

BETWEEN CONSENTING PEOPLES



This volume has emerged from the work of the Consortium on Democratic Constitutionalism (Demcon), an interdisciplinary, international group of legal, political, and social theorists who work on questions of constitutional theory, design, and practice. Demcon takes the view that participatory and deliberative institutions – their structure and operation, not merely formal rights guarantees – are essential concerns of constitutionalism. Contributors are especially concerned with integrating issues of cultural difference into reflections on democratic constitutionalism – in particular, drawing on insights obtained from indigenous-nonindigenous relations.

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# **BETWEEN CONSENTING PEOPLES**

Political Community and the Meaning  
of Consent

Edited by Jeremy Webber and Colin M. Macleod



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This fine collection of essays is the first to emerge out of the activities of the Consortium on Democratic Constitutionalism (Demcon). Demcon is a loose, interdisciplinary, and international group of legal, political, and social theorists centred at the University of Victoria, who work on questions of constitutional theory, design, and practice. Demcon takes the view that participatory and deliberative institutions – their structure and operation, not merely formal rights guarantees – are essential concerns of constitutionalism. It is especially concerned with integrating issues of cultural difference into reflections on democratic constitutionalism – in particular, drawing on insights obtained from indigenous-nonindigenous relations. Demcon is committed to in-depth theoretical reflection on issues that form stumbling blocks to collaboration in diverse societies. It brings perspectives on these issues into the conversation – perspectives that have been formed in isolation from each other but that should be speaking to each other. More information about Demcon can be found at <http://www.law.uvic.ca/demcon/>.

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# INTRODUCTION





## The Meanings of Consent

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JEREMY WEBBER

Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people ...

The face of the earth is continually changing, by the increase of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes. Is there any thing discoverable in all these events but force and violence? Where is the mutual agreement or voluntary association so much talked of? ...

I maintain, that human affairs will never admit of this consent, seldom of the appearance of it; but that conquest or usurpation, that is, in plain terms, force, by dissolving the ancient governments, is the origin of almost all the new ones which were ever established in the world. And that in the few cases where consent may seem to have taken place, it was commonly so irregular, so confined, or so much intermixed either with fraud or violence, that it cannot have any great authority.<sup>1</sup>

Thus wrote the inveterate skeptic David Hume, in direct response to John Locke's claim that society was founded on contract or consent. His remarks introduce several themes that are crucial to this volume:

- First and most obviously, Hume attacks the idea that existing political communities are founded on consent. Political community is often said to derive from the consent of the people. Hume claims this idea is a myth. When we look at how real societies have been created, we see that they are founded on force, not consent.
- Hume refers directly to colonization, which was in full spate at the time he was writing. Colonization could hardly conform less to a model of free individuals coming together in a state of nature to create their own political society. On the contrary, colonization is marked by force, fraud, and imposition. Elements of agreement may be present (in the indigenous context, one might think of trade relations and the conclusion of treaties), but these are generally (to adapt Hume's language) intermixed either with fraud or violence, so that consent cannot have any great authority.
- The crucial role of force in the founding of political power is not confined to the colonial relationship. Hume makes very clear that he believes this is true of all political authority, in both European and non-European societies. All political authority is historically founded on force.
- But this does not mean that Hume believes all political authority to be illegitimate. On the contrary, toward the end of his essay, he advances his own justification for political authority, even when this authority finds its origin in force (I will note his views later in this chapter). His point is that the consent of the people, at least consent as it is understood by a social-contract theorist such as Locke, cannot be the foundation of legitimacy. That view is, Hume argues, manifestly inconsistent with humanity's experience of how polities are created and maintained.

This chapter and this volume take up the questions addressed by Hume – not, of course, in Hume's terms, but in a manner that broadly shares his skeptical approach to the claims of consent. They examine the adequacy of a simple contractarian conception of consent as the foundation of political community and explore alternative ways in which the commitments expressed in the language of consent might be better understood. This critical reflection is stimulated by, is informed by, juxtaposing political theories of consent with processes of cohesion and adherence within indigenous societies and in indigenous-nonindigenous relations. The juxtaposition prompts several lines of reflection.

One is represented by the issue with which Hume begins: Is the language of consent at all consistent with our experience? Does it capture the basis of

political authority in settler societies? For most if not all people concerned with indigenous relations, this question has an easy answer. At least for the period of colonization, all are likely to agree with Hume that the relationship was dominated by, or at least rapidly came to be dominated by, unilateral appropriation, coercion, and fraud. We might argue over whether this is still true in today's Canada. Some may claim that we are in the process of emancipating ourselves from the discrimination and domination of the past, although that would be a brave assertion: the magnitude of the dispossession, the force of its accomplishment, and its continuing impact make it hard even to imagine precisely how full emancipation might be accomplished. But I suspect that, if we confine ourselves to historical origins, few will claim that indigenous-nonindigenous relations in North America are founded on consent.

But then we come to the consequences of that observation. How can we make it better? Can we establish a fully legitimate political order in North America? Have we already done so? How will we know when we have done so? These questions all depend upon a clear sense of the basis of political legitimacy in any society and between societies. Should we be aiming for consent? Is that consent as Locke understood it, or should it be some other, more subtle idea?

This further set of theoretical questions forms the principal subject for this volume. It is prompted by the dual recognition that, first, we do tend to use the language of consent when dealing with issues of legitimacy, and we especially do so in the indigenous context. We speak of agreement, of treaty, of acceptance; we at least note when consent is lacking. But, second, we also realize that our ability to give consent – in any situation – is severely bounded by the circumstances in which we find ourselves. How can one transcend the consequences of the past so that one can give free assent, undistorted by past inequities or simply by the sedimented positions and expectations of past relations? What aspects of the past have to be reversed before a genuine reconciliation is possible?

Moreover, the very giving of consent seems to presuppose so much:

- The definition of an agent whose consent is required. According to Locke, it was each and every individual. Other theories presuppose some form of collective consent, but then the questions arise: What collectivity? having what boundaries and what rules of membership? making its decisions in what manner (majority vote? referendum?)? And why is *that* collectivity legitimate?

- The degree of concurrence required. Must the parties reach full agreement on an express set of principles? Or can the agreement be more amorphous, less explicit, more tolerant of divergent understandings – more of the nature of a *modus vivendi* than a written contract?
- The norms governing the giving of consent and the maintenance of agreements. Arguably, a measure of community – certainly a measure of trust – has to exist *before* agreements can be concluded. What conditions are necessary for that antecedent trust or community?

And even if the manifestation of one's consent is an essential part of any process of political legitimation, it may be a relatively small part. It may simply be the final step in a process of reflection about the nature of one's community and of its essential character. Moreover, one may not believe that one is free to agree to just anything. A sense that one has obligations to the commitments of one's society, to one's ancestors, or to one's posterity may strongly temper the ability to give consent, possibly to such a degree that the manifestation of one's will becomes a relatively minor (though perhaps still indispensable) part of the process.

The precise nature and content of the "consent" required are crucial and yet surprisingly elusive factors. The answers we give will determine what forms of reconciliation we seek, what counts as reconciliation, whether we already possess forms of community and institutions that we should consider legitimate, and what types of process we should employ to achieve reconciliation. *Between Consenting Peoples* is intended to illuminate these questions.

This chapter is designed to set the stage for that reflection. It first reviews a number of ways in which consent is invoked in nonindigenous political theory. These are surprisingly diverse, and coming to grips with that diversity will help to identify various alternative conceptions of consent and the wide range of values that different theories affirm. This survey will also suggest shortcomings in common theories of consent. The next section then suggests possible ways forward. It will briefly canvass an array of alternative theoretical conceptions that may capture what we value when we invoke consent but without the problems that afflict the simplest conceptions. This discussion will be schematic and speculative, really just an invitation to further reflection. But I hope that it will provide means for considering how the other chapters in this book might relate to the problematic of consent.

My chapter will not draw expressly on indigenous traditions; nor will it address in detail the context of indigenous issues (although from time to

time it will suggest challenges posed to the theories by that context). Others are much better placed than I to draw on indigenous traditions with subtlety, knowledge, and insight, not least Val Napoleon in Chapter 2 of this volume.<sup>2</sup> Rather, this introduction clarifies how consent has been marshalled in nonindigenous theorizing. An engagement with the indigenous context is nevertheless crucial to the theoretical agenda of the book. The theoretical issues are in one sense general. They deal with the nature of human societies, the relation of members to their societies, the claims that individuals and groups should be able to make on societies, and the foundation of legitimate public action. But actual societies are always particular: they spring from a specific historical experience, they draw on a particular culture. We can learn from comparisons across different societies. We may find that what is claimed to be universal is no such thing, and we may find analogies or commonalities that are unexpected and illuminating. This volume seeks to juxtapose just such experience with theoretical reflection.

There is particular reason to think that the indigenous context will be especially rich in such lessons, especially with respect to consent. Early European observers were often struck by the egalitarianism and individual liberty characteristic of many First Nations. They noted, for example, the great reluctance of many North American peoples to compel compliance with a particular decision or interpretation of a norm, and to rely instead on persuasion, the moral force of consensus, and the desire of all for honour, respect, and the benefits of community. To many observers, this approach looked very much like a reliance on consent.<sup>3</sup> Furthermore, the practice of treaty making appears at first sight to adopt contract as the basic mechanism for achieving order across societal boundaries.

