 1990s. The conflict emerged as wealthy investors from Hong Kong bought and transformed properties in the exclusive Shaughnessy and Kerrisdale neighbourhoods with "seemingly little regard for their traditional

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[168] Cooper, *supra* note 139 at 537.

aesthetic qualities".[169] The debate reflected two dimensions of the enclave. The storied enclave neighbourhoods were *already* segregated by class and race, populated primarily by privileged Anglo-Saxon homeowners. The Hong Kong investors were then rhetorically painted as a counter-enclave, seeking to remake the neighbourhood in their own image. In fact, the new homeowners were a looser, more transient grouping of individuals than this narrative implied; their first priority was to purchase land and build their preferred homes, not necessarily to live together.[170] Nonetheless, the battle pitted one group against the other in a contest over aesthetics which represented a much deeper contest over difference. The debate reveals the collision of parochial visions of territory and nation with global forces of migration. In the contest between old and new homeowners employing legal vernaculars, the threshold between spheres of law come to the fore.

The monster homes debate stemmed from a larger remaking of Vancouver as a city of the Pacific Rim, brimming with transnational linkages and "millionaire migrants".[171] One reason for the growth of Chinese immigration and investment had to with immigration law changes. In 1978, Canada introduced an entrepreneurial immigration category, which permitted anyone willing to invest at least $250,000 in a Canadian business venture to enter the country. In 1986, a second investor visa category was added.[172] Another reason had to with the projected reversion of Hong Kong to the People's Republic of China on July 1, 1997. The resulting wave of migrants literally remade neighbourhoods in Vancouver.

> The capital flows that accompanied the migrants shifted real estate from a local to a global market and transformed the built environment almost immediately.[173]

This transformation involved the demolition of older homes in the west-side neighbourhoods and the construction of larger homes in their place.[174] The so-called monster homes maximized the allowable building size on their lots and often involved the clearing of older homes and trees. They

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[169] Laura Madokoro, "Chinatown and Monster Homes: The Splintered Chinese Diaspora in Vancouver" (2011) 39 Urb Hist Rev 17.
[170] David Ley, *Millionaire Migrants: Trans-Pacific Life Lines* (Malden: Wiley-Blackwell, 2010).
[171] *Ibid*.
[172] Trevor Harrison, "Class, Citizenship, and Global Migration: The Case of the Canadian Business Immigration Program, 1978-1992" (1996) 22 Cdn Pub Pol'y 7.
[173] Henry Yu, "Is Vancouver the Future or the Past? Asian Migrants and White Supremacy" (2006) 75 Pacific Hist Rev 307.
[174] Katharyne Mitchell, "Conflicting Landscapes of Dwelling and Democracy in Canada" in Stephen Cairns, ed, *Drifting: Architecture and Migrancy* (London: Routledge, 2004) 142.

were commonly "large, rectangular and relatively boxy in form".[175] Often, the surrounding area was paved and fenced. Their form was a nod to *feng shui* and to extended family accommodation, as well as a mark of conspicuous consumption.

The west-side neighbourhood associations challenged these changes through the venue of land use planning. They petitioned City Hall, which passed several zoning amendments for west-side neighbourhoods between 1986 and 1992.[176] City Hall also held a series of public hearings. These fiery hearings pitted west side associations against an *ad hoc* committee of Hong Kong immigrants allied with a number of developers. This *ad hoc* committee invoked notions of individual and economic rights, claiming freedom and assigning racism. Ultimately, City Council introduced design controls and rules on the possible size of developments and passed bylaws on the removal of trees from residences, but these were less stringent than they had looked at the beginning of the process.[177]

Older homeowners extrapolated property rights to the community in order to defend the character of the neighbourhood. They argued for "the home *plus* the neighbourhood" as the integral unit of purchase.[178] Then they mobilized zoning laws in service of this character. Anglo residents preferred the local, neighbourhood scale and its tools of zoning laws, invoking appeals to a unique history and neighbourhood preservation. For older homeowners, their entire case rested on the invocation of a prior existing community; in effect, their community was *already* constituted. In contrast, new homeowners relied on the individual character of property rights to defend their choice of dwelling. Hong Kong residents invoked the scales of the national and the provincial, appealing to liberal property rights and democracy, aligned with Canada the liberal-democratic state generally. These were rights claims based on liberal property rights and freedom of choice. They underlined the racist aspects of the debate, noting that a drastic change in zoning bylaws would effectively exclude them

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[175] *Ibid*.
[176] David Ley, "Between Europe and Asia: The Case of the Missing Sequoias" (1995) 2 Cultural Geographies 185 (it is worth noting there are differences between this piece and his account in *Millionaire Migrants*). See, *e.g.,* one letter: "We resent the fact that because they come here with pats of money they are able to mutilate the areas they choose to settle in. ... They have no right to devastate the residential areas". In 1990, City Council passed a citizen-drafted by-law to rezone a district of Shaughnessy to preserve single family dwellings and "the character of the district outlined [...] with special regard to encouraging retention of existing dwellings". See also: Madokoro, *supra* note 169 at 51.
[177] David Carrigg, "Former City Planner Remembers Vancouver's Monster-House War", *The Province* (7 December 2006). Ley, *supra* note 266.
[178] Ley, *supra* note 176 at 197.

from the neighbourhoods because of their race. Hong Kong homeowners argued that they were equal citizens of the community, which was continually constituted.

