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Value Collectivism, Collective Rights, and Self-Threatening Theory†

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Abstract—This review article discusses the conception of collective rights necessary to ground contemporary entrenchments of minority educational rights, Indigenous rights and collective bargaining rights, as discussed in Miodrag Jovanović's book, *Collective Rights: A Legal Theory*. Jovanović argues for a role for value collectivism in elucidating a rationale for the entrenchment of rights held by what he conceives of as pre-legally existing groups with interests not reducible to those of their individual members. This approach can offer an explanation for the entrenchment of minority educational rights and Indigenous rights. The article extols Jovanović's attempt to grapple with an explanation for rights not explained within standard liberal theory, even in Will Kymlicka's attempt to justify minority rights within liberalism. The review also critiques the argument offered by Jovanović. First, the review argues that a full-fledged adoption of value collectivism is not necessary to provide a justification for irreducibly collective rights and that the unnecessary adoption of such a theoretical construct may, in practical terms, work counter to the ongoing entrenchment of the rights it seeks to justify, thus becoming what it will categorize as a 'self-threatening theory'. Second, the review argues that Jovanović's stark division of rights held by pre-legally existing groups and legally constituted collective entities undermines his account's ability to explain collective bargaining rights of trade unions that are entrenched in some jurisdictions.

Keywords: rights theory, collective rights, value collectivism

1. *Introduction*

Rights instruments in a number of jurisdictions and at the international level increasingly contain references to rights seemingly ascribed to collective entities. Those seeking to apply and interpret these rights have in some instances commented upon the need for theory to explicate them better. As just one example, note the comments of Chief Justice Lamer of the Supreme Court of Canada on Indigenous rights, and particularly the passage in a leading case

† A review of M Jovanović, *Collective Rights: A Legal Theory* (CUP 2012).

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where he declared that 'Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society'.[1] The last words may themselves even further demonstrate the need for explication, in so far as they appear to refer to group-differentiated rights of individuals held on account of being Aboriginal, whereas the more contemporary legal conception is of rights held by Indigenous communities themselves. Despite the need for work in this area, a long period of fairly limited scholarly work particularly on rights held by groups themselves (as opposed to group-differentiated rights)[2] has only recently given way to a surge of writing on collective agency, responsibilities and rights.[3]

In *Collective Rights: A Legal Theory*,[4] Miodrag Jovanović enters into this field with a specific focus on offering a legal theory of collective rights, a theory that explicates the features of this type of rights as actually found in rights instruments. Jovanović's account rapidly makes clear its major claim that collective rights are explicable in terms of an underlying premise of value collectivism. By this premise, Jovanović means 'the view that collective entities can have inherent value, which is independent of its contribution to the well-being of individual members'.[5] In the course of offering this theory, Jovanović enters at some length into the nature of legal theory methodology, arguing for a view that legal theory tackles principally analytical questions but implicitly must engage with a normative-moral point of view even at the stage of concept formation. He considers theories that conceive of the concept of collective rights primarily in terms of who exercises a right or who has standing to assert a right, and rejecting any use of these features to define the concept, he argues for a view that looks to collective interests of the group itself as the distinctive element of collective rights, with these collective interests being morally pertinent because of the underlying premise of value collectivism.

[1] *R v Van der Peet*, [1996] 2 SCR 507, [19].

[2] This limited attention had been noted by inter alia L Cardinal, 'Collective Rights in Canada: A Critical and Biblographical Study' (2000) 12 Nat'l J Const L 165, 165; EA Posner and A Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia L Rev 689, 707; DG Newman, 'Recent Work: Collective Rights' (2007) 48 Phil Books 221. There had of course been some such writing, much of it critical of the idea, as well as a larger body of scholarly literature on rights held by individuals on account of their group membership, much of this in the wake of work by Will Kymlicka (eg W Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989); W Kymlicka, *Multicultural Citizenship* (OUP 2005)).

