Carving out a Federal Space from a Colonial Wound: US and Canadian Federalism and Indigenous Integration

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Abstract

The study of democracy continues to be relevant in western countries which have a history of representative government. Not only to measure the general quality of democracy, but also how outside minority groups can become incorporated into democratic practices. Federalism in both the US and Canada can serve as a tool to help bring indigenous peoples into the fold while also allowing them to exercise some form of representative governance. Similarities and differences are present in comparing these two cases. Both the US and Canada shared similar practices growing out of colonial legacies with techniques and institutions designed to focus on assimilation without providing opportunities for political participation. Both countries have since compromised with native groups providing channels for self-governance within their federal models. The Canadian case displays an evolution of practices from assimilation to inclusion through institutional methods following a constitutional framework and past accommodation practices. The US altered its initial practices, however the limited institutional framework and constitutional inflexibility maintains a vague status for these groups within federalism. Both the federal structure and critical past events caused separate paths to emerge. Each path has been dependent on specific mechanisms which initially altered the trajectory and overtime reinforced the patterns of each federation.

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To all my new CEU friends: You are the reason I am still here. It has been a great crazy time!

And of course thanks to Joseph Campbell who is continually inspiring me with his writings, philosophy, and memorable quotes:

"A bit of advice given to a young Native American at the time of his initiation: As you go the way of life, you will see a great chasm. Jump. It is not as wide as you think." – Joseph Campbell

Chapter 1: Introducing Federalism and Ethnic Integration

1.1 An Overview

The role of democracy in western development remains a popular topic in political research and yet despite this, its application within indigenous affairs continues to be largely overlooked. While the focus of this research is on minority groups surrounded by vastly larger polities the issue at its core has implications beyond the reservation. It strikes at the core of representative government, ethnic politics, and integration. These are issues that governments and societies across the globe continue to struggle to address.

Ethnicity defines the central makeup of many different groups. With the rise of nationalism the idea of the nation state gained popularity in many regions of the world. If the social cohesiveness provided by a third party state dissolves it is reasonable to conclude separate ethnic communities would want to form a state informed by their culture and customs. However, if the ideal of democracy is maintained we could conclude that if ethnic groups have representative institutions interacting with the state then their needs could be represented even if their identity is not predominate within the larger community. Federalism in theory provides an excellent opportunity to address ethnic conflicts and potentially elevate calls for ethnic sovereignty or independence.

Despite this many tribal governments of the various native communities spread across North America do not easily fit into the federal model. They occupy a gray zone between the traditional state or provincial subunit and the larger federal entity. If autonomy is sought by these tribal communities then in order to understand why and how this came about we need to focus on their relationship with the federal government. To facilitate the study I will use the most different comparative method focusing on indigenous communities in the US and in Canada. Differences

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in self-governance outcomes can then be explained by the variation in their relationship with the federal state.

The terms used to describe these people differ between cases with Native Americans used in the US and aboriginal used in Canada. Since I will be discussing groups in both countries I will stick to the terms indigenous or native peoples as these are terms academics frequently use when discussing issues involving pre-colonial communities. Practically speaking it also makes sense to use these terms since these groups are indeed 'native' or 'indigenous' to North America.

Ultimately the key question for this research is how is federalism used to integrate indigenous people into the US and Canadian political communities? What elements of federalism assist in this process? If these two federal states differ in order to understand why we must look at the root causes. It is also important to look at native responses to gaps in the federal model as well. Natives have displayed an ability to both work from within the existing system and if necessary work from outside of the normal political process through large-scale social movements to achieve their aims. Their aims encompass many separate issues including treaty rights, sovereignty or self-determination, environmental and social concerns, and land rights. All of these grievances are representative of a simple and democratic goal, to have a say in the public affairs that effect their lives.

1.2 Defining Path Dependency

Using the Historical Institutionalism approach can help explain why similar federal structures can lead to different opportunities for indigenous groups. To understand the origins of similarity and the differences which developed we need to observe institutional endurance, altered trajectories, and how this can represent path dependency. If institutions are the result of political struggle then in order to understand their evolution the time and ordering of political

processes explains institutional results. Kathleen Thelen notes that while comparative historical work focuses on the timing and connections between separate processes a key element missing is how mechanisms (critical junctures) reinforce processes leading to institutional legacies.[1] Without focusing on these mechanisms it is difficult to explain why structures are maintained following the moments of critical junctures.

Path-dependency is indicative of reinforcing feedback provided by actors either through coordination effects or distributional power. Coordination focuses on actors adapting to institutions and reinforcing the logic of the system, while distributional power focuses on how institutions empower groups while constraining others.[2] Coordination effects have occurred as US natives have taken advantage of their political ambiguity in the constitution to attempt to expand their powers through legal action. Distributional power is represented by the opportunities provided to the French during the 1867 Canadian Confederation in contrast to assimilation attempts toward the indigenous following this period.

Political change and institutional evolution are the result of interactions which disrupt stability and open opportunities. These openings are shaped by the mechanisms and how they interact with different patterns of institutional stability.[3] There is a direct link between the stability of political foundations and how change arises. Both countries were strongly influenced by colonial patterns in their initial interaction with tribal communities. Canada has made notable strides to reverse these early trends through both accommodation and structural changes incorporating the indigenous into the constitution. These openings allowed for self-government to grow from within Canadian Federalism.

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[1]   Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics." pg 390

[2]   Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics." pg 392-394

[3]   Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics." pg 397

The US also departed from its original assimilation policies through large-scale change in the 70s and 80s with policies supporting self-determination. However, the vaguely defined nature of natives within its constitution prevents these groups from occupying a clear space within US federalism. Instead their political status floats between the relationship between states and the federal government. Both opportunities and conflict have arisen from the multilevel governance occurring between these three levels. A focus on integration also has influenced the US approach to indigenous minorities and what compromises were offered to them.

I will begin the paper by comparing the demographics of these people. Next I will cover the organization, reoccurring grievances, and resources available to them within these communities. Chapter 2 will cover key features of indigenous struggles including integration policy, self-determination, sovereignty, citizenship, and the conflict over rights. Chapter 3 focuses on the similarities and differences in federal structures and Chapter 4 presents examples of how the indigenous attempt to overcome barriers to opportunity both within and outside of the political structures.

1.3 Comparative Basis for the Indigenous within the US and Canada

Over 600 tribes are divided according to the Canadian constitution into three main indigenous groups: The First Nations, the Inuit, and the Metis. The Inuit are primarily situated in the northern arctic areas of Canadian territories. The First Nations refer to indigenous groups spread across the Canadian provinces. The Metis are unique because they are decedents from ethnic mixes of European and indigenous and are especially concentrated in Manitoba and Alberta. Map 1.2 helps display the breakdown of the indigenous population across the nation. Table 1.2 also highlights the National Household Survey results from 2011 with the highest native concentration in the Yukon, Northwest Territories, Nunavut, Manitoba, and

Saskatchewan.[4] In total they compose 4.3% of the total Canadian population (See Table 1.2).

The US Census survey of 2010 lists the 'American Indian and Alaska Native' population as being 2.9 million, .9% of the total US population. While this is comparatively small to the rest of the population it is an 18.4% increase compared to the 2000 survey (See Table 2).[5] Map 1.1 also highlights their population density with the highest concentration in Alaska, Arizona, New Mexico, Oklahoma, and Montana. A key reason for this is these states all have reservations with the largest being the Navajo with 173,667 in the Arizona/New Mexico border region.[6]

According to the National Congress of American Indians there are 562 federally recognized tribes, with 229 located in Alaska while the rest are spread across 33 other states.[7] In both countries many of the areas with highest indigenous populations also are the least densely populated, for example, Montana and Nunavut. This helps highlight a distinction between indigenous groups and other minority groups because many indigenous groups have a connection to a home territory. It should however be noted that the in addition to reservations the US has a comparatively large number of natives living within urban areas. For example, according to the New York City had 57,512 who reported themselves as American Indian.[8]

1.4 Indigenous Organization

The organization of indigenous groups can vary depending on the level of interaction with the federal government. For example, the Navajo Nation has an official governmental structure shaped by US influence with three branches of government. Despite using other traditional features this has drawn criticism that following this system overlooks traditions

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4   "Aboriginal Demographics from the 2011 National Household Survey."
5   Norris, Tina et al. "The American Indian and Alaska Native Population: 2010." pg 7.
6   Norris, Tina et al. "The American Indian and Alaska Native Population: 2010." pg 14.
7   "Indian Nations in the United States." pg 2.
8   Norris, Tina et al. "The American Indian and Alaska Native Population: 2010." pg 11.

designed to maintain community links to the governmental structure.[9] Other groups like for example the First Nations use band government which put in place by Canada, but still has traditional elements of their society. Bands are represented communities which are led by elected officials in a band council. Bands also elect a provincial council as well the leadership of the Assembly of First Nations. The Metis are representative of groups who are still in the process of obtaining self-government under federalism and rely more on micro level creation of mechanisms supporting increased self-government. This is achieved through providing services to their communities, expanding existing and new governance institutions, pushing for specific Metis legislation, and pursuing development supportive of economic self-sufficiency.[10] The leadership of these communities is a key component of how their organization can help achieve their goals.

A study conducted by the Harvard Project on American Indian Economic Development questioned why some tribes with fewer resources were more successful than those with more. Successful communities were led by natives who combined traditional approaches with current management principles.[11] To claim self-determination communities must develop a hybrid institutional model mixing traditions with strategic decisions focused on long term 'society building.' This Nation-building model moves away from Modernization Theory's sole focus on economic development to embrace political and cultural outcomes.[12] Key components of this model include: local autonomy over economic decisions, effective institutions providing fair governance that matches cultural values, strategic long term decisions, and proactively following up on plans to meet project targets. This approaches tribal problems from a holistic perspective

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[9]   Lee, Lloyd L. 2008. Navajo Nationhood pg. 97
[10]   Dubois, Janique, and Kelly Saunders. 2013. "'Just Do It!' pg 193
[11]   Calliou, Brian. "The Culture of Leadership" Ch. 5 pg 53
[12]   Calliou, Brian. "The Culture of Leadership" Ch. 5 pg 54

matching economic development with education, health, and other areas to provide a stable foundation for improving the community.[13]

1.5 Grievances and Resources

Many issues which are brought up by indigenous communities involve a different reading of historical events. European interaction with indigenous communities disrupted previously established governance and many of the claims against the federal government are connected to reestablishing links to their cultural heritage. Issues include treaty rights, land rights, environmental concerns, and social conditions (health and education). These claims often feed into the larger struggle for increased autonomy. Self-determination in the US began to open up with devolving educational oversight through the 1975 Self-Determination and Educational Assistance Act.[14] In Canada it first began with a question of rights after the 1969 proposal to remove their special legal status and following subsequent Supreme Court rulings of the 70s both land rights and self-government were affirmed.[15]

With the failure of federal attempts at imposing top-down policies support for self-determination gained ground in both countries as the federal government began to fund self-government efforts. Political organizations supporting greater indigenous autonomy have also received government funding. Concerns in both the Navajo and Metis communities have arisen with federal or provincial governments controlling the funds and thereby setting the agenda. In 1987 President Reagan departed from past practices and bypassed the Bureau of Indian Affairs funding tribal governments directly. This served to increase tribal flexibility in its use and emphasized the 'government-to-government' relationship.[16] Additional resources available to

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[13]   Calliou, Brian. "The Culture of Leadership" Ch. 5 pg 56
[14]   Steinman, Erich. 2005. "Indigenous Nationhood Claims" pg 104
[15]   Kymlicka, Will. "Canadian Approaches to Recognizing and Accommodating Diversity." *pg 47*
[16]   Steinman, Erich. 2005. "Indigenous Nationhood Claims" pg 110

these communities in both countries include access to legal institutions, support from national and transnational political organizations, and social mobilization. In general, because of the internal space within Canada there are more resources available to groups working within the system. In the US opportunities do exist within the system, but other resources including lobbying provide the opportunity to interact with the system externally.