The heart of what was contested in the monster homes debate was the material representation of group difference. Frequently symbolic in character, group difference in the monster homes debate took on a measure of materiality that heightened the contest over homes. The material manifestation was the confluence of the collective and race, or at least visible difference. The Anglo-Saxon invocation of community only highlighted the contest between two so-called communities: one old and Anglo-Saxon; the other new and Asian. The older homeowners could not rely on individual property rights alone or even aesthetics because they were trying to make a case for reining in the "difference" part of group difference. In the end, the monster homes conflict precipitated a symbolic rearticulation of popular democracy — who is included in public hearings, who counts as a rights-bearer — but it did not reduce liberal democratic anxiety about territorial group difference. If anything, it highlighted the false distinction between an old storied enclave of Anglo-Saxons, one that Statistics Canada does not yet measure, and a new, rebuilt enclave of Asians.[179]

5.5.4 Richmond (British Columbia, 1990s-Present)

Lying about twelve kilometers south from Shaughnessy and Kerrisdale is Richmond, the embodied phenomenon of the ethnoburb. Richmond is North America's most Asian city; its population is approximately 45 percent Chinese.[180] As described at the beginning of this chapter, Richmond is a hub for the Chinese community, presenting a concentrated residential community alongside ethnic-based stores, services, and restaurants. The result is a consolidated ethnic group bound by language and culture. It remains a matter of dispute whether this growth of residential concentration and services is somehow indicative of greater ethnic commitment among Chinese.[181] The ethnoburb may be a matter of convenience and familiarity more than group loyalty. Yet this does not seem to lessen the difference that its embodied diversity presents. I suggest that this is because the enclave is cultural and thus outside of law.

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[179] I am indebted to Nick Blomley for this comparison.
[180] *City of Richmond, Hot Facts Series,* online: http://www.richmond.ca/__shared/assets/2006_Ethnicity20987.pdf.
[181] Peter Li & Huping Ling, "The Social Construction of the Chinese in Canada" in *Asian America: Forming New Communities, Expanding Boundaries* (Rutgers: Rutgers University Press, 2009) 223.

Richmond has had its share of city planning issues but it has maintained throughout a state of relatively calm coexistence. There have been no divisive or incommensurable group rights claims. It had its own monster home debate through the late 1980s and early 1990s, but City Council set some limits and successfully reframed the contest as community planning process.[182] This was followed by the development of an eleven hectare plot of Chinese shopping centres in the center of the city. In the early 1990s, residents petitioned City Council about their absence of English language signs. Again, city representatives met with business owners to emphasize the importance of English for business and community relations, and tensions diffused.[183] Then, at the start of the millennium, public and academic discourse began to raise the social policy challenge of Chinese isolation. David Edgington describes how "the same amenities and language facilities that made Richmond so convenient to the Chinese, also functioned as a 'cultural shield' between Hong Kong immigrants and the mainstream Canadian society".[184] Yet, even against this heightened redescription of social tension, Richmond City Council recently voted against a residential petition to ban Chinese only signs in the city.[185] Council reasoned that it was up to storeowners to decide on the language of their signs, and up to shoppers to decide to go elsewhere. In these private settings, language is a matter for owners and patrons.

How can we understand Richmond and other cultural enclaves – such as Brampton or Surrey – like it? Richmond should be understood as a territorialized group that resides outside of law. The Chinese population of Richmond is a loose cultural grouping. It has not raised contentious religious claims or made accommodation demands. Indeed, it is mostly self-sufficient. The enclave of Richmond is a social and economic phenomenon. It is a group of people deciding, more or less individually, to settle together and then the natural outcroppings of that settlement: retail stores, restaurants, services, and malls. These are its defining features: a cultural group that lives together for socio-economic reasons. It is not political, nor religious. Compare this to the fraught terrain of difference in Quebec, and the Bouchard-Taylor Report that tried to adjudicate it. Charles Taylor and Gerard Bouchard reported a series of group claims – to community centre and school accommodations – based largely on religion that precipitated the societal disquiet. By claiming law's protection or accommodation, these groups

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[182] David Edgington, "Social and Cultural Issues in the Pacific Rim: The Case of International Migration and a Look at Multicultural Planning in Greater Vancouver, British Columbia" (2005) 8 Korean Rev Int'l Stud.
[183] *Ibid*.
[184] *Ibid* at 11.
[185] "Richmond city council won't pursue 'Chinese only' sign ban", *CBC* (18 March 2013), online: <http://www.cbc.ca/news/canada/british-columbia/story/2013/03/18/bc-chinese-signs-richmond.html>.

placed themselves within law's ambit; they agreed to its jurisdiction. In contrast, the territorial groupness of the Chinese enclave of Richmond does not depend on law for any of its aspects. Indeed, where law is not invoked and rights claims are not made, the 'not belonging' aspect of groupness manifests itself through territory. To some extent, Richmond is more about individual members of a group exercising their individual rights and preferences in common than it is about the group *per se* but this is irrelevant because the group difference is territorialized. While law governs individual property holders, business owners, and the like, it does not reach the group that is the Chinese enclave of Richmond.

