The Land of Whose Father? The Politics of Indigenous Peoples’ Claims

by

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Political Science in the Graduate School of Duke University

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ABSTRACT

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How do the weak win political victories? The dissertation answers the question of how, why and when very weak groups are able to win concessions from the strong. Specifically, the research offers an understanding of how indigenous peoples have been able to gain recognition and extension of their land rights. Through comparative case study analysis, the first section explores why the governments of Australia, Canada, New Zealand and the United States have begun to recognize and return rights to land for the same indigenous populations whose rights have been denied or ignored for centuries. The second section further tests the proposed explanations in relation to specific claims outcomes and land transfers in 17 American Indian land claims cases in the United States.

The research finds that normative changes following World War II led to new attention to the rights of minority groups. Indigenous peoples were redefined as deserving of limited rights and protections by the state. Economic, demographic, and political trends meant that indigenous peoples were no longer perceived as threats to the dominance of those in power or the population that supported them. Indigenous peoples were encouraged by the success of other minority groups in gaining recognition of their rights. A growth in cohesion among indigenous peoples (domestically and internationally) also fostered the pursuit of claims for land rights against governments. Those in power were willing to recalculate the costs and benefits of responding to indigenous peoples’ demands in consideration of international pressure, domestic normative changes, and the position of the weak indigenous claimants. These findings apply to both the extension of rights and recognition at a broad national level as well as to the outcomes of claims for the return of specific territories. Truly weak groups can win when the strong feel the normative compulsion to offer concessions and when the concessions are considered affordable.
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1. Introduction

1.1 Why, How and When Can the Weak Win?

Politics is often reduced to the simple question of who has control over resources and power. Unsurprisingly, the winners are often those previously endowed with certain advantages, such as greater economic resources, experience, or control over decision-making processes. Once in control, those with power or benefits strive to maintain their position and exclude others by allowing change only when it is expected to serve their interests (Knight 1992; North 1990). What remains difficult to understand, however, are victories by groups that do not have these advantages.

According to many conceptions of how politics work, the weak should never win out against the powerful. If they do, it is because some allocation of power has changed: their numbers have grown; they have taken advantage of some unforeseen resources, or gained a powerful ally. Essentially, in these cases the weak win because they are no longer politically, socially, or economically weak. What needs to be better understood, however, are instances where groups that remain weak and unable to threaten dominant powers are able to gain victories in their favor.

This work seeks to determine how very small, resource-poor groups, particularly those which have specialized goals and interests, can extract change in their favor. This is even more perplexing when examining the gains of small minority groups that have been intentionally excluded from social, economic, and political institutions, often over long periods of time, under the same political structures that the groups are now seeking victories in. Further, the rights, property, or power claimed may be at the expense of the majority population. Why do decision-makers allow these changes? It is a perplexing situation, and yet it appears that such unexpected outcomes do occur. A prime example is in the increasing recognition of indigenous rights.¹

¹ This work relies on James S. Anaya’s well-accepted definition of indigenousness. The term indigenous: … refers broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of
After centuries of exclusion, discrimination and dispossession, many governments around the world are now acknowledging and even returning the rights and property of very small, ostensibly weak indigenous peoples. International attention has culminated in the passage of the United Nations’ Declaration on the Rights of Indigenous Peoples, passed in September 2007. In several countries, indigenous peoples are winning territorial autonomy and reclaiming rights to sovereignty that have been ignored for generations or were never previously recognized. Moreover, they are doing so within the confines of the same political and social systems that historically deprived them of these precise rights. In democracies, they are winning victories from governments supported by a majority population that must, therefore, be tolerating the redistribution. At the same time, it is important to note that these victories can often be inconsistent. In Canada, for example, some indigenous peoples have been able to negotiate valuable agreements with the government while others, falling within the same framework and timeframe, fail to reach an agreement and regain no rights or resources (Alcantara 2007a). A viable explanation for the victories of the weak must also include an explanation for divergent outcomes despite similar contexts.

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empire and conquest…. They are indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past (Anaya 2004, 3).

Anaya, along with the United Nations and many other activist organizations, scholars, and indigenous nations, emphasizes the use of the plural “peoples” rather than “people” in discussing indigenous groups. This signifies the distinct sovereign political, historical and cultural attributes that individual indigenous nations each have. This distinction remains important to indigenous peoples around the world who argue that each separate group deserves attention and respect in its own right (Neizen 2003). This work follows this distinction and maintains the plural when discussing a broader indigenous community. The case studies of countries that follow in Chapters 3 and 4 will address the particular issues of naming that occur within each country.

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2 Sovereignty in the western use of the concept denotes “absolute political authority over populations within its borders.” This may be an inadequate definition for indigenous peoples, for whom nationhood is a more consensual and communal notion. For this reason, some scholars refer to this power as nationhood (Corntassel and Witmer 2008, xvi). This work generally uses the term sovereignty, as understood by western populations and governments, because it is evaluating the extension of power by these groups.
A logically complete explanation of such victories of the weak should include the following elements: a causal mechanism or motivating force to explain why the elite have granted concessions to the weak at all; an historical device to explain why claims for rights and/or resources that were ignored (and in some cases willfully trampled upon) for decades now gain attention and serious consideration; an account of the facilitating conditions causing the general public to permit redistribution of valuable resources away from themselves; and a differentiating device to explain why some concessions were granted and others were not.  

This dissertation attempts such an explanation and is divided into two stages. The first stage uses a cross-nation comparison to explain the transformation from government oppression of the weak to the acknowledgement of their rights and even transfer of materially significant concessions. It focuses on the restoration of rights to indigenous groups in stable electoral democracies that were former British colonies (Australia, Canada, New Zealand, and the United States) to hold many legal and political factors constant. This facilitates an explanation not only of the progression toward recognizing rights, but also the variation in the substantive form of concessions chosen. Further, the progression of change in indigenous policies in these countries occurs over a roughly similar timeframe. A portion of the comparative work seeks to answer the question of timing and why these events might be occurring in tandem. 

The second segment of the work examines the outcomes of specific claims and claimant groups in greater detail to determine why some indigenous peoples within the same country win more than others, and why and when the majority population tolerates transfers of rights and resources to the weak. To provide the greater detail needed, and to continue with the context introduced in the first stage, the second portion of the study focuses on the United States and 

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3 This work relies heavily on the terms “claim” and “settlement.” Claim is used to refer to demands made against the government. A claim could be made by any member or group of society to a particular right, opportunity, object, or resources. As will be seen, the concept of claims used here often refers to the claims that indigenous peoples make for sovereign rights to property. The term settlement refers to what has been transferred in the resolution of the claim. Settlement refers to a positive outcome for the claimants, which in this case means the transfer of land. A claim that has ended without any award to the claimants is generally termed “failed” or “denied.”
outcomes in American Indian land claims and settlements. While the research narrows its scope in order to develop and test specific explanations, the potential applications remain broad. All aspects of the work strive to provide answers to the original motivating questions: Why, when, and how do the weak win?

1.2 Why Do Elites Consider Claims of the Weak?

The first question to address is why elites consider the claims of small, politically weak and historically excluded groups, much less extend rights and resources to the weak. After all, these countries have spent much of their histories seeking to terminate or ignore the rights of indigenous peoples to their property, culture, or independence. What prompts such a dramatic turn in policy? Why are the changes in favor of the weak happening at that particular time? Why is the dominant population supporting elites (or at least not punishing them) for changing the status quo? The answer should illuminate not only present motivations, but also the historical context of how this shift in policy and acknowledgement happened. There are several main groups of hypotheses that are plausible explanations for why the strong might feel disposed to recognize some rights and consider the return of resources to the weak. This section introduces some of the key possibilities for understanding the motivations of the powerful in recognizing the weak.

First, norms about the treatment of the weak group may have changed. Normative change on an international scale may put pressure on countries to act in accordance with newly espoused ideals. Domestically, the majority population may have gone through some sort of normative change in core values or beliefs. This might involve a new perception of the weak group(s) in question, shifts in attitudes toward minorities in general, or normative pressure from another source to change treatment of the group. Perhaps the passage of time has simply altered the majority populations’ attitude toward the weak group, even to the point off feeling sympathy or guilt for past treatment or current disadvantage.
To establish normative change at a popular, international, or elite level as the cause of new or renewed attention to weak groups there must be some evidence. This both difficult and complex; public statements and documents are rarely fully forthcoming although they are often the primary source of understanding the reasoning of elites. Public statements of Prime Minister Paul Keating that express regret over Australia’s past treatment of the indigenous population, for example, highlight his belief in the responsibility of whites in past injustices. These statements show a normative trend and part of the logic behind policy reforms, but there are likely to be other factors involved. If normative change is truly the driving force in change there may be an absence in the other posited factors.

A second area for explanations lies in the practical motivations behind policy changes and consideration of transfers. The assumption of a group’s weakness may be incorrect; the “weak” may possess some hidden strengths that are only now materializing. The weak group may gain strength through newfound cohesion or mobilization or have connected with new and powerful allies with similar interests. If the group in question is able to pressure the government electorally or economically where they did not exert force before, decision makers may take into account these new dynamics of power and grant concessions to the formerly weak group. Evidence for this would lie in the changing circumstances of the weak, such as the discovery and exploitation of new mineral wealth. To put it bluntly, the weak may be weak no longer.

Another practical possibility is that the rights or resources being sought are no longer considered valuable. The rights being offered may be to resource systems that are fully exploited or damaged so badly that they are now of very little of value. The majority population may now be wealthy enough to no longer “need” all that has been taken from the group in question and be willing to offer what are seen as token concessions. Some rights may be so widely granted among the population that it no longer makes sense to deny them to a small part of the population. The government or majority population may realize that they do not need to possess a resource outright to benefit from it, or that it is even expensive to maintain. As an example of a “practical” transfer, a
former nuclear submarine site was transferred to the Mohegan Indians of Connecticut in 1994 with the support of town, state, and federal officials concerned about the costs of cleaning the site up with public funds. Of course, even if the right or good in question is very low in value it remains to be understood why elites have decided that it is now time for recognition.

Thirdly, the restoration of rights to the weak may be an unintended spillover benefit resulting from uniform application of policies that were ostensibly created to improve the treatment of other, larger minorities. These larger groups, even if minorities, may have advantages that the weak group does not have, such as power in numbers or the possibility of creating severe economic disruption. In this line of argument, extending benefits to very weak groups is simply a side effect of the success of other groups, perhaps in the interest of policy uniformity. In other words, the change is an unintended consequence of another action. For example, the United States Voting Rights Act, which was created with primary consideration for African-Americans, has been used to support specific rights for other minorities such as American Indians and Hispanics.

In a related possibility, institutional openings may come out of miscalculations on the part of elites. An institutional change, intended for other purposes, may have backfired to allow the weak the opportunity to press for their goals or gain additional leverage. It is also possible that the strength, numbers, or tenacity of the group in question may have been misjudged by those in power. Legislators in the United States created the Indian Claims Commission in 1946, expecting a quick resolution to all possible American Indian land claims within a five to ten year span. Instead, the Commission was inundated with claims, extended four times until 1978, and still unable to resolve all of the claims. Its creators clearly miscalculated the huge number of claims that would be filed, the extensive time it would take to research, hear and resolve claims, and the way that those excluded (or unsatisfied) would react.
1.3 Putting “Weak” in Context: The Case of Indigenous Peoples

The recent recognition of rights and transfers of resources to indigenous groups offer an excellent opportunity to develop and analyze these potential explanations for the victories of the weak. For several reasons, this represents a remarkably difficult case to explain. Around the world indigenous peoples have been oppressed, disposessed, and frequently excluded from the rights of the rest of citizens. Many commonly invoked definitions of indigenous identity actually require this, including such language as “conquered” or “non-dominant” to define the population (Coates 2004). The effects of disease, violence, assimilation, and cultural eradication programs have often reduced the numbers of indigenous groups to tiny fractions of the national population, significantly reducing their political and economic power.

In many cases, the foundation of the modern state and its claim to territory is based on the denial of the property rights and legitimacy of indigenous institutions. In Australia, for example, the acquisition of the continent by the British was supported by the political and legal concept of the land as uninhabited prior to British arrival (labeled terra nullius). The assertion of Aboriginal land rights that demand the return of land requires an acknowledgement that the government and its control over territory are based on the false premise of terra nullius. Many countries continue to deny the rights of indigenous peoples for decades, if not centuries, after any realistic threat that they offer has been diminished by dispossession, assimilation, and population decline.

In fact, many countries (whether formally or informally) have expended great efforts to eradicate their indigenous populations. Violent conflicts have erupted across the globe between indigenous peoples and the conquering military forces or populations, even today. In Brazil, expansions into the remote rainforests continue to cause deadly conflicts between miners, developers, farmers, and indigenous peoples. Assimilation programs designed to eradicate the cultural and political life of indigenous peoples have been as varied as removing children from their homes, forcing them into boarding schools which forbid native tongues or dress, and banishing tribally held property in exchange for individual apportionment of land for (European style) farming.
In short, governments have not been passive in their treatment of indigenous peoples, but have invested a great deal of energy not only in denying their rights but in attempting to eradicate the population entirely. To admit that this was a mistake by returning rights or resources goes against this history and challenges the basis by which the majority initially acquired its dominance.

