Modern Constitutionalism, Treaty Federalism, Indigenous Peoples, and the Problem of Envy

SAMUEL PICCOLO[†]

Abstract: In recent years, sustained conflicts between Indigenous groups and the Canadian (and American) governments have led many scholars, James Tully foremost among them, to critique 'modern constitutionalism' for the way it subordinates Native peoples to the state. In Tully's diagnosis, the roots of modern constitutionalism in early modern political philosophy—especially John Locke—preclude the possibility of just relations with Indigenous peoples. Beginning with the context of Locke's thought, especially his engagement with Robert Filmer, I argue that Tully's critique of modern constitutionalism does not pay sufficient attention to the problem of political passions, the management of which is a major motivator for modern constitutionalism. I focus on envy as one specific instance of the passions. Envy and covetousness for property and power are defining concerns for key figures in the history of 'modern constitutionalism', and Tully's failure to take these concerns seriously means that the 'strange multiplicity' he envisions succeeding the modern state does not adequately consider their threat. I conclude the paper by suggesting that the Indigenous traditions with which Tully sometimes engages may have alternative solutions to the problem he overlooks. These Indigenous approaches emphasize the normativity of nature for establishing moral grounds on which to moderate politically destructive passions such as envy.

Introduction

In early 2020, just before it was clear that the mysterious virus spreading across the globe to increasingly panicked populations would shut down travel indefinitely, train travellers in Canada had another reason to worry for their trips: there seemed a reasonable likelihood that the tracks would be blockaded by protestors. Indeed, for a time, passenger service was out across the country, 1,000 passenger rail employees were furloughed, and much the same was true

[†] Assistant Professor of Political Science, Gustavus Adolphus College, Old Main 202A, 800 West College Avenue, Saint Peter, MN, 56082. My thanks to Connor Grubaugh, Jeremy Jennings, the reviewers, and participants at the *Politics & Poetics* conference on envy in Oxford in August 2023 for their many critiques, suggestions, and corrections.

of freight lines.[1] Protestors burned rail junction boxes, and even occasionally blocked auto traffic, including international bridges to the United States. Why the hubbub? All this protest activity was a reaction to events in Northern British Columbia, where the province's government had issued a permit to a natural gas company to build a pipeline across 120 miles of Wet'suwet'un First Nation territory. While the project had received some Indigenous support, and had satisfied various planning and environmental standards, the company had not received approval from all the Wet'suwet'un's hereditary chiefs, which, according to the protestors, made the project illegal and justified the mass resistance.[2]

This incident is just one of the most recent in ongoing clashes between Indigenous and non-Indigenous peoples in North America, clashes which revolve around two general questions that consistently resurface in particular cases such as the Wet'suwet'un conflict: Whose land or property is it? And who gets to make the decisions?[3] Political theorists and philosophers, playing their role in tussling out these conflicts intellectually, have attempted to analyse the situation and chart a path forward. One of the most prominent mainstream academic responses to these conflicts by non-Indigenous thinkers is what is known as 'treaty federalism', proposed foremost by James Tully, on whom I will focus in this essay.[4] This approach consists of both a negative and positive aspect. The negative is a rejection of modern liberal constitutionalism in its traditional form as articulated by John Locke, Immanuel Kant, and John Rawls, wherein equal citizens deliberate in a broadly contractarian vein, a contractarian approach which Tully and others see manifest in the Canadian and

[1] 'Via Rail Issues Temporary Layoffs to Nearly 1,000 Workers as Blockades Continue', *CBC News*, February 19, 2020.

[2] John Woodside, 'Canada's Supreme Court Recognizes Wet'suwet'en Law. So How Is Coastal Gaslink Moving Ahead?' *Canada's National Observer*, December 2, 2021.

[3] While I focus on Canada, similar dynamics occur in the United States, New Zealand, Australia, and elsewhere. Other conflicts include the mass protests at Standing Rock, North Dakota, or over lobster fishing in Nova Scotia. See Dan Bilefsky, 'In "Lobster War," Indigenous Canadians Face Attacks by Fishermen', *The New York Times*, October 20, 2020.

[4] Tully is the most famous of the practitioners, and I will focus on him, though his work has inspired many others who follow in the same 'critical' approach. I focus primarily on Tully's middle works, which reflect most fully the treaty federalist paradigm, though I do discuss some of his more recent articles that move beyond treaty federalism in articulating his political vision.

American states.[5] The approach considers modern constitutionalism to be culturally 'homogenizing' in its effects.[6] The positive project aims to replace the authority of modern constitutionalism with a 'nation to nation' approach of treaty federalism. Tully, for one, uses the motif of the sculpture 'The Spirit of Haida Gwaii', in which diverse figures of different species occupy the same canoe. Rather than worry about a single constitutional founding, or a supreme law to supersede all others, Tully's approach encourages an 'aboriginal and common law' system of layering legislation and sovereignty, in an ongoing reciprocity of dialogue and negotiation.

'The Spirit of Haida Gwaii'. Sculpture by Bill Reid. Photo by Bengt Oberger. License by CC BY-SA 3.0

In this paper, I argue that the treaty federalist approach to Indigenous issues in Canada (and the United States) ought to give us pause. I do this by focussing on the problem of political *passions*. I am inspired generally by Albert Hirschman's famous account, which holds that one of the central purposes of early modern political

[5] These thinkers' ideas are of course not identical by any means, but Tully's focus is not on their differences.

[6] James Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995), 41, 107.

thought was the re-orientation of political life away from unwieldy and unpredictable *passions* and towards regular and effective *interests*.[7] I select envy as an example of a key passion in these theoretical debates, although as Hirschman argues, the passions of acquisitiveness have 'long been solidly linked to one another in literature and thought, often in some unholy trinity.'[8] While this article is not meant to contribute to the literature on envy as such, the existence of a wide-ranging scholarship on the subject is suggestive of the crucial role envy plays in political life and our efforts to understand it.[9] I adopt a working definition of envy as the desire for the things of others, be it their physical possessions or their immaterial power, and a feeling of anger that arises because others possess these things.[10] Since I view envy as a passion that functions in concert with other passions, it is important to clarify that envy is a member of a family of related attitudes and emotions having to do with possession and property, a family that also includes greed, covetousness, and resentment.

I suggest that solving—or at least mitigating—the problem of political passions, and envy in particular, is a deep concern for the modern constitutionalists of whom Tully is so critical, and the main historical part of this essay involves a sustained contextual look at John Locke's treatment of envy. In dispensing with their political theories, Tully is dispensing with their efforts to mitigate outbursts of envy. 'Strange Multiplicity' opens the problem of envy wide open again. In making this critique, I do not mean to imply a defence of modern constitutionalism and its approach to Indigenous peoples. But I will argue that if we abandon the modern constitutional 'solution' to managing passions—including envy—politically, we must at the same time consider other approaches to addressing them.[11]

[7] Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (Princeton: Princeton University Press, 1977).

[8] Hirschman, *The Passions and the Interests*, 20. Hirschman cites Dante's trinity of envy, pride, and greed, and Kant's of ambition, greed, and lust for power.

[9] See, for instance: Sara Protasi, *The Philosophy of Envy* (Cambridge: Cambridge University Press, 2021); Marguerite La Caze, 'Envy and Resentment', *Philosophical Explorations* 4 (2001): 31–45; Krista K. Thomason, 'The Moral Value of Envy', *The Southern Journal of Philosophy* 53.1 (2015): 36–53.

[10] Justin D'Arms, 'Envy', *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2017. https://plato.stanford.edu/archives/spr2017/entries/envy/.

[11] I put solution in quotation marks to indicate that political life is not a math equation.

This paper has four main parts. First, I outline Tully's attack on modern constitutionalism in relation to Indigenous peoples. Second, I show how the problem of envy is a significant concern for the modern constitutionalists Tully condemns. Next, I argue that Tully does not deal adequately with the problem of political passions, including the intensification of envy, in his 'Strange Multiplicity', even as post-colonial political realities reveal the continued salience of these problems. Finally, I suggest that Indigenous thinkers themselves offer resources to address political passions, including envy, in a manner distinct from modern constitutionalism, namely, by an appeal to a natural normativity of ethical life beyond Tully's Wittgensteinian layering. While I do not offer an extended defence of Indigenous thinking, I do maintain that it provides some solid theoretical ground on which a political life beyond modern constitutionalism could be built.