5.6 Jurisdictional Governance: Relationships, Contradictions, Incommensurabilities

It is precisely *because* individual rights and liberalism are the governing order of extra-legal groups that enclaves are sites fraught with tension. These paradigms – of rights and autonomy – are meant to produce a logic of individuality and tolerance. Enclaves tease out the space in this logic for the territorialized group and placed difference; the space, in other words, for the group. More than this, they challenge the limits of tolerance precisely by presuming it. Tolerance presumes some sort of incommensurability of cultures or groups that must be held together by the toleration of difference. Enclaves do not contest this incommensurability but neither do they ask for tolerance.

5.6.1 The Meaning of Re-Territorialization

Enclaves make a theoretical contribution to territorialisation. They show how territory can comprise different meanings, and thus they reveal the continuities and ruptures between the state and territory. In so doing, enclaves help to draw out the role of territory in law making and law application and its role in jurisdictional analysis.

The terms deterritorialisation, diaspora and reterritorialisation filled the globalization scholarship of the late 1990s.[186] Enclaves mark a form of reterritorialisation wherein migrants resettle in the spaces of the liberal state. Yet territorialisation refers to the attempt to affect or control "people, phenomena, and relationships" by controlling geography.[187] It is not clear that this is the project of cultural

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[186] See, *e.g.*, Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996); Akhil Gupta & James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference" (1992) 7 Cultural Anthropology 6; Michael Hardt & Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000).
[187] Robert D Sack, "Human Territoriality: A Theory" (1983) 73 Annals Assoc Amer Geographers 55 at 19.

enclaves, which seem content to share neighbourhoods and services in common. This makes it hard to understand why enclaves have presented such existential angst for the liberal state. The reason for this lies in the rhetorical connection between the territory of the enclave group and the state. Even though enclave territory means differently, every invocation sounds in the register of the state: as a threat to its legitimacy, its social cohesion, and the terms of its rule. The enclave exists in tension with the notion of a unified liberal space governed by law.

If territory reflects the relationship between people and place, then enclaves reflect a socio-economic identity relationship.[188] Enclaves territorialise neighbourhoods in a particular way. For enclaves, territory is primarily social and economic. The base struggle of the enclave cases is to make territory mean something else; to take its meaning beyond a political unit or a juridical unit and to present instead as an *identity* unit. Whether the territory is the basis for a tight-knit religious life in common, as for the Hutterites or the Hasidic Jews, or the basis for a loose cultural community united by language and services, as for Richmond, it means differently for them. Law understands this meaning as rendering that territory outside of law's reach.

It is worth taking a step back to the controlling relationship between the state and territory. Territory is coextensive with the state; it is the state's existential identity. Territory is the link between the people and the sovereign – it provides the physical boundaries of inclusion and the basis for the nation. More than this, territory does a significant amount of work of the state. It informs group analysis at every scale and carries with it the baggage of statehood. This is not to deny John Agnew's important caution to avoid tethering territory too tightly to the state for fear of missing other dynamics.[189] As a project focused on group difference and law, however, it becomes clear that territory comes to stand in for the political theory of the group at different scales. In other words, precepts about groupness and authority and independence are sometimes glommed together under the category of territory, which becomes the measure of the group.

This becomes clearer if we pay attention to two particular meanings of the word "enclave". In international law, it refers to "a part of the territory of a state that is enclosed within the territory of another state"; in sociology, it refers to "a compact settlement that significantly differs from its

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[188] Jean Gottman, *The Significance of Territory* (Charlottesville: University of Virginia Press, 1973) at 5.
[189] John Agnew, "The territorial trap: the geographical assumptions of international relations theory" (1994) 1 Review of International Political Economy 53.

surrounding area".[190] Ethnic enclaves trade on both of these definitions, incorporating notions of territory and difference. Moreover, both definitions reveal the location of the enclave as *inside* the nation-state. The theoretical meaning of enclave requires its enclosure inside another territorial social formation.[191] Even the language of reterritorialization is suggestive of a space already once territorialized in the image of the state. This placement of the enclave inside the territory of the nation-state means that the state is the constant referent.

The fissure that enclaves reveal in any analysis of the state is that they are territorial groups which lack jurisdiction. All other sub-parcels of territorial groups are connected to the state by jurisdiction. All territorial configurations, from states to provinces to municipalities to reserves to electoral districts to neighbourhood census tracts, have been touched by — indeed *defined* by — the state. The enclave is unique in its occupation of territory and its assertion of groupness without a role for the state with respect to that groupness. Indeed, it is this distance from the state`s authority that makes enclaves so troubling; they discount the state. This is linked up to the kinds of rights that are at issue in this legal order – rights not to belong – so that both enclaves themselves and the nature of their group claims point *away* from the state.

5.6.2 The Group Outside of Law

This section builds on the challenges of the cultural enclave by further exploring the details of the enclave as a group largely outside of law. It pays attention to two jurisdictional technologies at work. The notion of the group as extra-legal begins with the fact that this kind of group is not regulated *as a group* in the sub-national legal order. It is then extended through the use of the category of culture and the work of scale.

The first issue is the nature of the group. The law characterizes aspects of the group as religious or cultural. Culture and religion are frequently raised and discussed separately in legal discourse and judicial opinions without reference one to the other.[192] When the concepts are discussed together, they are often used interchangeably, with passing justificatory reference to the cultural penumbra of religion, or subsumed under the banner of multicultural claims. The Supreme Court has referred to

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[190] Evgeny Vinokurov, *A Theory of Enclaves* (Lanham: Lexington Books, 2007).
[191] Michel S Laguerre, "Ethnic enclaves" in Ray Hutchison, ed, *Encyclopedia of urban studies* (Thousand Oaks: Sage Publications, 2010) 256.
[192] Frances Raday, "Culture, Religion, and Gender" (2003) 1 Int'l J Constit L 663 at 665.

culture in most of its freedom of religion cases without differentiating between the two concepts.[193] Although the concepts overlap and often undergird similar kinds of group identities and claims, they remain important categories of difference with different legal consequences.

