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RESEARCH ARTICLE/ÉTUDE ORIGINALE

Contested Frontiers: Indigenous Power, Settler Rights and the Re-Constitution of Federal Territories

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Abstract

Australia, Canada and the United States are settler-colonial federations comprising two types of federal units. The first are states/provinces: full, permanent federal partners, securely settler controlled. The second are territories. Historically, territories were "partners in waiting," slated for federal incorporation once settlers achieved control of the jurisdiction, outnumbering and disempowering Indigenous peoples. The "rights revolution" made achieving control by force less acceptable. Meanwhile, in Australia, Canada and the US, there remain several territories where Indigenous peoples hold significant power. I find today's remaining territories experience a new way settlers target Indigenous power, not through force but through rights-challenges. Further, I show these rights-challenges provoke "constitutive contests," the outcome of which are consequential, potentially "re-constituting" territories in a manner fostering settler control. Finally, I explore why territories might be especially vulnerable to re-constitution through settler-rights challenges.

Résumé

L'Australie, le Canada et les États-Unis sont des fédérations coloniales composées de deux types d'entités fédérales. Les premières sont les États/provinces: des partenaires fédéraux à part entière et permanents, solidement contrôlés par les colons. Les secondes sont les territoires. Historiquement, les territoires étaient des «partenaires en attente», destinés à être intégrés à la fédération une fois que les colons auraient pris le contrôle de la juridiction, en surpassant les peuples autochtones en nombre et en les privant de leurs pouvoirs. La «révolution des droits» a rendu moins acceptable la prise de contrôle par la force. Parallèlement, en Australie, au Canada et aux États-Unis, il existe encore plusieurs territoires où les peuples autochtones détiennent un pouvoir important. Je constate que les territoires qui subsistent aujourd'hui sont confrontés à une nouvelle forme de lutte des colons contre le pouvoir autochtone, qui ne passe plus par la force, mais par la remise en

cause des droits. En outre, je montre que ces contestations des droits provoquent des «conflits constitutifs» dont les conséquences sont importantes, pouvant potentiellement «re-constituer» les territoires d'une manière qui favorise le contrôle des colons. Enfin, j'explore les raisons pour lesquelles les territoires pourraient être particulièrement vulnérables à la reconstitution par le biais de contestations des droits des colons.

Keywords: territories; settler colonialism; Indigenous governance; federalism; individual rights

Mots-clés: territoires; colonialisme de peuplement; gouvernance autochtone; fédéralisme; droits individuels

Introduction

In the US territory of Guam, local authorities, seeking to determine the island's future political relationship with the US, enroll voters for a "decolonization" plebiscite. In deference to Guam's Indigenous people, the Chamorros, enrolment is limited to "native inhabitants." A non-native inhabitant—a member of Guam's "settler" majority—claims unlawful exclusion, sues and wins (Davis v. Guam, 2017a). The decolonization plebiscite stalls indefinitely.

In Canada's Northwest Territories, authorities redistrict the legislature, apportioning more seats to the rural half of the population, who are overwhelmingly Indigenous, than to the urban half, who are mostly settlers. Urbanites sue for "effective representation." They win, defeating Indigenous-rights counterclaims (Friends of Democracy v. NWT, 1999). Urban seats are added, shifting the balance of power in the territory and causing a "constitutional crisis" (Government of the Northwest Territories, 1999a: 66).

In Australia's Northern Territory, the federal government returns half the land to Indigenous owners and institutes a permit system regulating settler access. The settler majority calls this "apartheid." To bypass federal authority they press for statehood, drafting a "colour-blind" state constitution. Indigenous peoples boycott the constitutional convention and condemn the statehood effort. In a public referendum, by a tiny margin, statehood fails (Dunstan, 2006).

All three of the above cases involve settler-rights challenges. In such challenges, settlers invoke, enact and/or litigate liberal–democratic rights, targeting purportedly illiberal Indigenous uses of power. Settler-rights challenges are academically well documented. They have been found to arise especially in Australia, Canada and the US, the three predominant "Anglo-settler federations" (for example Berger, 2010, 2013, 2019; Blackhawk, 2019, 2023; Gover, 2014, 2015; McHugh, 2004, 2008; Spitzer, 2020, 2024).

All three of the above cases, moreover, involve a specific, rare type of Anglo-settler federal jurisdiction: territories. Historically in Australia, Canada and the US, territories were not partners in the federal union but rather subjects of the central government, established in Indigenous-dominated regions to engineer settler takeover. Once the jurisdiction was successfully transformed through settlement, territorial status gave way to statehood/provincehood. Because of territories' temporary, transformative function, they are mostly a thing of the past. Today just a few territories survive, enduring as among the last remaining outposts of Indigenous power in the Anglo New World.

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What has not been academically explored is the impact of settler-rights challenges on today's remaining territories. This article makes three contributions. First, I show that, since the 1980s, settler-rights challenges occurred in many of the Anglo-settler territories. In such challenges, settlers appealed to rights of universal inclusion, equal and undifferentiated citizenship, and unrestricted mobility, challenging Indigenous claims to self-determination, land-and-resource authority and group-differentiated citizenship. Second, I show that these settler-rights challenges were consequential, often provoking "constitutive contests." The outcome of these contests shaped the future of the territories, either re-constituting them to facilitate settler control, much as occurred in the territories of old, or preserving Indigenous authority. Third, I explore why territories might be especially vulnerable to re-constitution through settler-rights challenges.

I proceed as follows. In the next section I discuss how Australia, Canada and the US historically used territories as tools to achieve settler takeover, how today they still possess territories and how there is little scholarly focus on settler attempts to achieve control of these remaining territories. In "The Territories as Sites of Indigenous Power" section, I demonstrate that the remaining territories are, compared with states/provinces, sites of relative Indigenous demographic, cultural and political power. In the "Settler Rights-Challenges in the Territories" section, I discuss and provide examples of settler-rights challenges, showing they have been consequential in territories, sometimes re-constituting them. In the "Analysis and Conclusion" section, I propose and discuss possible reasons why territories might be especially vulnerable to re-constitution through settler-rights challenges. I then conclude.

Background and Literature Review

According to Wolfe, settler colonies exist where outsiders invaded Indigenous homelands, founded "a new colonial society on the expropriated land base" (2006: 388) and now maintain that society indefinitely. In this manner, European settlers transformed the world, so that whole continents are now settler colonies. This transformation is especially evident, and is seen as archetypal, in the anglophone settler states, including Australia, Canada and the US.