[3] See eg C List and P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (OUP 2011); T Isaacs, *Moral Responsibility in Collective Contexts* (OUP 2011); M Seymour, *De la tolérance à la Reconnaissance: Une théorie libérale des droits collectifs* (Boréal Press 2008); D Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing 2011). Although the recent works are the fullest-length treatments, one should not overstate the recency of the attention to collective rights by major theorists. Joseph Raz began developing the concept in parts of *The Morality of Freedom* (Clarendon Press 1986) and *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 2001) and gave it extensive attention in some essays, such as 'Rights and Politics' (1995) 71 Indiana LJ 27.

[4] M Jovanović, *Collective Rights: A Legal Theory* (CUP 2012).

[5] ibid 6.

Jovanović argues that conceiving of collective rights in this way gives reason for state efforts to promote effective agency by helping to put in place democratic representative mechanisms for rights-holding groups and reason for balancing between collective rights and individual rights based on proportionality analysis. In later chapters, he engages in some more general discussion of the universality of human rights and argues for the possibly universal status of some collective rights.

Jovanović's rich and intriguing analysis has potentially broad implications in terms of how to understand collective rights entrenched in legal and constitutional instruments, and it makes many important advances on widespread understandings of and past approaches to collective rights. It also has a larger scope in so far as he offers interesting discussion of legal theory methodology questions and of issues related to universality of human rights. However, this review will hone in on two central parts of his argumentation on collective rights specifically so as to question whether his approach is the most preferable way of moving beyond prevalent views on collective rights. First, Jovanović argues that collective interests rather than group exercise of rights or group standing to claim rights are the distinguishing foundation of collective rights, that irreducibly collective interests necessitate an explanation in terms of value collectivism, and that this approach then provides an appropriate way of understanding the task of balancing collective rights and individual rights. An approach based on value collectivism departs significantly from prevailing opinion in Western theory and Western societies. It bears noting on this dimension that the focus on collective interests is potentially a distinct part of the argument as compared to the claim that value collectivism is a necessary way of understanding irreducibly collective interests and a promising way of understanding individual-collective rights conflicts. Second, Jovanović argues for a sharp distinction between pre-legally existing groups and legally constituted groups, with only the former holding collective rights and the latter having to rely upon individual rights of their members to support any shared aspirations of the members.

This review article will argue that Jovanović's argument is right to focus on collective interests as the distinctive foundation for collective rights but will argue for keeping this element of the conception of collective rights separate from value collectivism and related claims. In particular, the article will argue that it is not necessary to rely on value collectivism to have an account of irreducibly collective interests and that an approach based on value collectivism undermines itself in a particular way (in being a 'self-threatening theory') in the context of the rights conflicts discussion. Second, the article will argue that the sharp distinction between pre-legally existing groups and legally constituted groups does not fully track pertinent considerations and that the legal constitution of some groups does not automatically prevent them from

claiming rights and, indeed, may be morally required to assist some putative groups to claim rights.

2. *Value Collectivism and Collective Rights*

A. *Exercise, Standing and Interests*

A prominent strain of scholarship in recent decades began to orient itself to collective rights being defined by either the fact that they could be exercised only by a collective entity or the fact that their underlying good could exist only in some sort of participatory or social form.[6] Jovanović is skeptical of claims of the inherently social character of certain goods, noting that the individual versus social character of particular goods often varies across societies or cultures, which he regards as significant when some collective rights, such as Indigenous rights, will protect a particular cultural group's rights as opposed to others' in the context of no shared conception of the particular good (such as land).[7] He also declines to reject James Morauta's critique, in which Morauta argues that the participatory nature of certain goods does not imply that the right-holder must be a group rather than an individual.[8] He even suggests that there are counterexamples, such as the right of someone from a minority language group to speak in a minority language, with the inherently social or participatory nature of language not meaning that one individual's right to speak in Serbian to a fellow train passenger in Switzerland is connected to the group's rights.[9]

