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ARTICLE

Incomplete Sovereigns: Unpacking Patterns of Indigenous Self-Governance in the United States and Canada

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ABSTRACT

In the early 1970s, both the Canadian and United States federal governments introduced modern land claim agreements as a first step forward in the states' recognition of Indigenous goals for self-determination. Since then, both the United States and Canadian federal governments have incrementally expanded their recognition of Indigenous rights to include Indigenous goals for political self-determination. Yet, despite the fact that both countries began implementing broadly similar policies at approximately the same time, the degree to which Indigenous political and economic self-determination has been realized varies considerably both within and between the two countries. The variation in Indigenous self-governing power and authority suggests that the policy shift towards Indigenous self-determination is incomplete and has faced important barriers to implementation. This paper investigates two key aspects of this variation in Indigenous self-determination in the United States and Canada: (1) institutional histories embedded in geography, and (2) the temporal nature of policy frameworks. I argue that the full realization of Indigenous self-determination has been shaped in different ways and, ultimately, is limited by the intersection of embedded institutional legacies and federal political dynamics.

KEYWORDS

Indigenous self-determination; policy change; institutional legacies

For much of the post-contact period between Indigenous nations and settlers, Indigenous nations have been systematically delegitimized and undermined by policies of land settlement and colonialism. While Indigenous nations throughout North America have consistently pushed forward their goals for political and economic self-determination, only in the last half-century have the United States and Canadian federal governments begun to recognize and respond to Indigenous goals for sovereignty and self-determination. The Indigenous political movement gained steam following the Second World War, as activism became transboundary and international, gaining legitimacy and building political momentum (Cairns 2000). Indigenous advocates tapped into a civil society movement focused on political suffrage and civil rights, accessing a period of broader ideational change through which to advance their goals.

In the early 1970s, both the United States and Canadian federal governments moved to reshape the Indigenous-state relationship, using modern land claims agreements as

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a means by which to recognize Indigenous goals for self-determination. Unlike past policy frameworks, modern land claims agreements were premised on Indigenous land *ownership*—with clear rights and title to land. Though both countries adopted a similar policy approach at approximately the same time, there has been considerable divergence both within and between countries with respect to the realization of Indigenous self-determination. Despite a shift in the willingness of the two federal governments to engage with Indigenous nations over questions of land rights and land management, the application of modern land claims agreements has been selective in its application, a feature of long-embedded institutional and geographic factors that continue to shape the relationship between Indigenous peoples and the state.

If we understand Indigenous self-determination to be the ability to "freely determine their political status and freely pursue their economic, social and cultural development" (United Nations 2008), it is clear that Indigenous nations in both the United States and Canada are far from fully realizing this standard. Though there are many examples of Indigenous nations with considerable governing autonomy, the degree to which Indigenous self-determination has been institutionalized is inconsistent at best. In this article, I explore some of the ways the push for Indigenous self-government has been shaped by two key factors: (1) institutional histories embedded in the geography of North America, and (2) the dynamic nature of time, in which policy frameworks are constrained by institutions and political actors.

Contextual and Historical Background

There are 566 federally recognized tribal groups speaking 169 distinct Native languages in the United States (Siebens and Julian 2011). Tribal groups vary considerably in their governance models, relationships with state and local governments, conditions for membership, and size. For example, the Cherokee nation numbers more than 700,000, while the Augustine Band of Cahuilla Indians in California has a tribal membership of just eight. Meanwhile, many Indigenous nations continue to go unrecognized by the United States federal government; approximately 100 Indigenous tribal groups continue to seek federal recognition (Ahtone 2014). In Canada, the Indigenous population is similarly diverse. Of the more than one million individuals who identify with an Indigenous group in Canada, close to 60 percent identify as First Nations, 35 percent identify as Métis, and 4 percent identify as Inuit (Statistics Canada 2017).[1] There are approximately 55 distinct Indigenous nations—each with its own traditions, history, and sense of collective identity. More than 70 Indigenous languages are spoken throughout the country, and there are more than 600 First Nations (*Indian Act*) bands (RCAP 1996, 26–27).

Despite having consistently articulated their distinctness as peoples who possess sovereignty, territory, and the inherent right to self-determine their economic and political futures (Steinman 2006), for centuries Indigenous nations have been systematically undermined by the colonial governments in both the United States and Canada. The earliest treaties between First Nations and colonial governments explicitly supported Indigenous claims to nationhood. In the United States, treaties recognized Indigenous self-governance and Indigenous sovereignty, and "dealt with Indian tribes as international sovereigns, establishing diplomacy and making treaties when not in armed conflict" (Steinman 2006, 299). However, this period was

relatively short-lived and, as the settler government grew in military strength and economic power, treaties became more coercive and less favorable towards Indigenous nations (Spirling 2012). Both federal governments engaged in policies that resisted or ignored the political and economic goals of Indigenous nations as they made large-scale territorial claims or attempted to maintain self-governing authority.

In the United States, attempts by the settler government to secure territorial authority and build the nation by removing the Indigenous population began in earnest in the 1800s. After the War of 1812, the United States government began to actively question "the propriety of considering the Indian tribes, no matter what their power, political organization, and sophistication, as sovereign nations" given its new "position of assured dominance" (Prucha 1994, 129). Beginning in the 1830s, a prolonged period of colonization undermined earlier nation-to-nation relationships through the confiscation of Indigenous lands. The United States federal government ignored its treaty obligations, and policies of separation moved the "Indian problem" away from the eyes of the settler populations through the creation of Indian reservations or the forced relocation of Indigenous populations within the territory. The policies of the 1800s resulted in the widespread destruction of American Indian populations.

Canada similarly engaged in coercive policies and practices aimed at removing Indigenous peoples from the land and opening it up to settler populations. Policies became increasingly paternalistic and exclusionary. The *Indian Act* of 1876 defined the Indian in Canada and adopted parallel tracks of exclusion on the one hand, through population removal and reserves, and "enfranchisement" on the other, through the attempted assimilation of Indigenous peoples into the broader Canadian population. In legislating the "Indian," Canada failed to address its relationship with other Indigenous populations in Canada, namely the Métis and the Inuit. Despite the exclusion of these populations from the legislative framework, for much of Canadian history the Canadian government continued to approach relations with these non-status Indigenous populations through a broadly similar set of policies, including forced attendance at residential schools, legislation that defined and discriminated based on Indigenous identity, and bureaucratic levers such as the '60s Scoop, which removed Indigenous children from their families, often adopting them out to non-Indigenous families. Indeed, the practice was so widespread that the Government of Saskatchewan created a program—the Adopt Inuit and Métis (AIM) program under the Department of Social Welfare—specifically devoted to facilitating the fostering and adoption of Indigenous children. Some of these policies remain as part of the institutional framework to this day. The *Indian Act* of 1876 remains in force and while it has been updated over time[2] to amend the most assimilatory components of the legislation, the policy itself is a relic of the broader colonial relationship (Morden 2016).