Chapter 2: Theory and Key Concepts

There are a number of key elements which play an important role in the complex relationship between indigenous groups and these federal models. This includes what kind of integration policies are available to governments and what role integration strategies play in the US and Canada. Understanding self-determination, autonomy, and sovereignty are also vital. An added layer of complexity is how the indigenous view terms like self-determination and sovereignty. In making a place within the federal framework for tribal groups the state must define the role of citizenship and rights. Many of these elements intersect with each other as attempts are made at addressing the question of indigenous self-government. These multiple themes influence how indigenous groups interact with both cases and provide a foundation for understanding what federal options are open to natives and how they respond to them.

2.1 Integration Policy

Understanding how different groups interact and coexist with each other is important in an increasingly globalized world. This is complicated further if a minority group has a history of being marginalized as the indigenous people within the US and Canada do. This friction between a minority group and the majority within society can make it very difficult for a state to foster integration. Traditional liberal thought favors assisting individuals to make choices in pursuit of the good without coercive means while also tolerating cultural diversity. These two principles have the potential to come into conflict with one another in the context of minority integration. It is important to clearly define what integration actually means.

Certain policies favoring integration can confine and limit personal autonomy. While the liberal state claims to support diversity there have been examples of harm inflicted upon minorities while attempting to address their social and political status. It is important at this point

to make a clear distinction. Although some believe integration is the best approach to address issues involving diversity (including segregation) this is dependent on the practical situation and other local developments within a particular state. The best policy for the situation a state finds itself in could be integration in one situation, accommodation in another, and certain assimilation practices in another depending on different factors.

The liberal state provides its citizens rights including expression, but duties are also attached to citizenship including tolerance.[17] This balance between rights of expression and the duty to tolerate others' expression should create a stable foundation for a diverse and mutually respectful society. Yet when a liberal state is influenced by nationalism the victims have been those with a distinct identity outside of the accepted norm. While defenders of the liberal state call this an illiberal perversion of a tolerant model, the victims have included indigenous minorities forced to either be excluded or assimilate.[18] Liberalism also allows for state institutions to try to counteract this by intervening for the benefit of its citizens.[19] To address issues involving heterogeneity within society the state has multiple options.

Scholars suggest policies can be divided between integration, accommodation, and assimilation. The distinction between these is based on a required cultural conformity that cuts across the public and private dimensions of life. Typically assimilation promotes this conformity which may even be achieved through coercive means. Integration favors a common public life with private differences maintained while accommodation respects both public and private diversity.[20] Variations can between these approaches can occur as the state may set a required threshold that all citizens must adhere to. For example, a certain level of public participation may

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[17]   Kymlicka, Will "Liberal Nationalism and Cosmopolitan Justice" pg. 128
[18]   Kymlicka, Will"Liberal Nationalism and Cosmopolitan Justice" pg 130
[19]   Kymlicka, Will"Liberal Nationalism and Cosmopolitan Justice" pg 128
[20]   McGarry, John, Brendan O'Leary, and Richard Simeon (2008) pg 42.

be required of minority communities including linguistic knowledge.

Assimilation could be viewed as the most paternalistic because it systematically erodes private identity while promoting the public identity of citizens. This common identity can also be promoted as a benefit to uncivilized groups of natives and immigrants who need a 'benevolent paternalist' to guide them.[21] Although three types of integration exist, for the scope of this paper we will be discussing liberal integration which is focused on creating conditions conducive of strong individuals by promoting the value of choice and freedom. Equality is promoted by opposing national origin discrimination while individualism is supported through talent and competition in the free market.[22]

Accommodation promotes the coexistence of different groups within the state by recognizing linguistic, national, and religious identities.[23] For these identities to be recognized they must be durable and resistant to transformation. Few states practice pure accommodation because it would require promoting the cultural autonomy of all minority communities including language of origin through schools. Western multiculturalism has become a unique variation of this as it creates space for private expression while also promoting a shared public culture.[24] This is influenced by liberal integration since the state's tolerance threshold is if a culture violates liberalism. One integrationist critique to pure accommodation is that allowing for such separation in society can create unequal treatment of minority groups. Integration refers to more than just how diversity is displayed, but also to equality for groups within society.

Elizabeth Anderson focuses on equality through the lenses of non-ideal theory as opposed to ideal theory. Ideal theory is most commonly associated with John Rawls and is based the

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[21]   McGarry, John, Brendan O'Leary, and Richard Simeon (2008) pg 44
[22]   McGarry, John, Brendan O'Leary, and Richard Simeon (2008) pg 47
[23]   McGarry, John, Brendan O'Leary, and Richard Simeon (2008) pg 52
[24]   McGarry, John, Brendan O'Leary, and Richard Simeon (2008) pg 56

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assumption that individuals or societies will comply with laws and that favorable social conditions support the individuals and societies' ability to follow principles of political cooperation. Essentially this is a best case scenario where as non-ideal theory often focuses on providing principles which practically address current issues without regard for an ideal just society.

This serves as a foundation for addressing inequality first, because policy must be tailored toward cognitive capacities of humans, secondly, gaps develop when we impose an ideal upon the actual world, and finally because operating from an ideal can prevent recognition of injustices in the non-ideal world.[25] Anderson's point here is that it is more logical to operate from a basis that is inclusive of the practical reality occurring than to compose policy aiming at an ideal not yet achievable. This theory views integration as being in opposition to segregation through heterogeneous equality.

If we accept integration as being the antithesis of segregation we can then accept Anderson's conclusions on what composes integration. All races within all social domains are included and participate in major societal institutions including education/economic advancement, access to public goods, and political influence.[26] Operating from this basis Anderson further distills integration's meaning by contrasting it against similar attempts at addressing segregation including desegregation, color blindness, and assimilation. These three alternatives fail to fully address segregation because they don't provide full cross societal and institutional intersection or force integration in favor of the dominate group with the others' identities being abandoned. Integration contrasts with these attempts by ending segregation and

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25   Anderson, Elizabeth. *The Imperative of Integration*.pg 3-5.
26   Anderson, Elizabeth. *The Imperative of Integration*. pg 112-113.

its institutional foundations without removing identities.[27] If we combine Anderson's and McGarry's definition integration is then the public equality of groups and the private acceptance of their diverse identities. This also further contrasts integration from accommodation which while it may succeed under ideal circumstances it has the potential to lead to inequality through a public separation that could transform it into segregation if mechanisms are not in place to prevent this.

2.2 Integration Strategies

When creating strategies for integration there are multiple options which can be influenced by assimilation or accommodation theories. J.H.H Weiler provides two models of addressing ethnic divides, comparing 'Come Be One of Us' with respectfully acknowledging differences. The first strategy seeks to remove boundaries between groups. It may not be coercive in its assimilation but still operates under the thinking that a group will be invited to change to the majority's identity which often comes with a loss of their ethnic identity.[28] The alternative strategy is based on accommodation grounds as it accepts the differences of the group and does not seek to replace their identity with the majority's culture.

These two strategies accurately reflect the divide between assimilation and accommodation as each attempt to alleviate issues concerning minority alienation.[29] The strategy chosen will determine if the society as a whole is more of a melting pot or a tossed salad of identities. Although Weiler provides this description to contrast the assimilation policy of the US with the EU it fits Canada quite well. This is especially the case because of the history of Canadian acceptance of the French identity in Quebec.

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[27]   Anderson, Elizabeth. *The Imperative of Integration*. pg 114.
[28]   Weiler, J.H.H.: Federalism Without Constitutionalism 66.
[29]   Ibid

2.3 Understanding Self-determination, Autonomy, and Sovereignty

To provide clarity to the debate over indigenous autonomy and self-determination claims it is necessary to clearly define these terms to better understand opportunities provided to indigenous groups. Lijphart notes self-determination is a process of giving rights to groups within the existing state.[30] To further highlight this point he offers autonomy as an example of self-determination as opposed to sovereignty which would not be within an existing state's framework. The process of self-determination has a more natural flow as 'it allows these groups to manifest themselves instead of deciding in advance the identity of the groups.'[31] Lijphart also connects this to autonomy options a state can employ to address minority representation.

In particular, internal autonomy can allow self-determination through for example, 'cultural councils' acting as a public body similar to a state within a federation.[32] The administrative functions of this council would oversee multiple social programs including education of the group's traditional culture. Equality of choice among the schools would require this 'self-segregation' be matched by the option of multicultural education as well.[33]

A multicultural education that is provided along with the 'traditional' education could also help create a shared identity across groups while allowing for their cultures to survive. Lijphart concludes his discussion on this segmental autonomy emphasizing that self-determination provides the flexibility to 'either be an alternative or an addition to geographically-based federalism.[34] Some of the comparative advantages of self-determination versus pre-determination better define it.

Self-determination is more flexible because it does not require individuals to be assigned

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[30]   Lijphart, Arend (1995) Self-Determination 275.
[31]   Ibid
[32]   Lijphart, Arend (1995) Self-Determination 282
[33]   Ibid
[34]   Ibid

to specific groups. Not all groups are willing to accept a state enforced label attached to them. This allows the individual to opt into group membership if they wish to preserve the shared identity, but also the freedom to identify with an identity outside of the group.[35] This can be the case for indigenous individuals who live outside of the geographic regions of their tribes, and may identify more with a shared indigenous identity than a single group. Lijphart also makes a distinction between federal territorial autonomy and cultural autonomy. Because ethnic groups will not always be divided into neatly segmented territorial blocks federalism on a geographical basis cannot solely be relied upon to address ethnic autonomy.[36] Self-determination in this sense serves as a basis for non-territorial autonomy providing individual freedom and acting as a supplemental feature of a federal model.

Autonomy, is frequently associated with self-determination and yet many states had previously been wary of this connection because of secessionist threats.[37] Autonomy is one solution among many which attempts to address self-determination claims before they grow into independence movements. Some states have begun to embrace autonomy via devolution to maintain territorial integrity while giving ground to local ethnic groups.[38] Stefan Wolff notes however, that while many have suggested autonomy as a substitute for succession it must be seen as one feature of a balanced constitutional design. This balance is struck between the regional self-administration and a vested interest in the strength of the larger political entity.[39] This is similar to subsidiarity as used by the EU which trades off central authority for efficient and

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[35]   Lijphart, Arend (1995) Self-Determination 285.
[36]   Lijphart, Arend (1995) Self-Determination 285-286
[37]   Weller, Marc and Stefan Wolff (2005) Self-Determination and Autonomy pg 1
[38]   Weller, Marc and Stefan Wolff (2005) Self-Determination and Autonomy pg 2
[39]   Weller, Marc and Stefan Wolff (2005) Self-Determination and Autonomy pg 4

democratic local governance.[40] Effective regional rule can be emphasized as a benefit of self-determination for the federal authority.

According to Wolff there has been much disagreement within both political science and the international community over how to conceptualize and define autonomy. Most struggle with the wide scope it occupies and the gray area that can exist with overlapping federalization of territorial units.[41] Common themes among the various definitions include freedom to act on the internal and domestic level, power transferred from the central to regional government, and authority, but not sovereignty, over affairs. No matter the variation (territorial or non-territorial) the autonomous entity will always be subject to the supervision of the larger political unit and thereby lacks sovereignty. Sovereignty, as it is defined, cannot be acquired with final authority still resting in the central government.