Relatedly, Australia, Canada and the US are federal countries, comprising two types of federal units. The first are their familiar constituent units, the states/provinces. But all three federations also contain a second kind of unit, territories. Territories have a distinct jurisdictional structure and function. Structurally they are often described in terms of their deficiencies vis-à-vis states/provinces (Sabin, 2023). Territories are subjects of the central government rather than federal partners. Thus, they lack the sovereign, enshrined, uniform status and powers of states/provinces. They may be politically "unorganized," without recognized local government, and so be ruled by martial law or by central-government bureaucrats. Or, if a territorial government has been established, its powers may be narrow, delegated and subject to veto or retraction. Moreover, territorial residents may lack rights enjoyed by residents of the states/provinces, such as birthright citizenship, full representation in the national legislature or a say in the selection of the head of state. And unlike states/provinces, territories are often not constitutionally entrenched but instead

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malleable and evolving. "Constitutive" questions, concerning the framing of the polity, may be open to alteration and contestation. Such questions include who belongs to, and who is excluded from, the territorial demos; how representation is apportioned; who can access, utilize or own land; whether land is owned collectively or severally; where the territorial borders lie; and whether the territory will be de-annexed, maintained as a territory or absorbed into the union as a state/province.

Functionally, meanwhile, territories are a means for the central government to directly control subnational areas (Sabin, 2023). Sometimes these areas are capital districts: interstitial gaps in the grid of states/provinces, serving as a neutral seat of power for the central government. More often, territories are established to oversee hinterlands—remote regions outside the grid of states/provinces. Often these are not just geographic hinterlands but ideational ones, seen at least initially as un- or other-inhabited. Underscoring this view are the names assigned to hinterland territories, often highlighting their far-flung location as viewed from the seat of the central government or the country's urban core: for example, the Northern Territory of Australia, the Northwest Territories of Canada and the erstwhile Northwest Territory of the US.

In line with this description, territories are not unique to Australia, Canada and the US. For example, Malaysia, Nigeria and Pakistan have federal capital territories, while remnants of Britain's empire are designated "overseas territories." Such territories share not merely the above-described structural and functional features; they also serve a common purpose. For reasons that may be political, racial or economic, the central government assigned them territorial status to hold them while *holding them apart*. These territories are subjects distinct from the rest of the country, treated as subordinate and permanent outliers. In the Anglo-settler federations, too, some territories have been treated in this way. Examples include Australia's capital territory, its Antarctic claims and its former colony of Papua New Guinea, and many of the US's offshore, arm's-length possessions, ranging from uninhabited but resource-rich islets to, formerly, the thronging Philippine archipelago.

But uniquely in Australia, Canada and the US, most territories, unlike the above examples, served a different purpose, facilitating the establishment of settler control. Instead of functioning as satellite possessions, these territories were "federal partners in waiting," slated for ingestion. In this way, territories played an outsized, even revolutionary, role in Anglo-settler state-building. Territorihood was typically a transitional jurisdictional status, leading to statehood/provincehood. It was applied not just to hinterlands generally but to a specific, liminal, fungible sort of hinterland – "the frontier." Turner, famously, called the US frontier the "meeting point between savagery and civilization" (2017 [1893]). Territories were an administrative mechanism to roll back that frontier, "civilizing" it. As such, they were a tool of re-constitution. By managing Indigenous subjugation (Owens, 2012: 76), orderly white in-migration, land-surveying and land sales and the establishment of liberal–democratic home rule, territories were the jurisdictional form shepherding settler takeover. Once the frontier was re-constituted, territorihood ended and statehood/provincehood began; thus, settler colonialism was secured in place.

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As mechanisms facilitating settler takeover, territories were the invention of Thomas Jefferson, who proposed them to occupy, democratize and federally absorb those US-held lands beyond the Thirteen Colonies (Immerwahr, 2019). The Northwest Ordinance of 1787 laid out a stepwise process by which territories would turn the "Western Lands" into states. Once Congress enacted and delimited a new territory, the jurisdiction would be assigned an appointed governor and panel of judges. When the territory's population reached 5,000 "free male inhabitants"—that is to say, white settlers—it could establish a legislature and send one voting delegate to Congress (though legislative decisions were still subject to gubernatorial veto). Once the settler population reached 60,000, the territory could petition Congress for admission as a state.

In the early years of the US, territories were tightly controlled by federal officials, who demanded gradual, orderly, "compact" settlement, in part to avoid costly conflicts with Indigenous peoples (Eigen, 2010). Settlers often bristled at this top-down, go-slow approach, decrying their exclusion from territorial decision making. As the nineteenth century progressed, settlers' demands prevailed. After 1848, new territories immediately achieved legislative powers. And whereas Indigenous peoples had at first been dealt with cautiously, often through nation-to-nation treaty-making with the federal government, dispossession turned more ad hoc, rapid, violent and chaotic (Blackhawk, 2023: 106), precipitating decades of "Indian wars." According to Immerwahr, due to settlers' explosive westward land-rush, the "great Jeffersonian system that had prevailed in the first decades, with western subjects semi-colonized, simply could not hold" (2019: 34). The territories increasingly fell under the control of settlers themselves, who scrambled to gain Indigenous land by any means necessary.

In this manner, dozens of territories, encompassing most of the geographic expanse of the US, progressed toward statehood. "Only when the territory was deemed assimilated ... would the Congress approve the petition for admission" (Blackhawk, 2023: 41). Some territories, such as Alabama, were converted into states in just a few years. Alaska, on the other hand, took nearly a century to be sufficiently settler controlled. All told, more than 30 US states began life as territories. Students of US history have commented extensively on the settler-colonizing function of territories, calling them "the official unit of American expansion" (Pomeroy, 1944: 40), a "particular system ... to cast a republican superstructure across the North American continent" (Rogers, 2017: 22), "the guarantor of the perennial rebirth of the thirteen colonies" (Santiago, 2002: 32) and a "blueprint for empire" (Onuf, 2019: xix). The US did not hide the expansionist function of territories. Indeed, each time a territory earned statehood, a star was added to the US flag.

Elsewhere in the Anglo New World, territories similarly facilitated national expansion. Following the birth of Canada in 1867, some officials treated the sprawling Rupert's Land and North-Western Territory as an inert possession (Eigen, 2010: 70), but others called for settlement. (Stated Canada's first prime minister, John A. Macdonald, "I would be quite willing, personally, to leave that whole country a wilderness for the next half-century, but I fear if Englishmen do not go there, Yankees will" [Bovey, 1967: 12]). Hence, Indigenous peoples in the territories were pacified—through violence, including the war against the Métis and "clearing the plains" (Daschuk, 2013), and through terms laid out in the 11

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"numbered treaties," which together covered most of the territories. Settlers moved westward, then pressed for home rule, carving out two whole new provinces, Alberta and Saskatchewan (Lingard, 1946; Thomas, 1956). In those provinces, the federal government initially retained control of public lands to better orchestrate their colonization (Hogg and Heerema, 2007). Much of the rest of the territories was transferred to Manitoba, Ontario and Quebec. Given this history, Sabin likens Canada's territories to those of the US: "living relics of North American imperialism" (2023).