However, one must take care with this example. The fact that there is an independent freedom of expression right held by individuals that allows some uses of language does not mean that rights pertaining to the actual social dimensions of a minority language are not group rights. In the same sense, a particular Indigenous person might have a right to fish in a certain river at certain times simply on account of being an Alaskan (and might have greater rights to do so than a non-Alaskan) but might have other fishing rights on account of being a member of the Alaskan Yupik community, with the individual exercise of these other fishing rights still being of fishing rights held only because the opportunity of members to exercise these rights, for cultural reasons, makes the community's life go better. There is no doubting that individuals sometimes physically exercise collective rights (such as the community's fishing right, which need not be exercised only by the whole

[6] See eg D Réaume, 'Individuals, Groups, and Rights to Public Goods' (1988) 38 U Toronto LJ 1; L Green, *The Authority of the State* (Clarendon Press 1990) 207; C Taylor, 'Irreducibly Social Goods' in G Brenna and C Walsh (eds), *Rationality, Individualism and Public Policy* (Centre for Research on Federal Financial Relations 1990).

[7] Jovanović (n 4) 91, 98.

[8] ibid 94, declining to challenge J Morauta, 'Rights and Participatory Goods' (2002) 22 OJLS 97.

[9] ibid 95.

community at once), but the mere fact that one can identify fully individual exercises of rights that physically look like individual exercises of collective rights does not take away from the possibility of coexisting collective rights. And Jovanović does not actually dispute this, but his example and his acceptance of Morauta's critique must be considered with care.

Those scholars who pursued claims as to certain goods being inherently social or participatory were generally not trying to offer any complete account of collective rights but, rather, were trying to draw attention to reasons to think that some rights must be collective. That some rights must be exercised in some collective context or that some rights can be claimed only by a group is interesting but does not give a complete account of collective rights. Jovanović rightly recognizes that the more promising route to an account of collective rights is to identify the existence of irreducibly collective interests that allow collective rights to fit within Joseph Raz's account of a right existing when an interest is sufficient to ground a duty.[10]

B. *Irreducibly Collective Interests and the Value of Collective Entities*

However, Jovanović too readily takes on a critique that one's ability to be a right-holder depends upon the proposition that one's well-being is of ultimate value.[11] Raz's discussion of capacity for rights partly sets up matters for such an assumption, though it bears noting that capacity for rights within Raz's account exists also in artificial persons.[12] It also bears noting that even persons who are of ultimate value will often hold rights unrelated to their own ultimate value but almost analogously to the way in which they would do if they were artificial persons. The journalist who holds a right not to reveal her sources, the right being grounded in the interests of many persons in the free flow of information rather than principally in some special interest of hers, holds the same right as does the media corporation for which she works, which similarly has the right not to reveal its journalists' sources on account of those interests of other persons. The categories of bases for capacity for holding rights based on interests are not themselves crucial to which rights any particular natural or juridical person holds. This fact suggests at once that there need not necessarily be an alignment between a right being held on the basis of collective interests and the collective entity holding it being of one of the particular types within the category of those with capacity to hold rights.

Jovanović would fairly rapidly connect collective rights to collective entities being of ultimate value, the form of value collectivism he embraces, but the conceptual connection is not automatically there within the general interest

[10] Raz, *Morality of Freedom* (n 3) 166.
[11] Jovanović (n 4) 106, citing Y Tamir, 'Against Collective Rights' in C Joppke and S Lukes (eds), *Multicultural Questions* (OUP 1999).
[12] Raz, *Morality of Freedom* (n 3) 166.

account of rights. The question becomes, though, whether the notion of an irreducibly collective interest makes sense without the collective entity being of inherent value. My claim is that it can make sense and that Jovanović thus takes on larger claims about value collectivism than he need take on for an account of collective rights to function, with this theoretical feature then perhaps ultimately alienating some whom it may make more reluctant to recognize, support or implement collective rights.