Another reason that indigenous peoples are surprising victors lies in the barriers to collective action as a group or in conjunction with other minority interests. The concerns and goals of indigenous groups are often quite different from the interests of other ethnic and racial minorities because of their special historic and political backgrounds. Not only are indigenous peoples often asking for very different rights than those sought by other minority groups, but indigenous peoples themselves also represent a diverse range of peoples that may not share the same interests or have capabilities to work together. Most ethnic, racial, cultural or religious minority groups seek equality and inclusion; indigenous groups, arguing that they never sought to become part of the surrounding nation, ask for self-government and a degree of exclusion from the general population.

In many countries, as will be discussed later, the myriad indigenous peoples are comprised of a number of very distinct populations with their own unique histories, cultures, governments, and goals. In the United States, for example, there are currently 562 federally recognized American Indian tribes, each acknowledged as an independent entity. In India there are 461 indigenous tribes listed on the census, although in both countries there are many more groups asserting their identity without the benefit of formal recognition. Each of these hundreds of groups has a distinct history, culture, political identity, and in many cases a unique native language. Another concern for pan-indigenous based collective action is that the populations of indigenous peoples are generally extremely small and often disbursed to more remote areas, making connections between groups

\[^4\] For a current list of federally recognized American Indian tribes in the United States see the Bureau of Indian Affairs website at www.doi.gov/bia/. For a list of formally recognized indigenous tribes (known as scheduled tribes) in India see the Census website at www.censusindia.gov.in.
harder to make and maintain. These unique characteristics of indigenous peoples have reduced their capabilities of engaging in collective action together or with other minority groups for similar causes.

Despite this disadvantaged status, the past 40 years have seen a surge in the formal recognition of indigenous rights and property. This change has happened although indigenous groups tend to remain economically, politically, and socially weak, and commonly as very small minorities. Further, in instances where claims are not just acknowledged, but compensated, there are often transfers of rights, funds, or property that are redistributed from the dominant population and removed from other use. These cannot be categorized simply as hollow victories- they are real and sometimes quite valuable. In addition, the timing itself is of interest- what has happened to bring about global change in the same timeframe? The research therefore considers not only why renewed attention to indigenous rights has occurred, but also why in so many places and at the same time.

The natural universe of available cases consists of countries whose population of colonial or conquering populations expanded their numbers and presence in territory once inhabited and used by indigenous peoples and later adopted policies of cultural oppression against the indigenous population. In some cases these indigenous groups were exterminated, in others assimilated, and in other cases (of interest for this research) they managed to survive and maintain their individual group identity, community, and culture in distinction from the majority population and are now making claims against that population or government.5 Those that have survived are now challenging the dominant population and ruling political structure and its treatment of them in places around the world, from Indonesia to Norway to Botswana. Governments in some of these countries are now retreating from their earlier oppressive policies with at least limited extension of rights, and in some cases, restoration and recompense for abrogated rights. Policy makers have chosen very different

5 In the United States, a frequent example given of a group that has disappeared entirely is the Yahi tribe of present day California, whose last known member (known as Ishi) died in 1916 (Scheper-Hughes 2001). Policies of economic, cultural and political oppression and assimilation have resulted in many indigenous peoples losing precious components of their history, including languages, religious rites, or ceremonial knowledge. As pressure to survive drives people to urban migration, many groups are retaining identifying names but maintain little if any cultural or political distinctness. The Cuyonin in the Philippines are an example of a group that is almost totally assimilated into the dominant population (www.iwgia.org).
methods of restoring rights to indigenous peoples by honoring old treaties, paying monetary compensation, granting group rights to resources or streams of income from resources, granting political autonomy to native governments and territories, and/or creating affirmative action or even quota policies for individuals from the aggrieved groups.

As mentioned above, the research controls for variations in legal and political form by focusing on the phenomenon of increased recognition of indigenous peoples’ rights in countries that share a similar English common law tradition and colonial background. The countries also share the characteristic of being established democracies with a reliance on the rule of law. Australia, Canada, New Zealand, and the United States face roughly similar challenges in terms of the dominant population, indigenous demands, and political incentives and constraints for lawmakers. At the same time, there is enough variation in terms of demographic and geographic details as well as the organization and success of their efforts to be useful in determining potential causes. It is significant to note that in an increasingly connected world, the tactics of indigenous peoples (or the responding government) in one country or group of countries may serve as a model to other countries around the world. Understanding the trajectory of indigenous rights in these four countries, therefore, is likely to shed light on the events in others following their example.

1.4 Why and When Would Elites Offer Rights or Property to the Weak?

Many claims against governments seek an admission of wrongdoing by specific groups. Groups of Korean comfort women (taken into a form of sexual slavery by Japanese armies during World War II), Japanese-American citizens interned during World War II, and indigenous individuals taken from their families and forced into boarding schools in Canada and Australia have all sought public apologies by the governments responsible for these actions. Often these groups do not seek any form of compensation, but still find that even a formal acknowledgement of wrongdoing is incredibly difficult to get from those in power (Nobles 2008, Weiner 2005). When apologies are offered, such as the February 2008 apology from the Australian government for forcibly removing
aboriginal children of mixed descent from their homes, the statements often specifically renounce the possibility of compensation for victims (Welch 2008). Despite these preferences of governments against redistribution, some recent land claims cases have resulted in sizable transfers of property as well as financial compensation.

The second segment of the research narrows in on why, after elites acknowledge the claims of weak groups, there are sometimes transfers of special rights or resources. It asks why lawmakers move beyond politically difficult apologies or even token concessions to offer potentially valuable rights, resources or property to weak groups. Further, the work explores why and when the public permits such transfers. It also considers the real changes in property and rights after the settlements, and whether the awards are really as valuable as they appear. As in the previous section, there are multiple possible answers to explain the chain of events leading to potential settlements as well as the divergent outcomes of claims. These potential explanations are related to the causal processes sketched above, which are fleshed out in the following chapter. The brief development of hypotheses here outlines the potential causes of transfers and different outcomes.

Once again, a prime area for potential explanations involves the practical incentives associated with the claim and claimant group. In the case of claims over property and resources, decision makers are likely to have an easier time transferring settlements that have a relatively low value. There may be potentially little demand for the property from the non-indigenous population, or perhaps even popular support to have the property in question taken out of public or private hands and into indigenous custody. The government may be holding extraneous property or resources, making it easier to cede portions to the claimant group without compromising government dominance or the support of the majority. Characteristics of the claimant group are also likely to have practical implications for the outcomes of their claims. Alliances with outside, stronger groups will strengthen the case of the weak group. Even on its own, however, a group that is able to present a coherent, united front with clear and consistent demands will be more likely to be taken seriously, maintain their claims against the state, and reach some degree of success.
There may be practical political costs (or benefits) of negotiations for decision makers as well. If there is strong pressure or support for the transfer from the dominant population, it is politically sensible for decision makers to act accordingly (although we would then need to determine the reasons behind this support). In addition, in situations where the weak claimant group in question is geographically concentrated and has enough electoral strength to be decisive in very specific votes (such as in an United States Congressional district), those lawmakers affected are likely to support the transfers, particularly if it transfers do not appear likely to drive the politicians’ dominant population supporters away. Of course, this explanation forces the consideration of how one or a few decision makers might sway many others with little investment in the issue.

Another possibility is that the economic strength of a group and its ability to be a substantial force in campaigns may play a role in outcomes. Elected officials are also subject to the demands and promises of the political parties that have helped elect them. If a larger party has associated itself with the claimant group in question or the extension of minority group rights more broadly, there may be an incentive for lawmakers to follow the party decree and platform. Identifying the reasons for this association would also be necessary.

The support or denial of the claims of the weak may be driven by normative considerations. A normative trend towards respect for minority groups and civil rights may include a new attention to the needs of indigenous peoples. There may also be a spillover effect— even when policy makers are not specifically concerned with indigenous peoples, changes made or support for other groups may trigger or encompass changes for the indigenous population too. More targeted normative beliefs can also be influential. Elite or public beliefs about a particular group, its deservingness, and its association with what is being claimed can also influence transfers of rights, property, or resources. If normative beliefs have changed to tacit (or open) support for providing redress for past wrongs, decision makers may have strong incentives to provide transfers to the weak groups. The specific boundaries and designations of social groups are important, as some may be seen by the dominant population as more deserving than others.
The way that both the society and government respond will be influenced by what the claimant group is asking for. As introduced above, claimants may be seeking rights equal to the majority population, an apology for past wrongs, financial compensation, transfers of territory or resources from the national government, regional government, or other property owners, or even separation or political autonomy. Some demands are much easier for the government to meet, while others may threaten, anger, or be seen as depriving the majority population. The context of demands will likely interact with the way that the dominant population and the policy makers that they elect see the claimant group; a minority population seen as peaceful, friendly and deserving of assistance might get a very different reaction to its claim for an apology or compensation than if it was commonly viewed as dangerous and militant. These components are therefore likely to be important in understanding the specific outcomes of claims and explain why the government is willing to resolve some claims but not others.

The interest in evaluating substantive outcomes pushes the research towards claims that can be realistically compared. The work will focus on claims targeted at land transfers (as opposed to other rights or resources) for several reasons. First, with variations in many of the other characteristics of claims and claimant groups, a single goal is needed as a control. Indigenous peoples have struggled and continue to fight for various rights, including fishing, hunting, water, and other resource and access rights. Valuable- and often controversial- settlements have occurred in all of these areas. Many rights, however, remain very parochial or regional in nature. A coastal indigenous group may be focused on fishing access and have very little interest in gaining hunting rights, while a group on the northern tundra may be far more concerned with subsurface mineral rights than traditional hunter-gatherers of the rainforest.

Despite this variation, land rights remain central to the history, culture, and present day economic issues of indigenous peoples (and many others) around the world. Further, while land is a focal point of indigenous peoples, it is also a nearly universal concern of the non-indigenous, making it a salient and contested transfer wherever it is raised. Claims to land can be compared against other
claims to land. While it is certainly easier to compare land transfers within a country, it is also possible to provide an evaluation of value, size, or success that work across national lines. Because land is such a controversial demand and difficult concession to make, this focus also ensures that the object of study is not something easy to give away. The research is well situated to understand why the powerful would give valuable concessions to the weak.

The conclusions derived from the first portion of the research and changing recognition of indigenous claims aid in the evaluation of the explanations of claim outcomes. The comparative segment offers a brief look at how individual nations have changed policy toward land claims in the context of broader policy toward indigenous populations’ rights. It begins to answer the question of why and when elites acknowledge the existence of the rights of the very weak. The comparative section also addresses the specific changes in policy toward land claims and transfers. This overview allows an assessment of the range of approaches that governments have taken and a comparison of the real changes in terms of property and rights that indigenous groups have won.

The second section turns to a more detailed dissection of the potential explanations for redistributing valuable resources to weak groups. It also identifies differentiating devices that explain why some claims would be settled and others are not. While there may be national policies for the hearing or evaluation of indigenous peoples' claims, each petition or suit is settled individually. Outcomes are dependent on the specifics of each case. In three of the cases (Australia, Canada, and New Zealand) there are administrative bodies in place to help evaluate claims. In the United States, there is no such structure. The settlement of claims has been left to elected officials who are largely responsive to the dominant population. This presents an opportunity to explore the political incentives that lead officials to settle some claims in favor of the weak while denying others.

To do this, the research focuses on land claims cases in the United States over the past 40 years. Even with early (although often inconsistent) recognition and an ongoing string of claims against the federal and state governments for centuries, transfers of land back to indigenous peoples in the United States have generally remained out of consideration since the expansion of the country
was completed. After many varied and unsuccessful attempts to deal with indigenous concerns (as well as the unease of the dominant population) over tribal titles to land, the federal government created the Indian Claims Commission to settle and extinguish any remaining claims to land with monetary compensation from the 1940s to the 1970s.

Several American Indian tribes did not accept this process or financial compensation, and a number of claims that defied the requirements of this body arose during and after its tenure and during the late 1960s and 1970s. Against all earlier indications, several of these claims for land have resulted in settlements that transferred property to the indigenous group, sometimes in large amounts. Many of these claims arose at nearly the same time in the same country, providing a control over most historical and cultural parameters of the majority population (although, as mentioned, tribal characteristics and characterizations might vary). Most have also followed similar paths through litigation and legislation. The characteristics of the claimant tribes and their demands have varied, along with their final outcomes. Some tribes won a settlement including much of the land that they had claimed; others have won support and made it to negotiations but not reached any settlement; and still others have been denied redress. These variations allow the research to evaluate the specific factors that lead to the success or failure of the specific claims of the weak.

The political victories of weak groups are difficult to explain. For indigenous peoples, who represent some of the most institutionally disadvantaged populations around the globe, recent gains in rights and even resources are major accomplishments. These outcomes also represent what appear to be surprising wins- why would politicians and dominant populations offer these concessions after generations of denying the very same rights and resources?