Within the history of the Indigenous-state relationship, policies of recognition are a relatively recent articulation of an evolving ideational framework. Policies of recognition require the state's acknowledgment that Indigenous claims to land and self-government are legitimate. However, even though federal recognition of Indigenous sovereignty has begun to swing closer to Indigenous conceptualizations of nationhood, Indigenous nations have not yet fully realized the degree of political autonomy that they desire. There is a general acceptance that Canadian and American efforts to recognize Indigenous rights fall well short of Indigenous visions of self-determination and that efforts towards full self-determination continue to be constrained to "some limited form of internal political autonomy" (Papillon 2008, 34). Even for

those Indigenous nations seeking negotiated settlements in 2019, options for autonomy remain constrained by the dominant society (Alfred 2005; Irlbacher-Fox 2009). Ultimately, institutional legacies of and federal political dynamics in the United States and Canadian federal political systems intersect with the policy framework and result in important asymmetries in the Indigenous-state relationship in the United States and Canadian federal systems. These factors shape the full realization of Indigenous political development and result in considerable asymmetry both within and between Canada and the United States. In the next section, I outline the approach to exploring these asymmetrical outcomes—highlighting my use of critical junctures and comparative historical analysis to ground the cross-case comparison.

Materials and Methods

This research utilizes a cross-national comparative historical analysis of Canada and the United States. The rationale for a cross-case analysis of Canada and the United States is based on a most-similar case design. Both states are federal political systems that have long histories of colonization of Indigenous peoples. Though there are some important differences in the way in which federal policies evolved over time, the United States and Canada are similar in a few key ways. Firstly, the cases are similar with respect to the federal governments' historic relationship with Indigenous populations, which are characterized by initially cooperative Indigenous-colonial relationships that gave way to increasingly coercive and assimilatory policies. Secondly, these cases are similar in that the trajectories of the Indigenous-state relationship in both countries are embedded in institutions. Institutions are "formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy" (Hall and Taylor 1996, 937). Finally, and most importantly for this research, the cases are similar in that both federal governments undertook a dramatic policy shift in the 1970s with the introduction of modern land claim agreements, but they did so in such a way that was uneven, and the institutionalization of this policy shift has resulted in considerable variation both within and across the two countries.

As a method, historical institutionalism guides the inquiry of this research. For the United States and Canada, the adoption of modern land claim agreements in the North marks an important critical juncture in national policymaking on the Indigenous-state relationship. Within the study of institutions, critical junctures mark the end of a transition period away from the old policy framework, as signaled by the first steps forward in institutionalizing new sites of authority or new organizations within the political system. Capoccia (2015) defines critical junctures as:

> An event or series of events, typically exogenous to the institution of interest, [which] leads to a phase of political uncertainty in which different options for radical institutional change are viable; antecedent conditions define the range of institutional alternatives available to decision makers but do not determine the alternative chosen; one of these options is selected; and its selection generates a long-lasting institutional legacy (151).

Capoccia's attention to the fact that the emergence of new ideas and institutional alternatives is constrained by "antecedent conditions" highlights the ways in which institutional change is constrained by at least some degree of path dependency in the

framework. In particular, the institutional trajectory of the Indigenous-state relationship has been constrained by past policy frameworks that have proved difficult to dismantle in the face of change.

Relying on the tools of comparative historical analysis also allows me to draw out the relationship between institutions and group behavior, as the approach emphasizes how asymmetries in power shape the development and operation of institutions (Hall and Taylor 1996). This emphasis on relative power is particularly important in the exploration of the shift towards, and institutionalization of, the new policy framework in the United States and Canadian Indigenous-state relationship. In both countries, this is a relationship marked by a wide gap in relative power, solidified through centuries of destructive colonial policies that stripped Indigenous nations of their autonomy. In adopting the historical institutional approach, I am able to investigate how the specific institutional features of federal systems—including how policy legacies that differentially affect the federal system—shape the evolution of the Indigenous-state relationship, and the patterns of institutional evolution across the two cases. I explore the factors shaping institutional development through archival research, utilizing several different types of primary documents, including internal Cabinet documents (Canada), legislative drafts and lobbying documents (United States), and government reports, as well as correspondence from Indigenous political actors and government officials.

Breaking down Policy Regimes—the Trustee Relationship under Scrutiny

In broad terms, the relationship between Indigenous peoples and the state is founded on a trustee relationship that was embedded in the earliest policies of colonial North America and which persist to this day. Under the trustee relationship, the United States and Canadian federal governments exercise the rights and powers of the state to the "benefit" of Indigenous peoples. This principle has been embedded in historic treaties, in the United States and Canadian constitutions, and in state constitutions (Wilkins 2002), and has been repeatedly affirmed by the judicial branch of government. In both the United States and Canada, Supreme Court decisions upheld this historic view of the Indigenous-state relationship. In the 1831 *Cherokee Nation v. Georgia* decision, the United States Supreme Court held the Indigenous-state relationship as being "that of a ward to a guardian" (Corntassel and Witmer 2013, 17), a decision further affirmed in 1886 in *United States v. Kagama*, with a ruling that "pronounced Indians to be wards of the state, further justifying federal control of reservations" (Steinman 2005, 765). Indeed, the courts expanded the terms of this relationship to include other Indigenous nations not otherwise governed by it. In Alaska, where Indigenous nations never signed treaties with the federal government, the federal government's responsibility to protect Native property rights was extended through *United States v. Berrigan* (1905), in which the court found: "The uncivilized tribes of Alaska are wards of the governments ... The United States has the right, and it is its duty to protect the property rights of its Indian wards" (Brady 1967, 2). Similarly, in Canada, the Supreme Court of Canada affirmed in 1939 that the *Indian Act* "embodie[d] the accepted view that these aborigines are… wards of the state" (Supreme Court Reference 1939), and expanded the purview of the federal responsibility to include Inuit peoples of Canada who (similarly) had no formal relationship or treaties with the federal government.