Jovanović does go through a longer discussion of why he rejects various challenges to value collectivism, but his central argument for it as a concept to be used in the explication of collective rights is that 'it can provide a more coherent grounding of certain forms of collective rights, particularly those that are attached to groups, which are not organized around liberal values of individual autonomy and tolerance (e.g. Indigenous peoples)'.[13] It is not actually clear why Indigenous peoples necessarily form the prime example of intolerant groups against individual autonomy. But, taking on the challenge underneath the argument, the question is whether it is possible to identify irreducibly collective interests that can ground rights for groups that may override some individual interests related to autonomy and tolerance without having to take on value collectivism.

If one conceives of a collective interest as something that makes the metaphorical life of the collective entity go better but where the collective entity would not exist without its members, the logical metaphorical application is to think of the collective interest as something contributing to the common good of the community.[14] That is to refer to that which animates and renders the ongoing collaboration of the members within the community as viable and reasonable. Because the community is part of the lives of the members (something Jovanović wants as well, since he ultimately is interested in communities that are constitutive for members), its flourishing makes their lives go better. Something that makes the community's life go better that would not have made a particular individual's life go better but for the individual's participation in the community is actually primarily a collective interest and only secondarily an individual interest. And, here, one arrives already at the possibility of collective interests that are in some manner irreducible to individual interests. A minority language's control of certain educational institutions will not typically fulfill directly many individual interests of members—perhaps for a few with peculiar political cravings, but it will generally put more work on many more individuals—but it contributes to the longer term flourishing of the community and thus indirectly to the lives of the individual members. But the interest is primarily, irreducibly collective. One

[13] Jovanović (n 4) 46.

[14] I offer this sort of account of collective interests at greater length in Newman, *Community and Collective Rights* (n 3) 60ff, drawing on J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 154 for the conception of the common good.

could of course put this argument in longer forms,[15] but the point is that there is a plausible alternative account of irreducibly collective interests and of collective rights of which Jovanović does not take full account.

One further question, of course, could become whether this alternative account can actually fit with collective interests that override individual autonomy-related interests. For example, one might wonder whether this kind of account can fit with a collective entity restraining some dimension of individual autonomy for the sake of a collective interest that contributes to the community's flourishing, which ultimately, over the long term, contributes to members' lives. Here, much hinges on the view one takes of autonomy. If autonomy can be conceptualized as one interest, albeit an important one, alongside others, there seems little difficulty with the scenario. However, those who attribute deeper significance to autonomy, who see autonomy as more constitutive of other discourse, may well not be ready to subscribe to this account.[16] But that point is not decisive as between the accounts in so far as those seeing autonomy in this constitutive conception will also not be ready to subscribe to value collectivism. It is not clear that there is an obvious advantage in adopting value collectivism, and it may contain dangers of limiting the scope of appeal of the theory.

C. *Collective and Individual Rights*

The possibility of tensions between collective and individual rights is a major concern for theorists, advocates and even governments contemplating the recognition of new collective rights,[17] and there are significant bodies of, for example, feminist legal scholarship that challenge arguments for collective rights on the basis of their implications for certain individual rights, including the rights of those belonging to 'minorities within minorities'.[18] Jovanović rightly recognizes this issue as an important debate and engages with the argument, although he begins by treating the inability of some accounts to let collective rights override individual rights as a problematic feature of those accounts prior to then developing an account of balancing between collective and individual rights. In particular, Jovanović argues that Will Kymlicka's well-trodden distinction between 'external protections' and 'internal restrictions' does not satisfactorily reconcile collective and individual rights claims

[15] For a longer form, see Newman, ibid.

[16] See RD Robb, 'Moral Theory, Autonomy, and Collective Rights: A Response to Dwight Newman' (2012) 25 Can J L & Juris 483, 492.

[17] See discussion in D Newman, 'Theorizing Collective Indigenous Rights' (2006–07) 31 American Indian L Rev 273.