The research presented here makes several contributions to Political Science as well as to the more specific body of literature on indigenous peoples. In terms of broad understandings of politics and power, it furthers an understanding of how and when weak groups can gain any recognition in political environments that have historically ignored or purposefully disempowered them. The work also illuminates the conditions under which weak groups may be able to exact very specific- and
sometimes valuable concessions from the government. The research also provides significant findings for advancing the literature on indigenous politics. The analysis identifies explanations for the state recognition and expansion of indigenous peoples’ rights. And finally, the research identifies the factors involved in the different outcomes in American Indian claims through the development of a systematic comparison. Ultimately, this work identifies the conditions under which the weak can win.
2. Explaining Victories of the Weak

We started with a puzzle: why, when and how do the weak win? The previous chapter introduced a basic framework for answering these questions. This chapter offers a more detailed exploration of these ideas and identifies those that are the most promising for generating relevant hypotheses about the victories of indigenous peoples. To do this, it delves into an array of potential explanations. In conjunction with political science, concepts and theories from disciplines such as law, sociology, anthropology and more are incorporated to explore how the weak might obtain victories against the powerful.

2.1 Who are the Weak (and What Do They Want)?

There are several kinds of politically weak groups. Any minority group that is racially, ethnically, culturally, religiously, or linguistically distinct from the majority population may be subject to discrimination based on these differences. There is a spectrum in term of minority group size and strength. In the United States, American Indians are an extremely small minority group, with less than two percent of the total population, while African Americans represent a much larger national minority of about 13 percent (although still far smaller than the dominant white population). In some areas minority populations are concentrated, which gives them some strength in that particular region or area. Hispanics make up almost 45 percent of the population in New Mexico, for example, while they are about 15 percent of the national population.

Minority groups may also be subject to intentional exclusion and discrimination, without equal (or any) representation in social, economic, or political sectors. The history of racial segregation in the United States in policies ranging from education to transportation is an example. In some cases, discrimination has kept minority groups from gaining full rights to citizenship or access to certain resources or opportunities. For example, even with formal federal enfranchisement African Americans were kept from political participation for decades through discriminatory laws and practices at the state level. There may also be more short term distinctions and inequality. The
group may be more recently arrived than others and less incorporated in the mainstream rights of citizenship, such as the Irish or Italians in the late 19th and early 20th centuries in the United States or Turks in contemporary Germany.

Any of these weak groups may have multiple goals- assimilation into the majority population with full and equal rights, incorporation as citizens while maintaining cultural and/or linguistic distinction, or recognition of a distinct status with specific group status and autonomy. To attain these goals, members of minority groups seek a variety of rights from the state, including equal access to services, public goods, or civil rights (such as valid participation in elections). Some claims are for formal recognition of past injustice through an apology or public statement. Others involve compensation as part of (or as proxy for) this formal apology. As part of a defined social or cultural group, individuals may also seek specialized rights not available to outsiders. These group based rights include affirmative action or quota type programs, in which a designated group is guaranteed a specific amount of representation in employment, educational facilities, or governmental bodies. Such goals tend to be for the purpose of gaining equality of opportunity and access and full assimilation into the dominant society.

Even within this diverse group and range of goals, indigenous peoples stand out. Their specific demands relate to their unique status and history. For indigenous peoples, who were often inadvertently incorporated by governments created by migrant populations, the goal is not for equality or inclusion but instead the restoration of their sovereignty and distinct political, economic, and cultural identity. Sovereignty, while difficult to define, can be equated with the idea of “nationhood” or “self-government.” Corntassel and Witmer (2008, xvi) define a nation’s sovereignty as “absolute political authority over populations within its borders.” Indigenous sovereignty is inherent, meaning it pre-exists any settling or conquering population’s government, was never ceded or abrogated, and is equal to the authority of modern states (Corntassel and Witmer 2008; Wilkins and Lomawaima 2001, 5). The early treaties between indigenous peoples and colonizing states are
cited as evidence of this status; a treaty establishes an agreement between equals (Wilkins and Lomawaima 2001, 40).

This relationship of equal nations quickly proved illusory in most cases. Settler populations, bolstered by military strength, increasing numbers, and a philosophy known as the “doctrine of discovery” were quick to disregard the promises of treaties. The doctrine of discovery, originating in the 15th century, held that “if a European country encountered a territory occupied by indigenous people, the original title of land rightfully belonged to the newly arriving, ‘civilized’ European settlers by way of ‘discovery’.” (Corntassel and Witmer 2008, 8). The doctrine of discovery argues that because native populations were non-Christian, or “heathen,” their rights to territory could be taken over by the righteous and more enlightened European states. As will be seen in the comparative section of the research, varying countries have had different specific relationships with indigenous peoples, but the underlying doctrine in support of European legitimacy and authority remained the same.

The conquering or colonizing power assumed sovereignty, with indigenous groups either pushed toward limited and eventually severely restricted self-government or denied their rights to nationhood entirely, regardless of earlier agreements. Because of this history, indigenous groups tend to have a very particular relationship with (and claims against) both governments and dominant populations. While indigenous peoples do demand equal social, political and economic rights and freedoms as individuals, the goals of their claims as indigenous peoples have been self-government and sovereignty, which they view as unbroken from the time prior to European settlement (and often affirmed by treaties).

Other minority groups seek equal status with the majority population. To indigenous peoples, all of these groups are in some way “invaders.” Indigenous peoples seek to resist the invasion of their territory, culture, sovereignty, and autonomy by all other groups, regardless of their segmentation into minority or majority populations. As Wilkins notes of American Indians:
...the general thrust of most racial and ethnic groups and their members has been to seek inclusion... by contrast, the general thrust of most indigenous nations and their citizens has been to retain their political and cultural exclusion from absorption or incorporation in the American polity (Wilkins 2002, 201).

This distinction is echoed around the world as one compares the demands of immigrant or other types of minority populations seeking equality to those of indigenous populations seeking sovereignty and distinction.

A key part of this demand for sovereignty is the restoration of land and both natural and financial resources in order to be politically and economically distinct and self sufficient. While many indigenous peoples seek moral recognition in the form of apologies or formal statements, many are also actively working toward more tangible transfers with a range of possible goals. Demands may be for a one-time payment of money as compensation for historical wrongs, such as inadequate payment for land or resources. Another type of demand may be for an ongoing commitment of funds, such as an annual payment into perpetuity or for a specified amount of time. Claims to resources or property include the expansion of access or use of the resource (without restriction to others); claims that restrict the rights of non-indigenous to the site or resource; or full transfer of ownership. Any of these might involve resources or property that have been under government control or ownership or that have been in the hands of private citizens or businesses.¹

The rights that indigenous peoples seek occupy a spectrum that can also be described as a range of goods from pure public goods to excludable private goods. For example, civil rights (such as the right to vote) are often intangible and non-rival public goods. If a minority group receives full civil liberties, it does not alter the civil liberties enjoyed by the dominant population. Awarding the right to self government for a specific group does not impair the rights of those outside of it to participate in their previously enjoyed rights. However, even if the dominant population’s access to

¹ While land and resource rights are something that many indigenous peoples are concerned with, these claims are by no means limited to these specific groups. Consider territorial disputes in the horn of Africa or in Palestine, for example, or disagreements over water maintenance and use in rivers that flow across multiple countries.
the public goods are not altered, there may still be animosity or dissatisfaction if part of the enjoyment of these rights or goods rests in their exclusivity.

Minority group claims to privately owned or controlled tangible goods or to depletable resources are far more difficult for the dominant population and government to respond to. The dominant population may contest the extension of rights to the weak if it involves access to something that is not shared. By far the most difficult award would be the transfer of private resources, such as individually owned land, to the claimant group. In this case, the former owner’s right to a good is being diminished (or eradicated) by transferring it to another owner. As opposed to the public goods described above, where rights can conceivably be expanded without taking any existing rights away (so a sort of win-win), the transfer of private goods as described in this paragraph can be quite easily seen as creating a class of losers who will not want the change to happen.

To add to the complexity, particularly in the cases of territorial or resource rights, what is being sought is not only a transfer or redistribution of rights, but often a fundamental change in property rights. A transfer to indigenous control often includes a transfer into an entirely different property arrangement. For example, in many cases land can no longer be owned by private individuals but is collectively owned and controlled. To borrow the classic definition from Demsetz:

Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of society (Demsetz 1967, 347).

What happens when property rights are transferred from the state or its private citizens to indigenous authority involves a dramatic change that may challenge the “laws, customs, and mores” of the

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2 An example of this comes out of the controversy in Washington State over the Makah Nation’s rights to whaling. The Makah were guaranteed the right to hunt gray whales in an 1855 treaty with the United States. The group voluntarily stopped their hunting in the 1920s because of the massive population decline of the whales. In 1937 the federal government banned all gray whale hunting, although this did not technically apply to the Makah’s sovereign and guaranteed rights. The whale population recovered. In 1999 (with the support of both the federal government and the International Whaling Commission), the Makah chose to reopen the hunt. There were loud protests from three main groups: opponents of whaling generally, opponents of the manner of the hunt (with steel harpoons and rifles) and opponents of the distinct sovereign rights of the Makah (and American Indians) (Wilkins 2007, 1-3).
This redistributive arrangement takes property rights away from one group of citizens (non-indigenous) and grants them to another (indigenous), who have very different customs and laws regarding ownership and may be exempt from additional regulation by the state. Further, in many cases the transfer to indigenous control cannot be revoked— the transfer may appear as permanent as an exchange between two sovereign powers. These two powers may have very different— even irreconcilable— views of property rights and ownership (Fleras 1999). So in the win-lose (indigenous- previous owner) scenario described above, the category of losers may include all of those who believe that their potential rights to own property under the dominant framework are being threatened.

Indigenous peoples’ goals are different from and potentially far more difficult to settle than those of many other minority groups. They have fewer natural allies, fewer overlaps with the goals of other groups, and often more contentious aims. Indigenous claims to property, resources, and autonomy are extremely difficult for political elites to settle because of the challenge to the governing system’s authority and the rights of the dominant population. In short, in the bigger category of victories of the weak, the victories of indigenous peoples are among those hardest to explain.

This chapter is organized according to a loose categorization of potential explanations for how the weak can win. The discussion is generally kept to the broad category of the weak, although it often points to the specific case of indigenous peoples and/or land claims. We first look at “demand side” explanations, or those that address characteristics of the weak group and the channels that they can use in making demands. Next, we turn to “supply side” explanations that treat the motivations or characteristics of the political elite or dominant population. This discussion also incorporates questions of timing, and why those in power might be willing to consider claims that it

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3 As I will discuss later in the research, however, the overseeing state often refuses to grant property rights in land or resources outright. More often, the state retains some form of residual control or oversight that diminishes the full rights of the indigenous group to the good in question as well as their capacity as true sovereign entities. The property is then caught somewhere in between the two different systems of property rights, without being fully in either one. The reluctance of governments to fully transfer property rights indicates the inherent difficulty in getting a state to fully recognize the sovereign powers of indigenous peoples who reside within their borders.
had previously denied or ignored. The explanations in this section are grouped along a spectrum of practical to normative motivations. While the distinctions between these two can sometimes become blurred, there is an attempt to keep them artificially distinct for the purposes of the chapter. A final section introduces a group of other potential explanations such as miscalculations of elites and spillover effects from other policy arenas. As we will see, there are some explanations that appear in several categories from different perspectives. This provides multiple avenues for seeking evidence of their influence in outcomes.

2.2 Demand side: Characteristics and Tactics of the Weak

Demand side explanations focus on characteristics of the claimant group that challenge the accuracy of their weak designation and/or identify how their position may have been altered. This section also includes tactics and channels that the weak group can use to get leverage in a political system that has persisted in ignoring their rights. Generally, these potential explanations fall under what has been described in the introductory chapter as “practical.” In other words, they deal with the weak group being able to provide commonly understood political or economic incentives for government decision makers to consider and potentially answer their claims. For normative change to be effective in increasing the rights of an indigenous group, it must take place within the dominant population or political elites themselves. Internal normative change among the weak group may be important in explaining mobilization, for example, but it provides no instrumental leverage in making demands for the extension of previously denied rights or resources.

2.2.1 Characteristics of the “Weak”

The first set of possible answers for why the weak mobilize to demand rights and resources involves a change in the characteristics that designate the group as weak. If specific changes mean that the group is not as powerless or disadvantaged as it has appeared (or has been perceived) it may be more willing and able to pursue its goals. Group mobilization can be an important tool for seeking change. If a group can coalesce around a given identity or issue and exert its combined
strength in the form of political or economic pressure, elites may have an incentive to take notice and enact change to satisfy the given group. For a group that is and has been excluded from standard political activities and policy agendas, mobilization may be the only way to get attention (Nobles 2008). This activity requires both organization as a group and a prompt for action.

The minority group that has been considered weak may become more powerful through several events. It may become more cohesive either as a single group or as part of a larger or previously latent group. The group may take advantage of the similar interests of other groups to form temporary coalitions with more powerful groups. The demographic or economic situation or characteristics of the group may have changed, perhaps through a growth in numbers, strategic voting strength in districts where the weak are concentrated, or the discovery of new natural resources. These changes may give the weak group new bargaining power in their relationship with elites. In the case of indigenous peoples, formal and informal discrimination (sometimes to the point of attempted extermination) tends to characterize their treatment by the state and dominant population. Indigenous peoples have generally faced long histories of dispossession, social isolation, and restrictions of their political and economic rights.

The question of collective action and group formation has been the subject of extensive work. Much of it focuses on the incentives that shape individual decisions to participate in a movement for group benefits (Hardin 1982; Kuran 1991; Olson 1965). Individuals must consider the potential costs of their effort as well as their expected payoffs. This involves calculating their own dissatisfaction with the current situation, the expectation of others joining, the likelihood of success, and any repercussions that might occur.