The language of consent and agreement is very common in First Nations' arguments today. But there are also, in indigenous societies, practices and traditions that seem to cast a substantially different gloss on these elements. Even if indigenous societies do involve a more substantial degree of individual equality and liberty than was common in the European states of the colonial age, do members of First Nations believe that their societies are founded on the voluntary association of their individual members? How do they conceive of the importance of their particular traditions and the relationship between these traditions and individual agency? Is nationhood simply a matter of choice, or is it a matter of obligation and responsibility, perhaps founded on kinship? In the case of treaties, Robert Williams has masterfully explored the range of meanings associated with those agreements, some of which seem akin to contract, but others of which appear

very different. Williams uses the terms “sacred text” and “constitution” to capture two of those meanings.<sup>4</sup> There seems to be a complexity to the invocation of consent in indigenous societies comparable to but perhaps different from that in nonindigenous political theory. It may well be that nonindigenous readers will find, through the encounter with indigenous ideas of social order, intriguing ways of thinking about the elements of customary legality, tradition, reciprocity, voluntary adherence, and individual agency present in their own societies.<sup>5</sup>

The same is true of indigenous-nonindigenous relations. We now have a long history of indigenous-nonindigenous interaction, which has sometimes involved agreement and mutual accommodation. It has also given rise to oppression, conflict, epidemics, forced and sometimes voluntary acculturation, changes in ways of life and patterns of settlement, the development of mediating institutions, the emergence of practices, beliefs, and norms that were a synthesis of indigenous and nonindigenous forms, and a host of other features, negative and positive. That experience must hold important lessons for what constitutes acceptable social intercourse, the role of formal consent, the impact of informal processes of change, and the ability to create new political institutions that cross substantial cultural divides. It too should hold lessons about the nature, ambiguity, vagaries, and preconditions of political legitimacy. And there is real potential for feedback: achieving greater clarity on what makes for political legitimacy is likely to be extraordinarily useful in designing better processes for indigenous-nonindigenous interaction.

It will become clear over the course of this chapter that I share Hume’s skepticism toward consent as a realistic, achievable, even desirable foundation for political community, if consent is conceived as the unencumbered exercise of choice by individuals. But this chapter is by no means a diatribe against consent. There are reasons why that language has so much appeal. At the very least, consent forces us to strive for individuals’ and groups’ willing adherence to community; it is not content with the sheer imposition of political authority. It emphasizes that a measure of identification should exist between members and their societies. It draws our attention to the role of human agency in the constitution and preservation of political society. But the simple notion of consent as choice is too simplistic. It glosses over constraints. It neglects important preconditions. And it is not just incomplete: as deployed by liberal political theorists of the seventeenth and eighteenth centuries, it specifically rejected more amorphous and less explicit forms of “consent” embodied in traditions and practices – forms of consent that (it



will become clear) I believe to be inescapable. At the very least, then, additional complexity must be built back into our conception of consent. And we may well find that, in considering consent, we discover other concepts that more accurately capture what we are after.

But this is getting ahead of ourselves. We should first examine the different ways in which consent has been deployed in nonindigenous political theory.

### Consent: Meeting of Minds or Thought Experiment?

Ostensibly, consent is concerned with the relationship between members' subjectivity and political authority – a relationship that takes its clearest form when members say they have *chosen* a specific political arrangement. But it is important to realize that this subjectivity is not always present in consent theories. Often, the “consent” is purely hypothetical, purely the product of a thought experiment. The theorist has no interest in the actual exercise of members' wills or in mechanisms by which they might voluntarily adhere to the community. Rather, consent is entirely imputed. Consent is a trope – an analytical or rhetorical device designed to impose a particular discipline on the analysis. This is true, for example, of the use of the original position in John Rawls' *A Theory of Justice*.<sup>6</sup> Rawls makes no pretence that people actually meet in an original position to decide their social arrangements. This is solely a device to get us to focus on what would be a just order of society, given certain egalitarian and rationalistic assumptions.

In such thought experiments, the imputation of consent might take any of three forms:

- It might focus on what citizens *could* consent to. Here the trope is used to suggest why certain political arrangements would be tolerable within a political theory based on individualistic premises. It explores why individuals might be willing to give up some of their presumed natural freedom in order to achieve the benefits of society. It almost always concentrates primarily on limits to legitimate state action: in specifying what individuals might be expected to consent to, it also specifies what they would be entitled to reject as an unjustified imposition.
- The trope might focus on what citizens *should* consent to. Here, the concern is not just with what individuals have sufficient interest to consent to but also why they might have an obligation to do so. It concentrates not only on the role of the state but also on that of the citizen – on the possibility that members might owe normative obligations to their societies.

- Or the trope may focus on what citizens *would* consent to if asked. This comes closest to a concern with actual consent, for at least in theory it retains an emphasis on the members themselves. It is just that, in the absence of direct expressions of members' consent, it is willing to presume consent.

These are not pure types. It is possible to visualize them being blended, or to imagine (for example) the third slipping toward the first and second as the theorist neglects evidence of members' actual preferences and instead relies on his or her own presumptions. Indeed, I suspect that these three are blended in different proportions in most thought experiments. But in each case, one can see the particular way in which the language of consent would discipline the analysis.

What none of these thought experiments provide, however, is the actual engagement of members' wills.<sup>7</sup> They do not establish that the real physical human beings who make up the society give their consent to that social order, or even that they align their attitudes in any less explicit manner to that order. Indeed, in the first and second variants, their actual subjectivities are strictly irrelevant; the ability to consent (in the first) or the obligation to do so (in the second) are entirely imputed. In fact, these approaches rarely focus on fully rounded individuals in all their complexity. They usually employ an idealized, abstracted individual, pared down to certain essential characteristics. They have often been criticized for the presumption inherent in these abstractions, in which the theorist presumes that certain features are important to personhood and then works out what such a "person" would agree to, on the basis of an imputed standard of rationality.<sup>8</sup>

The criticisms have special force in the indigenous context. The presumed unit for the giving of consent in the thought experiments is the individual. How, then, does one deal with collective identity, group identification, culture? A number of expedients have been used to try to incorporate culture into the analysis, notably by treating culture as one good among others that individuals might choose, as an individual attribute of the members, or as a consideration that helps determine the range of options and criteria of evaluation available to the individual.<sup>9</sup> But do these adequately capture what it means to belong to a culture and how that belonging operates in the lives of its members?

Moreover, should one accept the theorists' imposition of a standard of rationality on the thought experiment? It is this standard that allows the theorist to determine what, in the absence of any actual human participants,

their decisions should be.<sup>10</sup> But what if there are material differences in forms of rationality? Or, to make the claim not quite so stark, what if there are material disagreements over the specific presumptions underlying the thought experiment, disagreements perhaps associated with different cultures? If such differences exist, the integrity of the thought experiment is substantially undermined. Or at least, its validity is no longer universal but is confined to those who accept the specific presuppositions on which the theorist relies, perhaps to members of a particular culture. This was, in fact, Rawls' ultimate conclusion with respect to the argument in *A Theory of Justice*.<sup>11</sup> I tend to be more hopeful than many about the possibility of normative conversation across cultural boundaries. But even if one shares that optimism, it is rank hubris to assume away, by definition, all possibility of cultural difference and simply impose one's own unmediated and often unquestioned standards of rationality. Surely it is better to conduct an actual conversation, with real interlocutors, and see what comes of it. One may come away with unimagined insights.

In any case, it is clear that, in the thought experiments, the foundation of political community is not consent at all, if consent means the actual engagement of the members' wills.<sup>12</sup> That might never exist, and it does not ultimately matter to the theory whether in fact it exists or not. Rather, the emphasis on the hypothetical possibility of consent conditions the theorist's argumentation, ensuring that, in justifying the political order, his or her focus remains squarely on the presumed welfare of the members of the society and that this concern extends to each and every member (so that each might be in a position to consent).<sup>13</sup> This is a real constraint, not a negligible one. It is in many ways laudable. But in the end, it says nothing about the desirable relationship between members' subjectivities and their political communities.

Even though the thought experiments eschew, at least in practice, all concern with the actual exercise of members' will to join in community, the appeal of the theories still derives, in large measure, from the mirage of consent. They still retain the language of consent, agreement, and contract. They still assert that citizens could/should/would consent to a community structured in the way they suggest. They still speak of deliberation and agreement, even if these are entirely notional. They try, in other words, to harness the legitimacy attaching to consent, even if they never actually ask members to express their wills. The rhetorical force of their justifications would not be as strong if they replaced the language of consent with an assertion of methodological individualism, pure and simple.<sup>14</sup> One of the reasons for this is that an abandonment of the language of consent would emphasize the

extent to which these theorists, in conducting their thought experiments, impute interests to individuals. The trope of consent allows the theorist to maintain the impression that the members remain fully responsible for determining their own interests and indicating their will. The trope cannot be abandoned without emphasizing that the theory depends upon a predetermined, an imputed, concept of the member and his or her true interests.

It is therefore worth taking the invocation of the will seriously and seeing to what extent a theory of political legitimacy might be built, not upon a thought experiment but upon a real concern with members' subjectivities. It is worth exploring, in other words, the potential for real consent theories, not disingenuous ones. To such theories, I now turn.

### **Political Theories Founded on Actual Consent**

I divide the theories into two categories: "liberal theories," in which individuals actually give their consent to their political arrangements, where the legitimacy of those arrangements rests, in other words, on the exercise of individuals' wills; and "communitarian theories," in which the "consent" is more amorphous, more grounded in practice or in history – not necessarily the product of a conscious, decisional exercise of the will.