Similar dynamics shaped Australia's key hinterland territory, the Northern Territory. When the region was made a federal territory in 1911, Alfred Deakin, Australia's second prime minister, proclaimed, "Either we must accomplish the peopling of the northern territory or submit to its transfer to some other nation" (Walker, 1999: 122). But settlement was complicated by "the sustained Aboriginal struggle against European incursion" (Pedersen and Phillpot, 2018: 41). Spearings of frontiersmen were common. Authorities responded with massacres well into the 1920s. For decades, the territory experienced "a bloody war" (Northern Territory Government, 1998: 9). Eventually, much of the far north and central desert was made into Indigenous reserves. Elsewhere, cattle stations took root, exploiting cheap Indigenous labour. The territory's settlers bristled at federal "remote control" (Carment, 2007: 4), so in 1948 Canberra permitted the establishment of a Northern Territory council. In 1978, over Indigenous protests, the territory was granted Westminster-style "responsible government" and many of the powers of a state.

Today, Australia, Canada and the US still possess territories. The US has more than a dozen, all offshore, five of which are substantially inhabited: Puerto Rico and the US Virgin Islands in the Caribbean and American Samoa, Guam and the Northern Marianas in the Pacific. Canada has three territories, all vast and far north: the Yukon, Northwest Territories and Nunavut. In Australia lies the similarly vast Northern Territory, plus the Australian Capital Territory and a number of mostly offshore territories that are uninhabited or nearly so.

These surviving territories have in recent years inspired significant scholarship. In political science and adjacent disciplines, that scholarship has focused on local—especially Indigenous—empowerment, and on federal resistance thereto. In Canada, studies have addressed the particularly intense push for Indigenous self-determination in the territories, including difficulties (and notable successes) regarding the settlement of northern land-claims and institutionalization of Indigenous governance (for example, Alcantara and Davidson, 2015; Hicks and White, 2015; Nadasdy, 2017; White, 2020). In the US, research has focused on colonial indignities experienced by the remaining territories, including exclusion from full representation in Congress and the Electoral College, federal usurpation of territorial authority (for example, Cabán, 2018; Ficek, 2018) and racial and linguistic discrimination (for example, Barreto, 2016; Campbell, 2021). Finally, in Australia, recent research has especially addressed the federal government's 2007 Northern Territory Intervention, in which Canberra unilaterally suspended elements of the Aboriginal Land Rights Act and diminished Indigenous self-determination (for example, Macoun, 2011; Morphy and Morphy, 2013).

Less contemporary territorial research addresses the dynamic that long made Anglo-federal territories distinct: settlers' quest for control. With the advent of the

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"rights revolution" half a century ago (Epp, 1998), blunt settler force, including in the territories, has become more constrained.[1] "Clearing the plains" in Canada, the "bloody war" in northern Australia and the "Indian Wars" in the US are now condemned, in part for being illiberal. Yet as a few scholars have demonstrated, the rise of rights did not stop settlers from pressing their interests in the territories. Studies show that especially in the 1970s and 1980s, settlers in Canada's Yukon and Northwest Territories (Sabin, 2014) and Australia's Northern Territory (Jull, 1996) framed themselves as colonized subjects, competing with territorial Indigenous peoples to wrest power from federal authorities. In securing the establishment of Westminster-style "responsible" public governments, they succeeded. But, as will be shown in the next section, settlers failed at the time in blocking the settlement and institution of Indigenous land-claim and self-government agreements, as well as other Indigenous-governance protections, which impinge on settler power to this day.

This article shows that since the 1980s, settlers contested Indigenous authority in the territories in a new way, through rights-challenges. The resulting legal cases have received some attention from US law scholars, especially students of the "Law of the Territories" and the Supreme Court's "Insular Cases Doctrine" (for example, Torres, 2012; Mafnas, 2015; Villazor, 2017; Erman, 2021; Ponsa-Kraus, 2021). Less attention has been given to those cases by political scientists, including students of settler colonialism, who focus on the assertion and reification of settler power, and students of comparative federalism, who focus on the structure and function of federal units and systems. In Canada and Australia, meanwhile, relatively little attention has been paid to settler rights-challenges in the territories, even by legal scholars. Further, no scholarship has examined settler-rights challenges *across* the Anglo-settler federal territories, examining them as a transnational phenomenon or exploring them in the context of the historical, settler-colonizing role of territories. This article addresses those gaps, identifying settler-rights cases as consequential in Anglo-settler federal territories, and exploring why that may be.

The Territories as Sites of Indigenous Power

As shown, the remaining Anglo-settler federal territories differ from states/provinces in their institutional form and historic function. In this section I discuss two additional ways the remaining territories differ: they have large Indigenous populations, and relatedly, are frequently sites of enduring, or revitalized, Indigenous political power.

To appreciate how Indigenous demographics stand out in territories vis-à-vis states/provinces, first consider the latter. Australia, Canada and the US together encompass 66 states/provinces. All, just a few centuries ago, were home exclusively to Indigenous peoples. Yet in every US and Australian state and all but one Canadian province, Indigenous peoples were reduced to a minority by the time of admission to the union. (The exception is Manitoba, where Métis formed a majority at provincehood but were then immediately minoritized [Prefontaine, 2007].) Today the state/province with the highest proportion of Indigenous inhabitants is Alaska, at 20 per cent. Just a half-dozen states/provinces are more than 10 per cent

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Indigenous. In a vast majority of states/provinces, the Indigenous proportion is minimal, at under 2 per cent.

By comparison, of the 10 territories that are significantly inhabited, just 3 are minimally Indigenous (Puerto Rico, the US Virgin Islands and the Australian Capital Territory). Among the remaining seven territories, three are majority-Indigenous (American Samoa, 89 per cent; Nunavut, 86 per cent; and the Northwest Territories, 51 per cent) and four have a substantial Indigenous minority, exceeding that of any state/province (Guam, 37 per cent; the Northern Territory, 30 per cent; the Northern Marianas, 24 per cent; and the Yukon, 22 per cent). Moreover, in many of those seven territories, the settler population is only recently established: Guam, the Northern Marianas, the Northwest Territories and the Northern Territory were overwhelmingly Indigenous until at least the Second World War. As well, in many territories, settlers are transient. For example, in the Northern Territory, one-sixth of the settler population "turns over" every year. Thus, that territory's Indigenous peoples have been called "permanent residents among a sea of transient[s]" (Jull, 1996: 2), a description that equally applies to Canada's territories. In addition, in the Northern Territory and Canada's territories, settlers are almost exclusively concentrated in the capital city; Indigenous peoples predominate almost everywhere else. It can generally be said that in the entire Anglophone New World, the territories are the last remaining outposts of Indigenous demographic predominance.