In order for a weak group to come together, there needs to be a connection or identification that will allow them to meaningfully organize. Mobilization itself is a collective good whose production requires solving collective action problems, so members of this latent group must also have some confidence that their effort will be reciprocated by other members, perhaps from selective incentives provided by political entrepreneurs or from trust in others. There also needs to be an
anticipation that group mobilization and action will result in some payoff. The group might mobilize in expectation of quick gain or even in anticipation of gains not expected well into the future.

For indigenous peoples, there are some specific problems related to collective action. Primary is their very identification as a group. As emphasized by the plural in the term “indigenous peoples,” there are a plethora of distinct indigenous groups. The use of the collective label “indigenous” often masks the vast numbers of divergent identities that make it up. Globally, indigenous peoples are as diverse as the vastly wealthy Mohegan in Connecticut (who run the lucrative Mohegan Sun casino) and groups labeled “uncontacted tribes” in the Amazon who continue to live as hunter gatherers without interaction with the outside world. Within a single country, the indigenous population may be made up of a large number of culturally and politically distinct communities grouped together and administered under the title “indigenous” but hold little natural identification as a broader group (Corntassel and Witmer 2008, Wilkins 2007). Countries such as Indonesia, Russia, India or the United States, for example, have hundreds of different indigenous peoples, while others such as New Zealand or Norway have indigenous peoples more comfortable with a single political identification. The total number of indigenous peoples in a country may be very small, so if they do not share goals and cannot federate in a joint group their already weak position becomes even more so.

Each distinct group of indigenous people has its own identity and goals. These groups may be very small, with a few hundred members or less. As a further disadvantage to mobilization, there may be divisions within the group (such as a rift in tribal leadership) that hinder even the limited population and strength of each specific people. Cohesion as a group and in determining a goal is essential in making a claim against the larger state that has few reasons to pay attention, so internal divisions can be particularly damaging (McCulloch and Wilkins 1995; Shattuck 1991; Sutton 1985). Still, mobilization as an individual group or tribe is unlikely to produce much leverage, even at a local level, except for the few larger indigenous populations such as the Maori in New Zealand.
In some countries there have been attempts at regional or national collective efforts. State policies that treat all groups similarly as well as modern grassroots efforts encourage national indigenous mobilization (Coates 2004; Nagel 1996). Given the very small numbers of most individual tribes, bands, or communities this may be the only way to reach any sort of critical mass to gain attention to their issues. This is also true internationally; the rise of an international indigenous network of scholars and activists has provided support for many small indigenous nations around the world and raised public awareness of issues specific to indigenous peoples (Coates 2004; Niezen 2003).

As Olson (1965) notes, the larger or more fragmented a group, the harder it becomes to reach consensus on strategy or build the trust needed for joint action. At the other end, the smaller the group, the less likely it is be taken seriously by those in power as a credible adversary. Most indigenous groups are very small, and their numbers are further reduced if they are fragmented into distinct identities within their own communities. If small groups are able to come together into larger pan-indigenous organizations, consensus on goals, tactics, and even issues will be much harder to reach. This is a “catch-22” situation. Alone, individual groups may not have the numbers or resources to attract attention to, much less make gains toward, their goals. Together, the groups may not be able to reach a consensus on what their goals even are; a small group with specific concerns may find these unaddressed or even opposed by the rest of the group. Even if there a country-wide federation with all indigenous peoples working together, in many countries this is still likely to be a very small group.

There are a range of expectations for the effects of indigenous mobilization. Larger and more cohesive groups are more likely to reach success (i.e. recognition of indigenous sovereignty and control over resources) than small or fragmented groups. As an illustration, four countries’ populations are shown below.
Table 2.1: Indigenous Population Statistics

<table>
<thead>
<tr>
<th>Country</th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Population</strong></td>
<td>20,701,000</td>
<td>31,241,030</td>
<td>4,027,497</td>
<td>281,400,000</td>
</tr>
<tr>
<td><strong>Indigenous Population</strong></td>
<td>517,200 (2.5%)</td>
<td>1,172,785 (3.8%)</td>
<td>525,326 (14.6%)</td>
<td>4,100,000 (1.5%)</td>
</tr>
<tr>
<td><strong>Number of Indigenous Peoples</strong></td>
<td>At least 500 separate clan communities</td>
<td>Three main groups- Inuit, Métis, and First Nations, with at least 40 First Nation tribes and over 600 bands</td>
<td>Single language group, with at least 36 tribal groups</td>
<td>At least 562 separate tribes</td>
</tr>
</tbody>
</table>

These numbers lead us to expect that the Maori in New Zealand (with a much higher proportion of the population and fewer internal divisions) are more likely to join together and pressure the government than indigenous peoples in the United States, Canada, or Australia, who are tiny minorities further sub-divided into a much larger number of separate identities. Of course, attention alone does not translate to policy change- the real effects of such organizations and their influence in national governmental decisions needs to be evaluated. Not only do we need to see group mobilization and ensuing action to pressure the government, such as group protests, but there also needs to be evidence of pressure on elites.

We must also identify the cause for the latent group’s organization. Why has the group, unorganized or quiet for so long, decided to act? In the case of indigenous peoples’ rights, why are so many indigenous populations seeking rights in the same timeframe? McAdam, Tarrow and Tilly (2001) note that there is likely to be some sort of conversion in which a specific event or a new leader help to propel a group to action. An idiosyncratic event or the introduction of a specific leader are unique phenomena which can be difficult to compare and are only likely to come out in detailed process tracing case study analysis. Even then, it can be difficult to attribute causal importance to

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these unique events or people. Identifying patterns across cases will point to potential stimuli, particularly if collective action among the weak is occurring with similar timing- or based on similar arguments or tactics- across the range of examples.

Other causes are more comparable, such as a change in the size of the groups’ populations. Changing numbers may come through population growth as well as changing patterns of self-identification (Fitzgerald 2007; Nagel 1996). If birth rates are much higher than the rest of the population or more people in society are choosing to identify as part of the group, for example, it may change the proportions and demographic strength of the group, particularly in localized areas. Population growth or concentration because of demographic movement may also contribute to political power in specific areas or in times of very close elections.

Another possible change in group strength may come through shifts in their economic situation. The weak group might have developed a new economic enterprise or strength in a way that circumvents previous restrictions. The institutionalization and support for gaming beginning in the late 1980s, for example, has allowed some American Indian tribes to develop casinos on tribal property and in a few cases generate substantial wealth. The discovery of a new resource in an area controlled or challenged by the weak might also allow them to exert new power. The discovery of oil in Alaska on land that was subject to claims by the native population helped pressure state and federal officials to settle claims in order to free up the territory for development. For indigenous peoples actively seeking territorial rights, however, the absence of control over land or resources for development likely precludes this possibility. A secure territorial base is considered necessary to be able to develop economic leverage and independence.

Another way that a weak group can gain strength is through an alliance or coalition with another mobilized minority group. For example, the African American led Civil Rights Movement in the United States established new principles for dealing with minorities that created legal, social, and political room for other minority populations to press their claims. Such partnerships are very important in understanding the trajectories of issues that appear to be minority versus majority issues
(Lieberman 2005). If a very small minority group is able to appeal to a larger (but still minority) population based on similar specific interests, they may be able to gain enough support to reach a critical mass and influence the political elite. Similar to relationships between traditional interest groups, these coalitions may be short lived and based on singular goals, but still help to reach specific ends (Hojnacki 1997). Indigenous peoples, however, are often pursuing aims that are both specific and very different than those of other social groups, making it difficult to form coalitions based on shared goals.

The type and framing of the goal being sought is very important. The pursuit of a broad goal, such as basic civil rights, might serve as a basis for a coalition among different weak groups, but fall apart when it is time to consider more specific aims. For example, many minority groups have experienced discrimination at the hands of the law enforcement and criminal justice system, making this an issue where inter-group cooperation is worthwhile. For indigenous peoples concerned with issues of sovereignty and the power of their own indigenous criminal justice system, however, there is not likely to be a basis for broader organization among non-indigenous minority groups. Some indigenous demands, such as those to territory, may simply not resonate or have any corollaries among other weak minority populations, leaving little ground for collaboration. Further, some goals may be seen as contentious and cause friction. Indigenous claims to treaty based rights fishing rights, for example, may involve the exclusion of all who are not members of the specific group from any previously shared rights and alienate any potential allies. At the same time, if larger minority groups seek to establish new national principles or procedures for policies toward minority groups, these developments may be applied to all minority groups in the country even without any conscious or effortful cooperation in their pursuit.

If the weak group is able to take advantage of newfound mobilization, demographic or economic strength, or alliances with other groups, their bargaining power with political decision makers may shift (Knight 1992). In other words, the weak are not as weak as before and elites may
now have new incentives to pay attention to their demands. To take advantages of this strength, the weak group will need a path to access and pressure elites.

2.2.2 Channels for the Demands of Weak Groups

We have identified ways that a weak group might be able to organize itself to make demands. Even with new strengths, the group must be able to find some channel through which they can convert mobilization into the achievement of their goals. While situations where those in power give in to a weak group are not necessarily limited to democracies, democratic systems do represent the vast majority of cases in which the strong have awarded victories to groups that do not appear to be able to legitimately threaten the stability of the system. The possibilities discussed here reflect this, pointing to how weak groups may try to gain the attention of those in power under common democratic political institutions.

The weak may be able to access and influence politicians through elections or lobbying organizations. They may use legal action through the courts to provide pressure, where decisions may be made based on logical or normative merit and not on political strength. There is also the potential for influencing the dominant population through media dissemination and attention to the weak group situation, perhaps gaining more widespread support through a feeling of shame or guilt. The use of the courts or public attention only work when legal and public opinion are normatively vulnerable and perhaps already changing. They also then require the response of elected officials to either legal mandates or public opinion. Overall, this section looks at avenues through which legislative policy makers might be influenced to enact change in favor of the weak.

The weak group (assuming access to and interest in the franchise) might have electoral influence over elected officials in specific cases. Population growth or redistricting may give the weak group a sizeable voting bloc in a local or national district, pushing elected representatives pay attention to and potentially even act on their demands. Group cohesion and collective action as an individual group or as part of a coalition with another group would enhance this strength. Still, as
mentioned above, in the case of indigenous peoples any potential electoral strength (if it exists at all) is likely to be concentrated and remain limited due to their very small size.

Indigenous peoples tend to have few connections with elected officials. Many indigenous peoples, given their concerns with protecting the sovereignty of their own government, do not participate in elections outside of their own indigenous based government, reducing any potential electoral strength (Wilkins 2007). Their isolation may also result in populations that have little experience or knowledge of electoral participation in mainstream politics. They are often geographically isolated with little contact or media access to mainstream campaigns (Wilkins 2007). Further, indigenous peoples may be either formally or informally excluded from the option of voting, reducing any potential ties to elected officials. And finally, the unique goals of indigenous peoples may also generate opposition from other segments of society (Wilkins 2007). As Scholtz writes of indigenous peoples:

…policy makers’ usual payoffs for engaging with social groups are arguably too minimal to be worth the potential costs: little opportunity to win over a significant set of voters in return from some risk of electoral backlash, and a high risk of creating uncertainty among well-entrenched property interest over the ability of the state to act as their guarantor (Scholtz, 2006, 2).

The weak group might be able to gain strength through newfound economic development or newly discovered resources, allowing them to exercise some influence over legislators with campaign donations or lobbying efforts. This has happened in recent years, as the wealth of some groups allow them to connect with powerful forces. Still, the specific interests of each distinct indigenous group mean that their voices are often very small. Further, these efforts can counteract one another as indigenous peoples sometimes oppose the extension of rights to other indigenous peoples.

\[\text{5} \text{ It is important not to fully equate weak minority groups based on identity to interest groups, however, as it can reduce the meaningfulness of indigenous identity and the political distinction as sovereign powers. This is particularly true for indigenous peoples. Corntassel and Witmer’s 2008 work reflects this struggle, noting how federal and state officials have sought to treat indigenous peoples solely as interest groups, reducing their status as sovereign entities.}\]
While the weak rarely have the numeric or economic strength to influence politicians through elections or lobbying, the courts offer another channel of potential influence. Legal decisions can shape social policy and are particularly important in areas that are controversial or potentially against the interests of legislators and their electing majority populations (Horowitz 1977). Judicial decision makers, particularly those that are appointed and insulated from many political pressures, may not be strongly subject to the interests of the dominant population. While the judiciary cannot craft policy changes itself, decisions in favor of the rights of weak groups or their specific demands can put pressure on legislators to give attention to or change policy in ways that they would not enact on their own. There is evidence that the use of litigation in social movements and legal decisions are a prime means of promoting social change for marginalized groups (Epp 1998; McCann 1994; Paris 2001; Steinman 2005). The successful use of litigation by fundamentally weak groups requires that these groups have access to the courts, and that the courts are able and willing to rule on the basis of normative legal principles, rather than on the basis of political pressure.