In the 1950s, as public conceptions of human rights shifted in response to new understandings of individual and collective rights, the paternalistic logic of the trustee relationship increasingly came under scrutiny. In Canada, one of the first major rejections of the logic came through a 1959 Commission that reviewed the unfulfilled provisions of Treaties 8 and 11, which extended over a wide territory from the northern parts of British Columbia, Alberta, and Saskatchewan, well into the Northwest Territories and part of Yukon Territory. Although Treaties 8 and 11 had been negotiated and finalized in 1899 and 1921 respectively, the majority of the treaty provisions were never implemented. The report to the Privy Council Office marked the first formal rejection of the trustee model employed by the Canadian federal government. In the report, the commission denounced moving forward under the status quo, noting that "it would be unfortunate if the Reserve System provided for in the Treaties is permitted to come into existence. It is of the opinion that Indian reserves belong to a past era in Canadian history" (Nelson et al. 1959, 5). In taking this position, the commission made a clear move away from both the reserve model, used widely in southern Canada, and the trustee relationship that acted as its foundation. In cabinet meetings, discussions seemed favorable to a new option: settling claims using a combination of cash settlements, a share of resource revenues, and land title through lots "which would be patented to the individual Indians" (Report of Commission 1960, 10). At its core, the commissioners recommended (and the cabinet agreed with) the idea that the trustee relationship should be abandoned in favor of a move towards individual Indigenous property rights.

As other federal policymakers reviewed the failure of government to implement core provisions of treaties, or the absence of treaties altogether, Indigenous leadership across North America also began to argue forcefully against the paternalistic policy of federal control of reserve lands. In Alaska, the Native leader Emil Notti spoke against the policy, arguing that the path forward for Alaska Native peoples should not reprise bad policy from the south, noting "[Alaska Natives] do not want to be forever wards of the Federal Government, and we are not willing to stand idly by and become wards of the State Government" (Notti 1967, 2). Just as new ideas were emerging in Canada regarding potential pathways forward, alternatives were emerging with respect to land claims in Alaska. A 1967 draft land claims bill, prepared by the federal Secretary of the Interior, recommended that the Alaska process proceed with a monetary settlement (rather than a land settlement), in which revenues would be apportioned "among corporations to be organized under the laws of Alaska for the purpose of promoting the welfare of Natives residing in the geographic region served by each corporation" (Udall 1967, 2–3). This recommendation echoed that of the Canadian Commission on Treaties 8 and 11, which privileged cash settlements and resource revenue sharing. In early 1968, a Governor's Task Force on Native Land Claims built on this draft bill, highlighting the regional corporation as a potential policy instrument and reasserting the importance of land as a central component of the final bill. The most marked step away from past policy, however, was the task force's recommendation on how that land would be disbursed. In a clear move away from the trustee relationship, the Task Force recommended the disbursement of 40 million acres of land in fee simple title or in trust to village groups (allocated relative to villages in proportion to population). It also recommended the establishment of ongoing financial resources through royalty interests in outer continental shelf revenues and in state selected land (Hensley 1968).

The 1970s: A Critical Juncture in the Indigenous-State Relationship

The start of the 1970s marked a significant turning point in the Indigenous-state relationship as the United States and Canadian federal governments moved to settle land claims through this new model of land title and cash settlements. In December 1971, United States President Richard Nixon signed the *Alaska Native Claims Settlement Act* (ANCSA) into law. ANCSA marked the first step in recognizing the legitimacy of Indigenous claims to their land. The legislation also moved away from the instrumental and ideational underpinnings that marked the Indigenous-state relationship elsewhere in the United States (namely, in the Lower 48). Through the implementation of a modern land claim, ANCSA abandoned the trustee relationship, relying instead on the transfer of fee simple title (private collective land ownership) to 12 Native regional corporations and more than 200 community corporations, and paying out nearly $1 billion in compensation. This shift was remarkable not only in form, but also in scale: the 44 million acres of land transferred under ANCSA is more land than is currently held in trust by the United States government *for all other* Indian nations in the United States combined. Meanwhile, the cash compensation that accompanied the agreement was nearly four times the combined amount ever awarded to Native peoples through the United States Indian Land Claims Commission (King 2012). As such, ANCSA marked a clear departure from the previously dominant policy framework, one in which the United States federal government had limited land-based settlements because of a general refusal to negotiate with Indigenous nations.

Two years later, in 1973, the Government of Canada introduced its Official Policy of Negotiation and invited Indigenous groups to the table to settle outstanding land claims. As the United States federal government had done in Alaska, the implementation of modern land claim agreements in Canada recognized significant tracts of land as belonging to Indigenous nations through the establishment of collective fee simple title, and included financial settlements to Indigenous populations. Also, like ANCSA, which created the Alaska Native regional corporations, the Official Policy set out to establish new institutions of Indigenous governance. The cross-national policy similarities are clear, particularly when looking at the nature of early modern land claims agreements in Canada relative to the ANCSA model. The first modern land claim in Canada, the *James Bay and Northern Quebec Agreement*, signed with the Inuit and Cree populations of northern Quebec in 1978, transferred 3.5 million acres of fee simple land to the Indigenous groups, guaranteed subsistence usage and shared development authority over an additional 37 million acres (lands reserved for Native use), and $225 million in compensation. Similarly, the *Inuvialuit Final Agreement* signed in 1984 by the Inuvialuit (an Inuit group in the Northwest Territories) finalized the transfer of more than 22 million acres of land within the Inuvialuit Settlement Region. While the majority of this title is for the surface rights, the agreement also transferred subsurface rights to approximately 3.2 million acres, as well as a cash compensation of $170 million to the Inuvialuit over a 14-year period (Inuvialuit Regional Corporation (IRC) 1984).

In adopting this new policy instrument, the United States and Canada showed a willingness to engage with and recognize Indigenous goals of *economic* self-determination. That this recognition came first is perhaps unsurprising, as this goal was somewhat easier for the federal governments to align with their own goals to close the gap between the social and economic outcomes of Indigenous peoples as

compared to non-Indigenous populations. The goal also clearly aligned with the federal governments' goals to open the north up to development, with fee simple title offering a greater degree of certainty over land tenure, and providing an avenue by which governments could extinguish Indigenous claims to other land tracts. The recognition of Indigenous *political* self-determination, however, continues to be contentious and contested. While both the United States and Canadian federal governments have incrementally moved towards the recognition of national minority status through self-government mechanisms, there is considerable variation throughout North America, the patterns of which can be traced to two key factors. The first type of variation can be traced to the geographic patterns of early settlement and institutional development based on historic treaties between settlers and Indigenous peoples. The second type of variation can be traced to the changing policy framework since the 1970s. While there has been a general opening, the federal government has expanded and constricted the policy framework over time—reflecting changing ideas, the changing willingness of the federal governments to engage in negotiations, as well as the flexibility of policy instruments. I will explore these two types of factors in the next two sections.