Given those demographics, and their physical distance from colonial centres, it is no surprise Indigenous peoples of the territories have retained cultural sovereignty longer and more strongly. Until the Second World War, parts of Canada's Arctic remained unmapped by white people, and even today barely any of it is road accessible. Some Inuit remained beyond the reach of the state into the 1950s and were not "sedentarized" into permanent communities until the 1970s (Degen et al., 2024). In Australia's north, one Indigenous family remained "uncontacted" until 1984 (Kinsela, 2014), and even today much of the Indigenous population lives "out bush," in encampments remote and often purposely aloof from the settler state (Northern Territory Government, 2019). In part because of this, territories are where Indigenous languages and cultures remain most intact. For example, as compared with states/provinces, in almost all territories an outsized proportion of Indigenous residents speak an Indigenous language and/or engage in traditional lifeways, for example, securing food through land-based practices such as hunting and fishing.

Given all this, it should be unsurprising that Indigenous peoples in the territories also maintain a sharp sense of political distinctiveness. They seek to express and protect this distinctiveness through their government institutions and processes, which are more powerful than those of Indigenous peoples in the states/provinces. Take Australia's Northern Territory: in 1966 Gurindji stockmen, fed up with feudal working conditions, walked off the Wave Hill cattle station and demanded their traditional lands back. Meanwhile, the Yolngu of the Gove Peninsula, opposing establishment of a bauxite mine, issued the Bark Petition, a landmark native-title challenge. Chastened, Australia's federal government pledged support for nationwide Indigenous land reform. However, facing opposition from the settler-controlled states, the federal government commenced reform in the only major

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jurisdiction under its direct authority, the Northern Territory. The 1976 Aboriginal Land Rights Act gave Indigenous peoples inalienable title to 19 per cent of the territory and opened far more to land claims (Gibbins, 1988). Within a few decades, half the territory was Indigenous owned, with a permit system regulating settler access. Established as well were the Northern and Central Land Councils, "para-governmental bodies" answerable to Indigenous voters (Heatley, 2002). The councils became politically powerful, providing glimmerings of self-determination. Together these reforms placed Indigenous peoples in the territory in a uniquely strong position relative to their brethren elsewhere in Australia (Carment, 2007). The territorial public government, albeit settler dominated, has little power to resist: unlike state governments, it lacks authority over Indigenous land rights and certain types of mining. Moreover, decisions of the Northern Territory legislature can be, and in one instance have been, overruled by the federal government. Indigenous empowerment is in part why the Northern Territory has been deemed "the least successfully colonized political unit in Australia" (Carment, 2007: 53).

Similar circumstances prevail across the 4 million square kilometers of territorial Canada. In 1973, Yukon First Nations filed Canada's first modern land-claim. Soon the Inuit, Inuvialuit, Métis and Dene of the Northwest Territories also filed claims; the Dene moreover boycotted that territory's public government, deeming it colonial and illegitimate. Anglo governance was thrown into uncertainty: observed Dacks, "of all jurisdictions in Canada, only in the [territories] does the question still remain open as to which political philosophy—liberalism based on the individual, nationalism based on ethnic identity, or consociationalism which attempts to integrate the two—will ultimately guide the political process" (1986: 354). Over the next few decades the settlement of land claims produced constitutionally enshrined "modern treaties," transforming northern governance. The Inuit of the Eastern Arctic are now the world's largest private landowners, and govern a purpose-built territory, Nunavut, meaning "our land." In line with the traditional values of *Inuit qaujimajatuqangit*, Nunavut's government is geographically decentralized and its legislature is non-partisan and "consensus based" (Hicks and White, 2015). Also "consensus based" is the government of the rump Northwest Territories, home to 11 official languages, 9 of them Indigenous (Alcantara, 2013b). Numerous Indigenous nations in the Northwest Territories and Yukon now own large swaths of land and exercise "self-government." And, in all three territories, Indigenous peoples have achieved a formidable role in land-and-resource management, including disproportionate representation on so-called co-management boards (White, 2020). All of this differs dramatically from the situation in Canada's provinces, where only a handful of "modern treaties" have been signed (Land Claims Agreements Coalition, 2025), leaving Indigenous land-title largely unacknowledged and most Indigenous peoples still wards under the federal Indian Act.

The US Pacific territories are also sites of Indigenous group-differentiated rights and governance institutions. Most notable is American Samoa, where the traditional principles of *fa'a Samoa* are integrated into government. To guard Samoan self-determination, inhabitants are not US citizens but "US nationals." Representation in the territorial senate is limited to members of the island's *matai* nobility and is determined not through popular vote but customary selection. Americans from outside the territory cannot visit or take up residence without territorial-

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government permission. Almost all lands are communally owned (Tapu, 2020) and cannot be purchased by non-Samoans (Ponsa-Kraus, 2021). Another US territory, the Northern Mariana Islands, has similarly sought to prevent land alienation by allowing land purchases only by those of "Northern Marianas descent." In Guam there were, until recently, more modest land-alienation restrictions: the Chamorro Land Trust Act permitted the lease of trust lands, which cover one-fifth of the island, only to "native Chamorros" (Villazor, 2017). Guam, as well as American Samoa, is on the United Nations' list of "non-self-governing territories" and may one day hold a plebiscite on independence.

Settler Rights-Challenges in the Territories

As shown above, the remaining Anglo-settler federal territories are home to substantial Indigenous populations wielding significant powers. Yet as I will show, the territories are also sites where settlers in recent times challenged Indigenous powers, including by asserting liberal rights.

Of course historically in the Anglo-settler federations, settlers extended power through various "tools of elimination" (Wolfe, 2006). Most controversial, even at the time, were exterminations and expulsions (for example, Hoig, 2013; Saunt, 2020). Other tools included strategic treaty-making and treaty-breaking, gathering of Indigenous peoples onto reservations, and forced removal and assimilation of Indigenous children through residential schooling and adoption (for example, Calloway, 2013; Frantz, 1999; Milloy, 1999). These practices were sometimes justified using liberal–democratic rhetoric. Eisenberg shows that in Canada, settlers championed "liberalization" to promote "the collective cultural dominance of the majority" (1998: 39). Likewise, Hoxie displays how talk of "freedom" and "equality" served US Indian policy (1984). Tribal termination (Wilkinson and Biggs, 1977: 156) and the imposition of US citizenship (Porter, 1999) were said to grant Native Americans equality vis-à-vis other Americans. The most notorious allotment policy, the Dawes Act, was "the Indians' Magna Carta," liberating them from collective land ownership (Hoxie, 1984: 70). Canada's 1969 White Paper, proposing to dissolve reserves, dismantle treaties and annul Indigenous group-differentiated status, would "enable the Indian people to be free—free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians" (Chrétien, 1969).