A distinction needs to be made between territorial autonomy granting self-government to one ethnic group over a specific area of land and non-territorial autonomy which grants rights to group members regardless of whether they reside on the territory or not.[42] The territorial variation includes oversight over multiple social and economic areas including education, economic development, and other administrative functions previously provided by central authorities. Non-territorial autonomy would grant more flexibility to individuals of indigenous groups who may not stay on the reservation, but may not be as freeing as Lijphart's idea of self-determination as it is unclear if individuals could opt into membership or would be forced to do so. This meaningful within the US when attempting to determine who qualifies as indigenous for Affirmative Action. The debate over group and individual rights within a liberal society also

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[40]   Stoa, Ryan. 2014. Subsidiarity in Principle pg 31
[41]   Weller, Marc and Stefan Wolff (2005) "Self-Determination and Autonomy" pg 11
[42]   Weller, Marc and Stefan Wolff (2005) "Self-Determination and Autonomy" pg 13-15

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applies to how non-territorial autonomy is implemented.

Bringing Lijphart and Wolff's logic on self-determination and autonomy together there is a shared focus on the importance of autonomy in addressing self-determination. While Lijphart may emphasize the flexibility of self-determination more, this is complemented by Wolff's focus on using autonomy in a balanced way. They both stress that situational practicality requires understanding these terms are intertwined and influenced by multiple other factors including how locals connect with self-determination and their links to the larger political unit. Both authors highlight the internal or regional nature of the autonomy being offered to minority groups and how self-determination operates within an existing state. On this basis we should not confuse either autonomy or self-determination with sovereignty which is what the political entity granting the autonomy has. Indigenous groups frequently reference sovereignty in their self-governance claims, but these claims are more connected to colonial grievances and restoration of sovereignty provided in treaties.

In the US context indigenous sovereignty claims come into conflict with the way US sovereignty is viewed as being shared with the people collectively.[43] So it is difficult to accept tribal autonomy because the state's powers are taken directly from the polity's participation and representation through the constitutional system. Within the traditional American federal model sovereignty is understood with an underlying assumption of homogeneity.[44] Other federal systems including the EU and Canadian models cannot afford to draw this conclusion.

In their cases it is clear that there is such a level of heterogeneity that such assumptions cannot be practically sustained. Canada has a deeper and stronger federal cohesion than the EU, but the existence of the large French minority within the formation of the state has lead them to

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[43] Elazar, Daniel J. The United States and the European Union: Models for Their Epochs. 34
[44] Ibid

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accept the reality of their situation, namely the heterogeneity of their society. Despite how intellectuals define these terms the indigenous groups develop their own unique meanings behind these terms as they pursue expanded rights and representation in regional matters.

2.4 Native View of Self-determination, Sovereignty, and Citizenship

Equally important to understanding self-determination and sovereignty is how native groups attach their own meaning to these terms. Ultimately their narratives and struggles for representative rule are built upon these interpretations. Scholarship on this issue is also divided between the dominant views and indigenous beliefs. Indigenous scholars are often the ones attempting to counter the dominant societal views of their community and bridge the gap between Western academia and representation of indigenous views.[45]

Kathryn Manuelito asserts that this western definition placed upon non-Western societies has also lead to serious misunderstandings between the larger society and indigenous people.[46] This is also in part because indigenous reference to self-determination has remained vague and avoided a clear explanation. Some research do however provide a glimpse of how traditional indigenous views are represented (or not) by the accepted definition of self-determination. Manuelito focuses her study on the people's views of self-determination in the Navajo satellite community of Ramah.

The terms used to describe self-determination within this community include: do it for yourself, persevere, and plan and talk for yourself. The variation between the western concept and grassroots meanings of local communities begins to become apparently. Additionally, the term is perceived within the community as having been rooted in the family connected to having

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[45]   Manuelito, Kathryn D. 2006. A Dine (Navajo) Perspective on Self-Determination pg 7
[46]   Manuelito, Kathryn D. 2006. A Dine (Navajo) Perspective on Self-Determination pg 8

a good character, being respectful, trustworthy, and responsible.[47] According to Manuelito unlike the traditional western definition Navajo philosophy has directed self-determination within the community through connections with traditional beliefs. This has led to more importance being placed on a holistic understanding of the term than the conceptualized western definition. To be self-determined relates to how individuals display compassion and commitment to the people of their community beyond their own individualistic goals.[48]

The lack of concern for obtaining a clear definition is founded both in their holistic view that the concept has meaning beyond a concrete definition and in practical terms by the way the US provided them self-determination. The official act providing natives self-determination and control over educational services was administered by the US government. This is paradoxically as the top-down control and native consent to this western perspective is ultimately counter to their traditional views of self-determination.[49] While Manuelito connects traditional Navajo views of self-determination to western egalitarianism she also makes a clear distinction with how the English definition relates to communities. The individualistic basis for western self-determination created a chaotic environment in which competition was encouraged among Navajo communities contrary to traditional holistic beliefs.[50] In this way traditional community based goals and Navajo philosophy are overlooked or ignored by the standard western view of self-determination.

It is also important to note local issues can often influence these views. In the Ramah case local issues included land claims, but education held special importance. Before the US officially made self-determination available to native groups in 1975 this community rejected external

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47 Manuelito, Kathryn D. 2006. A Dine (Navajo) Perspective on Self-Determination pg 20
48 Manuelito, Kathryn D. 2006. A Dine (Navajo) Perspective on Self-Determination pg 23
49 Manuelito, Kathryn D. 2006. A Dine (Navajo) Perspective on Self-Determination pg 24
50 Manuelito, Kathryn D. 2006. A Dine (Navajo) Perspective on Self-Determination pg 20

boarding schools in favor of schooling children within the community. This action in 1970 asserting control over schooling served as an example of traditional communal self-determination playing out and inspired other groups rather than competing with them.[51] While it would be shortsighted to attempt to use this case to draw conclusions about the views of all indigenous groups it does highlight differences with accepted western concepts. This also displays how people within an effected group actually define the goals for involvement within the political community.

2.5 Citizenship or Sovereignty?

Citizenship relates to sovereignty and native groups have differing views of these terms and they are connected to past colonial legacies. Despite this some organizations like the Society of American Indians actively sought citizenship for natives as a way to overcome past inequalities. Barriers to accepting US citizenship stem from a fear that rights and benefits would also come at the cost of casting aside their tribal sovereignty. According to Tsianina Lomawaima this is based on the colonial settler definition of citizenship which constrained natives to being 'wards' of the government placed on a path toward obtaining citizenship.[52]

This link to the 'settler' meaning of citizenship has also been influential in informing the federal relationship with native tribes. As individuals within these communities were viewed as wards the sovereignty of their nations were also seen as dependents of the federal government and the vague description of native status in the US constitution maintained this status quo of federal power.[53] Because of this even within a post-1924 world in which citizenship was granted to US natives this forced dependent relationship continued to inform how the government

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[51]   Ibid
[52]   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 333
[53]   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 334

perceived these groups.

This link between citizenship, sovereignty, and the colonial legacy created an inconsistent environment in which citizenship was granted while cultural differences and the economic deficiencies of the communities were maintained. Lomawaima argues the complexity of layered citizenship and sovereignty must be countered with a layered approach addressing local community goals while targeting national issues of citizenship, treaty rights, and legal status to file claims.[54] Simple solutions cannot fully alleviate these societal inconsistences.

Indigenous scholarship frequently references sovereignty in equal terms as independence or in the context of obtaining original treaty rights of a separate nation. Sovereignty has been defined in these contexts as self-determination, in that it is rooted to the reaction against others influence and control.[55] Practically speaking self-determination frequently aims to maintain some element of domestic partnership under the federal level while also providing room for local administration. Sovereignty is ultimately where the power resides, which is not in the control of those seeking self-determination.

The ambitious status of these 'domestic sovereign nations' was believed to be resolvable through granting citizenship to the natives. According to Lomawaima "Once individual Indians were classified as US citizens, it was assumed, there would be no place for native nations."[56] Examples of this can be found in the policies within the US of the 1950s which supported assimilation and citizenship through removing the distinct cultural identities of these separate groups. These policies were a stark contrast to what some natives believed citizenship represented, namely self-determination at the individual level or in other words an 'almost

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54   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 335
55   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 344
56   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 338

unlimited personal liberty in a democratic society.'[57] Citizenship however does not always mean complete freedom from a state's oversight and at times interference occurs as part of membership within the larger community.

The ideal of citizenship may mean craving out a set of rights which are guaranteed to a select group, but the practical application of this principle can fall short. Lomawaima notes, for example, that while wardship did not end once Indians received citizenship it is also true that white citizens dealt with increased government regulation and blacks became accustomed to being citizens while still dealing with barriers to voting.[58] While citizenship may have been viewed as a catch all solution to multiple levels of inequality both on the individual and national group level the vague reality of native existence remained.

Not having a clearly defined status assisted federal power, while at times also benefiting natives attempting to create their own space alongside the federal structure. Native intellectuals from the Society of American Indians developed ideas surrounding layered citizenship and sovereignty which would allow for opportunities rather than blocking them off.[59] The idea of layered sovereignty can be viewed as the basis for multilevel governance which is discussed in greater detail in the next chapter on institutional structures. In this context native nations have existed within federalism while also being blocked from sovereignty by the legitimate status of the states.[60]

While past events illustrate how policy has be dictated for natives without their collaboration there is still opportunity for a multilayered partnership. While sovereignty may ultimately rest in the federal government legal jurisdiction and management of resources often

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[57]   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 343
[58]   Ibid
[59]   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 344
[60]   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 337

requires shared responsibility between federal, state, and tribal authority. These governmental relations are intertwined and their planning, governance, and education has a direct impact on reservation life.[61] These situations described above largely only apply to tribes within the US, but still serve as examples of how the complexity of these situations can undermine the previously accepted definitions intellectuals currently use for sovereignty, citizenship, and self-determination.

2.6 Individual vs Group Rights

Citizenship also plays an important part in the role of rights in indigenous communities. The role of rights became a key aspect of conflict between the state and minority groups. In 1876 and 1924 Canada and the US respectively granted citizenship to indigenous people. Rights connected to citizenship became the stage for the struggle between rights favoring accommodation of minority identities and rights that became associated with assimilation.

Group minority rights are normally associated with allowing the preservation of cultural customs and identity and while individual rights are centered on personal freedoms each person has. In the Canadian case after passing the Indian Act in 1876 indigenous groups were given the choice to either have full legal rights as citizens or maintain an Indian identity restricting them to the reservation with native rights.

The Indian Act and many similar policies offered the tradeoff of enfranchisement with assimilation into mainstream society in exchange for their group rights.[62] Similar developments occurred in the US after granting citizenship and indicate a pattern of tiring to assimilate and deny recognition to indigenous groups.[63] This conflict over rights grew out of how to address a

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61   Lomawaima, K. Tsianina. 2013. The Mutuality of Citizenship and Sovereignty pg 345
62   Champagne, Duane. "Rethinking Native Relations with Contemporary Nation-States."Ch.. 1 pg 11
63   Champagne, Duane. "Rethinking Native Relations with Contemporary Nation-States."Ch.. 1 pg 3

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colonial past while also providing justice for the society as a whole.

Within this conflict there are a number of possible response to indigenous right claims. According to Champange, one stream of thought rejects reshaping the theory of justice around group rights instead extending to them individual based rights. The second response provides limited room for reshaping liberal theory based on group rights, but they are confined by the liberal view of equality and autonomy.[64] The US often justifies its response to specialized group right claims along these first two grounds either outright rejecting minority right claims or providing limited areas for them to operate in.