Religion is not the same as culture, but it is often one of its defining features. Culture is a more general and vague category; religion is more particular category. Law does not cover culture, but it does protect religion as a particular dimension of culture.

> [S]ome distinctive things about religion are belief in a spiritual dimension of the universe expressed as a deity or in some other way, the explicitly articulated nature of belief and devotional practices (in contrast to cultural beliefs which are embedded in language and modes of social existence), and a conviction that one's own religion is the truth.[194]

The claim is not that there is a clear analogy between religion and culture, but rather that their overlap permits some judicial blurring. Specifically, when a religious practice is closer to the 'action' part of the belief/action dichotomy, courts may push it toward the category of culture. Benjamin Berger has described how the Supreme Court has relied upon a belief/action dichotomy in freedom of religion cases that makes the freedom to hold religious beliefs broader than the freedom to act on them.[195] I am suggesting instead a relationship between religion and culture that builds upon his insight: when freedom of religion is about more than individual belief, the law may categorize it as a matter of culture. There are various techniques here: perhaps the practice is optional or the communal aspect is incidental.[196] There is no legal protection of culture so the designation of a practice or aspect as cultural places the act on a lower rung of the law ladder. It also maintains the primacy of religion as individual belief. This dual maneuver – designation as cultural and religion as individual – keeps group difference at bay.

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[193] Justice Rosalie Abella, *Plenary Address*, British Association of Canadian Studies Conference (St. Anne's College, Oxford University, 2009).
[194] Margaret Davies, "Pluralism in Law and Religion" in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 72 at 85-86.
[195] Berger, *supra* note 116 at 303; *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772; David Brown, "Reconciling Equality and Other Rights: Paradigm Lost?" (2003) 15 Nat'l J Constit L 1.
[196] For the religious practice as optional, see: *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, 2004 SCC 47; for the communal aspect as incidental, see: *Alberta v Hutterian Brethren of Wilson Colony*, *supra* note 99.

Enclaves represent culture. Their presentation as a group living in common invokes it. Some of them are primarily religious in nature — the Hutterian Brethren and the Hasidic Jews — but law reads the fact of settling together on territory as a group as cultural first. It adjudicates their religious beliefs and practices but this is always against the backdrop of community. Indeed, it is law's intersection and image of culture that lies at the root of its issues with groupness at the sub-national level.

The work of scale has been to press group difference down. By this, I mean that it is very difficult to become a state in the international legal order or to be legally protected as a group in the national legal order. So, invariably, groups end up where they live, claiming individual rights. Boaventura de Sousa Santos described how similar instances are sorted through scales to appear different in kind, and this is undoubtedly true of groups. Scale makes it hard to think of enclaves and states as the same at all. It is not that they are the same — they are not — but that they share characteristics in common that make them confusing for the law. The fact that the jurisdictional scales operate together, simultaneously perceiving and sorting into legal fields and categories, means the nation is always also operating here. The nature of the nation – as having already decided the terms of inclusion/exclusion and their boundaries – limits the rights and autonomy that can be extended. Jurisdiction is always constrained by the terms of the nation that literally embodies the legal threshold.

This is the root of law's anxiety about the group generally and the enclave in particular. The enclave occupies an uneasy place alongside but not inside of law. It exists in a realm where it needs neither the approval nor censure of law. The ability of people to settle together, to live together, to buy houses together, to build retail and service complexes together is nowhere regulated by law. To be clear, enclave members and their neighbourhoods are governed by a myriad of laws covering everything from zoning bylaws to property law to criminal law. They are not in any sense unregulated. They are, however, free to live and manifest their group identity in realms that law cannot reach on that basis– in retail stores and restaurants, in neighbourhoods and community centres. Stated differently, the law of groups in either its regulatory or enabling modes does not extend to the cultural enclave. The crucial distinction is this: law is necessary for some groups to live their group identity because it must condone or exempt its various aspects; for enclaves, the conduct of group life is generally outside of the terms of laws about the group. Law apprehends this as making the enclave fundamentally ungovernable.

This sense that enclaves are unregulated by law joins up with the jurisprudential insight about groups seeking the right not to belong. The demand of a schoolboy to wear a kirpan inside of his clothing is discursively linked to enclaves; the media reads the fact of territorial group difference as empowering for groups and disempowering for the state.[197] The enclave comes to present as a symbol of belonging to some other entity. Indeed, this interpretation is one way to understand the different results in *Rosenberg* and *Hutterian Brethren*: the eruv was a request to live more like the mainstream, both in terms of equality and behaviours, while the driver's license exemption was a request to live differently.