1. Tully's attack on modern constitutionalism

Tully's attack on modern constitutionalism has two main parts: one pertains to its conception of property, the other to the equal individual rights and liberties upon which modern constitutionalism is founded. Both characteristics, Tully claims, 'misrecognize' the 'property systems' and 'political organizations' of Indigenous peoples.[12]

On the matter of property, Tully sees the root of our current understanding in the thought of John Locke. Tully argues that the question of how to justify English property ownership in America is central to Locke's political theory, and it is Tully's—highly controversial—account of Locke that I will lay out here.[13] The problem for Locke, writes Tully, 'was that the Aboriginal peoples recognized themselves as organized into sovereign nations with jurisdiction over

[12] James Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground', *Social Philosophy & Policy* 11.2 (1994): 153-180, at 155.

[13] That such a question was indeed central to Locke is debated among Locke scholars. Given that Tully's first book on Locke and property makes no mention of Indigenous peoples, I think it fair to say that even scholars like Tully who are interested in Indigenous issues can initially overlook its centrality in Locke's corpus. Nevertheless, it was certainly somewhat relevant to Locke, as Craig Yirush, Barbara Arneil, and David Armitage (in addition to Tully) have shown. See Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge: Cambridge University Press, 2011); Barbara Arneil, 'John Locke, Natural Law, and Colonialism', *History of Political Thought* 13.4 (1992): 587–603; David Armitage, 'John Locke, Carolina, and the *Two Treatises of Government*', *Political Theory* 32.5 (2004): 602–27.

their territories when the Europeans arrived.'[14] If the Indigenous peoples would not give up their land willingly, then the Europeans could either conquer it outright with violence, or they could come up with some other justification. Tully argues that Locke provides the latter by arguing that Indigenous peoples do not truly have property. Locke achieves this with a very specific definition of property, according to which it is not enough to simply have first occupancy and claim ownership. For Locke, ownership requires work—and in particular, cultivation.[15] Only when humans mix their labour with elements of nature do they take ownership of it. Cultivation is the 'standard of industrious and rational use, in contrast to the "waste" and lack of cultivation in Amerindian hunting and gathering.'[16] Since Indigenous peoples supposedly did not cultivate the land, Locke's theory thereby eliminates any property claims they made. 'Industrious use', moreover, is defined to conform to European understandings of farming; his theory deems even those few Indigenous nations that practiced agriculture to be using their land inefficiently, since they were apparently not squeezing as much from it as they could have been. And this, too, vacates their property-claim in Locke's view. The outcome of this theory, which Tully, Craig Yirush, and David Armitage have shown was widely influential among colonial administrators, is that Indigenous property only existed insofar as it could be seized by colonists.[17]

Tully claims this Lockean theory of property has persisted into the modern era,[18] first by way of Immanuel Kant, and then via contemporary thinkers from Robert Nozick to John Rawls.[19] These con-

[14] Tully, *Strange Multiplicity*, 71.

[15] John Locke, *Two Treatises of Government*, ed. Lee Ward (Indianapolis: Hackett, 2016), II. 37, 41, 42, 43, 45, 48.

[16] James Tully, *An Approach to Political Philosophy: Locke in Context* (Cambridge: Cambridge University Press, 1993), 156.

[17] Armitage, 'John Locke, Carolina'; Yirush, *Settlers, Liberty, and Empire*, 1–5. This is the phenomenon detailed at length by Robert Nichols. See Robert Nichols, *Theft Is Property! Dispossession and Critical Theory* (Durham, NC: Duke University Press, 2020). Of course, Lockean arguments were not the only ones colonists used to justify their possession of Native lands; Yirush details how they used the language of conquest, too. See Craig Yirush, '"Since We Came Out of This Ground": Iroquois Legal Arguments at the Treaty of Lancaster' in *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America*, ed. Brian P. Owensby and Richard J. Ross (New York: New York University Press, 2018), 118–50.

[18] Tully, 'Aboriginal Property and Western Theory', 167–69.

[19] Immanuel Kant, *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983); Robert Nozick, *Anarchy, State, and Utopia* (New York:

temporary thinkers, Tully suggests, do not even bother to justify the elimination of Indigenous property claims; instead, they simply start with the premise that the liberal state has absolute authority over property disputes within its territorial boundaries. The same flaw is present in the thought of Rawlsian liberal multiculturalists, such as Will Kymlicka;[20] they all fail to recognize that Aboriginal claim is ultimately derived from a complete *system* of property relations and traditions that is independent of, and prior to, the one Rawls posits.[21] While these liberal constitutional thinkers might be more interested in justice for Indigenous peoples than Locke was, Tully's point is that they have an understanding of private property that excludes Indigenous land claims. This 'modern constitutionalism', as Tully calls it, excludes forms of property that do not flow from the Crown or Constitution, invalidating traditional Indigenous conceptions of the proper source of titles to ownership. Thus, even if Indigenous people or nations legally have property or land, they can only have it under the laws of the state, not under their own traditions.

This persistent Lockean understanding of property is, in Tully's telling, deeply related to modern constitutional structures, because Locke's political theory and conception of authority follow directly from his theory of property. For Locke, political power originates in the natural equality of individuals in the state of nature and their natural right to execute the law of nature.[22] Government emerges when people voluntarily consent to 'resign' their natural executive power to a sovereign authority. Why would do they do so? In short, to protect their property. Individuals decide to leave the state of nature and cede power to government, because only government can guarantee their property rights.[23] In the state of nature individuals own themselves and their labour, and by extension the things

Basic Books, 1974); David Lyons, 'The New Indian Claims and Original Rights to Land' in *Reading Nozick: Essays on Anarchy, State, and Utopia*, ed. Jeffrey Paul (Totowa, NJ: Rowman & Littlefield, 1981), 355–79; John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); Vernon Van Dyke, J'ustice as Fairness—For Groups', *American Political Science Review* 69 (1975): 607–14.

[20] Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989); *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995). Duncan Ivison is also in this tradition. See his *Can Liberal States Accommodate Indigenous Peoples?* (Cambridge: Polity, 2020).

[21] Tully, 'Aboriginal Property and Western Theory', 168.

[22] Locke, *Two Treatises of Government*, II.7.

[23] Peter Laslett, 'Introduction' in John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), 101.

they mix their labour with to acquire property. But only government can secure property against theft and violence.[24] Tully's objection to Lockean constitutionalism, then, is straightforward. Locke's concept of property precludes Indigenous ownership, and property is the rationale behind Lockean government. Lockean government at its heart excludes Indigenous conceptions of property *and* Indigenous conceptions of government.

Tully sees the tendrils of the Lockean constitutional framework in all the same places that he sees Lockean property. Historically, he identifies it in the work of Kant, who sees Indigenous peoples as living in a pre-political state of nature with the 'lawless freedom of hunting, fishing, and herding' that is 'without doubt most contrary to a civilized constitution'.[25] The same applies to Rawls, whom Tully accuses of 'effacing the pre-existence of independent Aboriginal government, property, and traditions', since Rawls begins from Kantian assumptions about post-Reformation Europe—'toleration, rule of law, representative government, markets, and individual rights'.[26] The effect of this modern constitutionalism, Tully argues, is homogenization. It forces Indigenous peoples, who have accounts of property and governance outside of the Lockean/Kantian/Rawlsian tradition, to adopt the ones that animate the Canadian (and American, Australian, etc.) state.

'To treat the candidates for admission "just like the rest of us"', Tully writes, 'is not to treat them justly at all. It is to treat them within the imperial conventions and institutions that have been constructed to exclude, dominate, assimilate, or exterminate them.'[27] Applying the same liberal constitutional methods to Indigenous peoples by which other historically oppressed groups (women, homosexuals, etc.) have received greater recognition is, for Tully, a continuation of imperialism and domination by other means. Unlike other oppressed groups, which exist within the 'Western' cultural tradition,

[24] It is worth noting that in Tully's reading of Locke individuals surrender their property rights to the government when leaving the state of nature, and they only acquire these rights again once the government gives them the property back. See James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980). For a critique of Tully's interpretation, see Jeremy Waldron, 'Locke, Tully, and the Regulation of Property', *Political Studies* 32 (1984): 98-106.