Institutional Development: Variation Based on the "Reach" of Government

The contemporary institutional asymmetry that we can observe throughout the two federal systems reflects the long reach of colonial institutions. North America was not colonized in a day, nor was it colonized by a single people. As such, there are distinct geographic patterns of colonial settlement and the institutions created to expand the reach of settlers within the territory. Those institutions—including historic treaties between Indigenous nations and the new settler governments, purchase agreements, and institutions enacted following cessation—are embedded in the geography and history of the land. The next sections explore some of the ways in which these institutions continue to echo through the political relationship between Indigenous peoples and the Canadian and United States federal government.

Institutional Histories Embedded in Geography: Canada

In Canada, historic treaties were signed in some regions and not others. In British Columbia, Yukon Territory, and the parts of the Northwest Territories that became Nunavut, treaties were never signed with Indigenous nations. The advent of the *Indian Act* of 1876 also kept certain Indigenous groups outside the primary legislative framework that defined the Indigenous-state relationship. Though the Supreme Court of Canada clarified in 1939 that Inuit fall under the framework of "Indians and Lands Reserved for Indians" in section 91 of the *British North America (BNA) Act*, the institutional relationship between Inuit and Métis populations and the Government of Canada remains markedly different from First Nations ("Indian") populations. In particular, lands were never held in trust for Métis or Inuit peoples, reserves were never established, and the governance models provided for in the *Indian Act*—such as band councils—were not recognized for Métis and Inuit populations.

In Canada, the same was largely true for northern Indigenous populations in the Yukon and Northwest Territories. Though Treaties 8 and 11 were negotiated and

extended well into the northernmost regions of the Canadian mainland (see Figure 1), implementation was another matter entirely and the federal government failed to live up to the majority of its negotiated responsibilities. Meanwhile, the Inuit and Métis populations of the northern territories lacked any formal relationship with the state. Not only had they never signed treaties with the crown, they were also not recognized under the *Indian Act* of 1876. Prior to the introduction of modern land claim agreements, there was no coherent federal Indian policy in the northern regions of Canada or the United States.

Since the introduction of Canada's Official Policy of Negotiation in 1973, whether an Indigenous nation was a signatory to a historic treaty set Indigenous groups in Canada on one of a few very different paths. Indigenous groups with historic treaties in place could utilize the policy of negotiation for specific claims only. Specific claims relate to grievances raised by Indigenous nations regarding Canada's failure to meet its obligations under historic treaties, or with respect to the way in which the Government of Canada managed funds or lands.[3] As such, Indigenous groups (primarily First Nations) with historic treaties have generally been left out of the more extensive land and resource model now available to non-treaty groups. By comparison, Indigenous nations—including some First Nations, Métis, and Inuit nations—that had never before signed treaties were subsequently offered a more comprehensive set of options and could negotiate land ownership, capital transfers, institutions of co-management, and other types of administrative self-governance (see Figure 1).

The implications of this policy institutional history are particularly pronounced in the Canadian north, for another important reason: the lack of subnational intrusion in the negotiation process. While provincial governments have not always hindered the negotiation of land claims (indeed, the Province of Quebec was highly motivated to see a successful agreement in the case of the *James Bay and Northern Quebec Agreement*, as it paved the way to hydroelectric development in the north of the province), provincial stewardship of modern land claims has been problematic. In particular, Indigenous nations in British Columbia have faced considerable challenges to the finalization of their claims. In 1993, the British Columbia Treaty Commission (BCTC) process was established to address the influx of Indigenous land claims under the Official Policy, which was being opened to allow more parties to negotiate simultaneously. However, since its establishment, the BCTC has struggled to finalize claims, and First Nations engaged in the process have expressed frustration over a lack of progress, the expense of negotiations, and continued alienation of lands and resources while negotiations took place (Hurley 2009). The tripartite model of negotiations (in which the province, federal government, and Indigenous nations are all engaged in the process) increases the complexity of negotiations and has the potential to undermine success (Alcantara 2007). By comparison, modern land claim negotiations have moved forward much more rapidly in the northern territories, in no small part due to the control that the federal government maintains over the negotiation proceedings. While subnational political buy-in can help the process along in the territories, a lack of sub-national buy-in is not a death-knell to negotiations.