The use of litigation as a tool presumes that weak groups have access to the courts. The group must have the opportunity to bring such an issue before the courts, the experience and knowledge of the judicial system to do so, and the financial resources to support their case. It is also possible (if not likely) that the status quo will be reinforced, and that the institutions or policies that have denied the weak group’s rights will be affirmed. If electoral or lobbying pressures fail to generate policy changes, this failure does not increase future burdens. A failure in the courts, however, can create a precedent against indigenous rights that adds to the obstacles for future attempts. Despite this risk, there simply may be no other course of action for very weak groups. If there are indications that judicial actors are willing to step outside of the status quo and reconsider issues based on past treaties or developing international precedents, indigenous groups may see this as their most promising option (Scholtz 2006; Steinman 2005).

There are multiple channels for weak groups to mobilize and put pressure on decision makers (McAdam, Tarrow and Tilly 2001). There may not be one answer to how weak groups
change in strength, gain access, or influence decision makers. This is a research area where in depth case studies can help track and compare the development of contention and how and why groups act- and may succeed- in different ways. This may be particularly true for groups that are frequently left out of political considerations or treated inconsistently, such as indigenous peoples.

2.3 Supply Side: Explaining the Motivations of those in Power

The chapter now turns to the other side of the puzzle: why political elites direct their attention and even allocate resources to settle the claims of the weak. This is particularly perplexing in the specific case of indigenous peoples. After a history of indigenous dispossession and exclusion from political, social, and economic institutions, it is surprising to see these same political institutions change course and validate attacks on their own foundations (both proprietary and moral) by allowing indigenous claims any real consideration at all (Scholtz 2006). In essence, the recognition of claims and the potential for returning rights and resources goes against the weight of history and the development of state sovereignty that rejects the rights of indigenous peoples. To extend rights and/or resources to indigenous peoples and make decisions in their favor goes against decades, if not centuries, of purposeful disempowerment.

The fact that political elites have come into power and are supported by the standing institutional arrangement is important. As Knight (1992) writes, social and political institutions are the byproduct of strategic conflict over substantive social outcomes and distributions. Existing institutions develop out of the actions of decision makers striving to establish rules that structure outcomes in a way most favorable to them. Because of this, change comes both slowly and at considerable cost- those in power are likely to make decisions and allocate benefits in a way that keeps them in power and advantages both themselves and their supporters.

This section seeks to identify the motivations that cause elites to change their treatment of weak groups. Decision makers may be faced with a change in external conditions that alters their expectations of outcomes. A new arrangement may now appear better suited to offer benefits or
avoid some penalty. The previously weak group may have mobilized and be able to offer new political force or take advantage of new economic wealth. For this to be influential, we would expect to see a motivating force for elites to alter past behaviors, which often included forcibly breaking apart indigenous entities and taking their resources. I believe that normative pressures, either domestic or international, play a key role in encouraging lawmakers’ new treatment of the weak group. A collective sense of guilt, sympathy, or responsibility toward the weak puts political pressure on elites to adjust policy accordingly. The source of pressure may be normative, but the pressure creates a practical political calculation on the part of elites. It is also possible that the rights or resources being sought by the group are no longer considered valuable or worth the effort of denying, so elites can offer token concessions that satisfy all involved.

2.3.1 Practical Explanations

Institutional predictions argue that changes in resource and power allocations arise out of the rational calculations of those in power and/or control over decision-making processes (Knight 1992; North 1990). Weak groups lack conventional political or economic power, which makes them unlikely recipients of preferential treatment. Further, power holders may be specifically advantaged by keeping the weak group in a disadvantaged situation (McChesney 1990; Sturgis et al nd). We therefore need to understand how actions that benefit weak groups can also serve to provide benefits for political decision makers and presumably maintain their current position of dominance.

Political elites may find that offering concessions to the weak can generate several benefits. If the majority population has granted rights or created a process to consider demands (for other groups, or perhaps for other types of claims) this may offer an institutional opening that the weak group can take advantage of. The ongoing costs of continuing earlier policies may no longer be worthwhile to those in power. The dominant population may have become secure enough that concessions which once appeared valuable are now affordable. However, these reductions in the
costs of negotiating and even meeting demands from the weak will not produce concessions unless the net benefits are now greater than the newly reduced costs.

Change may be driven by growing concerns that the present policies or treatment of the weak group are expensive to the dominant population. A decrease in support among the dominant population for a welfare system that redistributes money to an economically disadvantaged group is one example. Specifically, the forced settlement of indigenous peoples on reservations where they are “compensated” with government stipends and services has often created concerns among the dominant population over the expense of supporting the indigenous population. Even when the actual finances involved may not constitute a large sum, concerns about public funds being used to support the group along with a belief that they could (or should) be self-supporting may contribute to a new public support for policies to empower the indigenous group. This changing public sentiment might be reflected in support for a change in approach or policy that redefines the policy or treatment of the weak group, which may (or may not) correspond to the demands of the group itself. Evidence of this might come through publicity and activism of segments of the dominant population related to the situation of indigenous groups or policy of concern. Officials responding to the demands of the dominant population are expected to be very public in their response, as it can garner support from their primary electoral base.

The dominant population or government may no longer value exclusive control of the resources or rights being claimed. For example, the right to vote may be so widely distributed to the rest of the population (and the weak group’s position so electorally insignificant) that the further extension of rights to indigenous peoples is not threatening to the position of the dominant population at all. The weak group may have claimed a resource that the dominant population no longer desires, or has been so damaged or degraded that it is now burdensome for the majority population to maintain or clean. The majority population may have become so wealthy that that a concession of low value does not threaten their position, making it a low cost offer for decision makers. Even if a concession has a low cost for negotiations or final settlement we would still expect
some net benefit in order for the dominant majority to support a transfer of rights or resources to the weak group.

Ongoing dissatisfaction and unrest among the weak group can also create ongoing costs for the government and decision makers if the group is willing to continue with lawsuits, protests, or other actions. Given the very weak position of the group, this is not likely to be threatening enough to seriously disrupt the political or economic system. The situation might create a drain on resources, funds, or public attention over the long term, however, as the claims of the weak group overburden an administrative branch, tie up public money and judicial resources in lawsuits, distress localized businesses or populations, and so on. These costs only arise in situations where the group has made enough progress for their claims to be taken seriously. In other words, the weak must have made some (even if minimal) progress in their rights to be able to press them and create such disruptions. Where the persistent and potentially ongoing claims of the weak impose continued costs, those in power may provide at least token concessions in order to stop the aggravation and expense of ongoing claims.

We expect decision makers to offer more than token concessions if the expected costs of negotiation and final settlement are low enough compared to calculations of ongoing costs for persistent unrest. For example, Walter (2006) has shown that government reactions to minority groups attempting secession from a state depend primarily on elite perceptions of future costs and benefits. If the government anticipates few (or no) additional secessionist movements and the value of land requested is low, they are far more likely to grant secession. This logic is applicable to all claims of the weak.

The larger the number of potential claims, the more reluctant the government will be to award any of them lest they open the door to more. Similarly, as the aggregate value of rights or resources claimed increases, the more unwilling the government is to offer settlements because of the potential for this to snowball into huge transfers as similar claims are processed. Finally, the more exclusive the right claimed by the weak (such as the demand for exclusive possession of resources
that will have to be transferred from current owners), the more reluctant the government is to award them for fear of opposition from prior or potentially affected owners. In contrast, if the indigenous group is seeking to share a non-rival right already enjoyed by many others (such as the right of citizenship, the right to vote, or the right to own property individually) the government is likely to extend the essentially costless right. If decision makers calculate it in their best interest to accommodate the weak in some way, lower cost concessions will always be preferred to higher cost concessions, and concessions that bring more net benefits are always preferred to those that yield less.

There is a clear option for political power holders to act with the appearance of considering the claims of the weak, or offer only token concession, without any intention of going further. This might soothe the demands of the weak while creating benefits- or avoiding costs- for the powerful. However, as the examples of indigenous peoples’ land claims and settlements illustrate, valuable transfers are made. The next section looks toward changes in norms and beliefs to explain why there may be broader actions taken to provide awards to the very weak.

### 2.3.2 Changes in Norms and Beliefs

A shift in the dominant populations’ norms or beliefs about the weak group may also be essential in understanding changes in the government’s treatment of the group. Norms can be defined as a “standard of appropriate behavior for actors with a given identity” (Finnemore and Sikkink 1998, 891). A conception of moral norms is used here and refers to those that carry a sense of “oughtness” and proper behavior, defining what is “right” to do and or expect from others. This pressure to act in certain ways can push decision makers (or their supporters) to change treatment of weak minority groups. There is room for norms in many understandings of rational behavior. For

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6 Finnemore and Sikkink (1998) write that institutions are made up of behavior rules. While institutions represent broad constellations of interrelated rules, norms are more targeted and isolate single standards of behavior. In the institutionalism literature, norms can also represent shared expectations that do not require a sense of moral compulsion, but simply represent expectations of how others will act.
those who incorporate altruism into their models of individual behavior, an individual’s belief that their actions serve some group purpose or broader goal may provide as much satisfaction as more obviously self-interested calculations (Andreoni 1995, Margolis 1982). Adhering to moral norms can provide internal benefits to elites willing to act on behalf of groups, even when those groups may not be able to offer them other, more clearly “practical,” incentives to do so.

Large scale normative shift, such as a change in support for civil and political rights for minorities, is likely to take place gradually over a long-term period, eventually altering perceptions and expectations of both the general population and political elites (Carmines and Stimson 1989). These changes may also alter the dominant populations’ expectations of the treatment and services that governments should provide to specific populations. Mainstream beliefs about the weak population itself may also change over time, creating a new conception of their deservingness in terms of rights or resources.

Normative change has influence over policy in a variety of ways. First, norms about appropriate treatment can change, such as the idea that the forced removal of children from homes and into boarding schools is no longer justified under any circumstances. These normative changes are general and universal, applying to all who are defined as “people.” Second, norms about how people should be treated may stay the same but new views of which particular groups are “people” may change. Groups that were once feared or despised may be seen more positively. Policies of mistreatment are often supported by the de-humanization of groups so that they are simply not seen as deserving of the rights or protections of the rest of the population (this has been true for indigenous peoples, Jews, gypsies, untouchables, and so on). Re-humanizing these groups as eligible for more humane treatment is therefore involved in policy change that extends the rights of previously recognized “people.” What changes in this situation is not norms about how “people” are treated, but the definition of what groups are “people” and therefore eligible for humane treatment. These changes are particular to specific groups. It is easiest for the dominant population to change
its view of a group that was once despised into a view of the group as innocuous and even pitiable after the group has been thoroughly dispossessed and disempowered.

Changing norms and public conceptions of weak groups can have particular utility in studying the politics that surround racial and ethnic groups. As Bleich (2003) argues, institutional perspectives trying to explain outcomes in racial policy often fall short because of the difficulty in identifying many commonly understood incentives in implementing change on behalf of the weak. Elite decisions to offer formal public apologies (which do not need to include any substantive concessions) are often driven by the dominant population’s collective sense of responsibility and guilt for the present situation (Nobles 2008; Weiner 2005). The issues of indigenous peoples are generally not of great national salience or mainstream electoral importance, pointing to the significance of normative concerns in swaying elite decisions for reform. A problem for arguments in this vein (particularly for indigenous peoples) is finding substantive evidence, as public opinion data on the relevant topics and over a period of time may be limited. Public statements of elites, media reports, and debates over the given legislation or policy are often used as evidence of normative reasons for the policy shift.

Widely shared norms and beliefs are slow and difficult to change. Finnemore and Sikkink (1998) offer a model for how norms can change through a process of norm emergence, norm acceptance and spread at an international level, and then acceptance at the domestic level as the norm becomes more a general standard. Some examples of this sort of change include the spread of norms against slavery and support for women’s suffrage. The first stage of norm emergence is often prompted by “norm entrepreneurs” who advocate for change, bring the issue to public attention, and press both social and political means for the new norm. These entrepreneurs might be leaders or activists from the weak group who continue to press their cause before the media or different organizations. The role of group mobilization and cohesion for providing support for this venture is
significant here. Often the first step toward public norm acceptance will be the public dissemination of the new ideal by recognized government officials in domestic or international forums.

After this support gets translated into domestic policy change, even on a small scale, other nations may follow. Nations with similar situations, interests, or legal or political systems would be those most likely to be influenced to change. In an increasingly connected world, the power of international attention and awareness is often important in understanding pressure to change. A particularly powerful actor, such as a leading state, may need to be first to change in order to encourage others to change as well. The final stage is when the norm becomes so widely applied and commonly accepted as to no longer be debated. Norms that meet this idea of globally shared expectations include the abolishment of slavery or the right of women to vote (Finnemore and Sikkink 1998, 895-902). Indigenous rights, still being hotly debated around the world (or in some regions, not recognized at all) are clearly not at this stage, but somewhere in the second. Still, growing attention—both domestically and internationally—to the specific needs, rights, and demands of sovereign indigenous peoples may be a source of pressure on elites for crafting policy change.

After the close of World War II and the Holocaust, international attention was given to the need for the protection of minorities. Western democracies, whose past treatment of indigenous populations often bordered on genocide, were faced with the prospect of their own past injustices and the need to offer evidence of a clear departure from these past policies.