The third and final response recognizes existing deficiencies in the liberal theory of justice and allows for reshaping of the existing framework to be inclusive of group rights.[65] Canadian accommodation is a clear example of how the framework of liberal theory can be extended to include minority right claims. Will Kymlicka's inclusion of self-government as a means of preserving individual autonomy under group rights also is in line with this third response.[66]

A key element in why this division in liberal thought occurs is if the basis of democracy is founded on a philosophy of either 'for the people' or 'by the people'. Pettit describes this difference as support for either popular electoral control of government (for the people) or through a cumulative electoral contest (by the people).[67] The first concept (for the people) views sovereignty as coming directly from the people and group rights are viewed as a threat and outside of legitimate sovereignty.

The protective nature of these rights are attached to group identity or membership and

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[64]   Champagne, Duane. "Rethinking Native Relations with Contemporary Nation-States."Ch.. 1 pg 5
[65]   Ibid
[66]   Ibid
[67]   Pettit, Philip. "Minority Claims under Two Conceptions of Democracy." Ch. 11 pg 199

ultimately do not align with a popular identity based in an electoral government whether they are exercised individually or collectively.[68] Additionally, because of the electoral nature of democracy under this conception these rights are considered counter majoritarian, outside of democratic requirements, and therefore not essential.[69]

The second conception of democracy is cumulative in the sense that its main focus is not only the sovereignty vested in the people but also the people's 'common interest' which includes minority groups.[70] This can be considered a more inclusive view of democracy. One in which the standard of democracy can and should be adjusted in order to welcome minority groups into the fold. Democracy in this sense is not simply defined through an electoral process, but also by how it adjusts to the complexity of minority rights claims. Pettit further highlights the important distinctions between these two democratic concepts in the following:

> Rights are inherently counter majoritarian in character but it is vital to understand that doesn't mean they are undemocratic. They are inconsistent with pure electoral, but are incorporated into the 2 dimensional view of contestory and necessary for proper democracy.[71]

American multiculturalism focuses on liberty offered to groups who seek integration, but it also causes issues for those groups with distinct identities that do not easily blend with the larger society. While the integration model for blacks and immigrants has been successful the real issue is that American liberals refuse to adjust the model viewing strong group identities as being unacceptable in principle to a successful model.[72] For American theorists one size fits all when providing rights and justice to minorities. Because of this the distinctive nature of tribal group rights is perceived to be in conflict with the America claim of individual rights and legal

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[68]   Ibid
[69]   Pettit, Philip. "Minority Claims under Two Conceptions of Democracy." Ch.11 pg 204
[70]   Ibid
[71]   Pettit, Philip. "Minority Claims under Two Conceptions of Democracy." Ch.11 pg 215
[72]   Kymlicka, Will."American Multiculturalism and the 'Nations Within'" Ch. 12 pg233

equality among citizens.[73]

This also contributes to one of the major issues for natives within the US, namely the unclear status they continues to occupy within the US system. The justifications of the current model of integration leave groups claims invisible which ultimately creates an ambiguous zone in which natives are pushed involuntarily under the US umbrella.[74] According to Kymlicka securing justice for these 'nations within' would require building into the theoretical models of American multiculturalism a place for minority rights.[75] Currently this is instead viewed with suspicion as being inherently illiberal and outside of the idea of American democracy. This debate is a central feature of indigenous struggles within the US and Canada and connects back to the integration/accommodation and the level of heterogeneity within society. This points out some of the significant challenges to policy makers attempting to encourage integration between these regional groups and the society as a whole. Federal arrangements play a critical role in attempting to overcome barriers such as these.

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[73]   Steinman, Erich. 2011. "Sovereigns and Citizens? Pg 67
[74]   Kymlicka, Will."American Multiculturalism and the 'Nations Within'" *Ch.12 pg233*
[75]   Kymlicka, Will."American Multiculturalism and the 'Nations Within'" *Ch.12pg 236*

Chapter 3: Institutional Structure

Federalism is often viewed as a potential solution for issues involving ethnic diversity within a state. This diversity can be within a regional context, dispersed throughout a society, or a mixture of the two. While federalism can help address regional diversity by providing a form of devolved local governance it is more difficult to address diversity distributed across society through federalism alone. Adding to this complexity is if certain groups have grievances which predate the existence of the state. Many indigenous groups within the US and Canada have called for rights to territorial autonomy and self-determination from what they consider a continuation of a colonial legacy. Similarities do exist in how the US and Canadian federal systems previously attempted to address indigenous issues, however the trajectories of these two paths have split. Both provide openings for indigenous claims, but critical factors influence the nature of the mechanisms offered.

3.1 Similarities within the US and Canadian Cases

Many of the similarities between the two cases exist within how the colonial legacies developed. Both countries initially made compromises with native tribes through treaties which recognized their sovereignty and indicating particular tracks of land to be occupied by them. The treaties at this point served as mechanisms guiding both countries on paths which defined the indigenous communities as external nations.

In both cases settler expansion gradually brought about more conflict between the state and indigenous tribes. Once settlers penetrated traditional native lands they reversed the *feedback effects* supporting the original path. The state's focus then shifted from dealing with an external rival presenting a threat to the development of the state to an internal struggle of trying to bring the natives into the fold of western society. Having absorbed most of what was originally native

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lands much of the work for the state was now in assisting these now disadvantaged groups. Usually this was through methods conducive of assimilation that sought to rid them of their religious and cultural identity to help them progress towards western standards.

The development of a nation building narrative played a key role in how both states interacted with the indigenous. According to McCormack, the Canadian narrative was similar to the US, but from the Canadian perceive their treatment of the indigenous was more humane than the US. There was less open conflict occurring with tribes in Canada, but in both countries the 'wild primitive' was systematically replaced by the 'tame and civilized' through 'modern' institutions.[76] In the Canadian case this process became known as internal colonialism which separated it from colonialism under the control of Britain.

Both the US and Canadian states viewed their expansion in North America as a manifest destiny, however Canada was more focused on progress than just territorial acquisition.[77] These narratives of 'manifest destiny' and 'humane taming' can be viewed as signs of *coordination effects* in which state actors reinforced their path and supported institutional actions with a shared philosophy. Despite the difference in narrative the methods used to assimilate the indigenous groups in both cases represent the western colonial philosophy commonly referred as the 'white man's burden' to civilize minorities. One example of this philosophy was the residential schools which in both countries removed children from their communities to better integrate them into western society.

The narrative to civilize also excluded the indigenous from being part of the larger nation's success story and gradually became the dominant interpretation taken for granted

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[76]   McCormack, Patrica A. "Competing Narratives:" Ch. 9 pg 111
[77]   Ibid

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without objection.[78] This represents the construction of institutional barriers constraining indigenous to a trajectory favoring assimilation. Despite the dominate nature of the nation building narrative indigenous groups also developed a counter-narrative. McCormack highlights how in Canada's case this was based on equality of people in their homelands with a focus on autonomy both as nations and individuals within social communities.[79] It divides western interaction into two different periods.

Initially both groups were treated as equals and were beneficial to each other. However as more treaties were signed and increasing numbers of settlers came they became more and more subordinate to the state. Their interpretation is that the 'spirit and intent' of the original treaties was to share land but was ignored as settlements expanded west ward.[80] Counter narratives play an important role in keeping alive institutional resistance and keeping open the possibility for critical junctures to alter the path. Although this description of the counter-narrative is taken from the Canadian context it is also representative of tribal experiences in the US.

Congress initially approved of treaties reflecting mutual sovereignty while the US state was young, then became more conflictual as the nation developed and settlement in native lands increased. Additionally, the narrative also reflects a similarity in how indigenous groups in both cases frame their demands pressed for self-determination. One reason for this is because the colonial legacy of western interaction with indigenous groups is present in both cases.

3.1.1 Western State's Interaction with Tribes

The root of many of these similarities can be traced back to developments that predated the federal structure related to how Western governments traditionally interacted with indigenous

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78   McCormack, Patrica A. "Competing Narratives." ch. 9 pg 113
79   McCormack, Patrica A. "Competing Narratives" ch. 9 pg 114
80   Ibid

groups. The internal colonization occurring in both countries was a method of bringing the settler

land under the state's legal framework. Frontier areas bordering tribal nations required the state

protect settlers, effectively oversee resources, and establish law and order.[81] The borders between

the tribes and settlers were often officially established by treaties, but settler encroachment on

their lands was frequent.

In response to this governments justified extending the state's control over tribal areas by

highlighting the beneficial elements of civilization and long term peace while downplaying the

vested economic interests of non-indigenous occupying these lands.[82] At the height of colonial

expansion in the late 19th century many states were struggling with bringing tribal societies into

the fold. Up until this point they were interacting with them as separate nations. Treaties had

acknowledged tribal sovereignty as small yet still independent nations. This was also supported

by legal authorities of the time who recognized the sovereignty of a people regardless of the

progress their civilization.[83] In 1871 the US Congress passed an act which bucked this trend and

no longer accepted sovereign rights of tribal nations.

Treaties now instead of supporting sovereignty were used as a tool to expand government

control over native lands to incorporate them into the frontier settlements.[84] The mechanism of

treaty making in this context now was used to initially over take and then constrain the

indigenous. The treaties acted as the first step in a process of absorbing tribal societies. Instead of

using military strength and conquest the government's control was established with official

treaties and followed up by installing state infrastructure into the tribal communities. According

to Bodley, this second stage included the appointment of political authorities, instituting the

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[81]   Bodley, John H. 1999. *Victims of Progress pg 60.*
[82]   Ibid
[83]   Bodley, John H. 1999. *Victims of Progress pg 62.*
[84]   Bodley, John H. 1999. *Victims of Progress pg 63.*

state's judicial system, collecting taxes, and extending educational and health services. Resistance to this political integration was also countered with organized large-scale programs designed generate loyalty and overcome hostility through peaceful means.[85] The system had been altered to assimilate these groups.

This process of incorporating the tribal nations into western society may have originated politically but ultimately cut deep into tribal society. The land policies put in place by governments increasingly shrunk the land available to natives. This resulted in altering the pre-western traditional system of land tenure making the tribal small-scale economic system unsustainable and forcing them to adopt state-controlled models.[86] The extent to which this occurred has led some authors to conclude that the changes could not be solely attributed to diffusion, but were rather caused by deliberate state policies.[87] This was a systematic process which gradually removed tribal sovereignty, political authority, legal jurisdiction, and economic control. A process which was mirrored within the US and Canada along with other states across the Americas and other regions which were touched by this colonial legacy. Differences however do emerge between how the indigenous are dealt with by the US and Canada as both countries moved out of this internal colonization period.

Following a period of change Canada internalized the existence of indigenous communities within the federal system by acknowledging them in the constitution whereas America does not. A key reason for this is the precedent set by French accommodation in Quebec. Stemming from this are examples of regional autonomy within Canada like the Inuit. The structure of American federalism leaves an ambiguous area which native groups occupy

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85   Bodley, John H. 1999. *Victims of Progress pg 64.*
86   Bodley, John H. 1999. *Victims of Progress pg 77.*
87   *Ibid*

between the state and federal level. The nature of these differences is to a large degree influenced by how their constitutions define the relationship between the state and indigenous groups.

3.2 Constitutional Foundations of Difference

A look at both constitutions displays the differences and how these can influence the nature of the federal structure. In the US Constitution the main reference to indigenous groups is in Article I Section 8 which outlines the powers of Congress. It states the Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[88] There is a wide range of interpretations that can determine how exactly this should be applied to the native tribes. It is not even clear exactly what kind of authority Congress has over the tribes. Because of this ambiguity the US court system has provided valuable interpretative guidance of Congress' role in tribal affairs.