Today, in part due to the "rights revolution," overt settler violence and authoritarianism are less acceptable. Yet arguably, in closing one door, the rights revolution opened another, empowering settlers to not merely engage in liberal rhetoric but to enact rights-based laws and challenge alleged settler-rights violations in court. By promulgating "colour blind" legislation and enjoining judges to strike down Indigenous protections said to treat settlers unjustly, settlers have used liberal–democratic rights to undermine Indigenous protections. This practice has been given various names, including the "settler-rights backlash" (for example: Goldberg, 1998; Grossman, 2003; Johansen, 2004; Rÿser, 1992; O'Malley and Kidman, 2018; Spitzer, 2024). For example, Goldberg observes that settler-rights activists demand "'equality', 'democracy' and 'civil rights' while accusing

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Indigenous-rights actors of 'apartheid' and 'ethnic cleansing'" (Goldberg, 1998: 6). Law scholars such as Berger (2010, 2013, 2019), Gover (2014, 2015) and McHugh (2004, 2008) have discussed how Indigenous powers, hinging as they do on collectivism, exclusion and group difference, are vulnerable to settler nondiscrimination challenges. Blackhawk found the same, hence stating "rights are feared in Indian Country rather than sought" (2019: 1796).

As captured in the examples below, a variety of settler-rights challenges have occurred since the 1980s in Anglo-settler federal territories, with potentially significant impacts on the constitutional future of those territories.

Challenges to Guam decolonization

The US acquired control of Guam following the 1898 Spanish-American War. In 1950, under the US Organic Act of Guam, the territory's inhabitants were made US citizens. At the time, the majority of those inhabitants were Indigenous Chamorros. Since then, Guam became a major US military outpost, resulting in Chamorros now being outnumbered by Americans from the mainland. The United Nations considers Guam "non-decolonized" and deserving of self-determination – an "international obligation" which the US Congress has previously acknowledged (Davis v. Guam, 2017c).

In the interest of such self-determination, Guam held a plebiscite in 1982, open to all residents, in which the electorate supported the island remaining a territory in "commonwealth compact" with the US. Guam thus submitted a draft commonwealth act to Congress. The draft included a requirement that final ratification be limited to Chamorros. Congress opposed this limitation and negotiations broke down. Guam resubmitted the draft act in numerous subsequent Congressional sessions, to no avail (Torres, 2012).

Guam thus began the decolonization process on its own. In 1997 it established a "Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination." In 2000 the commission created a Decolonization Registry, enrolling only "native inhabitants," which it defined as those who became citizens at the time of the Organic Act and their descendants. The decolonization vote was scheduled for 2014 (Torres, 2012: 170).

A US military retiree living in Guam sought to enroll in the Decolonization Registry but, being non-native, was denied. He sued, filing Davis v. Guam, charging "audacious racial discrimination" in violation of his Fifteenth Amendment right to vote. Guam, in its defense, maintained that "native inhabitants" was not a racial classification, à la "black" or "white," but rather a political classification, such as permits differential voting rights between US citizens and non-citizens or between US Indian tribal members and non-members. The court disagreed, in 2017 striking down the registry. The judge wrote: "The court recognizes ... the desire of those colonized to have their right to self-determination. However, the court must also recognize the right of others who have made Guam their home" (Davis v. Guam, 2017a: 25).

Guam appealed, stating, "This case is a wolf in sheep's clothing. Although styled as a reverse discrimination case ... [t]his case seeks to deny the 'native inhabitants

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of Guam' ... from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States of America" (Davis v. Guam, 2017b: 8). Taking the opposite stand was the US Department of Justice, which filed an amicus brief opposing the Decolonization Registry. Guam's appeal was denied. As of May 2024, the territory was still studying how to hold a constitutionally defensible vote on self-determination (Pacific Island Times, 2024).

Challenges to Northern Marianas land protection

Just north of Guam are the Northern Mariana Islands. Here too, native Chamorros, along with another Indigenous people, the Carolinians, are now outnumbered by settlers. The Northern Marianas were first colonized by Spain, then Germany, then Japan. Then, following the Second World War, they found themselves in a United Nations trust territory under US administration. The trusteeship agreement required that the US promote territorial self-government and protect inhabitants "against loss of their lands" (*Wabol*, 1990: 1462).

Though the trust's other members (the Federated States of Micronesia, the Marshall Islands and Palau) eventually gained independence, the Northern Marianas opted to become a US commonwealth territory. In 1976, the US and the Northern Marianas sealed their relationship through a "commonwealth covenant." In accordance with the covenant, the Northern Marianas drafted a territorial constitution with certain distinctive provisions, including permitting sale or long-term lease of land only to persons "of Northern Marianas descent," defined as those with at least one-quarter Chamorro or Carolinian blood (Willens and Siemer, 1977: 1397). This land-alienation prohibition mirrored US policy under trusteeship. It also paralleled guarantees in federal Indian Law relating to mainland Native Americans.

When a long-term lease was voided for transgressing this provision, the settler lessee filed Wabol v. Villacrusis, alleging violation of their Fourteenth Amendment right to equal protection of the laws. The federal appeals court found otherwise, concluding: "The Bill of Rights was not intended ... to operate as a genocide pact for diverse native cultures. ... Its bold purpose was to protect minority rights, not to enforce homogeneity" (*Wabol*, 1990: 1462).

However, the land-alienation prohibition was potentially time-limited: under the covenant, after 25 years it could be altered or abolished. Anticipating a referendum on altering the prohibition, the territorial government in 2011 established a registry of voters, enrolling only those of Northern Marianas descent. A settler sued, filing Davis v. Commonwealth Election Commission, invoking his Fourteenth Amendment equal-protection rights and Fifteenth Amendment right to vote. In its defense the territorial government argued that Northern Marianas descent is not a racial but a political classification. The court disagreed, ruling in the settler's favor and thus opening voting to non-Indigenous residents. The territorial government petitioned the US Supreme Court for reconsideration but was denied. Despite recent controversial efforts in the Northern Marianas legislature to put the land-alienation prohibition to a vote of all residents (Marianas Variety, 2021), for now the prohibition remains in place.

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Challenges to Yukon co-management

In Canada, the Yukon has been a territory since the 1898 Klondike Gold Rush. Also since the gold rush, settlers, albeit frequently transient, have outnumbered Yukon First Nations inhabitants. For decades the territory was run by federal appointees, often sent from "outside" (Coates, 1985). Settlers decried this federal control and championed provincehood. In the 1970s they took a major step in that direction, achieving "responsible government" by way of a fully elected territorial assembly.

This development alarmed First Nations: "[T]he Territorial Council is allegedly 'responsible.' This is the same government that sits on the opposite side of the table from the council for Yukon Indians ... This is a farce" (Yukon Indian News, 1979). Also in the 1970s, Yukon First Nations presented the federal government with Canada's first modern land-claim. This, in turn, alarmed settlers. Stated one settler legislator: "This thing hits you right in your guts. ... Why do they want segregation? All they're going to get is this backlash that's ripe and ready to go" (McCullum and McCullum, 1975: 99).

Yet despite "one of the most serious and open white backlashes in the country" (McCullum and McCullum, 1975: 76), the Yukon has since become Canada's foremost site of "modern treaties," with more land-claim and self-government agreements than any other jurisdiction in Canada (Government of Canada, 2024). These agreements establish and empower "claims-based co-management" commissions, one of which is the Peel Watershed Planning Commission, a power-sharing body composed half of First Nations appointees and half of public-government appointees. In 2011 the commission issued a landmark plan to bar development in 80 per cent of the vast, pristine, yet petroleum-rich Peel River watershed. However, the following year the settler-dominated Yukon government rejected the plan, proposing to protect only 30 per cent of the watershed.