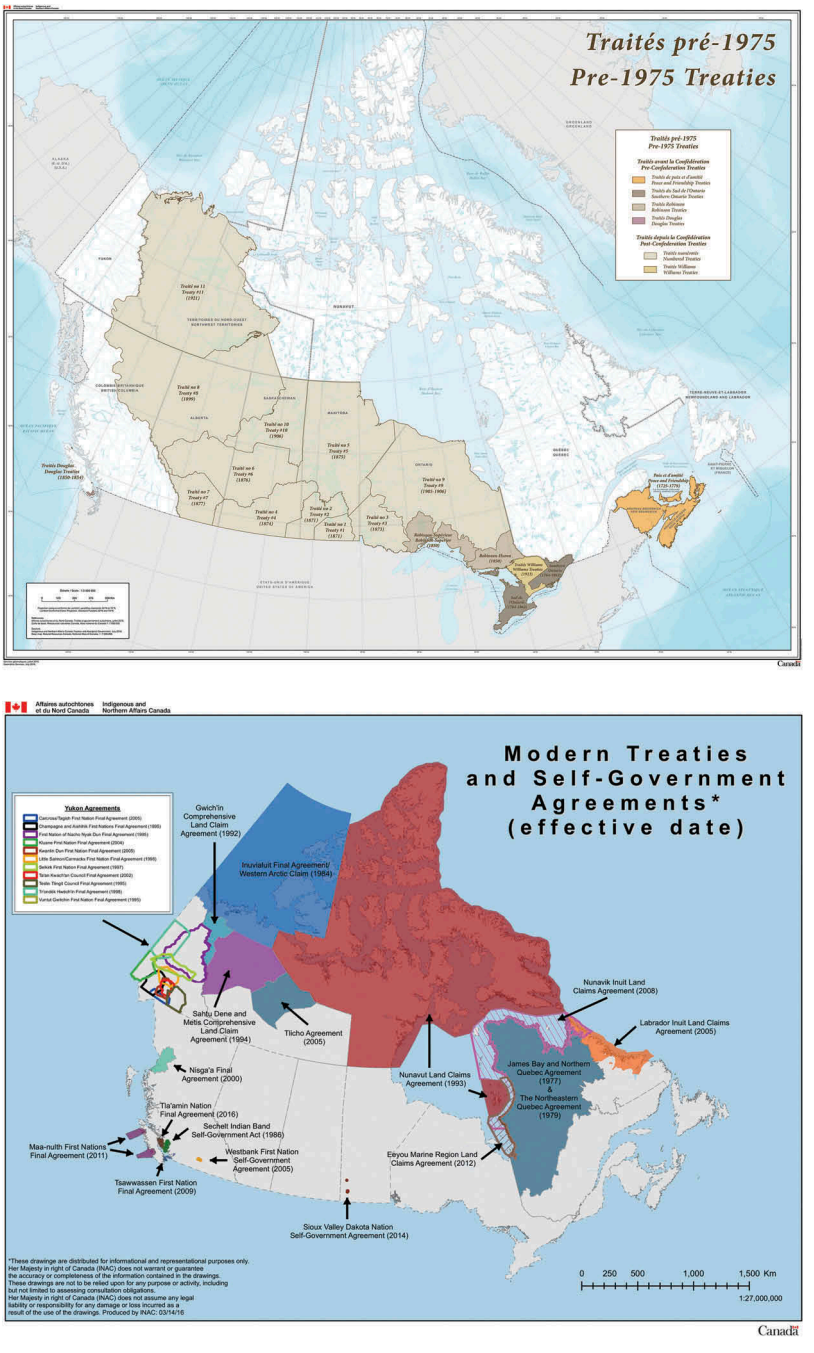

Figure 1. Geography of historic treaties vs. modern land claim agreements in Canada: Canada's historic treaties (top) and modern land claims agreements (bottom). Modern land claims agreements, negotiated under the 1973 Official Policy, are generally located in regions of Canada where historic treaties were never signed. The geography of modern land claims agreements highlights both the different access granted to different types of Indigenous nations as well as the embeddedness of institutional geography, as historic treaties (the factor determining whether a nation can engage in a "specific" or a "comprehensive" land claims agreement under the Official Policy) are themselves a function of the settlement patterns of Canada (Indigenous and Northern Affairs Canada 2018).

Institutional Histories Embedded in Geography: The United States

Like Canada, the United States sees considerable variation in institutional histories, which have shaped the evolution of the Indigenous-state relationship. In the western United States (including Alaska), the relationship between the federal government, subnational governments, and Indigenous nations over the land is remarkably different from the eastern United States. Like the Canadian territories, which traditionally have had very limited ownership over their land, the western states have tended to own relatively small portions of their jurisdiction as compared to their eastern counterparts. As later entrants into the federal political system, states like Nevada, Utah, and California are characterized by significant federal land ownership (with federal ownership of public lands at 85%, 61.6% and 45.8% in each of these states, respectively). A second interesting feature shapes the governance landscape of the western United States and Alaska. Many western states began as territories, and their inclusion into the federal framework required disclaimer clauses that warn against state intrusion into the treaty relationship between the federal government and Indigenous nations, or into the management of Indian lands (Wilkins 2002).[4] While these disclaimers were not universally applied, several of the states that lacked such clauses, including Alaska, later clarified Indian land rights through their enabling acts (which lay the foundation for statehood) and in their state constitutions. Alaska made reference to Native land rights in the *Organic Act* of 1884, in its *Enabling Act* (1958),[5] and in its State Constitution (1959) (Wilkins 1998).

On questions of self-government, however, the opportunity for subnational intrusion into the policy area is much more uniform, and states have progressively asserted policy authority over their Indigenous nations. Following President Richard Nixon's public support for tribal self-determination in the 1970s, tribes throughout the United States began to patch together a variety of governmental, corporate, and non-profit institutions through which to exercise their inherent sovereignty. These assertions of tribal sovereignty quickly created tensions with state governments. In particular, questions arose regarding state responsibilities to the sovereign nations operating within their borders. Despite the ruling in *Native American Church v. Navajo Tribal Council* (1959) that Indian tribes have a "status higher than that of states," states have progressively acted as if they were politically and jurisdictionally superior to the tribal nations found within their borders. As described by Wilkins (1998), these aggressive assertions of state jurisdiction over Indian country are highly problematic as they "violate the doctrine of inherent tribal sovereignty, run afoul of the treaty relationship between federally recognized tribes and the federal government, damage the federally recognized trust doctrine, and breach the doctrine of federal supremacy in the field of Indian affairs" (55–56).

In the United States, the intrusion of the states into Indian policy has been cast as a process of "forced federalism," in which state governments have repeatedly sought to challenge the sovereignty of Indigenous nations and undermine their treaty relationships with the federal government (Corntassel and Witmer 2013). The most pronounced example of subnational intrusion into the management of Indigenous nations is in the realm of Indigenous economic development and gaming. In the United States, the *Indian Gaming and Regulatory Act* (IGRA) of 1988 has been a veritable lightning rod. Though it is the responsibility of Congress to regulate commerce for Indigenous nations in the United States, the IGRA muddied the jurisdictional waters by requiring that casinos be created through state-tribal compacts. Indian economic development

through gaming thus requires input not only from federal and Indigenous officials, but also from state officials and the broader public (through referenda) (Steinman 2006). The subsequent use of gaming as a primary source of revenue for tribal governments has fed into the creation of the "rich Indian" stereotype . This stereotype has subsequently made it easier for subnational political actors to undermine either Indigenous economic development efforts (on the one hand) or the premise of Indigenous nationhood (on the other).