In the 1830s the Supreme Court defined the tribes as 'domestic dependent nations' under Congressional authority, which had residual sovereignty outside of state jurisdiction. In what has become known as the 'trust doctrine' this oversight was further clarified as the US resembling the guardian to its tribal ward.[89] The vague nature of the acknowledgment of indigenous tribes within the US Constitution has led to significant conflict over what degree of authority should be granted to tribal self-governance which has at different times been both expanded and limited by court decisions.

Federal policies attempting to address this constitutional gap and state governmental expansion have also limited the practical authority tribes have access to.[90] In an attempt to reclaim their 'residual sovereignty' some tribes have appealed to Article IV of the Constitution

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88   "Article I | Constitution | US Law | LII / Legal Information Institute." 2015.
89   Papillon, Martin. 2012. "Adapting Federalism pg 295
90   Ibid

which clarifies all treaties entered by the United States 'shall be the supreme law of the land.' Their efforts are centered on having the US honor the original treaties signed with the tribes acknowledging their sovereignty. Despite this attempt court decisions and federal policies are in line with this 'guardian to ward' relationship as has been interpreted from the constitution. The constitution has a powerful effect on the US path, not by altering it but rather by maintaining a consistent course. The ambiguity can both allow some tribes to reach for greater authority and also limit them. Supreme Court decisions maintain this trend as there is no clear direction in their ruling either fully supporting or confining tribal authority.

The Canadian constitution comparatively provides much more detail on the relationship of the Canadian government with the indigenous communities. It should however be noted that this was not always the case as the original 1867 constitution had a similar approach to the US granting legal jurisdiction over aboriginal lands and affairs to the government of Canada. The minority group which at the time gained more focus in the original constitution was the French who were granted language rights. In the new expanded Charter of Rights and Freedoms added by the Constitution Act in 1982 Part 2 is dedicated to the rights of the Aboriginal People of Canada. It is divided into four areas focusing on treaty rights, land claims, equality of the sexes, and inclusion in discussions leading to constitutional amendments.

Section one acknowledges and affirms treaty rights and defines the 'aboriginal peoples of Canada' as including the three groups of 'Indian, Inuit, and Métis peoples of Canada.'[91] Land claim agreements are included in 'treaty rights' as outlined in section two, while section 3 guarantees treaty rights to both the male and female sexes. The final section lays out a commitment by both the federal and provincial governments that before any amendment is made

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[91]   "Constitution Acts, 1867 to 1982." 2012. Branch, Legislative Services.

to this Act they must first discuss this with the aboriginal peoples.

This includes the Prime Minister convening 'a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, and […] inviting representatives of the aboriginal peoples of Canada to participate in the discussions on that item.'[92] This charter of rights can be viewed as an attempt to bring the indigenous groups to the decision making table.

Many influences helped lead to the change that culminated in the 1982 Charter of Rights including indigenous groups continuing to push their demands and liberal attitudes rising throughout Canada in the previous decade. However, the 1982 charter marks a critical juncture in which state actors expanded the distributional power afforded to the French to include the indigenous. The constitutional differences between the US and Canada laid the foundations for diverging federal institutions to rise and reinforce the differences in the indigenous presence within the two federal structures.

Taking these differences into account we can conclude that although the US and Canada have similar federal arrangements they are on separate paths in recognizing the indigenous communities. This is not to suggest that difference necessarily represents greater equality or opportunity in one country over the other. The process of creating a space for minorities within the federal structure is evolutionary and requires both federal and societal change. There are also key historical reasons behind these differences which shaped different approaches to satisfying the groups' self-determination efforts.

Both the US and Canada have similar structural arrangements which are in line with federalism as power is shared between a national or federal government and the provincial or

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[92]   Ibid

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state regions. At times struggles can occur between these two spheres of power as tensions build in this delicate balance between the legitimate rule of the federal center and the autonomy of its subjects.[93] The US Civil War and Quebec succession attempts are two representations of how this struggle can manifest and be overcome. Legitimacy of the center was reclaimed through military strength in the US and in Canada through complex measures aimed at accommodating the French minority.

Unlike alliances which rely mostly on a common threat, federations must be able to convince subjects and citizens through ongoing relations of the benefits membership provides.[94] While this may be true in the ideal federal model, sometimes within divided societies the center is too representative of the national majority. Arend Lijphart cautions against qualifying such majority control in divided societies as democracies because while this can happen in many ways it can be representative of an ethnic dictatorship.[95] Despite this stance many indigenous communities within these democracies have found themselves within a similar situation. What then maintains democratic principles is how the majority leaves space for minority interaction with the federal system both in terms of institutions and mechanisms.

3.3 Multilevel Governance

While federalism can produce a power balance between federal units to address evolving social environments additional features are required. Martin Papillon concludes that the flexibility needed in these contexts is often provided by multilevel governance (MLG) which instead of altering the federal structure layers over the previous institutions.[96] Instead of modifying the Canadian and US federations by adding federal units composed of the minority

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93   Filippov, Mikhail. 2004. *Designing Federalism pg 34*
94   Filippov, Mikhail. 2004. *Designing Federalism pg 46*
95   Lijphart, Arend (1995) Self-Determination 277
96   Papillon, Martin. 2012. "Adapting Federalism pg 289

territories indigenous self-determination and autonomy claims are adapted to coexist with the existing structure.

As federations become institutionalized their change resistant nature can create barriers for groups seeking political and legal status placing them in a gray zone neither fully within nor outside of the federation. MLG is more often associated with European Union practices involving diffused horizontal and vertical governance for polities outside but still connected to formal institutions.[97] Both the US and Canada have used MLG diffusion to create an institutional framework around these groups because both share similarities in how indigenous groups have interacted with the state.

While natives were initially excluded from establishing self-government the federation's legal mechanisms craved out a space within its political community. Responsibility over indigenous interests was inherited from the British Crown by the Canadian state and this process was mirrored in the US Supreme Court's 'trust doctrine' establishing wardship.[98] Treaties and court decisions with the groups often helped define the relationship within both federations. In the US court decisions have both asserted tribal land rights and at times chipped away at their authority in favor of the jurisdiction of other federal subjects. When Supreme Court Justice John Marshall interpreted tribal status from the Commerce Clause to be 'distinct sovereign entities under the plenary power of Congress' this served as the origin point for the constitutional framework supporting consistent ambiguity.

Papillon notes that MLG was also shaped by institutional legacies, the nature of the federal center's power, and political decisions made by the indigenous leadership.[99] Institutional

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[97]   Papillon, Martin. 2012. "Adapting Federalism pg 294
[98]   Papillon, Martin. 2012. "Adapting Federalism pg 299
[99]   Papillon, Martin. 2012. "Adapting Federalism pg 291

legacies relate to how history and the colonial relations influence the current structure. Natives were treated as external units in the US while Canada came to view them as internal minorities. Because the US has the separation of powers its use of institutional mechanisms is diffused unlike Canadian centered federal authority. As indigenous leadership attempts to navigate the political landscape their choices are influenced by and influence the institutional measures put in place to address their claims.

US MLG focused on mechanisms which facilitated communication between tribes and the federal government and coordinating with states on jurisdiction. Representative of the diffuse nature of American politics tribes were able to act as political entities, while also making key gains in policy creation through lobbying.[100] While these measures have blurred the lines between state, federal, and tribe they have also created opportunities for participation in the political community either as an intergovernmental agent or as a special interest group.

Canadian MLG has been more internally focused on the indigenous as members of the Canadian community. In 1982, Canada constitutionally recognized these groups as 'constitutional partners' which served as a channel for tribal self-government expression and access to the federal executive level.[101] This led to a self-administration policy which devolved responsibility and resource allocation to local band councils which are managed by indigenous authorities. While this may not be full self-determination it provides elements of autonomy within the Canadian federation. Both of these examples demonstrate adapting preexisting institutions in a path dependent manner that is in a trajectory the federal structure can maintain. While these examples display clear differences between the two cases the relationship with state and provincial governments are also key to the federal arrangements.

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[100]   Papillon, Martin. 2012. "Adapting Federalism pg 298
[101]   Papillon, Martin. 2012. "Adapting Federalism pg 301

3.3.1 Governance between Sub-Federal and Tribal Authority

As tribal governance evolved MLG conflict has occurred with provincial and state governments. Despite formal limitations of state power by the US Constitution and court rulings state authorities have attempted to expand their jurisdiction especially involving land, resources, taxation and gambling. In Canada provincial governments traditionally had oversight of reserves, but with inclusion into the federal model litigation has become a method of limiting encroachment in tribal affairs.[102] The Metis are an example of groups working with provinces to devolve administration over services. The Metis Child and Family Services Agency operates in Manitoba allowing them to not control administration, but actively shape services to reflect their culture.[103]

In the US overlapping jurisdiction has occurred between these governments through co-management agreements over land and resource rights beyond the reservation. Twelve of the thirty three states with federally recognized tribes have adopted a state-tribal relations policy. Washington State serves as an example of producing an agreement which recognizes mutual sovereignty of governments and outlines steps to facilitate cooperation.[104] The influence of sub-federal authority on tribal authority can either undercut self-government or serve to legitimatize it. As more sub-national units accept tribal authority this can serve as coordination effects to shift feedback from institutional rejection to acceptance of self-determination on the national level. Both devolution in the Canada and cooperation in the US encourage a shift in feedback effects. The way in which the federations accepted minority integration has also effected these divergent path trajectories.

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[102]   Papillon, Martin. 2012. "Adapting Federalism pg 300
[103]   Dubois, Janique and Saunders, Kelly. 2013."'Just Do It!' pg. 195
[104]   Steinman, Erich. 2005. "Indigenous Nationhood Claims" pg. 105-106

3.4 Integration Policy's Role in Federal Development

There are multiple reasons why MLG took different paths in each federation, but they are also influenced by how each state approached indigenous integration. Integration within federalism can be viewed as a process that occurs on both a federal and social level. Mikhail Filippov notes the importance of institutional mechanisms to facilitate cross-ethnic cooperation in order for federalism and potential ethnic autonomy to be successful.[105] Some degree of integration is vital for the survival of a federation. As previously stated, approaching heterogeneity within a society can be either based on integration, assimilation, or accommodation.

The distinction between these is based on a required cultural conformity that cuts across the public and private dimensions of life. Within this context through its history the US has moved from assimilation to integration policies. Canada although once being committed to assimilation, since the 1980s has been firmly supportive of accommodation for the indigenous. The basis for these separate policy approaches is connected to the US state coming into creation with higher degree of homogeneity than Canada who had to address the French minority.

3.4.1 The Role of French Accommodation

The presence of a large French minority within the borders of the Canadian state has been an inescapable reality throughout Canadian history. They were centered in Quebec and New Brunswick, but had multiple communities in other areas. Their language, culture, and religion formed a distinct identity and produced legal, political, and educational institutions.[106] The British promoted assimilation[*] through a combination of restricting language, removing self-

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[105]   Filippov, Mikhail. 2004. *Designing Federalism pg 273*

[106]   Kymlicka, Will. "Canadian Approaches to Recognizing and Accommodating Diversity." pg 49

[*]Assimilation Policies were encouraged through The Royal Proclamation of 1763 and the Act of Union in 1841

government, and encouraging majority resettlement in the minority's cultural centers.[107] The failure of these practices resulted in a compromise that included building a political space (Quebec) within the federal model and guaranteeing bilingualism within the Parliament and courts. Since the 1867 Constitution Act their status has evolved through multiple policies increasing both provincial autonomy and linguistic equality.