Decrying this decision was the First Nation of Na-cho Nyäk Dun, whose traditional lands encompass the Peel watershed. According to the nation's chief, the modern treaty "that we have in place, that took 20 years to negotiate ... stops the government from being able to unilaterally make decisions on the Crown lands. ... The deal that's on the table is co-management." But the Yukon government disagreed, arguing that claims-based co-management commissions lack democratic legitimacy. Stated the Yukon's premier: "When it comes to public land, it should be the publicly, democratically elected government that should be able to have the final say. ... Commissions are not elected and they're not accountable. ... [T]hey don't have the final say" (CBC, 2015).

In 2017 Canada's Supreme Court disagreed, ruling in First Nation of Na-cho Nyäk Dun v. Yukon that, irrespective of whether co-management commissions are publicly and democratically elected, they are legitimated by the modern treaties. As a result, the commission's recommendations were adopted into law, protecting most of the Peel watershed (CBC, 2019).

Challenges to Northwest Territories electoral apportionment

East of the Yukon lies Canada's oldest territory, the Northwest Territories – "the quarry from which most of Canada was mined" (Mercer, 2019: 22). The territory was overwhelmingly Indigenous until settler numbers jumped in the 1960s and

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1970s. Those settlers, Jull observed at the time, "are very conscious of the fact that they're building a new society, but it isn't new in any qualititative way. . . . For them there is no interest in new forms of organization but rather in getting the proven Canadian ones, pronto, and dominating them" (1978: 34).

Indigenous people resisted, calling for political protections including dividing the Northwest Territories to create a new Inuit supermajority territory, Nunavut. Settler leaders issued a public response blasting Indigenous protections as "something that has always been abhorrent to Canadians and violates our history—separating people according to race" (Government of the Northwest Territories, 1977: 47). The federal government agreed to create Nunavut, so in 1983, the Indigenous-controlled Northwest Territories government held a nonbinding plebiscite to determine the location for Nunavut's boundary. "[T]o have these long-term decisions made by the native people" (Government of the Northwest Territories, 1981: 414), inhabitants with fewer than three years of residency in the territory were excluded from voting. An excluded settler sued, filing Allman v. Commissioner of the Northwest Territories, in which she cited her rights to mobility and expression enshrined in Canada's Charter of Rights and Freedoms. The territorial supreme court ruled against her on technical grounds, finding the Charter does not apply to nonbinding plebiscites.

Over the next decade and a half the territory prepared for Nunavut's separation, which would leave the rump Northwest Territories demographically split between the mostly rural Indigenous population and the transient settler population concentrated in the capital, Yellowknife. The federal government suggested that, to fulfill Indigenous peoples' "inherent right" to self-government, they might be accorded "specific guarantees" of representation in the Northwest Territories legislature (Government of Canada, 1995). In that spirit, territorial leaders reapportioned the legislature, assigning the rural Indigenous population more seats per capita. Settlers sued. In the 1999 case Friends of Democracy v. Northwest Territories, they appealed for "effective representation" as guaranteed by the Charter. Indigenous groups intervened in the case, citing Indigenous-rights provisions in Canada's constitution.

The court ruled in favour of the settlers, prompting the creation of additional settler seats. A constitutional crisis ensued, with Indigenous leaders proclaiming, "the imbalance we have always feared is upon us" (Government of the Northwest Territories, 1999b: 8) and calling on the federal government to dissolve the territorial legislature and take back direct control of the territory. The federal government refused. In 2015, a similar reapportionment battle transpired, with settlers demanding even more seats, filing Yellowknife v. Northwest Territories. This time the lawsuit failed on procedural grounds. The territory's latest reapportionment effort, in 2022, once again broke down, raising the spectre of another settler voting-rights challenge.

Challenges to Northern Territory land ownership and mobility

In Australia, the Northern Territory is "a land left over" (Powell, 1982: 1), the only large swath of the country lacking statehood. The territory encompasses a settler

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majority in Darwin, the capital, and an Indigenous minority spread through the outback. As noted, the federal government in 1976 imposed the Aboriginal Land Rights Act, providing Indigenous peoples with ownership of, and power to regulate access to, half the land in the territory. This placed the territory's Indigenous peoples "on a collision course" with settlers (Smith, 2011: 9).

Settlers condemned the Aboriginal Land Rights Act as "remote control," the permit-system as "apartheid," and the push for Indigenous empowerment as "frightening" (Carment, 2007). The territory's founding governing party, the pro-development Country Liberals, made patriation of the land-rights act their cause célèbre. The party became known for its "Arcadian populism" (Smith, 2011). Supporters were cast as pioneering "Territorians" and Canberra was accused of strangling the frontier's prospects. To thwart Indigenous landownership, the party attempted a variety of tactics, including expanding Darwin's municipal boundaries thirtyfold. As Smith observes, for the Country Liberals, "Whilst the battle was about land, the electoral tactics were about race" (2011: 10). Those tactics worked: the party held power for 27 unbroken years, earning it the nickname the "Territory Party."

In 1998, to sidestep federal control, the Country Liberals moved to shed territorial status in favor of statehood. Indigenous groups protested, with leader Galarrwuy Yunupingu observing, "The rallying cry of 'Statehood!' has often been the first sound in a battle to defeat our rights" (2003). When settlers held a convention to draft a state constitution, the keynote speaker urged that the document deny Indigenous peoples a "special place ... because it will entrench difference and division between the races forever" (Northern Territory Government, 1998: 9). Subsequent convention speakers complained that, under territorial status, settlers experienced "horrendous" and "racist" "discrimination" and "segregation," violating the principle "that all men and women are created equal." The constitution they drafted eschewed mention of Indigenous self-determination, affirmed "Territorians" as an indivisible people, and placed land-rights under the control of the settler majority.

Many Indigenous groups boycotted the convention. Of the Indigenous delegates who did attend, all but one walked out midway through. A delegate representing the Aboriginal and Torres Strait Islander Commission declared "We just aren't going to be conned into colluding in our own oppression" (ATSIC, 1998: 4). Instead, Indigenous groups held their own constitutional conventions, where they called for augmenting the territory's unique degree of Indigenous authority. When the territory held a vote on statehood later that year, Indigenous residents overwhelming voted "no." The statehood effort was very narrowly defeated. According to Heatley, "Aboriginal opposition was the strongest factor in producing the negative outcome" (2002: 96). Indeed, the academic consensus was that Northern Territory statehood was "lost in the bush" (Murphy, 2005). Soon after, for the first time, the Country Liberals lost their majority in the territorial assembly. Though statehood continues to evade the Northern Territory, in 2007, Australia's federal government suspended elements of the permit system, citing, in part, its inconvenience to settlers (Perche, 2015).