In Alaska, subnational politics have shaped outcomes in two important ways. Firstly, in the lead-up to the finalization of the ANCSA legislation, the state of Alaska had limited capacity to shape the legislative outcome. While state politicians protested the models being proposed, the economic prospects of the state also hinged on successful resolution. Because it was in the process of transitioning from a territory within the United States to fully fledged statehood, the subnational government had no claim to any of the lands until the Native claims were settled. Secondly, since ANCSA's implementation, the state of Alaska cannot undermine Indigenous economic activity as other states do. In the State of Alaska, land ownership within the state is divided as follows: 224 million acres are federal lands; 105 million acres are state lands; and 40 million acres are Native lands. However, unlike Indigenous nations in the Lower 48, Alaska Natives own their land in fee simple title as set out by the *Alaska Native Claims Settlement Act*, managed by 12 Alaska Native regional corporations and more than 200 Alaska Native community corporations. Most economic activity and resource development is governed by the same regulatory framework as all businesses in the state; however, protections have been advanced to ensure that the uniqueness of the Alaska corporation remains entrenched and long-lasting.[6]

Summary

The recognition of Indigenous goals for economic self-determination through modern land claims agreements in Alaska and Northern Canada was aided by the fact that, prior to the early 1970s, the United States and Canadian federal governments had not developed any sustained presence in the north. The combined factors of geographic remoteness and a general policy of neglect, combined with the costs and logistical difficulties associated with northern engagement meant that northern Indigenous populations experienced the federal relationship very differently than their southern counterparts. In Alaska, no treaties were ever signed between Alaska Native groups and the federal government after the government purchased the territory from (what is today) Russia. In northern Canada, the model of Native reservations, through the designation of Indigenous trust lands, was never truly implemented.

Additionally, institutional change faced fewer political barriers from subnational governments. Unlike Indigenous nations in the Lower 48 and southern regions of Canada, the Canadian and United States federal governments could drive change almost unilaterally. In Alaska, the newly formed state had little capacity to launch a coordinated effort against the legislative settlement, and otherwise faced years of economic turmoil if a deal was not inked. Similarly, in Canada, institutionalization has taken hold much more strongly in the northern territories, where the federal government held control over lands and policy decisions. Though both Alaska's and Canada's northern territories have since asserted their political authority, and today are much more engaged on

Indigenous issues, there was little opportunity for them to stand in the way of the new policy framework in the 1970s and 1980s.

Institutional Development: Variation between Northern Nations

The differences between northern versus southern Indigenous-state relationships can often mask a second dynamic: that of asymmetries that exist between Indigenous nations who are otherwise operating under the same or similar policy frameworks. These differences can be directly attributed to the temporal dynamics of policy change and the interaction between time and institutions. While both the United States and Canadian federal governments have (generally speaking) exhibited an evolving willingness to recognize the governance rights of their Indigenous nations, actual governance outcomes have been shaped by differences in the contexts in which negotiations occurred, and the relative openness of the policy framework to undertake change.

Temporal Variation in the Rights Framework: Asymmetry in Northern Canada

For Indigenous nations that have negotiated agreements under Canada's Official Policy of Negotiation, outcomes vary considerably. While some nations have implemented land claim agreements, other nations have negotiated much more comprehensive self-government agreements. Meanwhile, others continue to languish in the negotiation space, with no agreements finalized (as in the case of British Columbia). Later agreements echo earlier ones, but learning happens on both sides of the negotiation table and the federal government has played an important role in shaping the scope of what is available to Indigenous nations.

The temporal aspect of policy frameworks can be seen in the changing nature of the Official Policy itself, which has expanded and contracted over time, responding to both internal and external policy forces. Early in its implementation stage, the Official Policy faced considerable internal scrutiny over its "success" to date. Federal policymakers, in particular, grew concerned about the prolonged nature of negotiations and how few land claims had been finalized, or seemed close to finalization. By 1978, only one land claim had been settled—the *James Bay and Northern Quebec Agreement*—and one Agreement-in-Principle, with the Inuvialuit of the Northwest Territories, had been signed. Though only five years had passed, the policy itself did not appear to be a "quick fix" on the way to developing the North or repairing the relationship between Indigenous peoples and the state (GNWT 1979, 13).

In an attempt to accelerate negotiations, the federal government removed some of the language around administrative governance, narrowing the slate of negotiable rights to economic concerns only. The 1981 retrenchment of the Official Policy rolled back the provisions allowing for the creation of community and regional governments to control education, health, and some social services. In addition to conceiving more narrowly the range of negotiable rights, the new version of the policy had a strict extinguishment clause. The clause required that Indigenous peoples extinguish their future claims to land title in exchange for collective fee simple title over "selected" lands, collective fee simple title over subsurface rights, consultation in the management of Crown lands, preferential harvesting and subsistence rights, and cash compensation (Fenge and Barnaby 1987). While this policy retrenchment was relatively short lived (the

Official Policy was subsequently re-enlarged in 1986 following the inclusion of Indigenous rights in the Canadian Constitution and Charter of Rights and Freedoms), the federal government continued to privilege the economic aspects of land claims in negotiations. The relatively slow-moving negotiation process, combined with the fact that the federal government restricted the number of negotiations to only six groups at any one time, meant that few other Indigenous groups could gain access to the negotiation route until the 1990s.[7]

In response to the fact that so many Indigenous nations were kept out of the negotiation framework set out by the Official Policy, Indigenous groups pushed forward their rights through the pan-Canadian Indigenous movement that gained steam from the late 1970s through the early 1990s, specifically during Canada's constitutional negotiations. The patriated constitution of 1982 opened a window of opportunity for Indigenous activists to advance their goals on the national stage. The closed negotiation style of the first round of constitutional negotiations—the Meech Lake Accord—combined with the relative lack of attention to Indigenous issues was objectionable to Indigenous activists. The Assembly of First Nations, the Inuit Committee on National Issues, and the Native Council of Canada all roundly rejected the Accord (Peach 2011), and when the agreement was scuttled in 1990, the federal government opened the door wider to include Indigenous activists in the Charlottetown negotiations. This round of constitutional negotiations marked a major step forward in the thinking about the future of the Indigenous-state relationship in Canada. The draft accord included several new proposals for mechanisms to include Indigenous political actors within the Canadian federal system and included language addressing the inherent right to Indigenous self-government (Doerr 1997).

When the Charlottetown Accord failed in the national referendum in 1992, Indigenous leaders and federal politicians alike sought to enshrine at least some of the proposed provisions on self-government. The federal government once again turned to the Official Policy of Negotiation, expanding the potential rights and benefits that could be negotiated through those processes, in essence, "layering" Indigenous self-government on top of the existing policy framework (Thelen 2000). This policy change has since enabled Indigenous groups to negotiate self-government institutions. Several of the Indigenous groups that had not yet finalized land claims agreements in 1995 were able to switch course, and include provisions for self-government in their comprehensive negotiations. For those nations with modern land claim agreements already in force, many re-started the negotiations process for the creation of self-government institutions. However, this policy decision has only reinforced the geographic disparities in resources and governance models for Indigenous nations in Canada, supporting the development of wide-ranging self-government models for those Indigenous groups in northern and western Canada who had never signed treaties. Meanwhile, opportunities for political development have remained limited for those nations still governed by the *Indian Act*.