These categories are to some extent misnomers, for even in the first of them, one might imagine the individuals binding their wills to any kind of polity, perhaps a profoundly illiberal one (as indeed, Thomas Hobbes imagined – although see David Dyzenhaus' contribution in Chapter 6 of this volume, which argues for a more liberal reading of Hobbes).<sup>15</sup> Indeed, "consent" has been invoked in support of just about any regime, often without making clear precisely what form of consent (if any) was in issue. Hume, for example, notes with irony that consent was invoked in support of absolutist government in France, and we can think of many authoritarian governments of our age that have claimed to rule with the will of the people.<sup>16</sup> The invocation of consent may mean simply that those in authority *want* to claim the allegiance of the society's members.

Nevertheless, the categories do have a certain logic. What I have called "liberal theories" ground political authority in a deliberate grant by the society's members, and they have generally employed the existence of that grant to argue for limited government and an obligation to respect individual rights. "Communitarian theories" see individuals and their communities as coexisting, as co-primordial if you will, and perceive "consent" as inhering in a particular relationship between them.

## Liberal Theories of Consent

### *Original Consent*

The paradigmatic form of consent in liberal theories is original consent, in which political society comes into existence by the free assent of its members. The “social contract” is one way of describing this original consent. Something like this notion was common to the Thomists’ conception of the foundation of political society, to Hobbes, to Locke, and to Rousseau.<sup>17</sup>

Ideally, all the individual members of society give their consent, so that all agree to be bound. However, the obvious impracticality of securing the concurrence of each and every person has meant that, in some theories, this is fudged, with consent attributed to a collectivity: the “community,” the “commonwealth,” or a majority of members.<sup>18</sup> But this leaves the theory suspended above the ground. Why should *this* collectivity bind dissenters? A further justification is needed to establish why this decision-making process is appropriate; the ultimate foundation for political community lies in that justification.<sup>19</sup> Locke, in contrast, keeps to the purity of the vision: the political community is established by *individual* consent (with individuals being seen as irreducible moral agents), and the community only subsequently makes its decisions by majority.<sup>20</sup>

A number of problems remain with this vision of original consent, at least if it is taken to be anything more than a fable. I will summarize them briefly, for the criticisms are common (and indeed, Hume cites most of them in the essay quoted earlier).<sup>21</sup>

Most importantly, what evidence exists for believing that there ever was, in any real society, an original contract of all members? As Hume says, history reveals that political authority has typically been acquired by force, and the citizenry has acquiesced in the new situation only gradually and over a very long period of time.<sup>22</sup> The government may be widely perceived as legitimate, but this is the result of a process of accommodation between citizenry and the new rulers after the fact, not of the events that brought those rulers to power. Nor is the analysis more promising in the case of revolutionary upheaval followed by a change in government (the situation that most closely approximates popular consent). In any real revolution, Hume says, only a small subset of the population is politically active, and the circumstances are generally much more confused, much more disordered, than the anodyne invocation of consent would suggest.<sup>23</sup> At the very most, the popular will is manifested by collective action, in which not all members

participate, and in which even those who do may well do so with a mixture of motives and objectives.

To cope with these problems, social-contract theorists generally locate the original contract far in the past, beyond the reach of recollection. But even if there was such a contract, many changes of sovereignty have subsequently occurred, often brought about by force or fraud. Why should today's government benefit from that original contract? And even if an unbroken line of descent does run from the first institutions to those of today, why should the citizens of today be bound by the consent of their remote ancestors? Any normative impact of that first consent becomes so attenuated that one might as well treat it as hypothetical. And this, in effect, is what most social-contract theorists do: their position collapses into that of the thought experimenters.

Even if one could imagine such a contract, would it, all on its own, be sufficient to bring society into existence? Doesn't the making of a contract, the giving of consent, depend upon practices in which people manifest their consent and in which they are expected to keep their word? Doesn't it depend upon a set of antecedent normative expectations as to how members should act? A society founded on consent cannot emerge directly from pure chaos but presupposes some measure of sociability. Williams talks about the processes of trust building necessary before parties could enter into treaties.<sup>24</sup> The argument might be generalized to cover all agreements. To some extent, a measure of community has to predate the institution of its formal structure.<sup>25</sup> But if this is so, shouldn't we be inquiring into the foundation of *that* community – the inchoate community that predates the formal giving of consent?

### *Tacit Consent*

In order to rescue the theory of original consent from many of its problems – especially the ambiguity as to whether original consent ever occurred and the problem of having ancestors bind their descendants – the concept of tacit consent has sometimes been invoked. Here, the argument is that fresh consent is being given now, people are adhering to the social contract now, through acts that manifest an intention to consent.

The problem is, what acts? Most of the acts commonly cited are ambiguous: there would be good reason to perform them quite apart from any desire to consent to political authority.<sup>26</sup> This is true of citizens' decision to remain within the state's territory (do they realistically have an option to leave?), their benefiting from the state's protection of their rights (can they

realistically reject that protection?), their voting in elections, or their receipt of public benefits (these are justified by simple prudence; they do not require any implicit acknowledgment that the government is legitimate). These acts may be relevant to citizens' sense of engagement in their society. We see these kinds of factors reappearing in communitarian forms of consent. But they do not manifest the deliberate grant of authority contemplated in liberal theories of consent.<sup>27</sup>

Because it is so hard to find definite evidence of tacit consent, some theorists have simply fallen back on prescription: governments have authority to rule simply because of long occupation of that role; the passage of time makes up for any lingering defects of consent.<sup>28</sup> But this amounts to an abandonment of the claim. The passage of time replaces any actual consent.

### **Communitarian Theories of Consent**

Significant difficulties, then, afflict liberal claims of consent. What about communitarian theories?

#### ***Group-Based Consent***

The first such theory effectively uses the same definition of consent as do liberal theories – the deliberate manifestation of assent – but it vests the power to give consent not in individuals but in collectivities. Thus, it is the entire nation, or the entire people, or the majority of a given constituency that gives consent, not each and every member. The giving of consent by a parliament, in the name of the whole people, might be a paradigmatic example.<sup>29</sup>

But as we saw above in the discussion of original consent, this simply drives the inquiry back one step to what gives *that* community the right to act conclusively on behalf of its members. The validity of the consent is entirely dependent on this prior theory of collectivities, one that explains why this community, expressing itself through these forms, is the appropriate agent to make this decision.<sup>30</sup> The underlying theory provides the ultimate standard for political legitimacy.

That imposes a substantial burden on the underlying theory, especially if there are contending definitions of the relevant community or substantial dissent within it. We see that stress especially in cases of secession, where collectivities that are taken for granted for many purposes are put severely into question when fundamental issues of political constitution are raised. Should Quebec be the appropriate collectivity for determining whether the province can secede from Canada? Or must First Nations give their consent? (And if so, what are the relevant First Nations? Do the James Bay Cree

vote as a unit, or do the communities of Chisasibi, Wemindji, and so on each vote separately?)<sup>31</sup> Does each municipality or each electoral riding get a separate say? And does the broader Canadian community have a right to participate? Does the Canadian government, in particular, have an obligation to support those residents of Quebec whose allegiance remains with Canada, residents of Quebec who rightly or wrongly see their liberties as dependent on the *Canadian Charter*, or First Nations whose historic relationship is with the Canadian Crown?

My purpose is not to undermine the ability of political communities to make collective decisions. Quite the contrary. My point is simply that the most fundamental questions of political legitimacy are unlikely to be resolved – at least not easily – by a straightforward appeal to a claimed right to consent vested in a particular government. That government's claims will be subjected to considerable stress. Its legitimacy for ordinary purposes may not carry over to the new, more consequential, set of issues. And dissenters are likely to insist much more vigorously on alternative definitions of community, or on mechanisms for involving the community as a whole, not merely its government. We see all those elements in treaty negotiations in indigenous communities. There are tensions between governments established under the *Indian Act* and traditional authorities. There are instances of contestation over the proper level at which to conduct negotiations (is the band the appropriate agent, or is some broader entity the nation?). Minorities have appealed to non-Aboriginal governments for protection of what they consider to be their interests. Membership disputes occur.<sup>32</sup> Nor are the tensions limited to the Aboriginal side. On the nonindigenous side as well, some citizens fiercely question the entitlement of their governments to consent to profound changes. The 2002 BC referendum on treaty negotiations was the result of just this kind of questioning.<sup>33</sup> On both sides, the tensions have led to the creation of special mechanisms of consultation and decision, notably to the use of referendums.

The simple giving of consent, in other words, has tended to become the least of the issues, with the argument over legitimacy digging much more deeply into the essence and dimensions of the political community, its relationship to its members, and its institutions' entitlement to act for certain purposes in certain ways. The giving of consent may remain an indispensable act, but it has become the final formality in a much broader and more extensive process, extending well beyond a simple determination of the collective will.



*Agreement Extended in Time and Place*

But there are also ways in which the broader sense of collective identity has been conceived in terms of consent. Like liberals, communitarians have employed the idea of consent to capture individual members' attachment to their most cherished collectivities.