[25] Kant, *Perpetual Peace and Other Essays*, 111, 122.

[26] Tully, 'Aboriginal Property and Western Theory', 168.

[27] Tully, *Strange Multiplicity*, 97.

Indigenous peoples come from a different one altogether. 'The constitution, which should be the expression of popular sovereignty, is an imperial yoke', Tully insists.[28] To adequately address the challenge that Indigenous concerns present, we need a different approach. For Tully, this approach is his 'Strange Multiplicity'. Tully's theory aims to be the opposite of social contract, state-of-nature theories, which produce rigid constitutional structures and permanent forms for political life. Before I detail Tully's proposal in section three, however, I want to first demonstrate what Tully fails to sufficiently consider about the 'modern constitutionalists' who are the targets of his ire.

2. Envy and modern constitutionalism

In Tully's telling, as we have seen, modern constitutionalism from Locke to Rawls is grounded on an understanding of property and authority which does not comport with ways of Indigenous peoples. As I emphasized in the introduction, I am not offering a defence of modern constitutionalism. I do not intend to dispute Tully's claims about Lockean property and the tradition of constitutional thinking that follows from it, though of course there are many who would take issue with his account.[29] What I point out is that there is much more to this Lockean tradition than simply a certain understanding of property and political authority. Being a Locke scholar himself, Tully is surely aware of this, but when he shifts from writing historical accounts of Locke's thought to polemics about contemporary Indigenous peoples, he tends to disregard these other aspects and motives within the modern constitutional tradition. For this reason, my argument often finds corroboration in Tully's own work. Specifically, I argue that the mitigation of outbursts of envy is a central concern for modern constitutional thinkers from Locke to Rawls. I treat envy as one member of the family of passions, emotions, or affects that (according to Hirschman) early modern political thinking sought to sublimate into 'interests'.

It is impossible to consider Locke's political theory in the *Two Treatises* without considering the thought to which he was respond-

[28] Tully, *Strange Multiplicity*, 5.
[29] Among Locke scholars, Michael Zuckert may be Tully's most prominent critic.

ing: patriarchalism, and specifically Robert Filmer's account of it.[30] Filmer's understanding of political authority relies on a literal interpretation of scripture, and I offer here a charitable recounting of what he argues. God gave dominion over the earth to Adam, and the rightful holders of sovereignty have inherited it from Adam via primogeniture.[31] For Filmer, the only form of government is monarchy; people are not born free and equal in any state of nature; and aristocracy, democracy, and tyranny are all illegitimate conceptions of governance. In his words, these forms are 'speculative notions, or airy names, invented to the delude the world, and to persuade the people…that there might be found some government, which might equal, if not excel, monarchy.'[32] Filmer was not the only one to insist on the Divine Right of Kings. While in retrospect the story sounds almost unbelievable, Filmer was restating an established and respected theory at a particularly troubled time in European—and especially English—political history. With frequent crises over political authority and the emerging presence (in Hobbes, for instance) of theories rooting that authority in individuals, Filmer was concerned above all by the threat of anarchy.

As Peter Laslett explains, Filmer claimed to show that 'no possible constitutional solution can be found to the problem of anarchy'.[33] Without firm authority in a single sovereign, authority that everyone recognizes as God-given and immutable, Filmer worries there will be nothing to stop constant conflict for property and power. In describing the results of departing from his account of authority, Filmer even uses the term 'envy'. The Romans, he argues, weakened the 'original power' of the Consuls by having a senate and

[30] The degree to which Locke was actually engaging with Filmer, as opposed to merely pretending to while intending to truly be in dialogue with Thomas Hobbes, is much debated, and largely revolves around when scholars believe the *Two Treatises* were composed. For an interpretation favoring Hobbes, see Michael Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence, KA: University Press of Kansas, 2002). For one favoring Filmer, see Laslett, 'Introduction', 1960. Zuckert's case is strengthened by the recent discovery of a memoir discussing Locke's familiarity with Hobbes. See Felix Waldmann, 'John Locke as a Reader of Thomas Hobbes's Leviathan: A New Manuscript', *Journal of Modern History* 93.2 (2021): 245-82. Yet the fact that Locke is in dialogue with Hobbes more than Laslett is willing to grant does not mean Zuckert's view that Locke's engagement with Filmer is pure theater is correct.

[31] Peter Laslett, 'Introduction' in Robert Filmer, *Patriarcha and Other Political Works of Sir Robert Filmer* (Oxford: Basil Blackwell, 1949), 11-16.

[32] Filmer, *Patriarcha and Other Political Works*, 200.

[33] Laslett, 'Introduction', 1949, 17.

other bodies. Such actions brought competition for power, 'danger and envy', and 'brought the government to confusion, civil dissension and utter ruin'.[34] For Filmer, patriarchalism serves the same purpose in apportioning political authority as primogeniture does in apportioning inheritance.

If primogeniture is simply the way inheritance occurs, and if everyone accepts this method of handing down property, there is no chance for the 'danger and envy' that characterize contemporary squabbles over inheritance in the absence of such uncompromising rules. Even if the second-born son (or first-born daughter) are privately envious of their brother's inheritance, there is nothing they can do about it, legally speaking. If individuals do not accept the justice of primogeniture or patriarchal inheritance of political power, envy may be a private problem, and some may wish to have the property or power of their brother or king for themselves. But so long as the political structure is able to suppress the public assertion of this passion, it is not a political problem. After all, Filmer is worried about the state of the political entity, not the state of souls.

Patriarchalism and its approach to the problem of envy are, obviously, no solutions at all for Locke. To begin with, men *are* free and equal, and so Filmer's efforts to demonstrate that some men are above others errs in its premise and intent.[35] This is where Locke brings in his accounts of self-ownership, property produced through labour, and property security as the grounds of his constitutional theory. Locke insists that his constitutional theory, contra Filmer's prediction, does not give rise to anarchy, since people will voluntarily consent to cede their natural rights to the government in order to preserve their property. Envy, or 'covetousness', is for Locke one of the significant forces that propel them to do so, though covetousness is not actualized in the *most* primitive state of nature for Locke, but only after the introduction of money and the division of available lands (although this is still prior to the social compact and institution of the sovereign state).[36] When some individuals in

[34] Filmer, *Patriarcha and Other Political Works*, 219.

[35] Laslett, 'Introduction', 1960, 93.

[36] To be sure, covetousness and envy are not identical, since envy involves both a certain dissatisfaction at the fortune of others in addition to a desire for their goods, while covetousness seems to involve solely the latter. That said, I believe that they are sufficiently related to justify my connecting of them here. See Locke, *Two Treatises of Government*, II.48-51, 75, 107-108; C. B. Macpherson, *The Political*

this advanced state of nature envy the property of others, they act to take it. Similarly, some may try to exercise arbitrary power over others. But there is yet no reliable body that can dissuade or punish such acts of naked ambition: 'the execution of the law of nature is, in that state, put into every man's hands'.[37] From such a situation, men are persuaded to enter the state of society, because only a single sovereign endowed with the political authority of the individuals under it can ensure the 'regulation of property and determination of landownership'.[38]

But envy is not only a source of motivation to exit the state of nature and enter political society. Before the emergence of the social compact, Locke suggests there is a point in the state of nature when envy does not exist because individuals simply do not desire *more* property or power. This is the very state in which Locke suggests Indigenous Americans found themselves upon the arrival of European colonists.[39] The 'Indians in America', Locke writes, have 'no temptation to enlarge their possessions or land'.[40] In such a condition, there is 'little matter for covetousness of ambition', since men confine 'their desires within the narrow bounds of each man's small property'.[41] Importantly, though, for Locke this state is not a prelapsarian one in which we should desire to remain. This state cannot last—and nor should it, since without any ambition or desire to venture beyond 'narrow bounds' no one feels the need to use the land industriously. It is *good*, to Locke, that we are desirous for *more*, because the production of *more* is what leads to the progressive improvement of humankind's estate. Explicitly suggesting that Native Americans lack this spirit of improvement, Locke writes that they are 'rich in land and poor in the comforts of life…A king of a large and fruitful territory there, feeds, lodges, and is clad worse than a day-laborer in England.'[42]

Theory of Possessive Individualism: Hobbes to Locke (Oxford: Oxford University Press, 1962), 236-237.