Temporal Variation in the Rights Framework: Asymmetry in Alaska

Temporal factors have shaped the governance and institutional outcomes of Alaska very differently from the Canadian experience. Unlike the negotiation of modern land claim agreements in Canada, which have been underway for the last 45 years, the *Alaska*

Native Claims Settlement Act finalized modern land claims simultaneously, and implemented the provisions of the act over a period of three years. ANCSA had an immediate impact on Alaska Natives. Implementation of the bill created 12 new regional and more than 200 local institutions of corporate governance to manage the disbursements of the land title and the nearly $1billion monetary settlement flowing out of the legislative settlement. But the immediate and long-term implications of the newly created institutions were not clear. As corporate institutions, these new governance bodies were economic organizations primarily responsible to their shareholders—Alaska Native *individuals* who would benefit from the ANCSA settlement. Yet, as institutions that acted on behalf of Alaska Native peoples, and managed land for *collective* benefit, the ANCSA corporations also represented newly empowered actors with both authority and legitimacy to speak on issues relevant to their communities.

Despite the relative gains in institutional and economic power, the modern treaty process in Alaska was contingent and constrained. As a tool for economic self-determination, the final ANCSA legislation did not move as far as Native advocates had hoped, and several important components were missing from the legislation. ANCSA did nothing to support or reaffirm tribal sovereignty or self-government within the state, it failed to guarantee subsistence usage or rights, and it failed to create institutions to enable the self-management of health and social security services for Natives in Alaska. Indeed, throughout the four (plus) years of legislative bargaining, Alaska Natives expected the ANCSA process would result in a sub-optimal outcome. Their access to the process was highly constrained, and they struggled to finance their participation in the process (Wright 1967). The inability of the process to address these three core issues was a fundamental failure of ANCSA. Moreover, the rigidity of the legislative tool that enacted modern land claims stymied Alaska Natives' goals of political self-determination, as there was little opportunity to return to the process to advance additional goals for greater political self-determination.

As negotiations for ANCSA came to a close, Alaska Natives recognized the limitations associated with turning back to the legislative process for future change and began to seek alternative policy mechanisms through which to advance their more comprehensive political goals. Since 1971, Alaska Natives have turned to a variety of institutional and policy mechanisms to secure their governing authority, including using the *Indian Reorganization Act* (IRA) of 1934 to form regional tribal governments and the *Alaska Non-Profit Corporation Act* and the *Indian Self-Determination Act* (PL 93–638) to create non-profit associations that could apply for federal funds and organize the delivery of services to their populations. Indigenous groups in the most northern regions of the state also used the Alaska State Constitution, consolidating Indigenous governing power through the creation of regional municipal governments (known as boroughs in Alaska, see Figure 2).

Unlike tribal governments, which restrict their membership and voting to Alaska Natives within a community or regional boundary, borough governments are public governments—political bodies open to all individuals. However, even though these governments are technically public, the demographics of the region (with largely Inupiat populations) have meant that these public governments have operated as *de facto* Indigenous governments. Inupiat leader Eben Hopson highlighted the potential of this type of *de facto* government for improving Inuit education in the north:

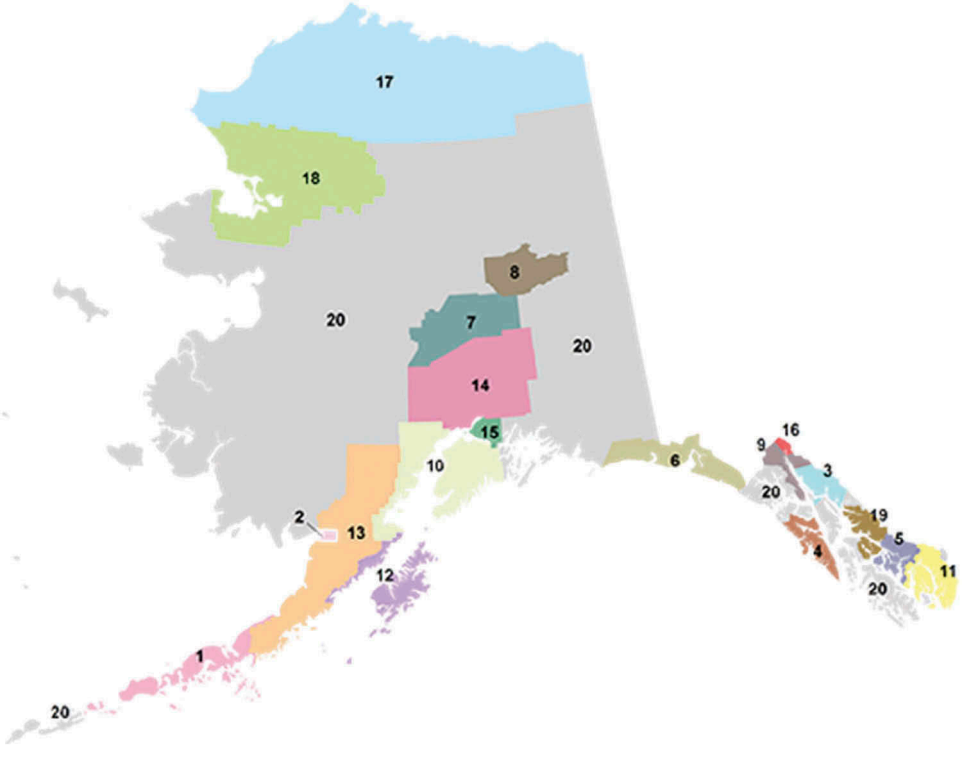

Figure 2. Borough governments in Alaska. The Northwest Arctic Borough (17) and North slope Borough (18) act as *de facto* Indigenous governments for the Inupiat in northern Alaska. In the southern and central regions of Alaska, there are 17 borough governments that are generally organized around municipalities (including the municipality of Anchorage, the city and Borough of Wrangell, etc.). By comparison, in northern Alaska, two Alaska native groups created through the *ANCSA* legislation organized large regional boroughs to correspond with the ANCSA boundaries, consolidating administrative governance authority in—what are in practice—Indigenous local governments (Government of Alaska 2018).