One such approach is that of the eighteenth-century British parliamentarian Edmund Burke. He certainly uses the language of consent. He describes the constitution as the "engagement and pact of society"; he presumes that the bonds of political society are based on "agreement," that civil society is "the offspring of convention," and that a member of society is "covenanted."<sup>34</sup> But he does not see this agreement as flowing from the unencumbered will of the present members. In his view, society operates within a longer horizon. Some of its accomplishments can be attained only over generations. The wisdom embodied in society surpasses that available to an individual member of the present generation. Burke therefore conceives of society as

a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primaevial contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and moral natures, each in their appointed place.<sup>35</sup>

Burke shifts the emphasis, then, from the members' exercise of will at a particular point in time to participation in a long-term "partnership" of mutual (though asymmetrical) obligation. Members participate in a grand order, so grand that it escapes the will of today's members and indeed, in Burke's view, assumes the supernatural dimensions to which he alludes in the latter part of the quotation. It is a relationship of interdependency, akin to contract but fixed by powers outside the members' immediate control: derived from the actions of past generations, extending to the activities of future generations, all under the guidance of a divine providence. The Biblical covenant is perhaps the best analogy.<sup>36</sup>

But, then, what reality can one give to the language of consent? Clearly his is a very different sort of "consent" from that envisaged by the liberal exercise of the will. It is much more bounded, much more encumbered by

obligations extending well beyond what one has voluntarily assumed. But I think there are at least three ways in which Burke's vision does capture elements associated with the idea of agreement. First, the member's relationship to his or her society is characterized by mutual obligation (although the obligations are not merely the product of mutual willing). Second, Burke cares about the member's subjective adherence to this constitution. He wants members to recognize a "principle of attachment" that is more than "a sense of present expediency." Indeed, Burke believes that this sense of obligation should be one of constancy and duration, not renounceable at will.<sup>37</sup> And third, the obligations are not simply imposed but are the product of human action within a particular society (under divine providence). They are not, then, simply the terms of a primeval contract imposed on humanity but, as he says, a clause within it, particular to the nation's distinctive experience. In that sense, they are the product of the society itself, of the actions of its members through time.

### *Consent Embodied in Tradition, Custom, and Usage*

Burke's view therefore shades into the next, in which consent is taken to be embodied in tradition, custom, or usage. In this conception, agreement is to be found not so much in deliberate expressions of assent but in consonance – in a sharing of a common set of commitments or a common language, even if that sharing does not result from a deliberate act of the will. As James Tully says, referring to the adoption of culturally specific ways of talking about the constitution of a society,

The agreement in judgements is "customary" or "conventional" in the sense that the discussants do not explicitly agree to use these terms in such and such a way but, rather, that their explicit and reflexive agreements and disagreements rest on this implicit agreement in usage.<sup>38</sup>

That "agreement" may flow from the members internalizing the particular terms in which participants in the society have conceived of the relationship between individual and community, formulated political objectives, evaluated social behaviour, and pursued common projects. It may, then, draw on the expressly communicative dimensions of human activity. It may also emerge implicitly from engagement in the society's practices. This form of agreement is not the result of sheer circumstance. Reason is inevitably involved in adjusting to others, coordinating expectations and actions, reflecting upon the

society's practices, and identifying their salient features.<sup>39</sup> But there is no centralized determination of the understandings, no canonical declaration of the agreement's terms. Rather, those terms continually emerge from acculturation and parcellized reflection, widely distributed among individuals in society, with no single individual having an exhaustive picture of the whole. Experience is, in a sense, primary. Participants attempt to derive and reinstitute lessons based on that experience.

Gerald Postema's account of the early common lawyers' conception of legal reasoning conforms to this model. The common lawyers saw rules of conduct as being implicit in long-established and stable social practices. Their purpose was to reflect on those practices, tease out those standards, and apply them. Participants were taken to have consented to those rules by their engagement in the practice. Their very participation was premised on their acceptance of the standards – not in the sense that they consciously consented to them (as in the liberal notion of tacit consent) but rather that they could not have participated without observing them. As Postema summarizes Matthew Hale's position, "Consent is evidenced in, indeed constituted by, long usage, and long usage becomes part of the constitution of the people, a constitution defining the reciprocal relation between people and government."<sup>40</sup>

This conception of agreement differs markedly from that in the liberal theories of consent. Agreement tends to be implicit, not explicit. It is grounded in historical practices – indeed, to such an extent that the terms of the agreement largely escape the exercise of today's members' wills. The members can adhere to those terms. They can accept them. But they can generally change them only incrementally, almost imperceptibly, by changing their patterns of action, jointly with others, over a long period of time. There is still a role for more direct and deliberate action through, for example, the enactment of statutes. But even those enactments take effect within a much broader web of norms of customary origin.<sup>41</sup>

The two conceptions of consent cannot coexist without some friction. Indeed, the liberal conception – consent as relying solely on the exercise of the will – was intended in part to break this hold of tradition and to make individuals' wills, not the legacy of the past, the basis for legitimacy.<sup>42</sup> But one can't help wondering whether the customary vision of consent is more appropriate to the constitution and the reconstitution of political society, especially given the dependence of more explicit forms of consent on a pre-existing set of normative assumptions, on a pre-existing sense of normative

community. And one wonders too whether it is more consonant with indigenous conceptions of political legitimacy, based as they are in a sense of obligation grounded in tradition.

The nagging problem with these conceptions is whether, in them, the members' subjective assent is just as imputed – ultimately, just as much a myth – as it is in the liberal social contract. These conceptions all invoke features we associate with consent: concurrence, mutual obligation, production through human interaction. But is this enough to justify the use of consensual language? In particular, does the members' subjective concurrence play any active role, or is it (like the liberal citizen's consent) wholly presumed?

Burke's image of an intergenerational partnership deliberately employs the language of myth, and one is prompted to ask, "How does one assume those obligations?" Is Burke simply asserting that they exist, using the language of agreement as a metaphysical sleight of hand? Doesn't the cosmic contract exist, for Burke, quite independently of any actual member's assent? The common lawyers' conception of participation in a practice is much less obviously mythological, but in what sense do members of society "agree" to its customs? Is the subjective identification merely presumed from participation, without any inquiry into members' actual states of mind? One's suspicions are reinforced by the inherent conservatism of these theories. They seem to project the existing order of social relations back onto the individual members, claiming their acceptance, perhaps without allowing them any meaningful opportunity to change them. Now, there may well be ways to address these conundrums (as indeed Tully suggests in Chapter 9 of this volume). But those ways have to take us beyond the simple claim that consent is inherent in a tradition or practice.

### **The Terms of Consent**

Thus far I have focused on who gives consent and how. But even if one accepts that societies should be founded on some form of agreement, what depth of agreement is necessary, with respect to what subjects? Consent theories are often profoundly ambiguous here, with the ambiguity occurring along at least three axes. Depending on the position taken on these matters, the kind of adherence required and the ultimate nature of the polity will be very different indeed.

The first axis concerns the object of the agreement: Upon what precisely should members agree? The most rudimentary focus of agreement would be

to the mere fact that one forms a political community, without the members having to consent to any procedures or substantive norms. The members would simply agree to treat their lot as common, come what may. Such an agreement, if it existed, would surely render the community legitimate in the eyes of its members, although the agreement would not fulfill the function served by most liberal theories of consent: it would not provide a rationale for limiting government. This rudimentary form of consent is most consistent with communitarian theories that see members' attachment to their communities as primordial, as preceding any conception of rights or constitutionalism. That feature of communitarian theories – the emphasis upon the prior existence of communities, to which members belong regardless of consent – has often formed the basis for a vehement critique on the grounds that the theories simply subject the interests of the individual to those of the collectivity. But this is a simplification. For one thing, communitarian theorists may still see rights as profoundly important. It is just that those rights can be created only after the community has come into being; they are premised on the existence of community.<sup>43</sup> Moreover, although many such theories do see attachment to community as primordial – as being, to some extent, independent of the will of the members – it is too simple to treat this as effacing the individual, for the member's sense of attachment is always to a specific community, with a particular character. The member is attached to that community precisely because his or her identity is aligned with, formed by, or embedded within that character. This attachment may be unconditional in the sense that a member has not made a conscious decision to bind him- or herself to certain terms, but it is nevertheless premised on a distinct subjective relationship between that member and society. That relationship may take the place of the liberal's consent. It is that underlying affinity on which Andrée Boisselle focuses in Chapter 8.

Some theorists within the liberal tradition conceive of the object of consent in a fashion that is almost as rudimentary as the one just sketched. Indeed, in these theories, the relationship of citizen to community may be even more rudimentary, since they do not require the subjective identification that most communitarian theories presume. Hobbes, for example, appears to limit the citizen's consent to the mere act of instituting a sovereign capable of maintaining order.<sup>44</sup> Any effective sovereign, even if harsh and unyielding, would appear to benefit from Hobbes' presumption of consent. Hans Kelsen's constitutional *grundnorm* – the simple postulate that a particular

legal order is valid – might similarly serve as a rudimentary object of consent, although Kelsen himself claimed that the *grundnorm* was simply a logical presupposition of any legal system, not that it was the result of consent.<sup>45</sup>

But one can see how, within a liberal frame, it will be difficult to limit the presumed object of agreement to such a minimal level. If one imagines that political community is formed by the future members' agreement in a state of nature, with all individuals deciding whether it is in their interest to subject themselves to the proposed sovereign, the theorist will very likely feel compelled to describe the kind of sovereign that such an individual could support. The theorist will identify the necessary attributes of such a sovereign – which, in the case of a government of any complexity, will mean specifying at least some decision-making procedures, jurisdictions, and perhaps even the fundamental norms that government must observe. One sees the beginning of that tendency even in Hobbes, in the institutional content he sometimes builds into his idea of order and in his affirmation that natural rights lie at the foundation of society. In Chapter 6, David Dyzenhaus exploits those paths in his interpretation of Hobbes as a political liberal. Many liberal theories follow this logic to treat the entire structure of government, or at least salient aspects of it, as the necessary object of each citizen's consent. Rawls, for example, considers that his hypothetical agreement should extend to the principles of justice that regulate the basic structure of society, including the legally recognized forms of property, the organization of the economy, and the nature of the family.<sup>46</sup>