5.6.3 From Individual to Collective and the Place of the Self

The foundational disarticulation of group difference in the liberal democratic state is philosophical. More precisely, it is about the sociology that undergirds philosophical theory. Alasdair MacIntyre once wrote that "a moral philosophy presupposes a sociology".[198] Frederick Cooper reminds us that the same is true of political theory.[199] The sociological ontology that underlies political theory is contested; this is the legacy of the communitarians and the liberal nationalists. Liberalism is individualist, communitarianism is groupist, and liberal nationalism is nationalist.[200] The terms of Canadian law manage to embody aspects of each, cobbling together a sociological ontology that is based on the primacy of individual rights-bearer, but which acknowledges a role for the group with respect to individual identity, and then locates the resulting amalgam inside the container of the nation-state. This core difficulty of group difference in law is most pronounced at the sub-national scale because this is where the law runs out for groups *as groups*, and so gaps and incommensurabilities are laid plain. This section briefly deconstructs the relationship between individual and group as it has been established and criticized in political theory. It tries to show how the slippage from individual to group has produced the tendency to treat groups as though they were individuals, and how this has left us with no workable modality for moving between them.

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[197] See the *Bouchard-Taylor Report*, arguing that, in Quebec, the *Multani* case "tinged the entire debate on accommodation in addition to discrediting the courts": Bouchard & Taylor, *supra* note 148.
[198] McIntyre, *supra* note 57 at 22.
[199] Frederick Cooper, *Colonialism in Question* (Berkeley: University of California Press, 2005).
[200] See: Rawls, *supra* note 48; Kymlicka, *supra* note 93; Raz, *supra* note 66; Taylor, *supra* note 57; Sandel, *supra* note 50; Miller, *supra* note 62; Tamir, *supra* note 59.

Liberal and other theorists have sought to describe the particularities of the relationship between the group and the individual as they matter for the self. This has coalesced around a revised philosophy of modern subjectivity, refocused on recognition and authenticity, contexts of choice, and webs of meaning.[201] It asks what we need for making a good life, how we develop our identities, and why they matter. Yet the debate about the constitution of the modern subject remains unresolved. Insofar as Charles Taylor's "politics of recognition" is about individual authenticity and recognition, it is a widely accepted theorization.[202] He eschews autonomy and neutrality in favour of authenticity and argues that identity formation is fundamentally dialogical. One of Taylor's many contributions was to make Georg Hegel's insight that individual identity was socially mediated into the basis of his vision of self-realization. The individual pursues her conception of the good, but this conception is never simply her own; it is always mediated by some community.[203] However, the precise nature of the individual's relationship to these ends differs based on school of thought: communitarians argue that individuals cannot "stand apart" from some of their ends, while liberal theorists such as Will Kymlicka counter that it is possible, albeit difficult, to revise one's ends.

Some of the confusion surrounding the relation between individual and group lies in the extrapolation of this insight to the category of the group. If the individual requires autonomy and recognition, then so does the group. Donald Horowitz describes how theorists equate individual autonomy with group autonomy, ultimately using individual autonomy as the basis for group self-determination.[204] He calls this a category mistake. Seyla Benhabib agrees with Taylor's intersubjective constitution of the self but she is less sure about its implications for politics. She argues that Taylor slides between individual and collective spheres:

> It is both theoretically wrong and politically dangerous to conflate the individual's search for the expression of his/her unique identity with politics of identity/difference. The theoretical mistake comes from the homology drawn between individual and collective claims, a homology facilitated by the ambiguities of the term *recognition*.[205]

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[201] Taylor, *supra* note 57; Kymlicka, *supra* note 93; Raz, *supra* note 66; Parekh, *supra* note 56.
[202] See: Taylor, *supra* note 57. Anthony Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction" in Amy Gutmann, ed, *Multiculturalism* (Princeton: Princeton University Press, 1994) 149.
[203] Binder, *supra* note 45 at 268.
[204] Donald Horowitz, "The Cracked Foundations of a Right to Secede" (2003) 14 J Democracy 5.
[205] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002) at 53.

This is not entirely fair to Taylor, though. The collective is already part of that individual; the preservation of the group is *for the individual*, not for the group itself. The preservation of the group is for personal self-realization. If individual identities are socially constituted, then political theory needs to contend with the social. The purpose of protecting groups is to protect the individual. This purpose is important because it locates the rationale in the individual. Throughout, the individual's self-realization remains the highly valued good.

Yet even with this gloss, there is still a pervasive tendency to run together individuals and groups. One way to understand this is to consider the difference between collective identities and social identities. Collective identity is a group characteristic – something that group members share. Groups differ from one another in terms of their collective identity. Social identity, on the other hand, is a characteristic of a person. It is part of that person's self and derives from the group memberships that she holds.[206] The point is that these are different – one treats the individual and the other treats the group – but they have been conflated. There is a distinction here between protecting cultural and religious identities in order that individuals may realize their authentic, autonomous selves and protecting such identities so that the collective group may be preserved. This distinction underwrites both theory and law, but it is often blurred.

This confusion over why the collective ought to be protected – for individual identity or for group preservation – is partly manifested in the treatment of groups as though they were individuals. The group becomes bounded and fixed, its complexities are flattened, and its difference is essentialized. The relationship between the individual and the collective remains unresolved. The precise priority to be assigned to the group to which the self belongs, and law's role in establishing and policing that priority, are persistent issues. What is less controversial is law's role there at all. Law adjudicates the social and jurisdiction adjudicates law's extension or retraction. Groups are a feature of the social. This gives jurisdiction a role in law's treatment of the collective, if only by revealing what visions reside there and how they are sorted at the jurisdictional limit. The constant conflict of rights opens jurisdictional space for considerations of the group.