[18] See eg SM Okin, 'Is Multiculturalism Bad for Women?' in J Cohen, M Howard and MC Nussbaum (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 12, 22; S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 60; C Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (CUP 2008) 290; A Eisenberg and J Spinner-Halev (eds), *Minorities Within Minorities: Equality, Rights and Diversity* (CUP 2005).

precisely because it does not allow collective rights to override individual rights.[19] Kymlicka's argument is grounded in a liberal egalitarian framework and rests on an argument that some individuals are unjustly disadvantaged because their minority cultural structures are under greater threat than majority cultural structures and that egalitarian principles thus permit them to defend these structures against outsiders to maintain their autonomy-promoting contribution to their lives. Kymlicka distinguishes internal restrictions from those external protections and concludes that internal restrictions are largely impermissible because they work against the individual autonomy that indirectly justifies external protections.[20]

Jovanović is right that a sharp distinction of this sort is not in keeping with the implications of collective rights entrenched in positive law like minority educational rights or Indigenous rights. To the extent that minority educational rights encompass some control of school administration, minority groups so empowered inevitably make decisions to the advantage of some group members over others, and the same is true in the context of Indigenous self-government. Where the survival of an Indigenous culture and language is at risk not just because of the conduct of outsiders but also because of individual members within the group who decline to study in the Indigenous language that is at risk (preferring the economic benefits of another language), the desired and just cultural protection might encompass some requirements imposed on members. Such requirements might be unjustifiable in an instance where the language is past a point of no return and will not survive anyway, but where the language and culture might be saved via some restrictions on individual members, it would be wrongheaded to reject this policy categorically based on a rigid approach to 'internal restrictions'.[21] Kymlicka's distinction is of course subject to other critiques as well, including that it cannot cope with the very frequent and sometimes litigated problem of group rights concerning definition of group membership.[22] One cannot use categories based upon insiders and outsiders when the very challenge at hand is often to define who is an insider or an outsider.[23]

Jovanović, however, moves towards a generic value collectivism and conclusion that the resolution of conflicts between collective and individual rights will be just a matter of balancing.[24] However, although theories of rights balancing have become increasingly sophisticated in the context of an

[19] Jovanović (n 4) 143.
[20] Kymlicka, *Liberalism, Community, and Culture* (n 2).
[21] See eg Newman, *Community and Collective Rights* (n 3) 22, 118.
[22] Classic cases include *Santa Clara Pueblo v Martinez* 436 US 49 (1978) and *R v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728. See also S Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (McGill-Queen's University Press 2009).
[23] See Newman, *Community and Collective Rights* (n 3) 19.
[24] Jovanović (n 4) 144.

internationally adopted approach of proportionality analysis,[25] the implication that collective rights might trump individual rights whenever they pass a proportionality analysis may not be reassuring to those with latent worries about collective rights. Indeed, the latent promise appears precisely to be that individual rights will be limited in a number of instances based on any newly recognized collective rights, an uncomfortable result if one maintains any ongoing sense that individual rights are to be trumps, side constraints or anything equally meaningful.[26] The alternative account referenced earlier that sees collective rights as explicable without resort to value collectivism even while maintaining that they are grounded in irreducibly collective interests could operate consistently with the principle that collective entities must, ultimately, serve their members' interests over the long term. An implication of that principle is that collective rights are actually interrelated with individual rights, and there are thus more prospects both for avoiding conflict and for adopting a model of reconciliation as between collective and individual rights that does not imply widespread restrictions on individual rights.[27]

The choice as between these two sorts of accounts in something that purported to be a thoroughly descriptive legal theoretical account would appear to hinge upon which more accurately described the relation between collective rights and individual rights in the context of those positive law instruments entrenching collective rights. Such an argument would still be subject to the challenge about to ensue. But Jovanović partly eschews any fully descriptive methodology and, in accord with significant recent argument on legal theory methodology, is also concerned with justification or normative-moral characteristics of the concepts at issue—although this might entail only indirect moral evaluation.[28] And this methodology is even more obviously subject to a concern that it is what I will call a 'self-threatening theory'.