Canadian lawmakers began to adapt their coordination to support inclusion of the French in Canadian society under the new accommodation model. Many challenges remain prominent in the French relationship with Canadian Federalism, but the rights and concessions the state provided them serve as the first interaction which began to destabilize the institutional legacy of assimilation. The new institutions also display distributional effects of power shifting to the French. Those same state practices of assimilation they overcame were later used on indigenous communities and were a key element in the process of internal colonialism. If Canada is on an accommodation trajectory then the acknowledgement of French minority status is the origin point of this path.

3.4.2 Moving Toward Accommodation

Before choosing an accommodation strategy the expectation of the government was that natives would naturally assimilate as the community around them continued to grow. Policies also attempted to accelerate this by removing land, sending children to residential schools away from communities, and restricting cultural and linguistic practice.[108] These practices culminated in 1969 when an official White Paper indicated the natives would be brought into the fold as equal Canadian citizens. The result would have been removal of all treaties and legal status previously acquired. Indigenous opposition to this stance was fierce and ultimately resulted in a

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107   Ibid
108   Kymlicka, Will. "Canadian Approaches to Recognizing and Accommodating Diversity." *pg 47*

reversal of the government's position. Another important factor was the continuing struggle with Quebec nationalism which provided an atmosphere conducive to accepting native rights in the constitution.

The next decade brought large scale reforms to indigenous rights leading to the 1982 Constitution Act which opened the door to self-government. Liberalism played a key role in this process as reforms occurred across policy areas leading some to refer to this era as the 'human rights revolution'.[109] During the 1990s another milestone was reached as the federal government began to consider self-government included in the constitutional rights. Ultimately this recognition helped lead to the agreement on Nunavut autonomy in 1999.

3.4.3 Inuit Case

Inuit autonomy can be viewed as the pinnacle of Canadian accommodation policy for indigenous groups. Isolation in the Arctic regions initially shielded them from European influence, but they were eventually incorporated into the state provided a government not representative of their culture or interests. Beginning in 1969 self-administration of services and infrastructure was allowed. Key elements of Inuit evolution into self-government were the unique conditions faced by northern communities, predominance of Inuit peoples compared to non-native in the territory, and emphasizing they were an integral part of Canada.[110]

The Nunavut territory has political boarders which are composed of the northern most segment of Canada and is geographically larger than Mexico. The Nunavut Agreement divided the new territory into three regions, established a decentralized territorial government, and created a legislative assembly which operates in their native language. In recognition of their unique geographic position the agreement also requires the local government align itself with

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109   Kymlicka, Will. "Canadian Approaches to Recognizing and Accommodating Diversity." *pg 54*
110   Rodolfo, Pino. "Autonomy in Nicaragua and Nunavut" pg 96

Canada's foreign policy with countries of the circumpolar world.[111]

Building upon this autonomy local groups have been able to concentrate on self-governance and supporting institutions. This is especially the case with Inuit communities in other provinces which have used land claim agreements as a basis for developing self-governance.[112] However, their internal location in other provinces serve be a barrier to self-government while leaving open opportunities for self-administration within the political community.

3.4.4 US-Moving from Assimilation to Self-determination

The US approach has similar origins to Canada, with an at times forceful assimilation agenda. Citizenship has served as one example of how assimilation can be encouraged. It was once a common assumption among officials in the 1930s that for citizenship to be obtained native identity and culture must be left behind.[113] Again similar to Canada boarding schools were established to assist this process. Another assimilation policy attempted to address native unemployment by relocating them to urban areas. This took place in the 1950s and was partly in response to native veterans returning from WWII. Some officials believed it was best to relocate unemployed veterans far from reservations to prevent a possible return and remove their dependency.[114] The reasoning behind this was that WWII helped remove integration barriers with native participation in the war effort and the opportunity was present to bring them into the national community.

Throughout the 1960s and 1970s through both litigation and protest mobilization natives began to show strong opposition to these assimilation practices along with state and federal

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111   Rodolfo, Pino. "Autonomy in Nicaragua and Nunavut" pg 124
112   "Inuit Regional Autonomy" 2015. *University of Northern British Columbia*.
113   Ramirez, Renya K. Native Hubs pg 16
114   Ramirez, Renya K. Native Hubs pg 46

authority over their tribal lands. In 1968 the Indian Civil Rights Act was passed extending civil liberties to natives while also acknowledging tribal jurisdiction in criminal and legal matters.[115] The US approach evolved into integration favoring local governance, without allowing complete devolution of responsibility. This again can also be attributed to the diffuse nature of US political power as Congress has final authority over decisions of sovereignty and often attaches conditions to devolved power.[116] Policies favoring self-determination did however provide the opening for groups to begin to exercise local authority.

The Navajo Nation is one such example of a semi-autonomous reservation which has devolved power. It also serves as a good example because according to the 2010 US Census its reservation has the largest population at 173,667.[117] As one of the largest reservations it stands out amongst other groups having normalized relations with its border states Arizona, New Mexico, and Utah since 1984. The degree of its self-government can therefore serve as a watermark for opportunities for other groups.

3.4.5 Navajo Case

Beginning in 1991 the government was restructured to have separated judicial, executive, and legislative branches which oversee institutions facilitating law enforcement, economic growth, education, and other social services. In the legislature delegates elected to the tribal council represent 110 chapters across Navajo communities. They have also refined their governance with institutions established to develop alternative ways of governing. This led to the Local Governance Act of 1998 which allows chapters to have local governmental authority

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[115]   Ramirez, Renya K. Native Hubs pg 52
[116]   Papillon, Martin. 2012. "Adapting Federalism pg 295
[117]   Norris, Tina et al. "The American Indian and Alaska Native Population: 2010." pg 14

providing more accountability to the community.[118]

Despite the presence of these institutions there is still frustration in the community because institutional standards are often set by Congress and jurisdiction can be limited by Supreme Court rulings. As socioeconomic problems have continued opposition to this has come in the form of Navajo nationalism which places blame on the Western institutions composing the 3-branch government.[119] The similarities between the federal and tribal governmental structure have some questioning if this governance is actually representative of native identity and culture or just a federal copy.

Some indigenous scholars have called for redesigning the government based on a 'Peoplehood Model' to ensure indigenous identity remains grounded in land, ceremony, history, and language.[120] This is seen as an alternative to the current model viewed as being connected to conditions Congress attached to policy and funding. Despite this view the Navajo have created a unique hybrid of institutions incorporating native and western traditions and mechanisms which facilitates governance. The Navajo have been able to use the contradiction in US policy treating tribes as external actors and Congressional subjects to expand their authority over tribal affairs and administration. They have also alluded additional federal oversight by never adopting a constitution which would require the approval of the US Secretary of the Interior. Their current governmental status serves as an example of the opportunity provided if groups know how to operate within the gray zone of US tribal policy.

3.5 Transnational Justice and Affirmative Action in Federal Integration

Redistributive measures have also played an important role as both countries addressing

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118   "San Juan Heritage." 2003.
119   Lee, Lloyd L. 2008. Navajo Nationhood pg. 97
120   Lee, Lloyd L. 2008. Navajo Nationhood pg. 99

social inequality and injustices created by past assimilation practices. Canada has made use of transitional justice as a means to correct past harm inflicted on indigenous communities. One of the most beneficial features of transitional justice is it is used to make amends and move forward with a common national identity by reestablishing the moral authority of the state.[121] However in indigenous cases when determining reparations and compensation for violations it is important to consult indigenous law. If they fail to do so then the transformative goals of transitional justice also fail by disregarding indigenous authority.[122]

Canada has used this framework to help address the hundred year operation of residential schools which had 150,000 students and whose main purpose was removing cultural and linguistic identities. By the 1980s and 1990s this became a political issue as most churches which helped facilitate the schools apologized for the cultural and physical harm committed during their operation. Following this a number of reports revealed government neglect and underfunding of the schools, which culminated in the 1998 Settlement of Reconciliation acknowledging government responsibility and a commitment to a $350 million community based healing initiative.[123] Indigenous groups responded with law suits and complaints that the government response was too slow and inadequate.

In 2006 after multiple negotiations an agreement was reached between all parties in an out of court settlement. It included a 'common experience' payment, an independent assessment process, a truth and reconciliation commission, commemoration, and healing efforts.[124] The degree of compromise the Canadian government has showed in this matter can help emphasize its commitment to the indigenous as part of the political community. While the path of internal

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[121]   Jung, Courtney. "Canada and the Legacy of the Indian Residential Schools" Ch 7 *pg 241*.
[122]   Jung, Courtney. "Canada and the Legacy of the Indian Residential Schools." Ch. 7 pg 244.
[123]   Jung, Courtney. "Canada and the Legacy of the Indian Residential Schools." Ch 7 pg 225
[124]   Jung, Courtney. "Canada and the Legacy of the Indian Residential Schools." Ch 7 pg 226

colonialization has ended, opportunities to address past actions from this path can allow state actors to further inforce the new institutions on the current path.

The US also has policies which attempt to right past actions. While affirmative action does not solely target natives it is committed to addressing the inequality of individuals before the law.[125] Minority incentives can take the form of preferential employment, university admissions, or economic advantages. Two of the more well-known native programs were preferential employment in the Bureau of Indian Affairs and the native administration of casinos on reservation lands providing economic relief to their communities. The scope of affirmative action is more general than and not as directed as Canada's transitional compromises. Affirmative action is an example of non-territorial autonomy requiring group membership to access, but no connection to a specific region. Societal justice is a good indicator of the direction of indigenous integration and can serve as a bridge to improve relations and foster dialogue between the federal center and tribal government.

The practices discussed above represent two departing approaches to indigenous integration within the US and Canada. They have both adapted traditional federal structures through the process of layering. While this has been helpful in addressing indigenous calls for autonomy and self-determination each federation's constitution and institutional structure has guided their chosen path and how layering occurred. Some groups can make use of the institutional framework and accommodation patterns to build a presence within the federal model like the Inuit. Others, like the Navajo find opportunities in the lack of constitutional structure to exercise authority and define their own space under Congress.

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[125]   Sowell, Thomas. 2004. *Affirmative Action pg 3*

Chapter 4: Indigenous Responses to Institutional Gaps in Federalism

Multilevel governance helps fill gaps in the federal model. Indigenous responses to these gaps can be within these multilevel mechanisms, through traditional means such as established legal systems, or through contentious politics. This also relates to how indigenous groups view the presence of western political structures within their societies. The term frequently used by natives to describe how these structures incorporate and domesticate their societies is internal colonization.[126] The external force initiates a top-down restructuring of tribal society to solidify its jurisdiction, tribal acceptance of the process, and overcome resistance including, but not limited to self-determination.

According to scholars of indigenous rights this resistance can manifest in two forms: either a struggle against the political structure as a whole or a struggle from within the structure. Challenging the structure directly can be through a revolution overthrowing the existing system, while attempts from within use techniques of government and exercising freedom of thought and action to modify the system and eventually transform it.[127] Direct challenges to the system can also be in the form of protest movements which may not be revolutionary in nature, but are still outside of the political structure. Internal changes typically focus on invalidating the legitimacy of the structure in critical areas surrounding freedom and equality of natives, validity of incorporation, and potential for shared jurisdiction.[128]

Tully notes that struggles using freedoms from within to modify the system can be more effective than struggles for freedom de-legitimizing the system through direct conflict.[129] This

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126   Tully, James. "The Struggles of Indigenous Peoples for and of Freedom"*Ch.3 pg 37*
127   Tully, James."The Struggles of Indigenous Peoples for and of Freedom"Ch.3 pg 50
128   Tully, James."The Struggles of Indigenous Peoples for and of Freedom" Ch.3 pg 51
129   Tully, James."The Struggles of Indigenous Peoples for and of Freedom" Ch.3 pg 58

description of the struggle against colonization matches indigenous struggles for space within federalism. In many cases the struggles to find a place for indigenous groups within the federal structure can be viewed as a continuation of the original struggle against colonialism. While internal changes may be more effective sometimes barriers preventing native groups from establishing a space within the federation require groups to circumvent the normal political process. Within the US and Canada there are examples of groups working both within and outside of the institutional framework.