If normative change on an international scale is important, there should be evidence of policy change following a formal shift, such as the adoption of a new international resolution. Further, there may be similar timing or a cascade of change among specific groups of countries with similar characteristics. Normative pressure converts into costs and benefits for elites through

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7 In the case of indigenous rights, the International Labor Organization’s Conventions (107 in 1957 and 169 in 1989) that advocated specific rights for indigenous peoples were a major sign of international support (although the measures have no enforcement mechanisms). The United Nations has been more reluctant in recognizing the demands of indigenous peoples. After decades of activities on the part of “norm entrepreneurs” in favor of indigenous sovereignty and protect, the UN passed the Declaration on the Rights of Indigenous Peoples in 2007, providing another level of institutional support (although again without any real enforceability) at an international level.
international pressure, domestic elections, and even legal decisions. Decision makers may change policies toward the weak to avoid domestic or international embarrassment, ostracism, or more formal sanctions. Of course, they may also offer only token actions in a show of following legal rulings or international norms, or choose not to act at all.

Decision makers may also be pressured to make decisions in favor of a group without power if it somehow relates to earlier or larger normative commitments made as part of a party platform or campaign. Actions would again be understood as part of avoiding negative publicity, in this case for not following through with earlier promises. This is partially a normative question in terms of understanding why parties or leaders make such commitments, but also, after the commitment, a practical one for party members who may be expected to support the larger platform in exchange for continued support. In many countries, one party has become more widely identified with protecting the civil rights of minority groups and providing additional services or programs to support this cause (Nobles 2008). If an indigenous group is seeking similar rights or services, they can make claims that relate to party commitments. Of course, the scant attention given to indigenous peoples is notable for being very small—generally their issues take up no attention on a wider platform and are not part of campaign promises or concerns at all. So while this remains a possible explanation, it is not very likely.

In countries with a respected rule of law and widely publicized decisions, legal decisions also offer an avenue for the weak to pressure policy makers to act (Horowitz 1977; Scholtz 2006; Steinman 2005). Decisions in favor of the weak might support the weak group’s right to bring claims against the government or overturn a policy or practice that has kept them at a disadvantage. Legal support offers a degree of institutional support that might otherwise be missing. While policy makers have the option of ignoring legal precedents (such as the infamous removal of the Cherokee Indians in 1838 despite the opposition of the Supreme Court), for modern democratic countries going against public legal decisions is very risky because of their reliance on the rule of law. To do so may threaten the legitimacy of the government in both domestic and international spheres.
Normative pressure for change can come through various pathways. Some normative changes matter because elites have changed their views (perhaps judges or policy makers) and devise or direct policies on their own. At other times, the normative change may work indirectly. Normative change among the dominant population, for example, may pressure policy makers to enact new policies even if policy makers themselves do not subscribe to or support the change.

Indigenous claims are particularly challenging for the dominant population to accept because they are frequently articulated as collective or group claims rather than as demands for equality as individuals on par with other citizens. They are not claims to “individual oriented racial equality,” as most rights claims are, but instead for an “affirmation of their collective rights, recognition of their sovereignty, and emancipation through the exercise of power” (Niezen 2003, 18). For example, claims for the extension of civil rights to minority groups in the United States have been based in an “egalitarian” order, or the idea that there should be equality for all members of society (King and Smith 2005; Smith 1993, 1997). For American Indians seeking rights to sovereignty- and a status that will be inherently unequal with the rest of the population- this sort of normative appeal is not relevant. By their very nature, indigenous rights’ claims often assert a right not to equality but to inequality, arguing that indigenous peoples should have options that no other groups do (Barry 2001; Hendrix 2005a; Kukathas 1992; Kymlicka 1995; Waldron 1992). This special situation means that norms on the treatment of indigenous groups need to develop and be accepted in order to create support for their specific claims.

The dominant population’s beliefs about the weak group may also be significant in determining policy change. Perceptions of the group influence how “deserving” the weak group is considered by those in power. Numerous works on social policy address the role of perceptions, stereotypes, and racial attitudes in understanding policy outcomes and allocations (Bobo and Tuan 2006; Cramer 2005; Gilens 1999; McCulloch and Wilkins 1995; Schneider and Ingram 1993; Stedman 1982). When a weak group has little political power to wield on its own, policy makers pay attention to the social perceptions that the dominant population holds toward them. If the dominant
population has positive associations with a group, they will see it as a more acceptable “target” for policy rewards (Corntassel and Witmer 2008; Schneider and Ingram 1993). In contrast, a policy decision that allocates rights or resources to a group seen negatively may alienate the dominant population and cause repercussions for the political elite. American Indians were seen as fearsome, dangerous, and threatening for much of the early years of American history, for example. These images supported policies such as removal, reservations, and military interventions. In order for American Indians to be considered deserving of policies that offer rights, services, or resources, the majority population’s view had to change.

Much of what is known about dominant public opinion and stereotypes toward minority groups and their role in policy outcomes comes from studies of African Americans in the United States, a much larger minority group than most indigenous populations. Gilens (1995, 1999), for example, shows that white racial attitudes about African Americans, specifically the stereotype of laziness, are important in understanding support for welfare policies. He notes that these stereotypes may be more predictive than other commonly used indicators, such as individual self-interest, individualism, or egalitarianism. Research on other weak groups also supports this conclusion; work on the Sinti or Roma (also commonly known as gypsies) points to the negative stereotypes held by the dominant populations in Europe as a main component of support for continued persecution and discrimination toward the gypsies (Milton 2000; Woolford and Wolejszo 2006).

This line of reasoning presumes that identifications of and distinctions between varying positive and negative stereotypes of weak populations can be made. These beliefs should also be widely held and recognizable among the dominant population. Some of these appear in global contexts, part of the heritage from the “doctrine of discovery” era ideas that still permeate many societies. Some “positive” or non-threatening stereotypes of indigenous peoples include those of the
“innocent, childlike native,” “proud noble savage,” or “conservationists.” Some examples of common negative or more threatening stereotypes of indigenous peoples include “warlike savages,” “militant,” “primitive and unintelligent,” and “lazy” (Jacobs 2006; Perry and Robyn 2005; Weaver 2001). These stereotypes are likely to come out of historical relationships with the dominant population, events and actions publicized by the media, and elites. Stereotypes are supported and perpetuated in various forms of decision making, such as public statements of officials, Judicial decisions, for example, often incorporate racial stereotypes as means of supporting an institutional inferiority of indigenous peoples, even in ostensibly supportive rulings (Wilkins 1997; Williams 2005).

Within these categories, some stereotypes are more helpful- or harmful- in promoting change than others. An indigenous group considered by the dominant population to be “innocent and childlike” for example, might generate public sympathy but be seen as incapable of managing a transfer of resources or funds. A group that the dominant population views as “conservationist” might be successful in gaining ownership over a polluted lake, while it may not have been seen as deserving if it was stereotyped as childlike or simple and unable to manage a complex natural resource. An indigenous nation stereotyped as “warlike” or “militant” may be seen as far less deserving than others with a less threatening, although still negative, stereotype as “lazy.” Generally, the less threatening that the dominant population perceives the indigenous group to be, the more likely the dominant group is to support the extension of rights to the indigenous group. If the dominant population can distinguish between and perceives individual groups of indigenous people as distinct, those with more “positive” (or less threatening) stereotypes are more likely to see their specific claims settled in their favor than those considered in some way dangerous or undeserving.

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8 It is important to mention that even ostensibly positive stereotypes can still be both reductionist and misinforming. For example, the idea of indigenous peoples as innocent or childlike diminishes the public view of their self-governing capacity and intelligence. Concepts of indigenous peoples as extreme conservationists who did not alter the land, used only what they needed, and all shared property communally neglects the reality that indigenous societies, just like others, responded to the specific environmental constraints that surrounded them in developing property rights and patterns of use (Anderson 1996; Anderson, Benson and Flanagan 2006; Parker 1989; Sutton 1975).
Dominant perceptions of claim itself are also likely to be important. This refers to the object of the claim (such as an area of territory or a specific right) and how the claim is justified. Demands for indigenous rights based on sovereignty are inherently difficult for state governments, as introduced in the first chapter. For countries settled as colonies under the British, much of their sense of identity and government are built on foundational myths and the idea of universalizing identity and values (Fleras 1999; Magallanes 1999). The rights and resources sought by indigenous peoples involve a redefinition of the basic concepts of nationhood and citizenship, and can conflict with the authority of the state and its legitimacy (Fleras 1999; Jarding 2004; Mason 1997).

If the dominant population views the object of the claim as legitimate, it will be easier for political power holders to consider and/or settle than if it is highly contested. Studies by Bobo and Tuan (2006) and Perry and Robyn (2005), which focus on indigenous tribes’ pursuit of specific treaty based fishing rights, point to the fact that dominant white reactions to the claims are heavily based on perceptions of threats to their political and economic dominance, resource access, and security. The dominant population is more willing to accept claims of the weak that are phrased and publicized in a way that fits within commonly held and accepted norms and values. The dominant population is also more likely to see the objects of claims justified in this manner as appropriate and legitimate.

I expect that a claim described or justified in a way that makes it appear more in line with mainstream values, rather than actively attacking the legitimacy of the government (and the dominance of the majority) it will be less threatening and confrontational and more likely to be met with the award of rights or transfer of resources. For example, a claim to resources that argues a group can use them to become more self-sufficient and less reliant on public money is more amenable to the dominant population because it taps into a predominant work ethic about work and responsibility rather than relying only on reasons of sovereignty. The same claim, but phrased in a way that asserts the resource should be transferred because the group’s authority was seized through
the trickery and deceit of the dominant population, is more confrontational and harder for the current leadership to cave in to.

In an overlap between more practical and normative explanations, it is not just moral confrontation, but direct confrontation and tangible threats to property that are difficult for the dominant population to stomach. If the indigenous group demands a piece of land that would require current (and arguably innocent) owners to be removed from their property, this is very personally confrontational as well as morally problematic in assigning blame and responsibility for past actions. In land claims, concerns abound over whether present owners should be dispossessed to return property to indigenous groups, and whether or not this move would simply transfer or even increase the injustice of the situation (Hendrix 2005a; Waldron 1992). Even the tactics used in negotiations can be seen as more or less confrontational, which may influence the government’s reactions and eventual outcomes (Alcantara 2007a). The more expensive and disruptive that settling a claim is to the dominant population, the harder it will be for decision makers to offer a settlement. Because of the redistribution of goods involved, they are likely to be concerned with a potential backlash from the dominant population, who may see themselves as losers in the new arrangement.

Changes in norms and beliefs about the weak group are important for understanding why those in power allow victories of rights or resources to the weak. While decision makers may not be influenced in favor of the weak by more traditionally understood incentives, such as votes or financial support, normative swings in an international and domestic setting provide new pressures and expectations.

2.4 Additional Considerations:

Other potential explanations for changing responses to the demands of weak group include spillover effects and/or unintended consequences. The idea of spillover effects from other policy changes been hinted at through the discussions of shifts in international norms shifts and the potential for broad partisan commitments to minority rights. The role of “unintended
consequences” or miscalculations presumes that there has been some error on the part of the elite, or that an (assumed to be) unrelated action opened opportunities for the weak group to pursue specific goals. The government may be bound legally or through public commitments from returning to the status quo.

2.4.1 Spillover Effects

There are two prime ways that policy effects might “spill” over from their intended targets to provide leverage for other groups such as the very weak. Domestically, the activities of one group or policies designed to achieve certain aims for one segment of society may have effects on other groups. Internationally, it is possible that change in one country may influence another to evaluate a change in its own policies. We would expect this explanation to be useful in understanding general shifts in rights, not the specific and varied outcomes of individual claims.

While the present research is concerned with those groups that are among the very weakest in society, in most cases there are a range of other non-dominant groups of various strengths and interests. If a minority with a larger population is able to press the majority population to change its treatment of racial or ethnic groups on moral grounds, for example, this new consideration can translate into greater awareness of the concerns of the very weak (in this case, indigenous) group. An acknowledgement of the special needs of minority groups or more concrete policy actions, such as new policies related to education or employment, may offer opportunities that all minority groups are able to take advantage of. This spillover may not be as effective for indigenous groups seeking distinct rights to sovereignty or for specific resource claims, but it may be explanatory in understanding broader acknowledgement and awareness of minority groups and their demands.

Spillover can be normative, as described above, or more rules-based. If the larger minority has won the extension of civil rights, for example, other minorities may also be covered by the new laws. This spillover is more likely in countries where the rule of law is enforced and the weak are covered by the consistent application of legal principles. This pathway is useful when the rights and
resources awarded to other groups are of interest to the weak group, but, as noted above, it may not be relevant for specific rights or resource claims related to indigenous sovereignty.

Spillover may also be international, when change in one government causes another to evaluate a change in policy. This may be related to widespread normative change, or it may be more isolated. A dramatic policy change in a neighboring or closely allied nation, for example, may pressure government elites to mimic at least some degree of change to maintain international standing (Niezen 2003).

### 2.4.2 Miscalculations and Unintended Consequences

Finally, there is the chance that miscalculations cause decision makers to implement policies or decisions that inadvertently open a path for greater rights or resources. Just as with any rational actor, political elites make decisions based on the information and understandings available to them (Knight 1992). When policy makers are misinformed or subject to dramatic changes in circumstances, the outcome may be far different than what was anticipated.