We might draw a distinction at this juncture between a self-defeating theory, a self-threatening theory and (perhaps) a self-sustaining theory. A self-defeating theory, when pronounced, entails some consequence that is logically inconsistent with the theory having truth value. It is obviously, then, a rather poor theory. However, more complex and more interesting possibilities exist in terms of the relationship between the pronouncement of a theory and the truth value of the theory. A self-threatening theory, in contrast, would be a theory whose pronouncement entails some consequence that, although not logically inconsistent with the theory having truth value, nonetheless undermines some of the

[25] See eg A Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 945; R Alexy, *A Theory of Constitutional Rights* (J Rivers tr, OUP 2010); A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia J Transnational L 73; A Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012).

[26] See discussion in Newman, 'Theorizing Collective Indigenous Rights' (n 17).

[27] See Newman, *Community and Collective Rights* (n 3) 85.

[28] Jovanović (n 4) 43, 70. cf R Alexy, *A Theory of Legal Argumentation—The Theory of Rational Discourse as Theory of Legal Justification* (R Adler and N MacCormick trs, Clarendon Press 1989) 177ff; J Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001).

conditions that would lead to the theory having truth value. Just as a logical possibility and not as the subject of further discussion here, one could perhaps also identify the notion of a self-sustaining theory whose pronouncement entails some consequence that helps to sustain the conditions for the truth value of the theory.

The concepts just distinguished may appear to put a peculiar emphasis on the role of the theorist. The theorist's activity is usually thought not to be appropriately the subject of discussion, and with good reason. If the theorist is centrally engaged with attempting to develop true accounts, any reference to the political consequences will typically be only a distraction and something that takes away from the theorist's appropriate focus. For that matter, one cannot evoke alleged beneficial consequences of a theory that ensue only if it is true to attempt to support its truth value.[29] Statements that even appear to blur the roles at issue—such as a prominent theorist's statements that theorists should not 'bestow' rights on groups[30]—arguably contain a category mistake and will provoke justifiable criticism from other theorists.[31] However, there nonetheless remains a distinction to be drawn here. A theorist who utters statements that become untrue the moment they are uttered, by virtue of the utterance, can appropriately be critiqued for those statements on grounds of performative inconsistency.[32] For example, the theorist who asserts the impossibility of making any general statements about morality contradicts himself or herself.

The concept of a self-threatening theory (or one could speak of a self-threatening statement) draws on these performative considerations. An anthropologist who revealed and widely dispersed sacred knowledge previously held only within one part of a community under study would performatively undermine any claim as to the ongoing secrecy of that sacred knowledge. An anthropologist whose statements about a community created conditions whereby the characteristics described by those statements would inevitably change would be uttering a self-threatening theory. In a similar vein, the legal or political theorist who offers a theory of collective rights that may create conditions that undermine the truth value of the theory will utter a self-threatening theory. This characteristic of the theory does not necessarily make it an untrue theory, but one can ask legitimate questions about whether it is the sort of theory the theorist should offer.

In the context of discussions about collective rights, such as in discussions between governments on rights embodied in the United Nations Declaration on the Rights of Indigenous Peoples,[33] governments contemplating support of

[29] Dickson (n 28) 88.
[30] Y Tamir, 'Against Collective Rights' in C Joppke and S Lukes (eds), *Multicultural Questions* (OUP 1999).
[31] See eg J Raz, 'Comments and Responses' in LH Meyer, SL Paulson and TW Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 269.
[32] J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 74.
[33] Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/47/1 (2007).

such instruments in general and the support of such instruments with reservations or interpretive declarations expressing views against collective rights, for instance, have stated a particular concern about collective rights that their entrenchment may take away from individual rights. Adopting unnecessarily an account of collective rights based on value collectivism that then leads to an approach of simply balancing off collective rights and individual rights risks playing into these very concerns. Were this to become regarded as the basis for collective rights, there would be very real possibilities that it would create conditions discouraging the further entrenchment of collective rights. The description of the subject matter would indirectly undermine its ongoing existence. On this argument, Jovanović's theory risks being self-threatening.