4.1 Indigenous Efforts within the Political Framework

Certain groups within Canada have worked internally to change their status. In particular, the Metis have struggled against attempts to shut them out of the process open to other groups because of their mixed ethnic status. To overcome this they focused on building grassroots institutions that gradually claim in a space within the federal structure. Initially this began through multilevel governance by having local mechanisms take over devolved responsibilities. The services taken over from federal and provincial government also increased the capacity for Metis communities to meet their own needs with a civil service and organizations focused on policy development, program delivery, and intergovernmental relations.[130]

Metis communities within Saskatchewan have taken the next step toward self-government by adopting a constitution that outlines the establishment of an accountable government. Efforts have also been strengthened by *The Metis Act* of 2002 which established an equal partnership on key matters between the government of Saskatchewan and Metis elected leadership. This also built further momentum toward establishing a national constitution and recognition at the federal level which the Metis National Council is committed to.

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[130]   Dubois, Janique, and Kelly Saunders. 2013. "'Just Do It!' pg 193

In 2008 these proactive actions resulted in a federal partnership between the Nation Council and Canada known as the Metis Nation Protocol. Key features of this include: a bilateral process examining jurisdictional issues over Metis land and harvesting rights, economic development, and Canadian commitments to Metis governance, institutions, and multilateral discussions with provinces on Metis concerns.

The process of incorporating Metis self-government into the Canadian federal model may have begun outside of the framework, but gradually through a series of key steps an internal space was established. Scholars reflecting on this process have also noted that while some of the mechanisms informing this relationship may not be supported by the courts, crystallization can still occur if they are observed over time.[131] With a stronger capacity to meet community needs legitimacy can grow among provincial governments which further strengthens the coordination supporting self-government as an institution at the national level.

The Dene Nation is one example of how the foundation of a political organization can lead to both internal and external mechanisms to altering the relationship with the federal government. Scattered across the Mackenzie Valley of the Northwest Territories are nearly 17,000 indigenous people. In response to government plans to allow a pipeline without tribal approval members of separate tribes came together to form the Indian Brotherhood of the Northwest Indians (later reorganized as the Dene).

They began working within the legal system to challenge the treaties which canceled their land rights. Ultimately a favorable ruling was overturned on a technicality by the Supreme Court leading to a declaration in 1974 that their interest was in 'land, not money'.[132] The declaration focused on their distinct status as a majority nation in the territories without political authority.

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131   Dubois, Janique, and Kelly Saunders. 2013. "'Just Do It!' pg 205
132   Bodley, John H. 1999. *Victims of Progress pg 157*

What began as a struggle for land rights however began to evolve into self-determination.

Similar to the Inuit example they did not mean to declare independence, but rather obtain a status grounded within the constitution. The pipeline development was halted through their ability to show to the Supreme Court that traditional land use was still an integral part of their society.[133] To continue the pipeline development negotiations began in 1974 on land rights and self-determination. By evoking the support of UN declarations on self-determination they underscored the need for a separate Dene System focused on cooperative communities, joint decision making, and communal land ownership.[134]

Their movement also helped propel the call for aboriginal rights within the constitution resulting in the 1982 inclusion. In 1988 the Dene fight for 'land, not money' resulted in an agreement transferring 10,000 square kilometers of surface and subsurface rights, 170,000 sq kilometers for surface and mineral royalties, and 1 million sq kilometers for traditional land use.[135] Both the Dene and the Metis struggles display how indigenous agency can help alter the course of a structure's trajectory. If elements of the structure begin to open to them including state and provincial recognition of indigenous claims then the feedback effects on the federal structure are more likely to be supportive of self-determination.

4.2 The Role of External Responses

If traditional politics are closed off to a group then a process of circumventing the normal political order begins. Threats to political opportunity can provide groups a shared sense of injustice reinforced by grievances.[136] Institutional gaps or barriers to opportunity have led to social movements within the US and Canada. However, while this helped gain momentum for

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133   Bodley, John H. 1999. *Victims of Progress pg 158*
134   Ibid
135   Ibid
136   Tarrow, Sidney G. 2011. *Power in Movement pg 25*.

self-determination the federal structure of each state shaped the kind of movement that developed.

Historically, native groups in the US forged a national movement, while in Canada efforts were localized. Reasons for this include issues with creating a Pan-Indigenous identity, a higher percentage of natives living in urban areas in the US, and government policies.[137] In the US during the late 60s and early 70s Red Power and the American Indian Movement (AIM) grew out of the instability in the society. The civil rights movement helped inspire natives at a time when government funding allowed these organizations to expand their mobilization.

Several large-scale protests occurred during this period including: the occupation of Alcatraz (1969), the Trail of Broken Treaties march (1972), and the occupation and siege at Wounded Knee (1973). During these events AIM leadership stressed a Pan-Indigenous identity over tribe loyalty helping to enforce a collective identity.[138] Protest methods were at times combined with mechanisms connected to the US political system. Following a march on Washington, DC group members engaged in lobbying efforts which played a key role in the passage of the Native American Freedom of Religion Act.[139] Mixing external efforts with MLG lobbying helped allow groups multiple access points to press for political change.

In Canada organizations were more focused on representing indigenous interests within the system rather than fighting it.[140] Because of this tribes often engaged in protest activity that drew attention to their local concerns. Activities included road blockades, fish-ins[*], occupying regional Indian Affairs offices, and occasional marches to Ottawa. Most of these activities allowed them to gain attention without using many resources. Two notable exceptions to this are

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[137]   Wilkes, Rima. 2006. "The Protest Actions of Indigenous Peoples A Canadian-U.S pg 520
[138]   Wilkes, Rima. 2006. "The Protest Actions of Indigenous Peoples A Canadian-U.S pg 519
[139]   Ibid
[140]   Wilkes, Rima. 2006. "The Protest Actions of Indigenous Peoples A Canadian-U.S pg 518
[*]   Fishing illegally based on federal law to assert land rights

the national-level mobilization responses to the 1969 White Paper and the reparation of the Canadian Constitution[*]. The Canadian government also shaped how protests developed as it directed funding toward governmental organizations within tribal communities instead of urban pan-indigenous organizations.[141]

Structural influences shaped the movements in multiple ways as indigenous groups have used strategic flexibility to match available opportunities. Some opportunities allowed for increased involvement in the US, while others altered how resistance was expressed in Canada. The federal structure of the US and Canada provides opportunities to further shape protest organizations by building self-government into the structural framework. Sidney Tarrow notes, "Federalism and local home rule are particular invitations to movements to shift their actions into institutions, because they provide alternative sites for participation."[142]

While this is more acceptable in Canada which did not have a national indigenous protest movement alternative mechanisms were also available in the US. Lobbying served as an opportunity for an alternative access point with the system both at the state and national levels. Protest movements are one of the tools groups can use along with direct interaction with the government.[143] These movements helped apply pressure for self-determination in both countries, at critical times when the paths were beginning to change. However, they did not affect how the paths trajectories were altered.

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[*] Refers to the process of reclaiming Canadian Constitution from Britain causing conflict between the state and provinces

[141] Wilkes, Rima. 2006. "The Protest Actions of Indigenous Peoples A Canadian-U.S pg 520

[142] Tarrow, Sidney G. 2011. *Power in Movement pg 303*

[143] *Della Porta, Donatella. "Social Movements and Multilevel Governance" Ch 4 pg 101*

Chapter 5: Conclusion

5.1 Wrapping Up

In comparing these two cases a number of observations stand out. First, there are strong similarities in how the original institutions and policies favored assimilation and grew out of a shared colonial past. Second, many of the barriers and issues which impeded tribal inclusion can be linked to elements of this colonial legacy. Third, coming out of assimilation practices influenced by the colonial legacy significant differences developed in how each country addressed indigenous groups.

Key to understanding reasons for these differences is the role of path dependency. Path dependence within historical institutionalism is divided between critical junctures and developmental paths.[144] Many of the events covered in this paper represent mechanisms which can either facilitate change or reinforce institutional stability. At these critical junctures actors play a role in determining the trajectory of institutions and through them the opportunities provided to the indigenous in each state.

There are multiple factors influencing why these countries are on different trajectories. A key feature of this are the constitutional differences. This includes not only if inclusion is offered within the framework or not, but also the flexibility in changing the constitution. Pulling together the constitutional differences between the US and Canada a pattern emerges.

The US constitution is known and often applauded for being immune to change. Canada on the other hand, has repeatedly overhauled its constitutional structure due in part to its unique relationship with Britain. The US Supreme Court has played a vital role first by establishing the origin of the ambiguous tribal status. And then, maintaining this path through multiple rulings

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[144]   Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics." pg 397

which did not fully support nor completely limit tribal authority. The Canadian constitution has through its history also been on its path of flexibility because of addressing French minority rights. Diversity within the constitution was gradually accepted for minorities.

Accommodation of the French minority served as a key stepping stone for opening the constitution for indigenous groups. However, it also was part of a previous institutional path which in line with internal colonization distributed power to one minority while limiting another. Inuit autonomy served as a defining moment which beginning with self-administration and building into self-government helped expand accommodation policy and eventually the constitution to include the indigenous.

In contrast to Canada the US began as a nation with homogeneity. Throughout its early history no minority was concentrated geographically and large enough to force its accommodation. There were examples like the Mormons, initially developing externally and later being absorbed into the nation. There were religious differences but culturally similarities existed and no linguistic boundaries were present. However, while this separates the two cases it is not as influential in defining the indigenous relationship within the US as the constitutional features. The Navajo example helps demonstrate there are benefits to being placed on a path which through a poorly defined status can allow groups to claim authority and redefine their status if institutional barriers have not been established.

While territorial autonomy is the main focus of this paper elements of non-territorial autonomy and transnational justice still serve an essential role. They provide states an opportunity to salvage past events and use them to further support a path with new institutions and an integrated society. Indigenous response both internally and externally has also influenced the alteration from a colonial/assimilation path to one of self-determination. This was achieved

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by creating multiple access points to open government institutions to change within the US. In terms of external responses in Canada they were localized being better equipped them to work within the system. Multiple groups built up their efforts at self-determination through creating community networks, taking over devolved services, and entering into government-to-government agreements with the national government. Multilevel governance served as the method through which indigenous claims and federal space were integrated in both cases. At times this layering required building agreements between provinces and tribes serving to legitimize their claims at the federal level with the help of provincial coordination effects.

In comparing these cases to countries addressing similar indigenous concerns further insights can be gained. In Canada there are no seats in the Parliament or Supreme Court delegated for the indigenous and no requirement for the PM to appoint any representatives to his cabinet. Comparatively, New Zealand has consocial elements reserving specific seats in the parliament for members of the indigenous community. The Maori people in New Zealand also have their own national party within the political system. According to Dubois, despite successes these critical gaps emphasize the underrepresented status of the indigenous in Canada's political institutions.[145] The US also does not have any required representative mechanisms built into its indigenous policies.

The developmental paths of both cases have been altered by critical junctures, but what actors were changing the trajectory of the path? A potential barrier to further integration is if indigenous representatives are not part of the critical junctures which alter the paths trajectory. In seeking to understand how indigenous people are incorporated into federalism this deeper issue arises. An issue connected to the colonial past as perceived by these groups. The federal state is frequently viewed as a continuation of colonialism because of poor implementation attempts

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[145]   Dubois, Janique, and Kelly Saunders. 2013. "'Just Do It!' pg 190

involving a top-down policy of promoting self-government. States must remember that in order keep self-governance as part of federal model the autonomous region must retain an interest in the success of the federal center. One way to do this would be to build mechanisms into the political structure that either encourage partaking in or allocating seats within the national legislature.