Policies of forced education for indigenous children, for example, were clearly intended to assimilate them into the modern culture and remove their connections to indigenous identity. While these schools removed many individuals from their societies and were successful in terms of encouraging the adoption of white culture, they also helped to create a pan-indigenous network of activists with connections across the nation. These networks were well-versed in mainstream politics and society, established communication between previously unconnected groups, and in some cases served as a basis for national mobilization and the assertion of indigenous sovereignty (Coates 2004; Nagel 1996).

### 2.5 Conclusions:

The review presented above provides a number of potential explanations that may fit into a larger understanding of how weak groups are able to win concessions and resources from the government. By focusing on indigenous groups and land rights, the remainder of the dissertation
offers a stiff test for explaining the victories of the weak. The claims of indigenous peoples are particularly difficult because they can challenge the authority, sovereignty, and legitimacy of the state itself (Fleras 1999). Further, questions of property rights and ownership are extremely contentious (Larson 1997). The cross-national and cross-claim comparisons and analyses that follow will help develop an understanding of how the very weak can win.

The following chart provides an overview of potential explanations for the extension of rights and resources to the weak and how they relate to one another. They are organized from left to right, with the initial motivation for action occurring on the left, facilitating factors in the middle, and channels of action on the right. Note that they can occur in a variety of combinations; a practical factor may motivate the weak to act first, but their attainment of their goal may be facilitated by normative beliefs of the strong. The outcome is the change in recognition of the rights of the weak. In this particular case, the outcome in question is land rights. There are multiple sorts of examples that represent the recognition of land rights: a national legal recognition of rights, the creation of a specific government body to evaluate claims, or the singular act of a transfer of land, for example.
Table 2.2: Factors that Make the Strong Grant Concessions to the Weak

Please note that all venues for decision making apply to “demand side” and “supply side” explanations, although the cell breaks across the page.

<table>
<thead>
<tr>
<th>Demand Side Explanations</th>
<th>Initial causes</th>
<th>Facilitating factors</th>
<th>Venues for decision-making and settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>At least one of these is needed for an actor to initiate an attempt at change. Not all are necessary, and indeed, for the very weak some of these are missing.</td>
<td>These factors are insufficient to launch events, but are supportive for the case of the weak if they occur. Some factors may be essential in producing a favorable settlement for a specific demand.</td>
<td>This where the weak and the strong meet and decisions are reached.</td>
</tr>
<tr>
<td>Practical Factors motivating the weak</td>
<td>The weak realize that they are not as empirically weak as before and mobilize to make demands. Reasons for this new strength might be:</td>
<td>Features of the weak that affect their ability to sustain mobilization</td>
<td>Electoral processes – This process involves influencing politicians who fear the loss of votes or loss of campaign funds, either from demand-makers or from those who sympathize with them.</td>
</tr>
<tr>
<td></td>
<td>-- Resources already owned by the weak turn out to have some economic value that they can capitalize on. This is unlikely to be true for those whom the strong have intentionally dispossessed and located in resource poor areas, unless new discoveries (such as the discovery of oil) indicate that the strong miscalculated these assignments.</td>
<td>These factors affect both the demand-making and settlement winning capabilities of the weak. Components may include:</td>
<td>Legislative decisions – Legislators are, of course, primarily motivated by electoral considerations. There may be additional forces operating when legislators create legislation in response to judicial decisions to “expand” the decision or apply its terms to groups other than those who brought the initial suit.</td>
</tr>
<tr>
<td></td>
<td>-- The numbers of the weak in certain areas have become substantial, giving them local influence via lobbying and local electoral pressure on politicians.</td>
<td>--Internal group cohesion and ability to act as a unitary force.</td>
<td>Judicial processes – Both practical and normative</td>
</tr>
<tr>
<td></td>
<td>-- The weak have achieved great influence in certain economic sectors or regions where their jobs are concentrated.</td>
<td>-- The group’s ability to maintain cultural continuity and avoid assimilation (i.e. loss of group identity).</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-- The weak have learned new methods and skills from the success of other weak (perhaps larger minority groups). They learn methods and skills from the successes of other (also weak, though likely stronger) groups. This is characterized here as a spillover effect.</td>
<td>-- The ability of the group to create an overarching identity. For indigenous peoples, this means identification as indigenous or American Indian, for example, as opposed to a purely tribal identity with no connections to the broader community. This allows the use of joint strategies among individual groups and thus a cumulative strength in numbers.</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Normative Factors motivating the weak</strong></td>
<td>-- There may also be a broader association with other weak groups, such as pan minority action in the United States or solidarity with international groups. This is likely to develop along with mobilization and some success in claims, but is not likely to launch the initial action.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-- The weak have a new belief in their ability to reach success. This may be from the inspiration of the successes of others (also weak, though stronger) groups. This is also a spillover effect.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 2.2 Continued

<table>
<thead>
<tr>
<th>Initial causes</th>
<th>Facilitating factors</th>
<th>Venues for decision-making and settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>At least one of these is needed for an actor to initiate an attempt at change. Not all are necessary, and indeed, for the very weak some of these are missing.</td>
<td>These factors are insufficient to launch events, but are supportive for the case of the weak if they occur. Some factors may be essential in producing a favorable settlement for a specific demand.</td>
<td>This where the weak and the strong meet and decisions are reached.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Practical Factors motivating the strong</th>
<th>Features of the strong that facilitate their willingness to make concessions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>These factors push the strong to initiate action towards concessions that they were not willing to make before. They are also making these actions towards groups that they have previously ignored or denied these rights or resources to. --The strong may create routes or opportunities inadvertently, such as recognizing the claims of the weak solely with the intention of extinguishing those claims. It is possible that this opens some unintended loophole that the weak are able to take advantage of. This is an unintended consequence, and would require an explanation for how the weak are able to exploit the opportunity. It also requires an explanation for why the strong took action to recognize the claims of the weak at all. --The target of the weak group’s claim has become costly for the strong to administer or control. Concessions in this case are actually a cost-cutting measure to relieve the strong of an unwanted burden.</td>
<td>These factors contribute to the willingness of those in power to act in ways that they have previously avoided. The security of the strong may allow them a new freedom in generosity towards those previously considered challengers. There are no guarantees that the rising arithmetic ratio of strong to the weak will enable change, but it makes change possible. As part of this change: -- The strong may begin to view the weak as non-threatening to their economic, social, and/or political dominance. -- The strong may now change their perceptions of the weak group from negative stereotypes (such as dangerous or incompetent) that were part of their justification of power holding, to more positive views of the weak (to deserving or honorable). -- Through these processes, the strong can recalculate the demands of the weak as relatively more “affordable” than before.</td>
<td></td>
</tr>
</tbody>
</table>

Normative Factors motivating the strong

There may be normative characteristics or beliefs of the strong that have changed. This includes change in the judiciary, which may support changes or concessions that they have previously dismissed or refused to consider.

--The redefinition of the weak group as “human” in terms of their worthiness for the general application of rule of law and rights to which all humans are entitled. This is a spillover effect from an external change or event, such as the reaction of the international community to the Holocaust or public shaming of a government for its failure to offer civil rights. This is an unintended spillover effect, and is also related to the two normative changes below. *

-- In a related argument, the devotion to rule of law and need for cognitive consistency would now require the application of the principle to the weak, now defined as humans or citizens.

-- There may also be a new need or demand for consistency in policy form and application across a variety of populations, including the weak.

*Dehumanization is a common cognitive method for maintaining the broad application of principle (such as the rule of law) to most people, while simultaneously depriving others. Thus Athenians could practice democracy for people, but define slaves outside of the democratic system as non-people; white Americans could preach about constitutional liberties for citizens, but define slaves and Indians as non-people who were ineligible for legal personhood or citizenship.
The argument about how the strong are now “able to afford” granting concessions to the weak after a history of considering the weak strong enough to be a threat is complex. First and foremost, those in power do not make concessions only because they can afford to make them. Some prior factor is necessary to make them interested, willing, or even determined to make the concessions. The question of affordability determines whether they will actually be able to make the concessions once they are willing to do so.

As the strong to weak ratio grows, it becomes less and less painful for the strong to grant concessions to the weak (although again, there are few reasons for the strong to initiate such action on their own). In some situations, the strong may have (or may still be developing) a high normative value for generosity. This will only be exercised when it is inexpensive to do so, but if it is of enough value for the strong to feel generous they may actually seek out opportunities to offer something to others. Still, if a weak group is considered to be undeserving (lazy, greedy, dangerous to the dominant population, etc), they are not likely to be appropriate targets for this generosity. The stereotype of the group would need to change to make them appear more deserving. For generosity to be motivated this way, those in power must see the weak group as deserving.

If the strong do not have any norms of generosity but are instead are only driven by practical considerations, we expect to see something more tangible change that now offers those in power practical value in exchange for the concessions being made. In this case, there is not likely to be a condition on the qualities of recipients. For indigenous peoples, who are among the least endowed in terms of size, strength, resources, and political power, there appears to be relatively little chance for them to offer practical returns for this second scenario.

This reasoning suggests that for the strong to exercise generosity toward the weak they need the following:
<table>
<thead>
<tr>
<th>Practical Motivation</th>
<th>Initial Cause</th>
<th>Facilitating Factor</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The strong are motivated by a practical pressure of some extraordinary sort. This can be brought to them by people whose own motivation is normative, but those people have to have tangible political power over the strong. Because the force for generosity comes from the strong, they are giving for practical reasons, and the image they have of the group they are giving to is not crucially important – a good image may help to improve the size of the award, but a bad image will not cancel the award.</td>
<td>AFFORDABILITY THRESHOLD: The Strong/weak ratio is large enough for the strong to be secure and consider generosity</td>
</tr>
</tbody>
</table>

| Normative Motivation                  | The strong have a normative compulsion to be generous to suitable targets of generosity AND have redefined redefinition of the weak as appropriate (and morally acceptable) recipients of generosity.                                                                                     |                                                                                                                                                                      |

Based on these considerations, the remainder of the work strives to develop an explanation for why, how, and when politically weak groups can see their claims against the state come to fruition. The following two chapters develop an explanation for why and when political elites may chose to acknowledge the existence of indigenous rights and actively consider claims against the state on their behalf. The in-depth comparative analysis engages in historical process tracing to analyze the events and decisions that lead to such a dramatic change. When the reasons for broad change have been established, the work then proceeds to develop more specific hypotheses related to why, if a country has decided to consider claims, some claims are more likely to be taken seriously and result in concessions and settlement than others.
3. Recognizing Indigenous Rights: Australia, Canada, and New Zealand

3.1 Recognizing Indigenous Rights to Land

The first question for consideration is why power holders acknowledge the rights of the weak at all. In the case of indigenous peoples, the extension of rights to property and resources comes after an extensive history of dispossession, purposeful denial of rights, and exclusion. In many ways, the recognition of indigenous peoples’ sovereign rights involves the government validating attacks on itself. By recognizing and restoring rights to the original inhabitants of the territory, political elites are admitting that they and their predecessors acted unjustly in their treatment of indigenous peoples (Scholtz 2006).

A second dynamic that makes indigenous peoples’ claims against the government and dominant population difficult involves the possibility of opening themselves up to demands to rights or access to valuable resources or property. The claims of indigenous peoples often involve intangible rights, such as formal apologies or recognition of special sovereign status. However, they often also include or lead to demands for tangible resources (such as monetary compensation or land ownership) that require redistribution from the dominant population. The potential for these future claims raises the stakes of political decisions that may appear to offer only a moral acknowledgement. When policy makers offer any concession or admit wrongdoing, it may open up a sort of “Pandora’s box,” introducing a state responsibility to deal with a broader range of historical misdeeds (Scholtz 2006, 2).

Cases where governments recognize and even return indigenous peoples’ rights to land are difficult situations to explain. Yet while it may be unexpected, the recognition and extension of land rights has become a reality in many countries around the world, particularly in the past 40 years. To explain this developing phenomenon, the next two chapters take a broad, cross-national approach to evaluate the ideas presented in the previous chapter.
3.1.1 Case Selection and Comparisons

The natural universe of available cases consists of countries whose population of colonial or conquering immigrants gradually expanded their numbers and presence in territory once inhabited and used by indigenous peoples, and who also adopted historical policies of cultural and physical oppression against the indigenous population. In some cases these indigenous groups were assimilated or exterminated, but in others they managed to survive and maintain their identity, community, and culture in distinction from the majority population. Globally, indigenous populations are estimated to comprise approximately 300 million people, encompassing over four thousand distinct societies (Niezen 2003, 4). Many of these groups are now making claims for rights and resources against the majority population or government and in some cases are winning recognition, rights, and even the restoration or compensation of territory or resources.

Four countries have been selected for a comparative historical analysis of the development of indigenous peoples’ land rights: Australia, Canada, New Zealand, and the United States. These cases have similar colonial histories, common law traditions, and all have small minority indigenous populations whose past dispossession was essential in the settlement of the country by European colonizers. In each country, indigenous peoples’ land rights have been increasingly recognized in the past 40 years, although with varying degrees of success and commitment.