[37] Locke, *Two Treatises of Government*, II.7.

[38] Laslett, 'Introduction', 1960, 104. Laslett notes this is somewhat difficult to interpret from the text itself.

[39] James (Sákéj) Youngblood Henderson provides a helpful outline of Locke's remarks on Indigenous peoples. See: 'The Context of the State of Nature' in *Reclaiming Indigenous Voice and Vision*, ed. Marie Battiste (Vancouver, BC: University of British Columbia Press, 2000), 24–25.

[40] Locke, *Two Treatises of Government*, II.108.

[41] Locke, *Two Treatises of Government*, II.107.

[42] Locke, *Two Treatises of Government*, II.41.

We can be jolted out of this complacent state, Locke argues, by two things: money and population. Currency allows individuals to accumulate more than what they personally need to survive, since they can trade their surplus property for coins that retain value and can be exchanged for other things; overall production then expands to meet this new demand. And the growth of population stimulates growth in agricultural productivity as a fixed amount of land must yield more to meet the needs of more people.[43] For Locke, two developments are inevitable for social groups in the state of nature, as he considers Native Americans to be.[44] First, external factors (namely, money and population) will disrupt the state of nature for Indigenous peoples in which 'their little properties and less covetousness seldom afford greater controversies'.[45] Second, once this happens, the presence of greater property and greater covetousness will indeed afford greater controversies. To avoid these greater controversies, in which envy and covetousness play a significant role, people—including Indigenous peoples—need to abandon the informal governance they previously had and adopt constitutional government as Locke envisions it. Locke 'constantly refers'[46] to the 'controversy about…title' and the 'encroachment on the right of others' that occurs when envious desires in the state of nature push individuals to acquire more than what they personally need to subsist.[47]

He constantly refers to this problem, and then he 'claims to settle' it—with a single authoritative definition of property rights and a constitutional government with the political authority to enforce these rights.[48] Locke does not claim to put an end to envy or 'covetousness', but he does claim to provide a system in which such envy can be mitigated and controlled politically before it erupts into the conflicts that 'raged across Europe and America from the early sixteenth century to well after 1690'.[49] In other words, Locke tries to eliminate Indigenous paradigms of governance and property-relations and replace them with his own because he thinks that Indigenous ways of political life will be utterly unable to handle the

[43] Tully, *An Approach to Political Philosophy: Locke in Context*, 155.
[44] Locke, *Two Treatises of Government*, II.49
[45] Locke, *Two Treatises of Government*, II.75.
[46] Tully, *An Approach to Political Philosophy: Locke in Context*, 146.
[47] Locke, *Two Treatises of Government*, II.51.
[48] Tully, *An Approach to Political Philosophy: Locke in Context*, 146.
[49] Tully, *An Approach to Political Philosophy: Locke in Context*, 146.

outbursts of covetousness and conflict that inevitably follow the introduction of money and the growth of population.

The idea that envy (among other passions) is a problem to which constitutional government is the solution is a theme that reappears in both Kant and Rawls, two other 'modern constitutionalists' whom Tully attacks by name.[50] While Kant's discussion of envy in his political works is relatively brief, his argument is elaborated in greater detail by his most celebrated present-day proponent, Rawls.[51] Whereas for Locke envy seems to be naturally present in individuals and their desirousness, for Rawls envy is produced by unjust inequalities between individuals. Rawls is no less concerned than Locke by the problem of covetousness and envy, but he goes even further than Locke in his vision of how to politically manage it. Locke seems content to merely manage envy and covetousness of property and power; Rawls suggests that it can be mitigated to a much further degree in the well-ordered society. In short, in a well-ordered society all citizens are free and equal, and will have the 'familiar individual rights and liberties, such as free expression, liberty of conscience, and free choice of occupation'.[52] The state guarantees these rights, and guarantees that all social and economic inequalities must be 'attached to offices and positions open to all under *fair equality of opportunity*', and that these 'are to be to the greatest benefit of the least-advantaged members of society'.[53] To Rawls, this well-ordered society has 'many aspects' that 'work to mitigate if not to prevent' the conditions that foster envy.[54] While we cannot hope that it will be eliminated altogether, especially among those who have 'some liability to envy', the conditions of a well-ordered society mean that 'it may never be strongly evoked'.[55]

Rawls hopes that the only sort of envy that will prevail is an 'emulative' type that spurs self-improvement. The features of his political theory that best undermine envy, Rawls says, are those that

[50] Tully, 'Aboriginal Property and Western Theory', 167–68.

[51] Rawls explicitly writes that he follows Kant on this subject. See Rawls, *A Theory of Justice*, 532. Cf. Immanuel Kant, *Kant on Education*, trans. Annette Churton (Boston: D.C. Heath & Co., 1900), 99; *The Metaphysics of Morals*, trans. M. G. Gregor (New York: Harper & Row, 1964), 127.

[52] Leif Wenar, 'John Rawls', *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2021, https://plato.stanford.edu/archives/sum2021/entries/rawls/.

[53] John Rawls, *Justice as Fairness: A Restatement*, ed. E. Kelly (Cambridge, MA: Harvard University Press, 2001), 42–43.

[54] Rawls, *A Theory of Justice*, 536. Emphasis Rawls'.

[55] Rawls, *A Theory of Justice*, 537.

ensure people in the public sphere are treated 'with the respect due to a sovereign equal', and that 'everyone has the same basic rights that would be acknowledged in an initial system as fair.'[56] Rawls' approach to the problem of envy goes beyond the merely juridical. He argues that in a state reflecting his theory, citizens will share a 'normally effective sense of justice' that leads them to abide by the society's institutions, the justice of which they affirm. Society should be structured by the principles of sovereign equality and equal rights, *and* filled by people who understand and see it arranged in this way. In such a situation, individuals should acquire a moderating sense of justice that limits their resentment and envy.[57]

In recent years, some scholars in analytic philosophy have questioned whether envy is always bad, but these scholars only defend envy in certain circumstances where the system has not been fair: in Marguerite La Caze's words, envy can 'alert us to injustice…and can be a spur to action.'[58] But La Caze and others never seriously consider whether a system of procedural justice—which I take them to mean in a generally Rawlsian sense—is the system in which envy can 'alert us to injustice' and 'spur' us to action.

In sum, for a modern constitutional thinker such as Locke, having a fair and consistent system of property requires constitutional government. Today we understand this to involve an independent judiciary, the branch of government that makes decisions on property disputes, decisions that follow the rule of law and reduce violent or otherwise undesirable conflicts of covetousness. We can see it reflected in the *Federalist Papers*, those documents written to defend the American constitution and a system of government that aims to balance the passions and neutralize their dangerous antisocial potential.[59] For Rawls, constitutional government with jurisdiction over the entirety of a nation is required to enforce the principles of a

[56] Rawls, *A Theory of Justice*, 536.

[57] John Rawls, 'The Priority of Right and the Idea of the Good', *Philosophy & Public Affairs* 17.3 (1988): 251-76, at 269.

[58] La Caze, 'Envy and Resentment', 41.