5.2 Areas of Further Study

There are a number of avenues in which future research could expand on what has been provided in this paper. Given the scope of this research I was not able to conclude how the indigenous themselves perceive sovereignty and what exactly they are seeking. Previous literature highlighted certain segments of the Navajo community's interpretation of self-determination. Building upon this future research could conduct studies across different tribal groups in both the US and Canada to see what variations may exist in how they define a successful solution to their political status and if self-determination is indeed the answer.

Additionally, there are many other cases to look at beyond those presented in this paper. In particular, the Sioux and other tribes are spread across the US-Canadian border region and a study focusing on the comparative self-determination efforts would be insightful. The issue of indigenous rights is also effecting many other states including New Zealand, Mexico, and many South American countries. These states also are the focus of scholarship on indigenous developments and attempts at compromising with these groups. The scope of this issue allows for many possible comparative studies which ultimately could help point toward common solutions to an issue which continues to linger in the political background of many of these countries.

One final area which requires further exploration is the indigenous claims to sovereignty

in both countries. Within many of the discourses they emphasize their rights not as self-governing, but as sovereignty peoples. In doing so they connect back to their pre-colonial interactions with states they are currently subordinate to. Many of these groups pre-date their federal arrangements and had relations with the US and Pre-Canadian Britain on a nation-to-nation basis. Can sovereignty continue to be accommodated through self-government? This question could be used as a basis for a comparative study between Scotland, Catalonia, and indigenous self-governing communities like Nunavut or the Navajo.

Appendix

Map 1.1-American Indians Percentage of County Population

Figure 4.
American Indian and Alaska Native as a Percentage of County Population: 2010
(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2010/doc/pl94-171.pdf)

Alone

Percent
- 8.0 or more
- 3.0 to 7.9
- 1.5 to 2.9
- Less than 1.5
- American Indian/ Alaska Native Areas

U.S. percent 0.9
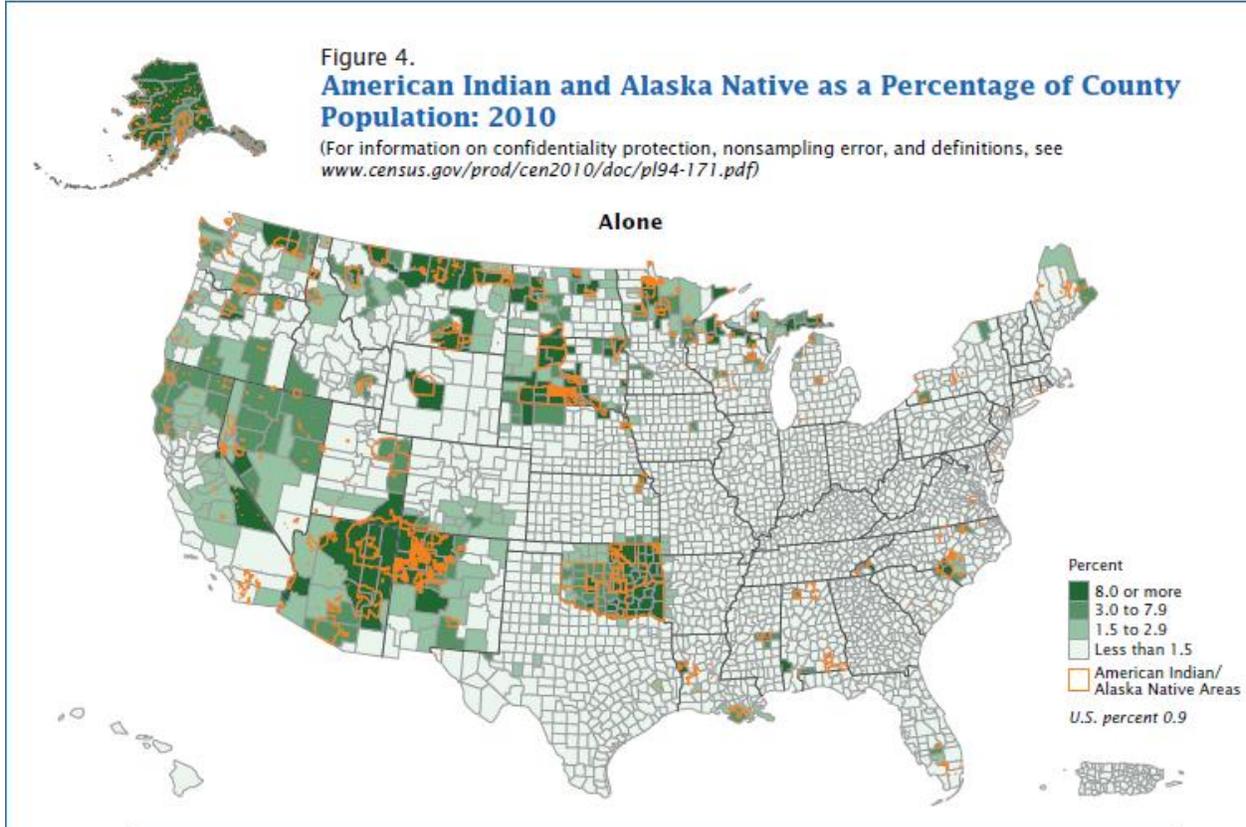
Source: 2010 Census Survey[146]

Table 1.1- 2010 American Indian and Alaska Native Population for US

Area	Alone Identification[*]	Combination Identification	Percent Increase from 2000	
			Alone	Combination
Northeast	212,864	292,626	30.9	38.4
Midwest	458,611	420,827	14.8	33.5
South	923,783	788,319	27.3	47.8
West	1,336,990	786,559	12.5	34.9
US Total	2,932,248	2,288,331	18.4	39.2
2010 Census Survey[147]				

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[146] Norris, Tina et al. "The American Indian and Alaska Native Population: 2010." pg 9.

[*] Alone indicates reporting only American Indian without a mix of other ethnicity.

[147] Norris, Tina et al. "The American Indian and Alaska Native Population: 2010." pg 7.

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Map 1.2 Aboriginal Identity Population＊
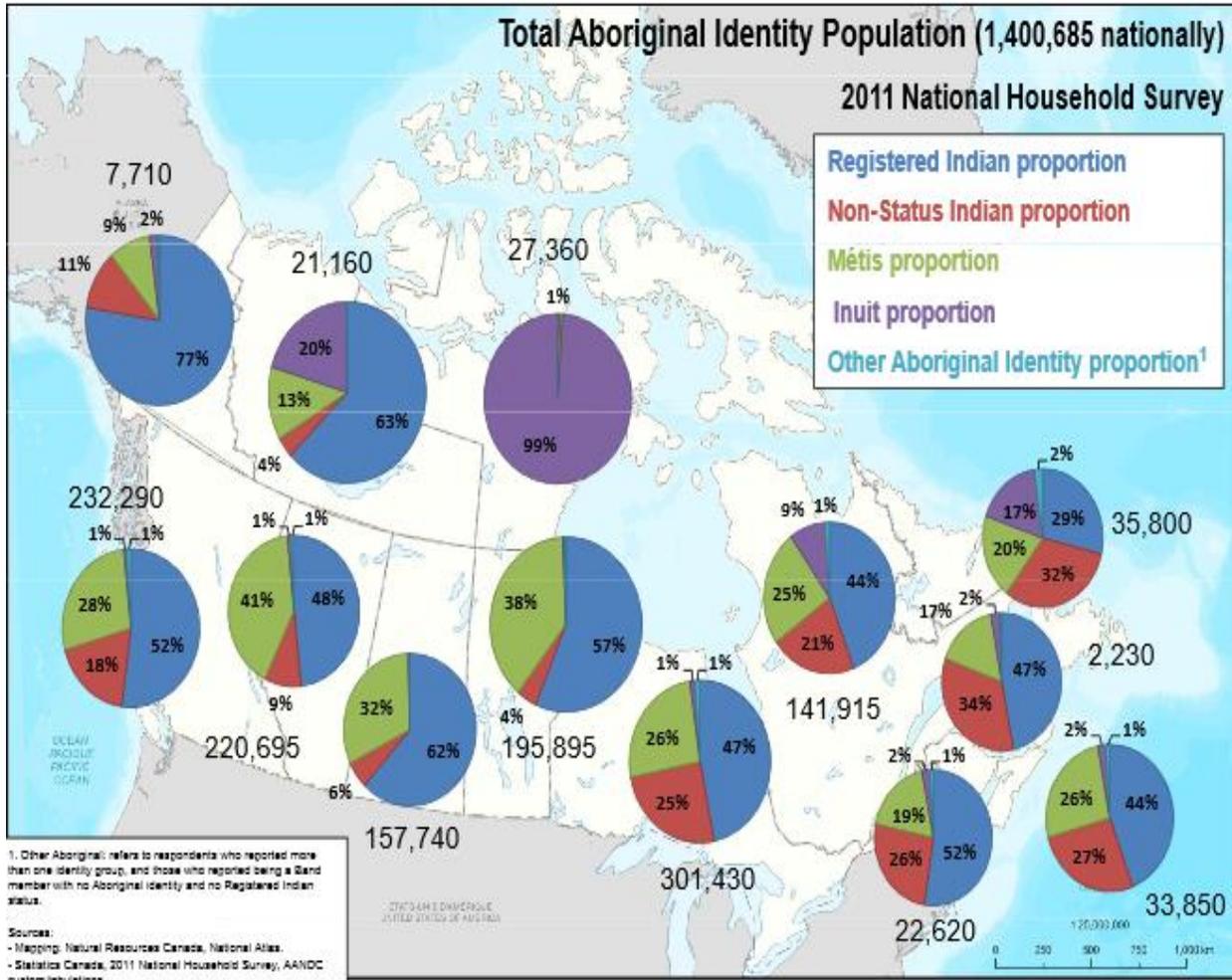
Source: 2011 National Household Survey*148*

＊ Other Identity-More than one identity group. Non-Status-No identity affiliation. Registered-First Nation affiliation
148"Aboriginal Demographics from the 2011 National Household Survey."

Table 1.2 Indigenous Peoples in Canada

Province/Territory	Number	Percent of Region	First Nations	Metis	Inuit	Multiple	Other
British Columbia	232,290	5.4%	155,015	69,475	1,570	2,480	3,745
Alberta	220,695	6.2%	116,670	96,865	1,985	1,875	3,295
Saskatchewan	157,760	15.6%	103,205	52,450	290	670	1,120
Manitoba	199,940	17.0%	130,075	78,835	580	1,205	1,055
Ontario	301,430	2.4%	201,100	86,015	3,360	2,910	8,045
Quebec	141,915	1.8%	82,425	40,960	12,570	1,550	4,410
New Brunswick	22,620	3.1%	16,120	4,850	485	145	1,020
Nova Scotia	33,845	3.7%	21,895	10,050	695	225	980
Prince Edward Island	2,230	1.6%	1,520	410	55	0	235
Newfoundland and Labrador	35,800	7.1%	19,315	7,665	6,260	260	2,300
Yukon	7,710	23.1%	6,585	845	175	30	70
Northwest Territories	21,160	51.9%	13,345	3,245	4,335	45	185
Nunavut	27,360	86.3%	130	135	27,070	15	15
Canada	**1,400,685**	**4.3%**	**851,560**	**451,795**	**59,445**	**11,415**	**26,470**
2011 National Household Survey[149]							

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[149]   Statistics Canada 2013

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