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[206] Bert Klandermans, "Politicized Collective Identity: Collective Identity and Political Protest" (2005) 22 Advances in Group Processes 155.

5.7 Conclusion

It is here, at the end, that it is possible to see how the law is organized by what it excludes. It has wrestled all along with groups. For the group that does not take the form of the state, the available legal categories are limited. In Canada, the modes of these constitutional categories are primarily taxonomic and diagnostic, rather than analogical and graded. The group is largely left to law's individualist devices. Jurisdiction sorts territorial group difference according to the logics of each legal order. The international and national legal orders reach the group when there is a coincidence of territory-group-law. Law is organized along scales and ideologies which hold group difference at bay in the greater interest of the nation-state, holding out the necessity of its survival and its identity. And yet, the enclave pushes back.

The enclave represents a multi-dimensional conception of territory and space. It proclaims that this territory can *mean* differently for this group than for the province or the nation-state. It often reveals the foundational efforts of groups *not* to belong to the nation-state in some capacity. Group demands are claims to regulate themselves. Some enclaves constitute themselves outside of the paradigm of group rights, proclaiming themselves part of the alegal category of culture and the product of socioeconomic convenience in the same breadth. For all of these reasons, the enclave is a magnet for anxieties about the group and about the reach of law. This unease is about the place for groups in the larger polity and in comprising the "we" and the "us" that are required by the constructs of the inside/outside dichotomy, nation, democratic legitimacy, and liberalism. The buzzwords of "integration" and "societal cohesion" are about the terms of constituting the people. To the extent that those terms are legal, enclaves provoke anxiety because they suggest the existence of groups outside of those terms.

The sense of ungovernability that the enclave conveys – both of the group and of the polity – invokes again the founding moment. It repeats the question of 'who are the people', suggesting an even more radical answer than the national legal order. At its base, however, it is *ungovernability* because the group wants to govern some aspect of itself, and this is what makes it incommensurable. The jurisdictional lens reveals this contest of rule, but it does more than this. It gestures toward its political origins. Each extension of jurisdiction refers back to the constitution of the nation-state, its terms of inclusion and exclusion, its organizing ideologies, its legal commitments, and its conditions of change. It also underscores the public aspect of jurisdiction as an authority that emanates from the

state. Jurisdiction is an extension of statal power, but it meets the deep implications of legal pluralism in the enclave. The enclave presents an alternative corpus of rule, partial or whole, sometimes conflicting, other times overlapping, and this puts jurisdiction in its place.

This chapter has highlighted the mistake of group theory which has been to treat the group like the individual without realizing that groups are often sometimes seeking something entirely different — to *not* belong, to be exempt, to opt out — and that this points in a different direction. What emerges is a clear gap in which law needs the tools to understand complex and sometimes circumstantial solidarities and then to adjudicate them. This does not necessarily mean that more jurisdiction is the solution for groups, although that remains a possibility. After all, political theorists may not speak in the jurisdictional vernacular but it is often jurisdiction that they are discussing. Charles Taylor, for example, distinguishes between fundamental rights and cultural rights, suggesting that cultural second-order rights should fall to the jurisdictional purview of Quebec.[207] Will Kymlicka draws a line between liberal and illiberal practices, explaining that illiberal practices must not be permitted.[208] The group may enjoy a modicum of jurisdiction but liberal state jurisdiction must trump when those practices turn illiberal. Ayelet Shachar has proposed a joint governance approach in which jurisdiction is shared.[209] Jurisdiction, in other words, is all around us. We just need to think carefully about its politics for the group.

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[207] Taylor, *supra* note 57.
[208] Kymlicka, *supra* note 93.
[209] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

Chapter 6: Conclusion

We know of no people without names, no languages or cultures in which some manner of distinctions between self and other, we and they, are not made.[1]

In the end, this is the point: groups and group identities are a constitutive feature of social and individual life. How does the law contend with that fact? This project has suggested a framework of analysis for the relationship between groups and law that is based on jurisdiction. This permits attention to scale and thus to different legal orders. This framework directs our scrutiny to the threshold between law and non-law. It codes this as jurisdiction and it is this construct which keeps rigour in the frame. Jurisdiction is a particular notion of 'legal authority over' which incorporates the concept of the political. There are particular animating concepts of the jurisdictional threshold — territory, scale, nation-state — and these concepts give jurisdiction stakes and direction. The threshold can then be teased through different legal orders to see how they parcel out authority, how they constitute the limit of law, and how they regulate the group. This does not mean that there is no more work to be done; there may well be a way to further deconstruct the categories of law and non-law, there may be a conception of jurisdiction which unites scope and content in a unified framework, and there may be insight to be derived from a shift in focus to the plural legalities of the group. Nonetheless, this is an effort to provide a common jurisdictional vernacular for further conversations and these are some of its conclusions.

The first conclusion that emerges is that it is possible to understand the legal orders as expressions of the limits within which claims are or must be reconciled with sovereignty. Sovereignty here is the spatio-temporal articulation of political community. Theoretically, statehood, self-determination, constitutionalism, and rights are all mutually constitutive. Statehood is required before a constitution may be inaugurated; rights depend on the state for enforcement.[2] This is the historical and legal weight of the nation-state; it is a kind of meta-technology of jurisdiction to the extent that it is the form that hovers over jurisdictional machinations. In effect, the national is located inside every other scalar order. This is an extension of Saskia Sassen's original thesis that the international was often

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[1] Craig Calhoun, *Social Theory and the Politics of Identity* (Cambridge: Blackwell Publishers, 1994).
[2] This is a sweeping statement and it ignores the analysis of the European Union in the tenor of constitutionalism as well as the few supra-national human rights enforcement committees. As a blanket statement, however, it expresses the general state of affairs. See: Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1979).

located inside the national and thus the national was implicated in making the international.[3] In this project, territory carries some of the weight of the nation-state into other scales.