[59] See especially *Federalist* nos. 72 and 51 in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Penguin, 1987). Cf. Hirschman, *The Passions and the Interests*, 29-30. Francis Fukuyama, among others, draws connections between the *Federalist Papers* and Locke on this front: Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 1992), 186-87. Unsurprisingly, Tully speaks scathingly of the *Federalist Papers*: 'On Gaia Democracies' in *Democratic Multiplicity*, ed. James Tully et al. (Cambridge: Cambridge University Press, 2022), 349-73, at 366–67.

well-ordered society. At the end of his career, Rawls began developing a framework by which such constitutional government could bring about a well-ordered society across the entire world.[60] Both theories necessitate the unity of the constitutional order, since without this unity there is no way to enforce the principles that animate the theories. It is this unity that so frustrates Tully and which leads him to call for a 'multiplicity'. 'Aboriginal claims are either ignored' in these orders, Tully argues, 'or, at best, misrecognized as claims for some sort of minority status within the European-derived normative framework of an overarching national community.'[61]

My aim here has not been to show that Tully is wrong about this claim. In fact, I think it likely he is right. Rather, I have tried to demonstrate how the problem of antisocial passions, including envy, has driven modern constitutionalist thought to hew to a normative framework with a single sovereign state.[62] Tully insists this assumption is a form of cultural imperialism, deriving from 'the early modern period of national consolidation and centralization, where cultural differences were experienced as a threat to one's own insular identity and treated as inferior. It has no place in the world of today.'[63] Again, while he may be correct to call this imperialism, my point is that Tully fails to consider other political concerns that motivate 'modern constitutionalism', including envy. Because he does not recognize these problems when dissecting modern constitutionalism, Tully reproduces them in his positive project of 'strange multiplicity'.

[60] Rawls's nonideal theory in his late work aimed at establishing norms for the relation of well-ordered societies with other societies, not necessarily well-ordered. Rawls's approach indicates he may have anticipated the difficulties of multiculturalism that Tully is criticizing him for overlooking. Yet Tully's critique is equally directed at relations within Western nation-states as much as it is relations between Western nation-states and other political communities around the world. See John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001).

[61] Tully, 'Aboriginal Property and Western Theory', 169.

[62] To be sure, envy and the passions in general were not the only concerns that led thinkers to develop theories of modern constitutionalism and the Westphalian state, and issues such as religious toleration were also significant. See, for instance, John Marshall, *John Locke, Toleration, and Early Enlightenment Culture* (Cambridge: Cambridge University Press, 2006).

[63] James Tully, *Public Philosophy in a New Key*, vol. 1 (Cambridge: Cambridge University Press, 2008), 255.

3. 'Strange Multiplicity' and the problem of envy

In one sense, it is unsurprising that Tully's approach gives little mind to the problem of the passions and envy—or any other issue that a positive political order might address. At many points, he characterizes the approach as 'critical' rather than 'regulative'.[64] His Wittgenstein-inflected method involves 'dissolving philosophic problems, not by another solution, but by a survey that brings critical light to unexamined conventions that govern the language games.'[65] Among these conventions, as I have already stated, he is especially focussed on the way in which modern constitutionalism tends to function as an 'imperial yoke'.[66]

Yet pointing out this tendency is not all Tully is doing. He says explicitly that he seeks a 'way to break with convention', not merely to examine it, and that the break consists in the initiation of a 'post-imperial dialogue in which the interlocuters participate in their diverse cultural forms'.[67] This post-imperial dialogue is his 'strange multiplicity', or 'treaty federalism', visually depicted by the Spirit of Haida Gwaii sculpture. While Tully is not overly specific on its details, the post-imperial dialogue is one without a clear hierarchal common authority mediating disputes.[68] He has more recently described the practise of post-imperial dialogue as an ethic of 'civic citizenship', which he contrasts with the 'civil citizenship' of modern constitutionalism.[69] Tully's is a theory of political life characterized by '*negotiated* practices all the way down'.[70] Crucially, these practises do not depend on any 'proto-institutional background' such as rules, conditions, or processes.

Political life without violent conflict is made possible by one of two things: a common authority, or a common norm. Without a common authority, 'treaty federalism' or 'civic citizenship' must have a common norm to guide participants. Tully's candidates for these norms are what he calls the 'three conventions': self-determination, consent, and continuity. He argues that all three are 'basic' in 'the

[64] Tully, *Public Philosophy in a New Key*, 1:225.
[65] Tully, *Strange Multiplicity*, 35.
[66] Tully, *Strange Multiplicity*, 5.
[67] Tully, *Strange Multiplicity*, 57.
[68] Tully, *Public Philosophy in a New Key*, 1:228.
[69] James Tully, 'On Global Citizenship' in *On Global Citizenship: James Tully in Dialogue* (London: Bloomsbury Academic, 2014), 3-101.
[70] Tully, 'On Global Citizenship', 36. Emphasis in original.

western and aboriginal traditions',[71] and he has elaborated further on these virtues of democratic freedom in more recent work. While he indicates that they are present in many traditions, however, Tully does not offer any substantive defence of them. He makes clear that he is not arguing about solutions but aims to provide 'critical distance'.[72]

Would these norms of treaty federalism address the problem of the passions, including envy? Would they prevent its emergence in a political situation no longer governed by a modern constitutional order? I believe they would not. I will leave aside Tully's claim that self-determination, consent, and continuity are genuinely 'basic' norms in the Western and Indigenous traditions alike, though Tully's own testimony indicates otherwise, since he establishes that from Locke onward a large part of the Western tradition both denies that Indigenous nations are legitimate polities and that their consent is required for exercising political authority over them.[73] Instead, I will argue that these conventions are too thin in themselves to address serious problematic passions such as envy—a fact made all the more salient considering that Tully does not address them at all.

Tully suggests his three conventions would orient the 'irreducibly diverse' inhabitants of the strange multiplicity canoe towards a post-imperial dialogue. But why, on his grounds, would any passenger of the canoe abide by the conventions? It is Tully's own political theory that constitutes the language games which in turn provide the foundations for such conventions. If I am in the canoe and feeling envious of whomever is steering, why would I not simply refuse to play the language games that underlie the conventions preventing me from taking the paddle?[74] Once I have understood the language games, I can dispense with the conventions—just as Tully does with modern constitutional conventions. Indeed, as David Armitage has observed, Tully seems to recognize implicitly that these conventions are not enough. While he writes dismissively of 'juridical approaches' that claim to transcend mere convention and ground norms in universal principles, he also 'still speaks the language of "continuing

[71] Tully, *Public Philosophy in a New Key*, 1:232, 279.
[72] Tully, *An Approach to Political Philosophy: Locke in Context*, 138.
[73] Tully, *An Approach to Political Philosophy: Locke in Context*; 'Aboriginal Property and Western Theory'.
[74] George Crowder, *Theories of Multiculturalism: An Introduction* (Cambridge: Polity Press, 2013), 116-17.

rights to the land," "prior sovereignty," and "the rights of Indigenous peoples to self-determination" when describing their claims against the hegemonic assertions of settler states to subsume them.'[75]

Despite this implicit recognition that juridical guarantees are significant, Tully downplays the possibility that a canoe governed by multicultural and dialogical convention alone will lead to violent conflict. Asks Armitage: 'how can his philosophy take account of widespread armed struggles driven by greed or grievance rather than directed strategically toward peaceful negotiation?'[76] Armitage uses the language of greed rather than envy, but his focus is likewise on the passions. Armitage is surely thinking of the chaos visited upon a multitude of post-colonial states around the world after achieving independence in the twentieth century. Places such as South Africa, Zimbabwe, Mozambique, and Angola liberated themselves from unjust constitutional orders that—even more than Tully's Canadian and American states—exercised unilateral authority over native inhabitants. In the South African case, liberation from unjust constitutionalism has not led to peaceful dialogue among culturally diverse groups. Instead, wealth inequality has grown worse, violence and crime have intensified, and citizens seem to expect violent political conflict to break out at any moment.[77]

So too in Zimbabwe, where the end of British colonial rule and a resident minority of British descent afforded the opportunity for a strange multiplicity, oppressive constitutional rule of one sort was succeeded by something even worse. Robert Mugabe, jealously guarding his own power and envious of those who also had some, did not listen to others in pursuit of dialogue; he had them massacred. There was no consent-based consideration of land—those who envied the holdings of others were simply encouraged to take them by violence.[78] While some of these crimes were carried out against the remaining British population that had previously collaborated with the colonial regime, many of them were not—especially

[75] David Armitage, 'Probing the Foundations of Tully's Public Philosophy', *Political Theory* 39.1 (2011): 124-130, at 127.

[76] Armitage, 'Probing the Foundations', 127.

[77] Jason Burke, 'A Crisis of Faith in South Africa: "People Have Given Up on the State"', *The Guardian*, April 1, 2022.