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Analysis and Conclusions

As shown, settlers have long invoked liberal principles to justify Indigenous disempowerment. Moreover, in recent decades their invocations expanded from rhetoric to legislation and litigation. With the "settler-rights backlash" they now enact and sue for liberal–democratic rights, doing so to challenge Indigenous-governance protections – which, hinging on collectivism, exclusion and group difference, are impugned as illiberal. Such challenges have occurred in the federal territories of Australia, Canada and the US, with potentially significant consequences. For example, as detailed above, challenges in the territories target Indigenous protections concerning who is included in the territorial demos, when residents qualify to participate in that demos, how legislative representation is apportioned, who can own or access land, and who makes land-management decisions. If such challenges succeed, they may "re-constitute" territories, facilitating settler control.

Having found that settler-rights challenges occur, and may be of great consequence, in territories, I now explore six potential reasons why. I make no conclusions about these possible causal factors, but merely propose them as subjects for further research.

The first possible factor is that territories have always been ripe for settler-versus-Indigenous conflict. After all, historically, that is what territories were for. Territorial status was assigned to places targeted for—and was assigned to oversee—settler takeover. Territories were by nature the only organized Anglo-settler jurisdictions where Indigenous peoples retained some measure of power. That is still true in today's territories. In places such as American Samoa, Australia's Northern Territory and Canada's Yukon, Indigenous peoples still form demographic majorities or substantial minorities and to a significant degree remain linguistically and culturally intact. Alert to their political vulnerability, they possess both the numbers and motivation to protect their interests through Indigenous governance. In contrast, territories have also always been – and today remain – where settlers are fewer, newer and less politically secure. Under such conditions, settlers' motives for challenging Indigenous power need not be malicious. Individual settlers may simply seek the protection of settler-state laws and norms. Yet whatever their motives, their actions are part of a pattern: for more than two centuries, settlers have arrived on the "frontier" and pressed their interests in a manner almost invariably facilitating domination.

A second factor I suggest may explain the outsized significance of settler-rights challenges in the territories is, of course, the advent of the "rights revolution." As discussed earlier, the rights revolution sanctified and politicized rights, on one hand rendering blunt force less acceptable while on the other amplifying the effectiveness of settler rights-challenges, making them especially useful for contesting Indigenous power. For example, prior to Canada's adoption of the Charter of Rights and Freedoms in 1982, settlers enjoyed no enshrined right to "effective representation" – the right they subsequently invoked to successfully challenge Indigenous overrepresentation in the Northwest Territories in the aforementioned Friends of Democracy case. It is thus logical that settler rights-challenges became more common in the few territories that survived into this present, rights-focused era.

But the incidence of settler-rights challenges in today's territories may also relate to a third factor: the distinctly public nature of territorial Indigenous governance. Such governance is an easy target for attack. Elsewhere in the Anglo-settler federations, particularly in the US states and Canadian provinces, Indigenous governance is largely siloed within Indigenous-specific bodies of law (US federal Indian Law and Canada's Indian Act), which officially recognize Indigenous-specific polities (tribes, bands) and individuals (enrolled tribal members, "status Indians") and/or apply in Indigenous-designated jurisdictions (reservations, reserves). Settlers are often only indirectly subject to these siloed laws, giving them less occasion to feel aggrieved and launch rights-challenges. Moreover, where settlers nevertheless launched rights-challenges contesting these Indigenous-specific laws, their challenges were not infrequently rejected, including on the grounds that for certain purposes, officially recognized Indigenous collectives are a constitutionally protected political class distinct from the general settler-state public (for example, Berger, 2010, 2019).

In the territories, by contrast, Indigenous-governance mechanisms frequently find expression not through siloed Indigenous-specific laws but through regular public government—through the structure of the Senate of American Samoa, for example, or through the composition of environmental co-management bodies in the Yukon, or through the enrollment of voters in Guam's Decolonization Registry. These public laws, institutions and processes govern all residents of the territories irrespective of whether they are Indigenous or settler. This public quality of Indigenous governance is in part due to the simple fact that, where Indigenous peoples are the majority, for example in American Samoa, then public governance unsurprisingly reflects Indigenous traditions and interests. But it is also because certain Indigenous-specific federal laws that apply in the states/provinces have been purposely denied to the territories. In the US, the federal government declined to extend Indian Law to the territories (Arnett, 2018), refusing to recognize territorial Indigenous polities as "tribes," Indigenous individuals as "tribal members" or Indigenous lands as "reservations," thus denying them protected political status. Somewhat similarly, Canada never placed Inuit, who are especially numerous in the territories, under the Indian Act, created almost no reserves in the Yukon, Northwest Territories and Nunavut and unlike in the provinces, assigned financial and administrative responsibility for Indigenous programs not to the federal Department of Indian Affairs but to the public territorial governments (Coates, 1985). Perhaps because territorial Indigenous peoples were left with few alternatives, they sought to protect their interests in part through public-governance mechanisms. Because such mechanisms exhibit Indigenous preference, they are susceptible to settler-rights challenges, which impugn them for favoring Indigenous members of the territorial public over settler members.

A fourth factor potentially explaining the significance of rights-clashes in the territories is that, if territorial Indigenous-governance protections are, due to their public nature, susceptible to settler rights-challenges, they are conversely—at least for now, in some instances, somewhat precariously—also distinctly shielded. Settler-rights challenges in the territories in some instances probed for weakness in, and thereby sought to puncture, those shields. The most obvious example is in the US territories, where the Supreme Court's imperialist "Insular Cases" doctrine has in

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recent decades been repurposed to shield certain Indigenous-governance protections from rights-based attacks (Rennie, 2017). Under the Insular Cases, protections that would elsewhere be unconstitutional were found permissible in the unique cultural context of the territories, where striking them down would be "impracticable and anomalous." It was precisely this standard that the court applied in the above-mentioned Wabol decision, upholding land-alienation restrictions that protect Chamorros in the Northern Mariana Islands. But the Insular Cases doctrine is on shaky ground. Due to its imperialist roots, the US Department of Justice condemned the doctrine in 2024 and US courts are under pressure to repudiate it (US Department of Justice, 2024). Certainly, courts have become wary of invoking the Insular Cases. While in the follow-up case to Wabol, the aforementioned Davis v. Commonwealth, the courts could have chosen to again cite the Insular Cases to defend land-alienation restrictions in the Northern Marianas, they declined to do so. In effect, the "shield" proffered by the Insular Cases in Wabol was not made available two decades later in Davis v. Commonwealth.