3. *Legally Constituted Collective Entities*

Within his account, Jovanović draws a sharp distinction between pre-legally existing groups and those that are constituted by law and that he thus dismisses as mere 'juristic persons, such as trade unions or corporations', naming me as someone who fails to attend to the difference, with my failure allegedly stemming from adhering to an obscure 'nineteenth-century legal teaching'.[34] He is by no means alone in assuming that entities such as trade unions and corporations do not hold collective rights in the same sense as ethnic minorities or nations, and this sharp differentiation is present in other collective rights theorists as well.[35] However, this sharp differentiation leads to peculiar consequences, and there are strong reasons to question why the partly legal constitution of trade unions or corporations would automatically undermine their status as potential holders of collective rights.

Jovanović does not actually settle on one description of what makes a group a pre-legal collective entity but cites to a varied set of descriptions restating that main requirement, noting their nature as 'given' (presumably rather than constructed), stressing the shared understandings between group members, noting their lack of regulated entry and exit and lack of membership cards and fees, noting their ascriptive nature and noting their constitutive role in the lives of their members.[36] Jovanović of course must acknowledge that some groups, for example certain Indigenous communities, are subject to state interference in the boundaries of legally defined group membership, but he insists on the main point that legal definition of group membership does not change the fact that there was a pre-legally existing group.[37] This acknowledgement means, at once, though, that a mere coincidence of legal definition in the context of a

[34] Jovanović (n 4) 126.
[35] See eg V van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory' in W Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995) 31, 33; Seymour (n 3).
[36] Jovanović (n 4) 125.
[37] ibid 129–31.

pre-existing entity does not remove its essential group character as a potential rights-holder. But just what Jovanović considers to ground that ability to hold rights is not especially clear.

There is no reason to think that a group with a legally entrenched definition cannot meet any of a number of the other possible elements within the bundle of descriptors Jovanović lists. A group whose membership the group itself or the state has legally defined might nonetheless evidence shared understandings between group members, might be constitutive within their lives and so on. Some of the criteria listed appear of no plausible identity-related significance. If a minority ethnic group did provide its members with membership cards so as to make clear who could claim rights as a group member, that it did so would not seem susceptible of undermining its group rights claims.

If a group of workers in some jurisdiction that had a statutory bar against unionization in their industry felt a clear set of shared understandings, a shared identity and some other items on Jovanović's list, they would arguably have a pre-legal existence. Their commitment might not even be solely based on pecuniary aims but might also encompass shared commitments to certain social justice goals. Were they to put a novel constitutional challenge against the statute on, say, freedom of association grounds, then it might well be possible for the courts to recognize a novel constitutional collective right that overturned the barrier to unionization.[38] If the group then attained status as a trade union under the new legal framework the state adopted in response to the court's pronouncements on these rights, the fact the group had legal recognition and legal definition would not be good reason to then say that it could not hold collective rights.

Suppose a cultural-religious community in a particular region had reasonably clear social rules concerning membership in the community that were based on the community's religious principles of matriarchal descent. The fact that the state subsequently intervened in the community's membership principles through the enactment of a statute barring ethnic discrimination that the courts interpreted so as to bar matriachy-based community status[39] would not give good reason to say that the legally reconstituted group could not claim collective rights. For example, it would remain very much plausible that the reconstituted community would have certain claims to control the group's cultural and religious property.[40] This right would not suddenly have become reshaped into some sort of individual right by even significant alterations of and impositions of membership rules on the group.