Territory is the most significant jurisdictional technology. It bears the concepts of bounded space, borders, peoples, and legal authority. Territory constructs the inside and outside and organizes and communicates authority such that it becomes the territory itself that controls. One particular mode of territory is to make territory *mean* differently in each scalar order. So, for example, if the enclave and the province and the state all claim Richmond, then there is a jurisdictional conflict. If, however, the enclave's territory is socio-economic land, while the province's territory is a political jurisdiction, and the state's territory is *territorium*, understood as the extent of its rule, then the meanings can fit together. Jurisdiction encounters the overlap by projecting scale onto territory, which tells which legal order governs the jurisdictional conflict. This intersection between territory and scale is a reminder of how constructs are mobilized. The project of putting these scales and territories into conversation with one another proves profoundly disruptive of legal thinking. It reconstitutes the group across various legal orders to reveal gaps and discontinuities.

Yet, jurisdiction is not only territorial. As we saw in the first chapter, it is also generic-conceptual. One of the sticking points of jurisdictional thinking has been its focus on forms of political territorial administrative jurisdiction such as electoral districts to the detriment of a broader conception of jurisdiction. Indeed, it is at least arguable that we are witnessing a rise in jurisdiction based on status, particularly in migration regimes, but that is a subject for another time. The larger point is that territory does not tell us everything about jurisdiction, but it does figure even when it is not explicitly at issue. So, for example, territory is in the background of most jurisdictional decisions as the placeholder for community or governance. It is helpful to think of territory as a verb; this adds political weight to the term. Once territory is conceived this way, it is possible to see how territory smuggles the political into every legal equivocation about jurisdiction. Jean Gottman suggested that territory's wider significance was that it signifies a distinction, indeed a separation, from other territories.[4] This is equally true of jurisdiction, which ends up reading the threshold as a series of distinctions – between statehood or not; between national minority groups and immigrant groups; between founding nations; between religion and culture.

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[3] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).
[4] Jean Gottman, *The Significance of Territory* (Charlottesville: University of Virginia Press, 1973).

What emerges initially from this project is a picture of bounded legal orders with their own rules. A closer look, however, reveals those orders to be fluid and the rules to be contested. Jurisdictional orders are at once separate and incommensurable *and* nested and mutually reliant. Everywhere, the overlap and mutual constitution of the international, national, and sub-national are apparent even while jurisdictional sorting prevents overt contradiction and incommensurability. There is no self-determination for the province of Alberta or the city of Brampton, and yet constitutionalism only makes sense in a bounded community and enclaves are only threatening when read against their location in the larger nation-state. This is the second insight of jurisdictional analysis: groups are governed by laws and philosophies that are further back than plain view. The legal threshold is not only about specific invocations of rights but also about whether this unit — these people — constitute a group at all. Indeed, this is the work that the political performs. The key query of the political is the eternal question of 'who are the people' and this turns out to orient all of the legal orders and each resolves the question in a different manner. The result of jurisdictional scale and technologies is to present the body politic as pre-political, as already constituted.

It is possible to read the case law for both its sorting function and the series of distinctions that it secures. Self-determination was for East Timor but not (yet) for Western Sahara, but there is consensus that they are both governed by the international legal order. Quebec, conversely, is denied secession by the national legal order, which renders a judgment which speaks to both the international and national legal orders. Yugoslavia is adjudicated by the international legal order according to constitutional rules and by constitutional jurists who ultimately make international law about transposing federal administrative borders into international ones. It is equally possible to read some jurisdictional technologies for their role in sorting out group difference. Without scale, the minority/majority designation that undergirds national constitutional minority rights is wildly incommensurable. Consider that French-speaking Quebeckers are a minority within in Canada but a majority within Quebec; Anglophones are a minority within Quebec but a majority within Canada; and Aboriginals are a minority within Quebec and within Canada. Jurisdictional scale, in other words, makes the minority by drawing the boundaries. Finally, it is possible to read aspirational norms such as accommodating diversity for their delimiting technologies. Diversity is the *raison d'être* of federalism and *Reference re Secession* may be read as an ode to Canada's constitutional

accommodation of difference. And yet, diversity is only for some groups — provinces and constitutional minorities — and not for others. In Canada, diversity has already been accommodated.