Meanwhile, in Canadian and Australian territories, Indigenous governance may also be distinctly but precariously shielded. The settlement of land claims, for example, has been especially feasible in the Australian and Canadian territories, in part because the territories are, uniquely, federal subjects (Alcantara, 2013a). In Australia, at least, the shielding of these land-claims settlements may hinge on the *preservation* of federal subjecthood—which is why settlers in Australia's Northern Territory denounced federal subjecthood and instead sought statehood. In Canada, however, land-claims settlements may be less vulnerable to reversal. Such settlements, as well as other Indigenous-governance protections, are sometimes shielded by Indigenous-rights provisions entrenched in Canada's constitution (Section 35) and Charter (Section 25). Settler-rights challenges probed for weaknesses in these shields. They failed to find such weaknesses in the aforementioned Na-cho Nyäk Dun case, but succeeded in Friends of Democracy, where they proved that Indigenous overrepresentation in the Northwest Territories legislature is not a Section 35 right.

Settler-rights challenges in the territories may be especially impactful for a fifth reason. For decades, federal governments have gradually handed over powers to many of the remaining territories, ushering them toward jurisdictional maturity. This process is called "devolution" (Alcantara et al., 2012). Settler-rights claims have the ability, and some urgency, to shape devolution. As noted, all the remaining territories are for now wards of their respective federal governments. Hence officials in Canberra, Ottawa and Washington D.C. can legally quash acts of the territorial legislatures (which, as noted, has occurred in Australia's Northern Territory), seize control of their finances (as the US did recently with Puerto Rico), unilaterally impose US citizenship on their residents (as some suggest could happen with American Samoa), redraw their borders (as happened repeatedly with Canada's Northwest Territories), de-annex them (as with the former US territory of the Philippines) or absorb them (as occurred with almost all former US territories). But also, and especially importantly, the federal government can cede powers to the territories, devolving to them some arrangement of greater authority. For decades this has been the trend in all three Anglo-settler federations—a trend which, while not irreversible, has been largely unidirectional. As territorial settlers are aware, the

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particular arrangement of authority that is devolved to the territories will benefit some territorial groups more than others, in a manner that will be difficult to undo (Sabin, 2014). This gives settlers immediate incentive to shape devolution, including by appealing to settler rights. Settler-rights challenges may seek simply to moderate federal devolution decisions, as occurred when settlers in the aforementioned Allman case sought a say in determining the boundaries of the proposed Nunavut territory. Even more impactfully, settler-rights challenges may seek to *quash* federal devolution decisions—as, for example, occurred in Friends of Democracy, which obviated the federal proposal to accord Indigenous peoples "specific guarantees" of representation in the Northwest Territories legislature.

There is one related, sixth reason why I suggest settler-rights challenges in territories have such gravity. Unlike states/provinces, which are fully, clearly and fixedly constituted, in territories the structures and principles that frame the polity are protean—they are for now ill-defined, unstable, malleable and manipulable. Settler-rights challenges in the territories are therefore especially high-stakes: They are, as I have argued, "constitutive contests." In such contests, settlers strive to re-constitute the territory to their advantage. Where in states/provinces the existence of a fixed constitution limits the opportunity for, and consequences of, rights-challenges, in territories such challenges frequently problematize the fundamental framing of the polity—who can travel or reside there; who comprises the electorate; how decision-making power is apportioned; who can own, use and access the land and natural resources; where the borders lie; and indeed, whether the jurisdiction can break away completely, achieving independence from the settler state. In short, settler-rights challenges in the territories may re-shape the bounds and ground-laws that define the polity in the first place. Hence, territories are not merely sites but *subjects* of rights-challenges, with the re-constitution of the jurisdiction hanging in the balance.

Conclusions

As shown in this article, settler-rights challenges commonly provoke constitutive contests in territories. In such contests, Indigenous peoples press to enshrine Indigenous-governance protections, preserving and entrenching the territory as a distinctly Indigenous domain. Settlers conversely press to import the liberal–democratic principles of the greater settler state, thus undermining Indigenous collectivism and group-differentiated status, and advancing settler interests potentially to the point of facilitating settler demographic and political takeover.

Above I proposed six factors that may explain the notable frequency and consequences of constitutive contests in the territories. Those factors are that territories have always been ripe for conflict; that the "rights revolution" made rights-challenges a formidable weapon; that the public nature of Indigenous governance in the territories poses an easy target; that legal doctrines protecting such Indigenous governance are potentially vulnerable; that settler-rights challenges seek to shape "devolution" of federal authority to the territories; and finally, that settler-rights challenges promise a substantial "payoff," potentially "re-constituting" territories in the image of the settler-state. Because of such factors, I suggest,

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territories are, of all settler-state jurisdictions, those at once standing on the most pliable political foundations while subject to the strongest re-constitutive forces. They are especially available to settler-rights challenges and especially liable to thereby be re-constituted.

The settler-rights challenges discussed in this article all sought to re-constitute the territories in which they occurred. Some did so successfully. Davis v. Guam successfully re-constituted Guam as a place where "we, the people," even for the purposes of decolonization, comprise not merely Chamorros but also the more numerous settlers. Similarly, Davis v. Commonwealth re-constituted the Northern Marianas such that decisions on land alienation are open not merely to Chamorros but also to the settler majority. Friends of Democracy re-constituted the Northwest Territories as a place where representation is accorded more or less equally to all residents, rather than being accorded disproportionately to Indigenous inhabitants to guarantee them a measure of control.

Other settler-rights challenges, meanwhile, failed at re-constitution. The challenge to "claims-based co-management" in the Yukon failed to make that territory a place where decisions about development are made not through Indigenous/settler power-sharing but instead democratically, according to the will of the overwhelming settler majority. The Northern Territory statehood challenge failed to re-constitute the jurisdiction as one with a single, universal, "colour-blind" land regime, instead maintaining a more favourable land regime for the region's Indigenous peoples. Further research might be useful here to determine what made settler-rights challenges in these territories less successful than in others.

Irrespective of why settlers launched rights-challenges in the territories, and irrespective of whether they won or lost, it is true that, in most cases, they no longer seek to convert territories into states/provinces. Settlers today do not push to formally expand the union, adding stars, as it were, to the flag. Thus, at least nominally, territorihood may be here to stay. But the aforementioned contests are nonetheless of historic consequence. Over the past several centuries, settler colonialism engulfed what is now Australia, Canada and the US, very nearly but not completely dethroning Indigenous peoples. Today's remaining territories are the only federal jurisdictions that have evaded full assimilation. They are redoubts where settler domination could still be avoided. Decisions about current territorial settler-rights challenges—over, for example, who can vote in Guam, guide environmental protection in the Yukon and access land in the Northern Territory—will move these "last frontiers" either toward, or away from, settler domination.

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Note

1 In saying this, I do not mean that blunt settler force is now uncommon or inconsequential. Oft-cited recent acts of settler physical violence include the killing of Colten Boushie (MacDonald, 2021) and police raids of Wet'suwet'en land in Canada (Hume and Walby, 2021). And force need not be "blunt" to do violence. Indeed, even developments which in this article I characterize as Indigenous empowerment—such

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as the negotiation and implementation of comprehensive land-claim agreements—may conversely be understood as tools of settler violence (for example, Coulthard 2014).

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