Indeed, why should one stop at the constitutional order? If one wants to justify governmental action to individuals, one really wants to justify the laws that constrain their actions. This may mean that the necessary object of consent becomes every single law, especially if one doubts the ability to create a legislative structure that is sufficiently legitimate to impose laws on those who disagree. Indeed, some modern consent theories appear to take the entire body of the laws as the object of consent.<sup>47</sup> In his influential reformulation of a consent theory, Jürgen Habermas does not perhaps go this far, but he certainly comes close: he takes the position that persons' relations should be governed by norms that respect conditions of validity, and he lays down this principle: "Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse."<sup>48</sup>

But here is the rub: The broader the scope of the agreement required, the more the theorist is likely to fall back on forms of deemed consent – of consent that is attributed, not actual – because members manifestly do not

concur on questions of governmental structure and legislative action. The more expansive the object of consent, the less real that consent becomes. These theorists therefore limit their arguments to establishing what any member could agree to (on the theorist's best understanding of individuals' interests), or to establishing a set of principles that any member should agree to, deriving the set of acceptable laws from those principles. This "agreement" is then used to determine the limits beyond which no government should be permitted to go. In the case of democratic governments, this has the paradoxical effect of restricting citizens' actual capacity to make decisions on the basis of a prior, but entirely fictional, consent. Moreover, the theory can have more pernicious consequences. It can justify the reconstruction of societies and of individuals so that they conform to the theorist's preferred principles of government. "Consent" can be a cover for imposed, not responsive, government. At the very least, such a theory misstates the grounds for the legitimacy of such reconstructive government action. This can be a particular problem for indigenous people, forced into ways of life and forms of community organization that are far from their own, all on the basis of interests that are attributed to them, not actually held by them. In Chapter 4, Tim Rowse forces us to attend to the imposed object of an imposed consent.

The second axis concerns the degree of concurrence required. Does agreement mean full subjective concurrence of all those involved? Or does it mean an acceptable trade-off, a compromise? In daily life, contracts generally take the latter form, each party giving up something in order to reach agreement. We haggle over the way in which we will pursue a particular objective, making concessions to our collaborators, as long as we get enough of what we take to be important. The same is true in social orders founded on negotiation, or on the kind of deliberation and acquiescence described by Val Napoleon in Chapter 2.<sup>49</sup> Consent theories, on the other hand, generally apply a much more demanding standard, where government must be based on some rich form of subjective concurrence. The implicit question posed in these theories is, "Does each individual, in his or her own mind, accept this principle (or have reason to accept it)?" rather than "Does each individual see this as an acceptable term in a negotiated arrangement?" The focus on substantive concurrence is almost inevitable when one is dealing with deemed consent, because there is no real negotiation among individuals out of which trade-offs might emerge. All the theorist can do is postulate individuals, having particular interests, who might concur on a range of matters.

The net effect of this slippage in consent theories is ambiguity as to both the presumed basis of political community – is it a working relationship among diverse individuals, or is it the product of a rich and substantive normative solidarity? – and the level of concurrence required to found the community. The political theories of Hobbes and Locke do contemplate an exchange – individuals give up their natural liberty in order to secure the benefits of society – although even here the fact that the individuals are imagined means that their actions are a stylized portrait of agreement, rather than a true bargain. Most contemporary theorists, however, veer toward substantive solidarity, with the result that either the permissible scope of governmental decision making is greatly restricted or (more often) citizens are deemed to have given their wholehearted consent to arrangements that are controversial in any actual society.

Finally, the third axis concerns the status of the vision of society arrived at through consent. Is that vision an essential condition for the legitimacy of political society, or is it an ideal to which a society should aspire but will probably never achieve? Or, to put it more concretely, is it necessary that a society conform to Rawls' stipulations in *A Theory of Justice* for Rawlsians to believe it is legitimate, or does the theory present an ideally just society – a model at which we should aim but where the ultimate legitimacy of the society does not depend upon its attainment? Most theories speak as though they are setting out the basic conditions for governmental legitimacy (indeed, the very invocation of consent suggests this is what they are doing), but their stipulations are much more appropriate as an aspiration. It is hard to imagine any society consistently meeting them.<sup>50</sup> But if that is so, how seriously should we take their claims to set out the foundation of all legitimate political community?

### Possible Ways Forward

Serious challenges, then, afflict theories that purport to ground the legitimacy of political communities in consent. In Chapter 5, Margaret Moore canvasses these problems and explores alternative resources that exist within the liberal tradition for establishing legitimacy, finding that they too have difficulty addressing the situation of indigenous peoples. In this section, I want to suggest some potential ways of reconceiving consent – ways of understanding the basis of political community that capture the concern with members' subjectivity inherent in consent but do so in a fashion that is more compelling than contractarian theories.



It should first be noted that there are, of course, radical alternatives to the language of consent. Collectivities can be treated as naturally given or as metaphysically ordained, without requiring further discussion or justification. They can be seen as existing by virtue of considerations quite apart from the desires or wishes of their members, so that their legitimacy does not depend, in any respect, on the subjective attitudes and allegiances of their members. I will not pursue such radical alternatives here. The language of consent is popular precisely because it is widely accepted that political legitimacy does involve, in some measure, the will or adherence of the community's members. Even if there is broader metaphysical significance to our communities, that significance is articulated by the human beings who make up the community; those people are the interpreters of the metaphysical vision, and ultimately they must resolve any disagreements over the nature and purpose of their communities. Even if the metaphysical conceptions are crucially important to the self-understanding of the community's members, they are mediated through those members. Some conception of subjective attachment, adherence, or concurrence of members to their political communities therefore remains inescapable. The essential problem is how to characterize the kind of subjective adherence required – What is its character? How should it be manifested? How is it produced?

When I look back at the diverse ways in which consent is invoked, it strikes me that a large part of the challenge may be due to the error of treating it as a single entity: “consent” as a matter of engaging one's will, at a particular point in time on a particular proposition, with little external constraint; “consent” as making a choice. Some uses of “agreement” or “convention” involve no such choice but instead presuppose a continuing relationship, in which members are attached to their community without ever having “chosen” to be attached (as we have seen in conceptions of consent grounded in a tradition or practice). In still other uses, “contract” or “agreement” may be deployed entirely metaphorically, without any intention to describe the subjective attachment of the members but where the outcome shares some characteristics with contracts (such as mutuality of obligation, but where the obligations are imposed, not assumed).

This diversity of ways in which consent is deployed raises the possibility that consent might usefully be disaggregated. We may tease from it a range of values – diverse kinds of subjective connection between members and their communities, which are often cumulated under the label “consent” and thereby confused or masked from view. We may be able to make better

sense of its principal values – the values that drive us to rely upon consent even when some of its most salient aspects (such as the deliberate exercise of the will) are manifestly inapplicable – if we pull these apart. The following list attempts to do this, at least as a first approximation.

The different forms of subjective attachment in the list should not be conceived as strict alternatives. I suspect that, in most societies, several operate simultaneously, perhaps connected to different aspects of community. They represent a menu of ways in which the relationship of political communities to their members can be understood. That relationship is often consolidated and deepened by initiatives that foster several of these forms of attachment simultaneously. In the eyes of its citizens, the legitimacy of the political order is not an on-off affair, crystallized in a moment in time by an act of adherence. It is a matter of degree, so that one can speak intelligibly of a political order having greater or lesser legitimacy. Moreover, the kind of connection we associate with consent can be intensified (or it can atrophy) over time. Consent therefore becomes a process, a project, seeking to bring the political community into stronger relationship with its members, along the lines of the initiatives in consent building that James Tully advocates in Chapter 9.

In the list below, the elements at the beginning provide the foundational reasons for citizens to acquiesce in a wide range of tolerable orders. But well-governed polities would rarely aspire only to acquiescence. Instead, they reach for the more demanding forms of approval that appear later in the list. One should be careful not to think of the later items as being necessarily higher forms of consent, so that there is a rising gradient from start to finish. The later items are placed at the end because they are closer to classic formulations of consent. But for that very reason, they may be less apt in explaining the complex processes by which people relate to their communities. Moreover, some of the items in this list are more consistent with liberal theories, whereas others are more reflective of communitarian conceptions of belonging. They are not, then, necessarily combinable in a single consistent theory of political legitimacy. Nevertheless, one would not want to exaggerate their incompatibility. The lines between liberal and communitarian theories have become blurred in recent treatments of cultural difference. And of course, real-world institutions can satisfy multiple theories of legitimacy.

“Consent” is often used, then, to refer to any of the following types of subjective relationship:

- 1 A sense of passive acceptance, where one merely acquiesces in membership. At its most basic level, this may come down to a simple calculation that the costs of opting out – the costs of rebellion or emigration – outweigh those of remaining.
- 2 A sense of identification with the community's institutions – an acceptance, by the member, that those institutions are "mine," even if they are in no sense chosen or willed. At its most basic level, this identification may simply be the result of immersion or familiarity: one was born into a society and raised within those institutions; those are the only institutions one knows. In this form of subjectivity, the direction of causation may be ambiguous: Is the institutional context mine because I have accepted it (is it mine because I have willingly embraced it)? Or have I accepted it because it is mine?
- 3 A sense of commonality, of shared subjectivity, with a group as a whole. Here, the sense of identification is not merely between individual and institutions, but communal: one considers oneself to be a member of a group that together has certain characteristics, certain institutions. The sense of attachment is joined to a sense of solidarity. Most forms of nationalism, other than a purely civic nationalism (and indeed, probably many versions of civic nationalism), have this character.
- 4 Sometimes this sharing is conceived in terms of mutual obligation, even if this obligation does not flow from an exercise of one's will. Here the distinctive language of contract begins to have some purchase. Burke's idea of the member's insertion in a web of mutual obligation is of this kind.
- 5 Sometimes one's attachment is crystallized or completed by a conscious act of assent but where that assent is to something to which one was, in a sense, already attached, without any real possibility of alternative choices. Here, the act of assent is best analogized to a process of initiation into a community or a church, an act of covenant or confirmation, an oath of fealty. The integrity of this notion does not depend upon the member having a choice among different options. The act of assent simply serves to make a particular allegiance "one's own."
- 6 A sense of agency within the community's institutions. Here, the engagement of the member's will in his or her community occurs continually, not through choosing the community or giving tacit consent to it but by participating in the determination of the community's future direction. This form of subjective engagement comes down, then, to a notion of collective self-determination.