To eschew legally constituted groups as not being true collective entities without more analysis is to give too much significance to law. To take the fact

[38] cf eg *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [2007] 2 SCR 391.
[39] cf eg *R v Governing Body of JFS* (n 22).
[40] cf eg *Metropolitan Church of Bessarabia v Moldova* App no 45701/99 (2002) 35 EHRR 13.

that a legal definition coincides with a pre-existing group of moral concern to take away from that group's collective rights claims is to endow law with a perversely powerful effect. At the same time, paradoxically, this approach may also simultaneously underestimate the significance of law. Some groups may struggle to define themselves but may function well as groups once constructed. To say that they may have rights claims only if they can constitute themselves would be to sacrifice the important tool of the law. The legal construction of entities like trade unions may in some contexts recognize pre-existing entities, but it may also construct them, but once constructed they may still be groups as real as any other.

Indeed, many legally entrenched rights of trade unions cannot readily be explained as individual rights. The use of a strike will work against the interests of some specific workers but may still be a collective right of the trade union. Jovanović's exclusion of legally constituted groups from the scope of analysis is an unfortunate choice that reduces the scope of his book's description of collective rights.

4. *Conclusion*

Jovanović's book engages with and seeks to justify a set of rights increasingly entrenched in rights instruments but all too often receiving little attention in rights theory. He provides a strong argument that entrenched rights like minority educational rights and Indigenous rights necessitate a different conception of rights that are held by groups with non-reducible interests. He rightly highlights a number of important consequences of this conception, notably that policy-makers must rigorously face important questions of who legitimately speaks for a particular group and its claims and that individual rights need not always take priority over collective rights. He grounds this argument in a form of value collectivism, a conception in which collective entities can have inherent value that is potentially entirely independent of the entities' contribution to individual members' well-being.

This review article has provided two central criticisms of Jovanović's account. The first challenges the use of value collectivism on two particular bases. The first of these bases is that full-fledged value collectivism is not necessary to explain and coherently ground collective rights like those held by Indigenous peoples. Jovanović is right that the range of rights held by Indigenous peoples cannot be adequately explained by accounts grounded solely in individual interests, such as that of Will Kymlicka. However, Jovanović neglects the possibility of an account that recognizes irreducibly collective interests while continuing to require that groups serve their members. Such an alternative account has advantages in explaining the interrelationship of collective and individual rights. The possibility of such an account evokes the second basis for challenging his use of value collectivism, which is that advocacy based on value

collectivism risks undermining the political and legal support for the very rights for which it advocates. Though not intended to do so, it indirectly feeds into the worst fears that collective rights evoke. On this point, this review article has made the claim that an account that is self-threatening in this manner, even if seemingly descriptively accurate, cannot function as a successful account. The second central criticism of Jovanović's account is that it does not actually describe and account for all of the sorts of rights at stake. In particular, collective bargaining rights of trade unions are not fully explained by individual interests and traditional liberal accounts of rights and would benefit from an account of their collective legal rights. Moreover, the decision to exclude trade unions from the scope of groups whose rights one seeks to describe based on their juridical status reflects assumptions about the nature of groups that attribute, paradoxically, both too much significance to law and not enough. The fact that law has helped to constitute a particular group does not undermine its nature as a group. Conversely, the law may well be morally obliged to help some groups into existence to respond to their members' interests and then to recognize these groups as groups with certain rights. So, the law may play a more central role with some groups than Jovanović acknowledges, and the fact that it does so need not be thought to undermine the subsequent moral standing of those groups.

Any review article, due to the nature of the enterprise, inevitably focuses on critique more than on praise. Although I have challenged Jovanović's account in two central ways, I nonetheless admire his endeavour and commend his book. Jovanović makes very important contributions to continuing discussions on group rights, particularly by highlighting the real need for different theoretical accounts of rights and right holders and calling for clearer differentiation of collective rights from other related legal concepts. His book manifests some of the ways in which jurisprudential scholars can contribute much to the elucidation of contemporary concepts in domestic and international law.