[78] Steven Gruzd, 'Robert Mugabe's Journey From Freedom Fighter to Oppressor', *The Atlantic*, June 9, 2019.

the *Gukurahundi* genocide of 1982-87 against the Northern Ndebele people.

The point is that abandoning modern constitutional frames—which may yoke diverse groups under its overarching norms, but which simultaneously mitigate political passions that so often lead to violence—can easily lead to more disastrous outcomes. Conventions of trust, good governance, and non-violence may seem stable under certain conditions, but if constitutional rules are abandoned it is less clear that open negotiation will avoid them equally well. Mere conventions are unlikely to control outbursts of envy. The current Canadian conflict over authority and resources with which I began this paper—Wet'suwet'un land—is managed by the Canadian courts, authoritative enforcers of Canada's (modern) constitution. A treaty federalist multiplicity, with no clear constitutional order to rule on conflicts and only three 'conventions' to guide interactions seems likely to lead to greater outbursts of envy and destructive rivalry.

Indeed, before the Canadian courts made decisions on these issues, the situation was beginning to resemble a war of all against all, with various factions within each party (including Indigenous nations) making unilateral declarations about their authority, and even Leonardo DiCaprio participating in the discourse.[79] This does not mean that Tully and other proponents of treaty federalism are not to be commended for thinking beyond modern constitutionalism—they should be, as the faults of modern constitutionalism compel us to consider alternatives. But in doing so we must be forthright about the problem of political passions that modern constitutionalism addresses and the need for any alternatives to also address them. This, alas, Tully does not do. In the final section of this paper, though, I suggest that Indigenous philosophic traditions *do* address the political passions—including envy—in a substantive way by offering a normative account of human life that includes moral counsel *against* these passions. While Tully at times considers Indigenous thinking in its own right, especially in recent years, he more often invokes it only to 'give us ... much needed critical distance from our basic assumptions' in the Western tradition.[80] That is, he uses it as a tool for critique. Yet because Indigenous traditions see themselves as of-

[79] Gidimt'en Clan, 'Opinion: We Are Wet'suwet'en and the Coastal GasLink Pipeline Protesters Do Not Represent Us', *National Post*, December 7, 2021.
[80] Tully, *An Approach to Political Philosophy: Locke in Context*, 138.

fering genuine alternatives to political problems rather than endless critique, it is worth considering them on their own terms.

4. Indigenous approaches

To be clear, I do not mean to defend Indigenous thinkers and their philosophy here, as I have neither the space nor the standing to do so.[81] But I wish to make clear that Indigenous thought must be taken seriously as a philosophic alternative in a way treaty federalists fail to do when they deconstruct modern constitutionalism.[82] As hermeneutic thinkers such as Hans-Georg Gadamer and Fred Dallmayr suggest, we must be willing to consider whether the other is right—especially if one thinks, as Tully and others do, that *we*—insofar as non-Indigenous peoples are inheritors of modern constitutionalism—have gotten something wrong.[83]

What I want to focus on here is the way in which Indigenous thinkers approach the passions, especially human acquisitiveness and competition with others, in the context of politics (as opposed to personal well-being, etc.). I argued in section two that the modern constitutional approach aims to mitigate the political effects of the passions, including envy, by establishing authoritative rules and procedure to manage competition over property and office. It is this system that Tully argues is unjust to Indigenous peoples, as it misrecognizes and misrepresents their political and cultural traditions. I

[81] I use Indigenous to mean those people descended from the prior inhabitants of lands that were subsequently subject to colonization, though my focus remains on the Anglosphere where the dividing lines between Indigenous and non-Indigenous are clearer than elsewhere in the world. See S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004). Speaking of 'Indigenous' approaches to managing the passions brings with it the great risk of flattening the differences among Indigenous nations and peoples into a single pan-Indigenous perspective. Here I aim for a general account of various thinkers while remaining aware of this risk. See Yann Allard-Tremblay, 'Rationalism and the Silencing and Distorting of Indigenous Voices', *Critical Review of International Social and Political Philosophy* 24.7 (2019): 1024-1047.

[82] For instance, Daniel Sherwin argues that we should turn 'away from Indigenous thought traditions, and towards critical examinations of political theory's entanglements with colonialism and imperialism.' See Sherwin, 'Comparative Political Theory, Indigenous Resurgence, and Epistemic Justice: From Deparochialization to Treaty', *Contemporary Political Theory* 21 (2022): 46-70, at 65.

[83] Fred Dallmayr, 'Beyond Monologue: For a Comparative Political Theory', *Perspectives on Politics* 2.2 (2004): 249–57; Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum, 1975).

do not dispute this point of Tully's.[84] But I will argue that Indigenous thinkers tend to endorse a strong moral norm limiting the desires of individuals for property and power on the basis of what they understand humans to inherently be. This includes a normative account of humans' proper relation to property and political power. For Indigenous thinkers, I suggest, this norm is not a mere convention or cultural attribute but part of a genuine human good, a fact of nature which describes how the world really is.

Missionaries in North America, including the Jesuit Fr. Paul le Jeune, quickly noticed that Native peoples appeared not to have the same appetites as Europeans. 'If it is a great blessing to be free from great evil, our Indians should be considered fortunate', le Jeune writes of the Montagnais. 'For there are two tyrants, ambition and avarice, who distress and torture so many of our Europeans but have no dominion over these great forests. Because the Indians have neither civil regulation, nor administrative offices, nor dignities, nor any positions of command.…they never kill each other to acquire these honors. Also, they are content with basic subsistence, and so not one of them gives himself to the Devil to acquire wealth.'[85] Drawing on written accounts of America (for he never himself visited), Locke makes a similar observation, writing that there is 'little matter for covetousness of ambition' in the state of nature, since men confine 'their desires within the narrow bounds of each man's small property'.[86] But le Jeune's admiration notwithstanding, the relative lack of envious passions among Native Americans—as I have already established—is a problem for Locke because he sees desire and covetousness as engines of development, provided they are properly managed. It is good, for Locke, that we might see the plenty of another and envy it—provided that the political system allows

[84] That said, some argue that the United States and Canada in fact developed partially under the influence of Indigenous political traditions and represents a synthesis of Indigenous and European political practices. Certainly, the Haudenosaunee Confederacy, among others, had a highly structured political order, though it governed—at least explicitly—far less of life than modern constitutional regimes. See: William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, OK: University of Oklahoma Press, 1997); Kayanesenh Paul Williams, *Kayanerenkó:Wa: The Great Law of Peace* (Winnipeg, MT: University of Manitoba Press, 2018); John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Penguin Canada, 2009).

[85] Allan Greer, ed., *The Jesuit Relations: Natives and Missionaries in Seventeenth-Century North America* (Boston: Bedford Books, 2000), 33.

[86] Locke, *Two Treatises of Government*, II.107.

us to mix our labour with natural objects and accumulate plenty of our own. Envy can drive us to produce, and greater production is desirable in itself.

Cherokee philosopher Brian Burkhart, in his contemporary account of Indigenous philosophy, agrees with Locke and le Jeune that Indigenous peoples try to limit their ambition and covetousness for property and power—but, like le Jeune and unlike Locke, he does not think that this is a bad thing.[87] Without explicitly mentioning Locke, Jicarilla Apache philosopher Viola Cordova similarly argues that, at least in the Navajo tradition, desirousness along the lines that Locke envisioned 'would be an abnormal or incorrect state of the human being'.[88] Why wouldn't Indigenous peoples desire more property or envy those with more property than they? Because the natural world and its constituent parts are not simply dead matter that exists for us to manipulate to our ends.[89] And humans are not simply driven by wanton passions to such an extent that we can only hope to *harness* them through constitutional systems into productive interests—on the contrary, we are capable of genuine virtue. Unlike Kant, who argues that even a 'people comprised of devils' could be well-governed if they had the right legal framework,[90] Anishnaabe jurist John Borrows insists that legislation and other societal structures are of little benefit if the individuals themselves are not 'striving to be good'—a potential that they have within themselves.[91] Rather than trying to mitigate and redirect bad passions through procedural rules or their sublimation into manageable interests, Indigenous thinkers often emphasize the importance of encouraging moral goodness.