- 7 The choosing of one's community, ideally from among a wide range of options and with little constraint, so that the choice is as "free" as possible. Here, one is dealing with a one-time choice, not a continual process of engagement; and the range of choices is usually given, not the product of one's own will. The decision to immigrate is perhaps the best example, although even then, most real-world decisions to immigrate are subject to severe constraints.
- 8 The coincidence of free and unencumbered choosing among different individuals, who together fashion their new community by a joint exercise of their wills. This is the social contract in its purest form, where the community comes into being through the meeting of minds that occurs in contract.

All of these are, I hope, resonant of different invocations of consent in political theory. Their diversity is apparent. Some focus on the conscious agency of the individual member. Some allow for a more passive form of identification, although in all cases, there is some element of subjective adherence. Most also have an intersubjective dimension, but they often conceive that dimension in different ways – frequently in ways that have little to do with the juridical notion of contract as the coincident exercise of wills.

A common problem concerns the relationship between the sense of commonality and individual agency.<sup>51</sup> Indeed, the different conceptions often diverge over how they construct this relationship. In some, the sense of commonality is inherited without any necessary exercise of will. In others, the exercise of will is very much encumbered by one's inheritance (by one's prior socialization, by the options that are realistically available). Only in the last one is the exercise of will taken to be independent and self-sufficient – and in it, there is a valid question about how realistic the presumption of self-sufficiency is.

One way of reconstructing the problem of consent, then, is to ask how one might better understand the dynamic relationship between members' agency and commonality. In the remainder of this chapter, I will briefly review a number of lines of inquiry that may provide more adequate ways of understanding "consent." These are not strict alternatives. It would be possible to combine them or to use them as starting points for more profound inquiries. At least in comparison to social-contract theory, some of them (especially the third and fourth) seem to offer much more promising tools for conducting a dialogue in the indigenous context or to be more compatible with indigenous conceptions of belonging.

### **Consent as Justified Acquiescence**

Before we address more satisfying possibilities, it may be worth acknowledging the importance of the rudimentary notion at the start of the list above – the item that envisages the minimal acquiescence of members in political institutions.

This is Hobbes' argument that some social order is better than none, and that individuals have an interest in putting up with virtually any such order, regardless of its characteristics, as long as that order provides some security against chaos.<sup>52</sup> Hume too adopts this justification for political authority in the essay quoted at the head of this chapter.<sup>53</sup> It essentially comes down to the argument that the cost to individuals of revolutionary upheaval is so severe that they have an interest in acquiescing in established political authority, no matter what their ideal political order might be. Stated this baldly, it is a sour and uninviting conception of political legitimacy, consoling to those in power but bitter to others. And yet it does seem to have some descriptive force: there certainly have been situations in which subjected individuals and groups have made precisely this kind of calculation. Indeed, one might argue that the task of reconciliation between indigenous and non-indigenous people is precisely about moving from this kind of acquiescence to something more positive.

Now, I certainly don't think this provides an adequate conception of political legitimacy, and indeed, the balance of this chapter is about what one should aim for in addition. But I do think this elementary vision plays a more constructive role than might at first appear. It suggests why there is a measure of tolerance, a measure of play, in the demands people make of their communities. It suggests why people may retain their support for a certain political organization, even though that organization does not accord, in all respects, with their own opinions. They do so because, within limits, some such community is better than none.<sup>54</sup>

That insight is important in providing the basis for society in an imperfect and pluralistic world.<sup>55</sup> In such a world, one is never going to achieve the kind of consent contemplated in social-contract theories: wholehearted subscription, by each and every citizen, to each and every tenet of the constitution (or the utterly implausible alternative, assent to each and every law). The measure of agreement is likely to be much rougher and readier – a willingness to go along, because on balance the political organization is more positive than negative. One wants that balance to be as positive as possible. The rest of this section is about how one might achieve that. But the criterion of success is not and cannot be that everyone, at the

end of the day, accepts the same vision of society. That degree of consent is inconceivable.

### **Consent through Democratic Participation and Deliberation**

This approach to consent picks up on the sixth form of subjective connection in the list above. Rather than considering that members' agency is exercised once, when they decide to join a society, it treats agency as continually engaged, as citizens participate in the process of making and remaking their society. They may never give the kind of consent contemplated in social-contract theory: they may never have an opportunity to opt between belonging to the society and not belonging. But they do have a role in the determination of their future.

This approach leads into the rich body of theory on democratic participation and deliberation. I will not discuss that literature in detail here but simply note one challenge that arises specifically in the indigenous-nonindigenous context. Most democratic theory focuses on decision making within a given political community. It tends to say little about how the boundaries of a political community should be determined or about how negotiations should be conducted across those boundaries, yet these are the crucial questions in indigenous-nonindigenous relations. To address them, a separate theory of national or cultural identity is required. Democratic theory alone may not, then, provide much help. It kicks in only once the unit of decision making has been determined.

There is much in that objection. A theory of democratic decision making does have to be complemented by reflection upon what makes a political community and what decision making should be exercised by different communities. But I wonder about treating democratic decision making as being purely and simply dependent on a prior determination of the constituency. If there is legitimate room for argument about the configuration of political communities – what matters should be determined at an international level? what at a local level? should some matters be determined by majority, others by consensus? – *who* decides might become relatively less important and *how* one decides (the home territory of democratic theory) might become more important. Or to put the point in a slightly different way, it might be possible to finesse questions of final decision-making authority by instituting highly deliberative and reflexive processes. In Chapter 2, Val Napoleon describes the Gitksan people's method of dispute settlement. It involves deliberation, with no entity possessing final power of decision. It appears to be both effective and, in the eyes of the community,

legitimate. Such relatively non-coercive forms of decision making are common among North American indigenous peoples, which have traditionally accepted that groups might confederate in or secede from collective decision making with remarkable freedom. They suggest that it may be possible to develop processes without continually chasing one's tail to determine the scope of the community and who gets to decide. This too is the direction traced in Chapter 7, in Duncan Ivison's emphasis on contestability in place of consent.

This is not to suggest that a theory of community is unimportant. Such theories have an impact on arguments of relative legitimacy; they would no doubt shape what the participants considered to be legitimate processes. Nor do I claim that one can always avoid the question of who gets to decide. Not all issues can be submitted to the concurrence of all concerned. My point is simply that we begin in mid-discussion, with final decision-making authority often contested. It is worth asking ourselves whether viable processes of consent building can be instituted without waiting for resolution of all aspects of the community's definition. Indeed, the processes might be the very method by which issues of community definition get resolved. And isn't this exactly the approach we must take in treaty negotiations or in initiatives to resolve membership disputes? If so, issues of deliberative process become immediately relevant.

### **Consent and the Relational Definition of the Self**

Another set of theories – those grounded in a relational definition of the self – takes aim at the separation of self from context that is assumed in many theories of consent, where the choosing self is perceived as autonomous and self-sufficient, deciding in isolation whether or not to enter community. Relational theories emphasize the extent to which the self is necessarily fashioned in a social context, through the very process of interaction with others. Autonomy itself is a quality that is dependent on that relational context. Indeed, these theories generally have a concept of autonomy (and therefore consent) that is richer than merely the ability to make unconstrained choices and that includes the development of the capacities necessary for effective self-government in the member.<sup>56</sup> Engagement in a community is not, then, the antithesis of individual agency but rather its precondition. The key question is not whether someone should join in community, but how one should reconstruct existing communities so that autonomy – understood as individual and collective self-determination – is maximized.

One group of relational theories might be called “institutional.” These theories focus on the role of institutions, social structures, and practices in shaping members’ capacities and scope for creative self-determination. They especially emphasize the extent to which particular institutions constrain or distort members’ ability to self-determine. The pragmatists’ theory of the self has this character.<sup>57</sup>

Jennifer Nedelsky draws on feminist theory to articulate a relational theory of the self that is similarly directed toward institutions and social practices. Her work forms part of a second set of relational theories that focuses on the quality of face-to-face interaction and the consequences of that quality for the development of autonomy.<sup>58</sup> These might be called “dialogic” theories, for they conceive identity as constructed through direct interaction with another. The works of Martin Buber, Mikhail Bakhtin, and Emmanuel Lévinas frequently serve as inspiration for these theories, as they seek to unpack the nature, conditions, and implications of dialogue, and build an ethics of interaction on the encounter with another’s irreducible uniqueness.