> We wanted the right to send *our children* to schools operated by *our own people* serving on a local school board. We wanted a high school within our own area. We wanted to give our children the finest possible education, an education good enough to equip them to improve their world, even as we were attempting to improve our world (Eben Hopson 1973). [Emphasis added]

The creation of the North Slope Borough in 1971 extended Indigenous control over a 56-million-acre region at the top of Alaska and converted the mechanism for "maximum local government" into a tool for Indigenous political empowerment in the North. The Inupiat of the Northwest Arctic (the NANA region) followed suit in the early 1980s, voting to create the Northwest Arctic Borough.

Summary

Time has had different impacts on the evolution of Indigenous governance in Alaska as compared to northern Canada. Because ANCSA was simultaneously negotiated and settled, its impact was felt almost immediately. On one hand, the agreement endowed

Indigenous political actors through regional corporations, creating economically powerful institutions that could be harnessed to advance other political goals. On the other hand, the institutional models created were narrow in scope, aimed at advancing the economic prospects of Indigenous Alaskans, and institutionally rigid (relatively incapable of expanding to fit other goals). As such, since ANCSA's implementation, Indigenous nations have pursued their political goals through several different policy mechanisms, resulting in considerable variation in both how and how much self-government has been achieved. By comparison, the temporal nature of change has had major implications for Indigenous nations in northern Canada. In particular, as the federal government updated the policy framework in response to Indigenous activism, groups that entered negotiations later in the process have been able to secure a wider set of political self-government mechanisms.

Conclusion

The Indigenous-state relationship in North America today reflects an ongoing struggle between the goals of Indigenous nations and the goals of government. Like all minority nations, the relative power of Indigenous nations within the United States and Canadian federal systems has consistently placed them at a disadvantage in the push for greater autonomy. Though Indigenous nations and activists have been very successful in moving the rights framework forward through protest, litigation, and negotiation, Indigenous nations continue to face barriers that undermine their efforts for full political and economic self-determination. Indigenous nations in North America are diverse not only in their culture, language, and history, but in their political and economic goals, and the size of the nations themselves (Alcantara 2007; Papillon 2012). This diversity, combined with a general lack of resources needed to support lengthy negotiation processes, undermines the relative power of Indigenous nations seeking greater autonomy. Even in the case of modern land claim agreements—the most recent articulation of the Indigenous-state relationship—the negotiation framework disproportionately favors the federal government.

The United States and Canadian federal governments have also tightly constrained the types of institutional outcomes available and, in order to negotiate, Indigenous nations have been expected to operate within a defined set of principles and towards the finalization of a select set of options. While the advent of modern land claims agreements was a means by which government responded to Indigenous activism focusing on their economic futures, the policy instrument is steeped in normative questions as these agreements simultaneously worked to satisfy the economic goals of the state. New research has identified the problematic nature of these agreements and, in particular, the incentives for government to engage in this type of negotiation process. Modern land claim agreements were premised on the promise of certainty over land ownership—but that certainty flowed both ways. While Indigenous nations would have clear title over their lands, so too would government have clear title—opening up the potential for resource development. Although the rigidity of the governments' position on extinguishment (in which Indigenous nations agree to give up future claims to land not titled to them) has relaxed somewhat over time in response to sustained Indigenous activism against this issue, the economic rationale that forms the foundation of these agreements shapes how they function. While on the one hand, the institutions

created through modern land claim agreements are expected to act on behalf of the Indigenous nation that governs through them, the institutions entrench western visions of economic growth, establishing governance frameworks that encourage development through extractive industries and use collective Indigenous land title as the economic base (Colt 2005; Kulchyski and Bernauer 2016). Similar concerns are being raised with other efforts to privatize Indigenous land ownership and renegotiate the relationship between the state and Indigenous peoples over land management, including the *First Nations Land Management Act* (FNLMA) and the *First Nations Property Ownership Act* (FNPOA) in Canada (Pasternak 2015).

Since the 1950s, both the United States and Canadian federal governments have opened the window ever wider for the advancement of Indigenous self-determination. Presidents and Prime Ministers have committed publicly to fostering a stronger nation-to-nation relationship and federal policies have progressively allowed tribal governments to take over the administration of programming in education and social services. In Canada, Indigenous self-determination has been recognized progressively through the willingness of the Canadian federal government to negotiate self-government agreements. Yet, despite these movements forward, Indigenous self-government, as negotiated through contemporary policy frameworks, continues to fall well short of the political goals of Indigenous nations and the full implementation of even the abridged model has been stymied by other political and institutional factors (Steinman 2004). Ultimately, the nature of the relationship between Indigenous nations and the state remains highly constrained by history and is highly contentious today. The antecedent conditions of long-embedded institutions, colonial structures of governance, and the geography of settlement in North America echo through contemporary attempts to revisit the relationship and seek common ground.

Notes

1. Some of these numbers have come under scrutiny; in particular, there was a large increase in self-reported Métis identity, up 149.2% in Quebec and up 124.3% in Atlantic Canada since the 2006 census.
2. Reforms have included (a) removing the conditions for the "enfranchisement" of Indian citizens, whereby individuals would lose their Indian status and become Canadian citizens upon receiving a university education or joining a recognized profession, (b) extending voting rights, and (c) allowing Indigenous women to retain their status if they marry non-status Canadians.
3. Since 1973, more than 1,200 specific claims have been launched against the Canadian federal government, of which 390 were settled through negotiation. As of March 2017, an additional 143 specific claims are undergoing assessment while 230 remain under active negotiation (Government of Canada 2016).
4. States with disclaimers are Wisconsin (1836), Iowa (1838), Oregon (1848), Washington (1853), Kansas (1854), North Dakota (1861), Nebraska (1854), Colorado (1861), Idaho (1863), Montana (1864), Wyoming (1868), and Oklahoma (1890).
5. The *Enabling Act* disclaimer reads: "The People and the State forever disclaim all rights to Indian land and to any land or other property (e.g., Fishing rights) held in trust by the United States. All lands and property under absolute federal jurisdiction, except when held in fee simple title" (Wilkins 1998, 35).

6. At its passage, ANCSA included a clause would have allowed Alaska Native "shareholders" to sell their shares to non-Native individuals, corporations, or governments after a 20-year period (beginning in 1992), which raised concern among Indigenous Alaskans about how to ensure that Native lands remained in Native hands. After several years of lobbying by Alaska Native leaders, amendments to ANCSA were passed in 1980, including a provision to remove the clause on stock alienation (NANA Regional Corporation 1978).
7. Of the 26 modern land claim agreements that have been finalized in Canada, only three were finalized in the first 17 years of the policy.

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