Unlike the Lockean account, which presumes humans to be self-interested accumulative agents, Indigenous traditions see hu-

[87] Brian Burkhart, *Indigenizing Philosophy Through the Land: A Trickster Methodology for Decolonizing Environmental Ethics and Indigenous Futures* (East Lansing: Michigan State University Press, 2019), 40; cf. William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 2003), 80.

[88] Viola F. Cordova, *The Concept of Monism in Navajo Thought* (Doctoral Dissertation, Albuquerque, NM, University of New Mexico, 1992), 105.

[89] I elaborate on this element of Indigenous thinking elsewhere. See Samuel Piccolo, 'Indigenous Sovereignty, Common Law, and Natural Law', *American Journal of Political Science* 0, no. 0 (2023): 1–13.

[90] Kant, *Perpetual Peace and Other Essays*, 124.

[91] John Borrows, 'Seven Generations, Seven Teachings: Ending the Indian Act' (National Centre for First Nations Governance, 2008), https://epub.sub.uni-hamburg.de/epub/volltexte/2012/12723/pdf/john_borrows.pdf.

mans differently by nature.[92] Chippewa sociologist Duane Champagne explains that, typically speaking, Indigenous traditions do not see humans 'as self-seeking economic and political actors'. Instead, they 'often have religious, ceremonial, or community tasks set as their life missions.'[93] Indigenous thinkers tend not to think of community fabric as simply a set of historically contingent human laws but rather a constant effort 'to fit into the lawful, ordered, earth community which always already is.'[94] Or in Tewa scholar Gregory Cajete's words: 'education is nature-centered' *and* community oriented.[95] Indigenous thinkers view the moral education of members as a crucially important element of the political community, and believe that this education must be grounded in an understanding of the world as constituted by a moral order that is not entirely dependent on human political communities.

Rather than a strategic grouping of individual interests—a contract to manage power—the foundation of community is conceptualized by Indigenous thinkers in terms of the way it advances the human good. 'Without community potential', writes Shuswap activist George Manuel, 'the learning of an individual is either wasted or drives him away from the community to which he should be contributing.'[96] In the introduction to his book *Law's Indigenous Ethics,* a work

[92] The degree to which the Lockean account endorses 'possessive individualism' is debated, with C. B. MacPherson stating the original case most forcefully, but clearly Locke's account assumes self-interestedness at some level, at least in relation to the accumulation of property and power. See MacPherson, *The Political Theory of Possessive Individualism*. For an overview of Macpherson's critics, see David Miller, 'The MacPherson Version', *Political Studies* 30.1 (1982): 120–27. Tully himself does not affirm MacPherson's thesis, but he does commend MacPherson for the argument, and his discussion of Locke's relationship to colonialism—via commerce—appears to echo some of MacPherson's ideas. See Tully, *An Approach to Political Philosophy: Locke in Context*, 95; 'Aboriginal Property and Western Theory', 161; *Strange Multiplicity*, 72-77.

[93] Duane Champagne, 'Remaking Tribal Constitutionalism: Meeting the Challenges of Traditionalism, Colonialism, and Globalization' in *American Indian Constitutional Reform and the Rebuilding of Native Nations*, ed. Eric D. Lemont (Austin, TX: University of Texas Press, 2006), 17.

[94] Aaron Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together One Vision of Anishinaabe Constitutionalism* (Dotoral Dissertation, Victoria, BC, University of Victoria, 2019), 76; cf. Thomas D. Peacock and Marlene Wisuri, *Ojibwe Waasa Inaabidaa* (Edina, MN: Afton Historical Press, 2002), 74.

[95] Gregory Cajete, *Indigenous Community: Rekindling the Teachings of the Seventh Fire* (St. Paul, MN: Living Justice Press, 2015), 39, 58; *Look to the Mountain: An Ecology of Indigenous Education* (Rio Rancho, NM: Kivakí Press, 1994), 174.

[96] George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Minneapolis, MN: University of Minnesota Press, 2019), 204.

on the seven grandfather/grandmother Anishnaabe teachings, John Borrows attributes the following insight to Andrew Stark:

> Unlike some individual virtues that are quite self-focused and contribute primarily to the individual's own excellence…the seven Anishnaabe grandmother teachings are other-focused and contribute to the functioning of society. Love, truth, bravery, humility, and honesty, though they are individual virtues too, have to do with how the individual treats others.[97]

In Indigenous thinking, as Stark has it, ethical teachings are good *both* for the individual *and* for society because the ethical life to which we aspire is one in which individual and social goods are harmonized. This means that living a good human life involves participation in community as 'a living, spiritual entity supported by every responsible' member.[98] This does not mean that individual freedom is not valued in Indigenous thought, but that the exercise of it must be 'consistent with the preservation of relationships and community harmony',[99] including relationships with moral forces in the broader world.

Anishnaabe scholar Leanne Betasamosake Simpson insists that 'Indigenous education is not Indigenous or education from within our intellectual practices unless it comes through the land, unless it occurs in an Indigenous context using Indigenous processes.'[100] Individual skills and ethical values are of course part of this education, and Simpson uses the skill of syrup-making and the values of cooperation, trust, and reciprocity as examples.[101] But I take her more profound point to be that the purpose of the education cannot be reduced to teaching individual skills, and certainly not skills oriented to economic ends alone.[102] Because it must come 'through the land', the foundation of Indigenous worldviews, education is about much more than specific skills or values—education is about giving

[97] John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019), 22.

[98] Cajete, *Native Science: Natural Laws of Interdependence*, 276.

[99] Murray Sinclair, 'Aboriginal Peoples and Euro-Canadians: Two World Views' in *Aboriginal Self-Government in Canada: Current Trends and Issues*, Purich's Aboriginal Issues Series, ed. John H. Hylton (Saskatoon, SK: Purich Publishing, 1994), 25.

[100] Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (Minneapolis, MN: University of Minnesota Press, 2017), 154.

[101] Simpson, *As We Have Always Done*, 150.

[102] Cf. Cajete, *Look to the Mountain*, 22.

community members the context and opportunity they need to live a good life (*mino bimaadiziwin*). All community members are responsible for discovering what *mino bimaadiziwin* means for themselves, but Simpson's work clearly indicates that this plurality of individual perspectives on *mino bimaadiziwin* should not violate the 'fundamental principles and values of Nishnaabeg society'.[103] Political communities should thus educate members in a worldview that arises from the land so as to provide members with strong 'fundamental principles and values' that allow them to pursue genuinely good variations of *mino bimaadiziwin*.

Though Indigenous thinkers rarely lay down the sort of foundational universal principles that can be found in the Western natural law tradition, as Kahnawake political theorist Taiaiake Alfred explains, 'in most traditional indigenous conceptions, nature and the natural order are the basic referents for thinking of power, justice, and social relations. The land was created by a power outside of human beings.'[104] In suggesting that moral education can come from the always already existing land, Indigenous thinkers are setting out an understanding of morality that amounts to more than negotiation between competing interests (as in the modern constitutional framework) or pluralistic worldviews (as in Tully's strange multiplicity). Instead, Indigenous thought affirms that human beings have a nature which can only flourish when the passions are educated and ennobled by being brought into accordance with natural order.

In sum, I have outlined one way in which Indigenous thinkers offer a distinct approach to the problem of the passions in political life: by arguing that humans by their nature flourish in the context of community, they suggest that envying or desiring gain for oneself at the expense of the community is contrary to the right way for humans to live. They suggest that political communities should educate their members in a moral manner to avoid envy and other such passions, and—as I will reiterate in my conclusion—that this morality has some sort of grounding in 'nature and the natural order'.[105]

[103] Leanne Betasamosake Simpson, *Dancing On Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg, MT: Arbeiter Ring Pub., 2011), 138.

[104] Taiaiake Alfred, 'Sovereignty' in *A Companion to American Indian History*, ed. Philip J. Deloria and Neal Salisbury (New York: Blackwell Publishing, 2002), 470.

[105] Taiaiake Alfred, 'Sovereignty' in *A Companion to American Indian History*, ed. Philip J. Deloria and Neal Salisbury (New York: Blackwell, 2002), 470.