These theories offer exceptionally promising ways of avoiding the simplification inherent in many theories of consent, while still keeping issues of members’ agency and self-determination at the forefront. They use an image of dialogue that has some of the immediacy and power of the idea of consent. They provide rich potential for thinking through how agents define themselves in relation to others, those agents simultaneously developing areas of commonality and distinction. They are amenable to cultural pluralism, for they envision social interaction as occurring among people who are and remain different – who need not reach a high level of agreement in order to join in society. And they offer a way of conceiving a community’s legitimacy as a function of the quality of its interactions, rather than of a historic (and generally mythical) act of adherence. A number of authors have drawn on these approaches to illuminate indigenous-nonindigenous relations.<sup>59</sup>

### **Consent as Grounded in a Form of Life**

Finally, there is a large group of theories that are heirs to the vision of consent as grounded in particular traditions or sets of practices. These theories emphasize the way in which living within a culture shapes individuals, providing them with a language that they use to understand themselves and their society. These theories often draw, directly or indirectly, on Ludwig Wittgenstein’s observation that modes of understanding are embedded in



particular forms of life – that linguistic formulations take their meaning from the way they are employed in social life and cannot be fully comprehended without understanding how they are used in those social practices.<sup>60</sup> Language always, then, takes the form of a vernacular, local in origin and particular in its signification. In the theories of community that draw on Wittgenstein, these distinctive languages of social interaction, grounded in distinctive sets of practices, are seen to be the model for the commonality that exists in particular communities, traditions, or cultures.<sup>61</sup>

These theories can be used to reconstruct the challenges of consent in a variety of ways:

- They suggest that an element of members' subjective attachment to a society may be the fact that the society employs their particular terms – the language in which they learned to express their identities, the set of reference points and arguments in which they defined their political aspirations (these are the second and third forms of subjective connection in the list derived from the disaggregation of consent, above). These theories provide one way, then, of understanding the significance of cultural or linguistic difference for the structure of political community.
- They may describe more accurately the relationship between individual agency and commonality. In particular, the linguistic analogy may help us understand how members can share a great deal – caring deeply about that commonality, even if it is not the result of conscious choice – and yet still disagree over much that is important. The language provides a medium for engaging in political discussion; it does not predetermine the content of that discussion (though it may well shape it). Among other things, this may capture how express instances of consent necessarily take place against (and indeed presuppose) a backdrop of beliefs and norms that are not the result of conscious choice.
- They may provide guidance on how to build the mutual understanding on which durable agreements are based, or more generally how to manoeuvre across cultures. They suggest the importance of the background practices and cultural conceptions to any true understanding, they probe the impact of languages of normative debate on outcomes, and they are alive to the creation of new practices that may themselves form the basis for new sets of norms.

In the finely described detail of Chapters 2 and 3, Val Napoleon and Janna Promislow provide thought-provoking material for reflecting on all

these aspects, as does Tim Rowse in Chapter 4 (although he draws attention to the potential for profound, though perhaps unseen, disjuncture). The impact of particular vernaculars upon action and the room for agency against this discursive background are critical themes in the work of Andrée Boisselle, James Tully, and others.<sup>62</sup> Those theorists expressly use Wittgensteinian concepts in analyzing the relationship between agency and culture. In fact, one might see the rich array of work that draws upon indigenous traditions for principles of political life as being, in part, deep and highly instructive meditations upon particular traditions, upon particular forms of life, and their significance for members. Much of the work of indigenous scholars Taiaiake Alfred, John Borrows, Larry Chartrand, Paul Chartrand, Gordon Christie, Jeff Corntassel, Glen Coulthard, Sákéj Henderson, Darlene Johnston, Kiera Ladner, Tracey Lindberg, Leroy Little Bear, Patricia Monture-Angus, Val Napoleon, Heather Raven, Audra Simpson, Rebecca Tsosie, Dale Turner, Mary Ellen Turpel-Lafond, and Robert A. Williams has this character, and there are many more early-career scholars who are following a similar vein.

This work also raises, expressly or implicitly, the extent to which forms of life, and the modes of understanding based upon them, should be treated as self-contained and impermeable. Are different traditions entirely separate worlds of understanding, or is it possible to develop understanding across traditions, in a manner that is respectful to all? Can one engage in borrowing or learning across cultures, or does borrowing necessarily produce an unstable and incoherent mix, by combining elements tied to different forms of life? Do we as individuals and communities participate simultaneously in many forms of life and therefore many cultures, all with their own integrity, some of which may be confined within what we normally think of as cultural boundaries, others of which may cross cultural boundaries? The answers to these questions depend on one's precise understanding of forms of life, their fixity, their exclusivity, and the existence of interconnections or analogies between them. Different theorists working with the notion of tradition take very different positions on these questions. My own sense is that there is considerable potential for cross-cultural understanding (and indeed, learning) and for cross-cultural community, and that the frameworks provided by Wittgenstein, Hans-Georg Gadamer, and Charles Taylor help us comprehend how that might be possible and how it might be accomplished in respectful and dependable fashion. Indeed, the very ability to use a common vocabulary to think about contrasts between traditions –

“tradition,” “form of life,” “vernacular” – suggests the ability to develop some understanding across cultures. But then again, some may find the Wittgensteinian terms themselves to be false and distorting.

What is clear is that the answers given to these questions have considerable significance for the issues of consent at the heart of this volume. Many of the forms of consent explored above – including the liberal conceptions themselves – depend upon the possibility of achieving a measure of concurrence, a measure of understanding, or an adherence that presupposes intersecting and translatable languages, at least in part. The task of achieving common ground across cultures is therefore integral to any pursuit of durable consent. How that might be done, the resources that exist for achieving such an outcome, and whether it might be done without impairment or oppression are crucial issues.

### **Conclusion**

This chapter has explored a number of ways in which the language of consent has been deployed, difficulties with the concept, and alternative ways in which the relationship between agency and community might be conceived.

It has tended to suggest that the problem of consent is much more complex, the extent of members’ interdependence with community much more significant, than many conventional invocations of consent assume. It has tended to push for more complex understandings of the relationship between agency and community – understandings that emphasize the informal or implicit mechanisms by which people come to identify themselves with their communities, in addition to and perhaps even in substitution for the explicit mechanisms. I confess to some hesitancy about wholeheartedly following this line. A great merit to the language of consent is its insistence that one actually go out and get conscious expressions of adherence (at least if one takes consent seriously and does not fall back on the expedient of a thought experiment). The language of consent may oversimplify the extent to which we are already connected, but at least it values the actual voices and opinions of the participants and protects against theories of adherence that pay too little attention to evidence and rely too much upon wishful thinking. The value of such deliberate manifestations of consent should not be discounted, then. But it remains the case that such instances of consent take place against a backdrop that has the complexity sketched here. Even if the simple manifestations are maintained, we may well want to consider the broader framework that shapes members’ adherence to their communities.

It is interesting to contrast the concepts that political philosophers have used to define community, and their ways of establishing particular communities' legitimacy, to conceptions of community and membership that draw directly on indigenous traditions. It is useful to compare our theoretical reflections about consent and its alternatives to the experience of negotiations and attempted reconciliation on the ground – to treaty processes, land claims negotiations, and other initiatives. In good Wittgensteinian fashion, those practices hold lessons; they generate their own understandings of consent and cast doubt on others. Any decent understanding of the challenges of consent can greatly benefit from reflection upon our often troubled experience of establishing community across (between?) cultures. That is what this volume sets out to do.

#### NOTES

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- 1 David Hume, "Of the Original Contract" in David Hume, *Essays: Moral, Political and Literary* (London: Oxford University Press, 1963) 452 at 457, 458, 460.
- 2 See also the many works by the indigenous scholars listed on page 34. John Borrows in particular has been a prolific and inspiring contributor. See, most recently, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).
- 3 See e.g. Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991) at 56ff.; Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* (New York: Alfred A. Knopf, 2006) at 18-22. This was true even of John Locke, *Two Treatises of Government*, rev. ed. by Peter Laslett (New York: New American Library, 1963 [1698]), Second Treatise, at para. 102, although Locke argued that colonists were entitled to overrun indigenous lands and displace indigenous governments. See James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993) at 137-78.
- 4 Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).
- 5 Precisely such an encounter has been fruitful in Tully's work: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). I too acknowledge such a debt: Jeremy Webber, "Relations of

- Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 *Osgoode Hall Law Journal* 623; Jeremy Webber, "The Grammar of Customary Law" (2009) 54 *McGill Law Journal* 579.
- 6 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).
  - 7 Thus, Jeremy Waldron distinguishes quite rightly between "voluntaristic and rationalistic accounts of political legitimacy," corresponding to the distinction between actual and hypothetical consent. Jeremy Waldron, "Theoretical Foundations of Liberalism" (1987) 37 *Philosophical Quarterly* 127 at 140.
  - 8 For criticisms of Rawls on these grounds, see Iris Marion Young, "Toward a Critical Theory of Justice" (1981) 7 *Social Theory and Practice* 279; Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), throughout, but see especially at 49ff.; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 79.
  - 9 For two contrasting approaches, see Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" (1991-92) 25 *University of Michigan Journal of Law Reform* 751 (culture as an object of choice); and Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) (culture providing contexts for choice; Kymlicka himself does not advance a contractarian vision of society).
  - 10 As Waldron, *supra* note 7 at 145-46, makes clear.
  - 11 John Rawls, "Justice as Fairness: Political Not Metaphysical" (1985) 14 *Philosophy and Public Affairs* 223, although this concession to relativism was heavily tempered by Rawls' sense that, through deliberation toward unforced agreement, individuals would converge on something like the positions he favoured.
  - 12 See the oft-quoted comments of Ronald Dworkin, *Taking Rights Seriously*, new impression ed. (London: Duckworth, 1978) at 151.
  - 13 Benjamin R. Barber, *A Passion for Democracy: American Essays* (Princeton: Princeton University Press, 1998) at 8.
  - 14 And so, for example, Rousseau hesitates between a purely hypothetical invocation of consent and one that truly engages the will of a society's members. *Ibid.*
  - 15 See also David Dyzenhaus, "Hobbes' Constitutional Theory" in Ian Shapiro, ed., *Leviathan* (New Haven: Yale University Press, 2009); Richard Tuck, "Hobbes and Democracy" in Annabel Brett and James Tully, eds., *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006) 171.
  - 16 Hume, *supra* note 1 at 471, n. 1.
  - 17 Quentin Skinner, *The Foundations of Modern Political Thought: The Age of Reformation* (Cambridge: Cambridge University Press, 1978) vol. 2 at 161ff.; Thomas Hobbes, *Leviathan*, ed. by Michael Oakeshott (New York: Collier, 1962 [1651]); Locke, *supra* note 3; Jean-Jacques Rousseau, *Du contrat social* (Paris: Garnier-Flammarion, 1966 [1762]).
  - 18 See Skinner, *ibid.* at 163-66, 329-31, and 342-44.
  - 19 See the tentative search for such a further concept of community in Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999) at 273.
  - 20 Locke, *supra* note 3 at paras. 95-97.
  - 21 Hume, *supra* note 1.