This is the third point: the incommensurability between legal orders means that they are supported by different logics. Self-determination as the logic of statehood is wholly incommensurable with the national legal order because it threatens the existence of the nation-state as a unit. That is why *Reference re Secession* was adjudicated by national constitutional law. The logic of constitutional minority exceptionalism in the national legal order is circumscribed to historical compromise and territorial concentration; otherwise, the exception would become the rule as minority groups claimed language and education rights. Finally, the logic of liberal multiculturalism is itself *sui generis* to the extent that it is meant for immigrant groups. It does not reach constitutional minorities or aspiring states. If it did, the result would fall somewhere between an exuberant celebration of universal groupism and a retreat to individualism. Indeed, once places become synonymous with the people within one, part of law's work has been to ensure that the right of self-determination of a group does not devolve infinitely.[5]

The contradictions and incommensurabilities are sometimes best viewed from the liminal cases, the ones that do not quite fit the logic or at least manage to push its boundaries. In the international order, there is Kosovo, an autonomous province, which has twice declared independence, and now stands between statehood and recognition. It literally inhabits the threshold between law and politics and between jurisdictional modes of self-determination or international territorial administration. In the national order, there are the Acadians, a distinct cultural group, aligned with one founding nation because of language but not territorially concentrated enough nor politicized enough to claim similar jurisdictional ground. They receive some constitutional recognition but their threshold is between legal enumeration and group at large. In the sub-state order, there is Richmond, a socio-cultural ethnic enclave, rarely implicated in law's machinations, yet discursively powerful as a site of difference. Its threshold is between law and non-law and between categories of difference (religion and culture). As the culture side of the equation, the enclave shows us the places where law cannot reach and comes to embody a sense of ungovernability.

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[5] Gerald E Frug, "The City as a Legal Concept" (1980) 93 Harv L Rev 1057 at 1106-7.

This ungovernability is not mere incompatibility; it is something deeper. It is the fact that new or different laws would be required to reach the enclave. This underwrites the fourth insight, which is that there is something about the nature of group claims which makes the liberal-democratic state uneasy, and this blurs the line between rights and sovereignty. Moreover, there is a common sense in which their claims aim toward self-rule. In the international legal order, this means they point toward statehood. In the national and sub-national legal order, it means they point away from their encompassing state. In *Strange Multiplicity*, James Tully argued that all types of identity claims could be subsumed under a broad notion of self-rule.[6] Of course, there are degrees and variations on the notion of self-rule itself, but, at bottom, he meant something like a measure of sovereignty and, since this is often enacted in the legal register, this in turn implied jurisdiction. The crux of this claim is for the group to exercise authority over themselves. It remains unclear if self-determination has enough content above and beyond UN institutions and power politics, or if constitutionalism can be more inclusive without revisiting the original terms of the constituent power, or if enclaves constitute a true threat to the liberal democratic state, but this characterization helps to explain why law encounters the group with such trepidation.

The fifth insight is that the jurisdictional threshold powers an analysis of limits that is richer than the inclusion/exclusion dynamic. It shows how law constitutes inclusion and exclusion, what their terms are, and how those terms play out in practice. And, while the jurisdictional limit always includes or excludes from law, it also performs other tasks that are not only about exclusion. It makes legal doctrine, defining the terms of statehood, constitutional exceptionalism, and religious territoriality. In so doing, this project reveals that part of what is required is a more robust analysis of legal exclusion. There has been significant work in recent years on borders and boundaries as sites of inclusion and exclusion, but this work does not tell us how the border may be more than the inclusion/exclusion paradigm or what else might live in the limit. Jurisdiction takes us some distance toward providing a richer set of insights about exclusion. Between jurisdictional technologies and the jurisdictional threshold, this framework takes exclusion beyond physicality and consequence and toward metaphor and stakes and direction.

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[6] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

Indeed, all of the concepts at issue in analyzing the relationship between law and group difference through jurisdiction share the common element of exclusion: identity, difference, group membership, law, legal categories, and legal techniques. The former are social forms of exclusion (this is the post-modern deconstructive notion that you know who you are by who you are not), while the latter are legal exclusions (the policing of categories and content). By using jurisdiction to hone in on the edge of both social and legal exclusions, we can see how they interpellate legal categories and identities. The social group that law addresses tends to look like the legal categories of group that it knows – *i.e.* nation, province, and constitutional minority. This is what hindered Western Sahara in the International Court of Justice: its form of sovereignty and political organization did not resemble the forms that law knew. Yet the legal can equally remake the social, reconceiving Quebec as a social and cultural group of French speakers, rather than a political or juridical unit.

The final insight of jurisdiction has to do with subjectivity, and this insight reaches the depths of this dissertation. Jurisdiction matters for legal subjectivity because it underwrites the terms of the modern legal subject in particular ways. This is both the value of the jurisdictional lens and the reason to pay attention to jurisdictional findings. Jurisdiction is legal and political, tied to legal precedent but beholden to political theory, and it is constrained by both of these forces. It enacts its subjects in relation to its own constitutive concepts of sovereign equality, statehood, and individual rights. When the subject is group difference, jurisdiction allows us to hone in on the decision that either constitutes the group as a legal subject or keeps it from such constitution. It allows us to read this decision for its loyalties and commitments, and, in so doing, the legal subjectivity of the group is revealed.

In a time when scholarship pits the unbundling of the state upwards, outwards, and inwards against the re-entrenchment of sovereignty, we should consider whether the sovereign residue that jurisdiction carries with it might also require unbundling; whether, in other words, jurisdiction's politics should be re-politicized. In a different context, Emilios Christodoulidis and Stephen Tierney characterize this project as "a redoubled effort to re-politicize that which has already been politicized as non-political; namely, as economic or juridical".[7] In the end, then, jurisdiction reveals as much about the politics of sovereignty and the reach of law as it does about the normative theoretical commitments of jurisdictional logics. The effort to re-politicize jurisdiction shifts attention from the

[7] Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008).

law of the group to the larger question of who has the jurisdiction to define and decide, and on what basis.

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