Conclusion

I have made four main arguments in this essay. First, that treaty federalist critics of Canadian and American constitutionalism—here represented by James Tully—consider these constitutional orders illegitimate because of their treatment of Indigenous nations. Second, that modern constitutional orders treat political passions, of which envy is a prime example, as political problems that the constitutional structure should address. Third, that Tully's treaty federalist approach to constitutionalism does not sufficiently consider the role of the passions in the escalation of political conflicts, including the threat of outbursts of envy. Fourth, that Indigenous political and philosophic traditions recognize and address the problem of human desirousness. I argued that Indigenous traditions address the problem of political passions by way of a specific philosophical understanding of land, human being, and political life based in natural goodness.

It is worthwhile to consider Tully's work alongside Indigenous thinkers because they share a general antipathy to modern constitutionalism and a conviction that its uniformity is damaging to Indigenous peoples. Both seek to move beyond its authority. But while Tully's 'strange multiplicity' operates on the basis of open-ended conventions with uncertain foundations, Indigenous thinkers tend to ground their political norms on a particular understanding of nature and human life—one which is certainly not definitive or overly prescriptive, but which orients humans away from the appetites and desires constitutive of envy. Both seek to replace the authority of modern constitutionalism with new norms, but unlike Indigenous thinkers, Tully does not generally ground these norms in any substantive vision.

Nowhere is this contrast more apparent than in the gulf separating Tully's work from that of his own Indigenous students, such as Anishnaabe law professor Aaron Mills. Mills' work is clearly inspired by Tully, including his critique of modern constitutionalism. But where Tully's motif is a strange multiplicity, a 'post-imperial constitutionalism', Mills's is 'rooted constitutionalism'. Mills cites an Anishnaabe elder, Harry Bone, who explains that the Anishnaabe concept of '*miinigowiziwin*' refers to 'laws and original instructions' that 'are gifts from the Creator on how to live in harmony and bal-

ance all other creation'.[106] Mills explains: 'That last sentence reveals the inherent order and lawfulness that characterizes rooted accounts of creation', which Mills suggests can provide a foundation for a legal order.[107]

The rootedness of legal and political practises gives them a secure basis in a specific way of understanding the world. As Mills writes, 'constituting community as a reproduction of the earthway in which one is immanently rooted means annihilating any pretense of a nature/culture divide.'[108] This means that culture should be rooted in nature—not in a way that provides ready-made commands for all situations but one which provides guidance for human behaviour. In this account, by paying attention to this natural order we should be able to see the good in limiting our desires for power and property; we should be able to see how envy can be managed not by an authoritative constitutional order but by our understandings of what is good which structure our habituation into communities and practises that reproduce the 'earthway'. Unlike Tully's account of the three conventions, such 'rooted' norms have a foundation deeper than historical tradition and democratic decision. If the land was created by a power beyond human beings, and that power has moral content, then human existence cannot be adequately conceived or meaningfully lived solely in terms of language-games and principles of 'free play', or *Spielraum*, as Tully would have it.[109]

In recent years, Tully has distanced himself from concepts of treaty federalism or strange multiplicity in favour of what he calls 'Gaia citizenship', or 'Gaia democracy'.[110] He has hinted that a more substantive grounding of politics in principles of self-limitation may be necessary given the damage being done to the climate under current political orders. He discusses issues of the climate and natural philosophy by drawing on some Indigenous natural philosophy.[111] He now calls modern constitutionalism 'constitutional representative

[106] Qtd. in Mills, *Miinigowiziwin*, 69.
[107] Mills, *Miinigowiziwin*, 69.
[108] Mills, *Miinigowiziwin*, 76.
[109] Tully, 'On Global Citizenship', 44-45.
[110] Tully, 'A View of Transformative Reconciliation: Strange Multiplicity and the Spirit of Haida Gwaii at Twenty' (Indigenous Studies and Anti-Imperial Critique for the 21st Century: A Symposium Inspired by the Legacies of James Tully, Yale University, 1-2 October 2015); 'On Gaia Citizenship' (The Mastermind Lecture, University of Victoria, 20 April 2016); 'On Gaia Democracies'.
[111] Tully, 'On Gaia Democracies'.

demoarchy', which he argues 'concentrates official political power in representative institutions, thereby weakening and disempowering local self-government.'[112] He endorses the cultivation of 'ecosocial democratic ethics in communities of practice of various kinds', which involves 'democratic economics, technologies, citizen-governance and participatory modes of representation and networking'. For Tully, when individuals participate in such forms of living, 'they withdraw from and non-cooperate with the unsustainable systems that these replace or transform. They cultivate a cyclical and sustainable counter-modernity.'[113] He argues that Indigenous traditions are one of several that have long encouraged human life to work in concert with other living beings rather than exploiting them.

But Tully remains reluctant to treat nature as any sort of guide or norm for human behaviour, much less politics, in a way that Indigenous thinkers often do. He remains rhetorically committed to an antifoundationalist political theory, even as it is unclear why democratic freedom is not for him a kind of foundation. In fact, Tully also appears to have a foundational commitment to non-violence. His commitment is so strong that he describes non-violence as existing on a 'higher ethical and transformative plane', and offers several examples of political actors initially committed to violence who recognized its futility and abandoned it, such as Malcolm X.[114] Yet it is hard to square Tully's commitment to non-violence with his claim that, in his theory, 'there is never the last voice or word'.[115] *Either* there is never a last word, *or*, as Tully argues in the same volume, violence is inherently inferior to non-violence—i.e., it is a foundational first principle. If civic citizenship is negotiated all the way down, then violence is always a possibility—for what could keep political actors from negotiating into violent conflict?[116] Modern constitutionalism offers strong mechanisms and procedures aimed at mitigating the passions that often lead to political violence. Tully asserts

112 Tully, 'On Gaia Democracies', 367.

113 Tully, 'On Gaia Democracies', 371.

114 Tully, 'On Global Citizenship: Replies to Interlocutors' in *On Global Citizenship*, 269-327, at 283–89.

115 Tully, 'On Global Citizenship', 36.

116 Tully's appeals to the natural world and the state of the climate in his Gaia theory also raise questions about 'last words'. It is unclear what role the apparent facticity of his claims about Gaia and the non-human natural world, which, after all, does not speak to us in any language of its own, can have in the realm of 'negotiated practises'.

that violence is inferior to non-violence, but if he cannot make this a foundational moral claim, he needs to explain how a postmodern constitutional theory will mitigate those passions.

As I have said repeatedly, my aim is not to offer a polemical defence of Indigenous philosophies' approach to the passions or human desires, but simply to outline those approaches and contrast them with Tully's 'strange multiplicity'. Mills explains that 'rooted constitutionalism' is rooted in a particular way of understanding the world, one which he and other Indigenous thinkers hold both to be true and less conducive to violence than alternatives.[117] Still, it is a fact that this worldview is not shared by many in North America, and much work would need to be done to spread it before rooted constitutionalism can become a viable alternative to modern constitutionalism. But for those committed to abandoning modern constitutionalism, it is surely work worth doing. Tully is certainly correct that concerns about the state of the climate—not to mention the COVID-19 pandemic—have raised questions about whether the antifoundationalist impulse in twentieth-century political philosophy was correct or salutary for society, and whether there is anything that constrains human moral and political freedom beyond the rights-claims of other humans.[118]

In the political realm, people will still conflict over whose property and whose power should reign, and we would be complacent to think there little risk under any political order that these conflicts of passion will explode into outbursts of envy and competition. Critics of modern constitutionalism such as Tully have ably demonstrated that this constitutionalism is not as peaceful as its proponents claim—especially for those outside of the European world—and they may be correct that their approach of examining language games can dissolve the *philosophic* problems that modern constitutionalism presents in a self-assured manner.[119] But the *political* problems that modern constitutionalism arose to address may perhaps not be so easily soluble. We forget this at our own peril.

[117] Mills, *Miinigowiziwin*, 268.
[118] Ava Kofman, 'Bruno Latour, the Post-Truth Philosopher, Mounts a Defense of Science', *The New York Times Magazine*, October 25, 2018.
[119] Tully, *Strange Multiplicity*, 35.