- 22 *Ibid.* at 461.
- 23 *Ibid.* at 458-59.
- 24 Williams, *supra* note 4 at 124ff.
- 25 Even Hobbes, for example, argues that the capacity for language is a necessary precondition to the conclusion of a contract. Hobbes, *supra* note 17 at 33. But, as Durkheim pointed out, the requirements of sociality must go beyond simple communication. James Dingley, *Nationalism, Social Theory, and Durkheim* (New York: Palgrave Macmillan, 2008) at 88. Note that Hobbes himself (*supra* note 17 at 136) contemplates the taking of decisions by majority vote in the state of nature; this suggests some antecedent bond of sociality, which Hobbes finds simply in the participants entering the assembly. See also Skinner, *supra* note 17 at 164-65.
- 26 Or, as Waldron, *supra* note 7 at 138, puts it, “the crucial question to ask of such accounts is always: ‘What would count as the withholding of consent?’ If there is no plausible answer, then it is clear that the concept is not really pulling its weight in the argument for obligation.”
- 27 See e.g. A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) at 79-100.
- 28 See e.g. Skinner, *supra* note 17 at 163, but one suspects that similar assumptions are much more widespread.
- 29 See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), throughout, but see e.g. 30-31.
- 30 See Avishai Margalit and Joseph Raz, “National Self-Determination” (1990) *Journal of Philosophy* 439 at 456-57.
- 31 During the lead-up to the 1995 referendum on Quebec’s secession, the Cree did hold their own referendum (as did the Inuit and Montagnais), voting 96 percent against secession from Canada. A. Derfel, “The Message Is Clear: We Won’t Go” [*Montreal Gazette* (26 October 1995) A15; Grand Council of the Crees (of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, QC: Grand Council of the Crees, 1995). The question of the appropriate definition of the Cree nation was not raised and did not need to be raised in that context, given the overwhelming opposition of the James Bay Cree to secession. But one can imagine that issue becoming relevant in other contexts, as it has for other First Nations in, for example, land claims negotiations.
- 32 Arguments over the entitlement to negotiate and the process of negotiations would be familiar from many contexts. See, for example, the separate negotiations that followed the failure of the 1990 collapse of the Dene-Métis settlement. David Leyton-Brown, *Canadian Annual Review of Politics and Public Affairs: 1991* (Toronto: University of Toronto Press, 1996) at 272-74. Nonindigenous governments have taken advantage of divisions, as in the case of the Lubicon Cree. Dawn Martin-Hill, *The Lubicon Lake Nation: Indigenous Knowledge and Power* (Toronto: University of Toronto Press, 2008) especially at 21-25.
- 33 See Melvin H. Smith, *Our Home or Native Land?* (Victoria: Crown Western, 1995); Lisa Dufraimont, “Continuity and Modification of Aboriginal Rights in the Nisga’a Treaty” (2002) 35 *University of British Columbia Law Review* 455 at 468ff. and 492-

- 93; "B.C. Treaty Referendum" CBC News Online (2 July 2004), online: CBC News <[http://www.cbc.ca/news/background/aboriginals/bc\\_treaty\\_referendum.html](http://www.cbc.ca/news/background/aboriginals/bc_treaty_referendum.html)>.
- 34 Edmund Burke, *Reflections on the Revolution in France* (Harmondsworth: Penguin, 1969 [1790]) at 105, 148, 150.
- 35 *Ibid.* at 194-95.
- 36 For antecedents to this language of covenant in British constitutionalism, see J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, 2d ed. (Cambridge: Cambridge University Press, 1987); Victoria Kahn, *Wayward Contracts: The Crisis of Political Obligation in England* (Princeton: Princeton University Press, 2004).
- 37 Burke, *supra* note 34 at 184.
- 38 Tully, *supra* note 5 at 38. Interestingly, Jeremy Waldron, whose previous work had remained very much within liberal conceptions of consent, adopts a conception of consent as grounded in custom, in Waldron, *supra* note 19 at 63-66, using it as a foundation for understanding legislation.
- 39 Tully, *supra* note 5 at 61; Lon L. Fuller, "Human Interaction and the Law" (1969) 14 *American Journal of Jurisprudence* 1 at 4.
- 40 Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)" (2003) 3:1 *Oxford University Commonwealth Law Journal* 1 at 24.
- 41 Webber, "Grammar," *supra* note 5.
- 42 Tully, *supra* note 5 at 60 and 62ff.; Waldron, *supra* note 7 at 134-35.
- 43 Charles Taylor, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers* 2 (Cambridge: Cambridge University Press, 1985) 187; Charles Taylor, "Cross-Purposes: The Liberalism-Communitarian Debate" in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989) 159.
- 44 Jeremy Webber, "The Hobbesian Premise," in preparation, although see Chapter 6 in this volume.
- 45 Hans Kelsen, *Pure Theory of Law*, 2d ed., trans. by Max Knight (Berkeley: University of California Press, 1967).
- 46 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 257-59.
- 47 Most explicitly, Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970).
- 48 Jürgen Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification" in Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. by Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, MA: MIT Press, 1990) 43 at 66. The ambiguity lies in the level of generality at which Habermas states this principle. What exactly are people presumed to consent to? Are they consenting to all the effective normative content of a law, only to certain principles that regulate law, or only to principles that regulate certain kinds of laws?
- 49 For an example of the difference, see David Grossman, "Looking at Ourselves" *New York Review of Books* 54:1 (11 January 2007) 4 at 4, in a speech at a ceremony in memory of Yitzhak Rabin, Tel Aviv, 4 November 2006: "Every thinking person in



Israel – and, I will add, in Palestine as well – knows today precisely the outline of a possible solution to the conflict between the two peoples. All thinking people, in Israel and in Palestine, know deep in their hearts the difference between, on the one hand, their dreams and wishes, and on the other, what they can get at the end of the negotiations.”

- 50 But compare David Gauthier, “Constituting Democracy” in David Copp, Jean Hampton, and John E. Roemer, eds., *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993) 314, in which Gauthier says that deliberation resulting in unanimous agreement is an ideal, although unattainable in practice. He goes on to discuss the legitimacy of the US Constitution on the basis of lesser forms of consensus.
- 51 Indeed, Waldron, *supra* note 7 at 137, sees consent fundamentally as an attempt to reconcile liberty and sociability, or (as he puts it) “our individual need for control and the desirability of our interaction with others.”
- 52 Hobbes, *supra* note 17.
- 53 Hume, *supra* note 1 at 467ff.
- 54 Martin Krygier takes the Hobbesian insight still further, arguing that the maintenance of order is an inescapable purpose of any state, requiring that states attend, no matter what, to certain aspects of order and security. Once these are in place, states can consider more positive and responsive modes of action. See Martin Krygier, *Beyond Fear and Hope: Hybrid Thoughts on Public Values* (Sydney: ABC Books, 1997). I am hesitant to follow an analysis that tends to subordinate other government functions so thoroughly to the (perceived) needs of security. In suggesting the continued relevance of the Hobbesian insight, then, I do not mean to be embracing such an order of priority.
- 55 Compare Webber, “Relations of Force,” *supra* note 5, and Webber, *supra* note 44.
- 56 Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale Journal of Law and Feminism* 7; Jennifer Nedelsky, “Meditations on Embodied Autonomy” (1995) 2 *Graven Images* 159; Catriona Mackenzie and Natalie Stoljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000). See also Taylor, “Atomism,” *supra* note 43.
- 57 See e.g. Matthew Festenstein, *Pragmatism and Political Theory: From Dewey to Rorty* (Chicago: University of Chicago Press, 1997) at 66ff.
- 58 See Nedelsky’s work, *supra* note 56. Many of the theories belonging to this second set have been inspired by Charles Taylor, *Multiculturalism and “The Politics of Recognition”* (Princeton: Princeton University Press, 1992).
- 59 See e.g. Williams, *supra* note 4; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), especially his “Indigenous Declaration of Interdependence” (at 138-58); Michael Asch, “Lévi-Strauss and the Political: *The Elementary Structures of Kinship* and the Resolution of Relations between Indigenous Peoples and Settler States” (2005) 11 *Journal of the Royal Anthropological Institute* (N.S.) 425.
- 60 Ludwig Wittgenstein, *Philosophical Investigations*, 2d ed., trans. by G.E.M. Anscombe (Oxford: Blackwell, 1958).



- 61 Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal and Kingston: McGill-Queen's University Press, 1994) at 183-228; Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Royal Commission on Aboriginal Peoples, ed., *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) 133.
- 62 For Boisselle and Tully, see Chapters 8 and 9 in this volume and also James Tully, "Situated Creatively: Wittgenstein and Political Philosophy" in James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) vol. 1, 39; Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).



PART 1

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# THE CHALLENGES OF CONSENT IN INDIGENOUS CONTEXTS