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14These countries are often studied in conjunction when addressing indigenous peoples’ rights because of their comparability. Some examples from a range of disciplines include: Bartlett 2000; Brookfield 1999; Kymlicka 1995; Mason 1997; Scholtz 2006; Sender 1999; Sutton 1975; Weiner 2005.
### Table 3.4: Outcomes in Indigenous Peoples’ Land Rights

<table>
<thead>
<tr>
<th>Federal Administrative Body for Return of Land (date of creation)</th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Native Title Tribunal (1993)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office of Native Claims (1974)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waitangi Tribunal / Office of Treaty Settlement (1975)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>None for claims to transfer land (as of 2009)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of Land Controlled by Indigenous Peoples (1998)</td>
<td>15%</td>
<td>Approx. 26%</td>
<td>5.6%</td>
<td>2.7%</td>
</tr>
</tbody>
</table>

The table shows two major indicators used to evaluate the outcome of indigenous peoples’ land rights. In three of the countries, the national government established a formal body (or bodies) to evaluate indigenous peoples’ claims for the return of land. This is used as an indication of the commitment of elites to acknowledge the claims of indigenous peoples for the return of land. How active or effective these bodies have been at resolving indigenous peoples claims is a matter of debate, and will be discussed in the case studies. The second indicator is the percentage of the country’s total landmass controlled by indigenous peoples in 1998. These numbers offer a rough estimate of how successful indigenous peoples have been in keeping or regaining sovereign territorial rights.

There are several key factors that establish the comparability of the cases. Small-N comparative case studies require the shared attributes of common challenges, common actor

---

15 Dates for the establishment of the Administrative Body for Return of Land taken from Scholtz 2006. Data for land controlled by indigenous peoples for Australia, and New Zealand is taken from Dow and Gardiner-Garden 1998. The Canadian statistic given by Dow and Gardiner-Garden is no longer accurate, given the creation of the territory of Nunavut in 1999. While the entire territory is not owned by the Inuit (the federal government and other private owners control portions of the territory), the Inuit do have a reasonable amount of authority in controlling the land and agreeing to its use. For this reason, the entire territory (nearly 20% of the Canadian landmass) is included as indigenous controlled. Data for the United States is from the Bureau of Indian Affairs, www.doi.bia.gov. Note that this does include Hawaii and Alaska, two regions whose indigenous peoples are often considered legally and politically distinct from those in the continental US. Also, for all countries the numbers reflect land held in trust and controlled by indigenous peoples as political entities, and not land owned by indigenous individuals in outright fee simple title. The specific parameters of trust land will be discussed later in the work.

16 While there have been administrative bodies in the United States for land claims, they were created to offer financial compensation, not transfer land. This situation- and the consequences for groups seeking the return of land- will be discussed during the United States case study.

17 A better indicator would be the amount or percentage of land that has been regained during a period of time, such as since 1960 or from the time of the creation of the administrative land claims bodies. Accurate figures for lands transferred during set times have been surprisingly difficult to ascertain for a variety of reasons, and the author is continuing to pursue this information.
orientations, and common institutional settings (Scharpf 2000; Sharp 1955; Sutton 1975). As former British colonies, the four countries have each replicated a common Anglo political and legal tradition. They share similar frameworks of majoritarian democracies with established rule of law. Further, they each share a history of conquest based on the European ideal of the “doctrine of discovery.” Mass migration and settlements were pushed by the drive for inexpensive land, and in each country this triggered conflict and dispossession for the indigenous populations (Deloria and Wilkins 1999; Havemann 1999; Wilkins and Lomawaima 2001).

The comparability of the cases extends beyond the similarities of the settler societies to the characteristics of the indigenous groups- all were decimated by disease, forced removals, starvation, dependence, and violence. All have also been confronted by ongoing social and institutional discrimination and racial conceptions of white superiority (Sharp 1955). In each country, the indigenous population lags the rest of the country in terms of social, political and economic resources. The indigenous peoples in the four countries also share a similar basis for their claims; each group has based claims on inherent group rights to self-government and territory. The four cases therefore share common institutional settings (democracies based on the rule of law and British traditions), common actor orientations (political power holders responsive to majority demands, indigenous peoples seeking similar goals), and common challenges (how to respond to claims of indigenous peoples that may conflict with the goals and demands of the majority).

There are also distinct differences. Perhaps most relevant are the differences in formal treaty and sovereign to sovereign relationships. The British negotiated treaties with the indigenous peoples in North America, recognizing their sovereign power over territory. Treaties with individual tribes remain the foundational aspect of sovereignty in the United States and Canada, although in Canada many of those who were not formally recognized with treaties are also bringing claims against the government. In New Zealand, a single treaty, the Treaty of Waitangi, forms the basis of the relationship between the settler government and the indigenous population. At the opposite extreme, Australia’s indigenous peoples were legally disregarded, and no treaties have ever been made
(Coates 2004). While treaties may have originally appeared as arrangements between sovereigns, treaties with indigenous populations were often later disregarded by the government and dominant population. Their set arrangements tended to fall quickly to pressure to settle land or exploit natural resources, so even if they stood a theoretical reminder of legal status they were often ignored in practice. Still, as we will see in the development of the case studies below, treaty relationships (or lack thereof) have been important in defining the legal and political status of indigenous peoples in modern times.

There are other political differences as well. New Zealand now operates as a unitary body, while the other three are federal systems. Canada and Australia both have regions where the federal government is the sole governing body for internal territories. With its presidential system, the executive branch of government has had a much stronger role in determining indigenous policy in the United States. The political experience and incorporation of the indigenous peoples are also quite different. Some of the basic political situations and important dates for indigenous people, policies toward the indigenous, and recognition of land rights are laid out below. These similarities and differences make these four countries compelling for comparison, offering common preconditions and contexts along with different policy choices and policy outcomes. Even with these distinctions, there is a shared trend toward more generous treatment of indigenous peoples.
### Table 3.5: Political Characteristics of States, Indigenous Peoples & Rights to Land

<table>
<thead>
<tr>
<th></th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Form of government</strong></td>
<td>Federal government, bicameral legislature</td>
<td>Federal government, bicameral legislature</td>
<td>Unitary government, unicameral legislature</td>
<td>Federal government, bicameral legislature</td>
</tr>
<tr>
<td><strong>Treaty Recognition of Indigenous sovereignty</strong></td>
<td>No</td>
<td>Yes – for some parts of the country</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Indigenous Parties to treaties</strong></td>
<td>N/A</td>
<td>Individual tribes/ bands</td>
<td>Maori</td>
<td>Individual tribes</td>
</tr>
<tr>
<td><strong>Federal authority over indigenous affairs established</strong></td>
<td>1967</td>
<td>1867</td>
<td>1852</td>
<td>1788</td>
</tr>
<tr>
<td><strong>Constitutional mention</strong></td>
<td>No</td>
<td>Yes (1982)</td>
<td>No (no written constitution)</td>
<td>Yes (1788)</td>
</tr>
<tr>
<td><strong>Federal right to vote extended to all indigenous peoples</strong></td>
<td>1962</td>
<td>1960</td>
<td>1840</td>
<td>1924</td>
</tr>
<tr>
<td><strong>Segregation on reserves or reservations</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Forced schooling/ assimilation by government</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The political and policy differences will be discussed in greater depth in the individual case studies, although the quick overview points to a history of greater inclusion for the Maori than for indigenous peoples in the other three countries. Still, successes by any group are muted by the social and economic disparities that face indigenous peoples across the board. The next table illustrates the dramatic differences between each country’s dominant population and indigenous peoples in terms of socio-economic standing.

---

18 Sources for this data include: Coates 2004; Havemann 1999; Wilkins 2002
<table>
<thead>
<tr>
<th>Table 3.6: Demographic Characteristics of Total and Indigenous Populations¹⁹</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Population</strong></td>
</tr>
<tr>
<td>----------------------</td>
</tr>
<tr>
<td>20,701,000</td>
</tr>
<tr>
<td><strong>Indigenous Population (%)</strong></td>
</tr>
<tr>
<td>(2.5 %)</td>
</tr>
<tr>
<td><strong>Median Age</strong></td>
</tr>
<tr>
<td><strong>Percent Unemployment Total Population/indigenous</strong></td>
</tr>
<tr>
<td><em><em>Life Expectancy</em>- Male Total/indigenous</em>*</td>
</tr>
<tr>
<td><strong>Life Expectancy- Female Total/indigenous</strong></td>
</tr>
<tr>
<td><strong>Median Income</strong></td>
</tr>
<tr>
<td><strong>Total/ indigenous</strong></td>
</tr>
</tbody>
</table>

Statistics for the total population are in plain type, while those for indigenous peoples are in bold type.

*The calculation of life expectancy for indigenous population is problematic as deaths may be underreported, particularly in rural and isolated areas. Australia, Canada, and New Zealand all make formal notes of this in their presentation of data. Despite this flaw, the data reflect the most accurate statistics possible.

** All incomes are denoted in national currency. The United States data are estimated for full time, year round employment, so may overestimate the income of many American Indians who are under-employed.

The data illuminate some similarities between indigenous groups in these countries. All are small minorities in the population, although the Maori in New Zealand have a far greater percentage

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¹⁹ Data have been taken from the following sources: **Australia**- Australian Bureau of Statistics, 2006 Census Reports and Australia Year Book 2008. Figures are from 2006 with the exception of unemployment rates (2005 for the total population and 2004 for the indigenous population) and indigenous life expectancy data, which reflects statistics gathered from 1996-2001. All information available at www.abs.gov.au. **Canada**- Population statistics are taken from Census 2006. Because of delays in reporting on the full range of results from Census 2006, the remaining data are taken from Census 2001. All data is available at www12.statcan.ca/English/census. Total population life expectancy is from 2004, as reported by Statistics Canada on December 20, 2006. **New Zealand**- Statistics New Zealand, 2006 Census, Quick Stats National Highlights and Quick Stats About Maori. All figures are from 2006 with the exception of Maori life expectancy. This comes from 2001 data provided by Maori Health. All information available at www.stats.gov.nz or www.maorihealth.gov.nz. The statistics provided here refer to those who have responded in the Census as having Maori ethnicity, as opposed to Maori descent. 643,977 respondents listed themselves as Maori by descent. **United States**- US Census Bureau, Census 2000. The data has been compiled from “We the People: American Indians and Alaska Natives in the United States” prepared by Stella Ogunwole (February 2006) and “American Indian and Alaska Native Population 2000: Census 2000 Brief” by the same author (February 2002). Life expectancy for the total population is taken from information for 2004 as provided by the Center for Disease Control www.cdc.gov. Life expectancy for American Indians reflects information presented by Charles Grim to the Indian Health Service in 2006. All data available at www.census.gov or www.ihs.gov. The population number provided is for those who have identified as American Indian or Alaskan Native alone or in combination with another race. If just the population identified as American Indian or Alaskan Native alone is used, the number drops to 2.5 million in total and approximately 0.9% of the American population.
of the population than any of the others. Even the Maori still rank far below the dominant population in the indicators shown. In each country, indigenous life expectancy is lower, incomes are lower, and unemployment is higher. The indigenous population is, on average, much younger than the rest of the population with fewer people in the workforce. Indigenous Australians suffer greater disparity than those elsewhere, with unemployment more than three times the national average, life expectancies lagging by 20 years for males, and median income at only 62% of the national statistics. These are all current statistics, revealing the fact that even if indigenous peoples have made any gains in land rights, they remain at the bottom of the social and economic spectrum.

Historically, the indigenous populations in each of the four countries have shown similar demographic trends. Each suffered a massive decline in population after contact, reaching their lowest points in the early 1900s. All four countries have also seen a recorded rise in the indigenous population. Increases may be due to the inclusion of people with partial indigenous heritage as well as growing trends for self-identification as indigenous. Fully accurate historical estimates of indigenous populations are difficult to pin down. There are several reasons for this—early numbers may have been intentionally misreported due to the incentive for colonial record keepers to minimize the size of the indigenous population or skewed from poor methods of estimating or recording indigenous populations (if officially tracked at all). Further, questions over who is counted or identified as indigenous or not (and who has the power to make this identification) can also have repercussions for the numbers reported. With these caveats noted, we can begin to make some comparisons between the countries studied.
The comparative population trends highlight the relatively recent increase in indigenous population and identification. In New Zealand the numbers began to rise around 1920, but in the other three countries no consistent increase is noticeable until around 1960. With the exception of Australia (which did not recognize native title until 1992), the shift toward returning indigenous property came during the 1970s. This indicates that these changes came in conjunction with or before, rather than because of, population increases.

A last comparative overview illustrates the varying geographic constraints in each country. While they may have shared colonial and institutional backgrounds, each operates in a very distinct

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Note: Data is compiled from the following sources: **Australia**- Vamplew 1987; Australian Bureau of Statistics (www.abs.gov.au); **Canada**- Historical Statistics of Canada (www.statcan.ca and http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm); **New Zealand**- Bloomfield 1984; Statistics New Zealand (www.stats.govt.nz); **United States**- “United States- Race and Hispanic Origin: 1790 to 1990” and current census data (www.census.gov).
physical environment. This has consequences for the pressures of settlement and population, as well as the value of the areas that indigenous peoples may be able to lay claim to.

Table 3.7: Geographic Comparisons of Countries and Indigenous Groups

<table>
<thead>
<tr>
<th></th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenous Population</td>
<td>517,200</td>
<td>1,172,785</td>
<td>525,326</td>
<td>4,100,000</td>
</tr>
<tr>
<td>(2.5%)</td>
<td>(3.8%)</td>
<td>(14.6%)</td>
<td>(1.5%)</td>
<td></td>
</tr>
<tr>
<td>Landmass</td>
<td>7,686,850 km²</td>
<td>9,984,670 km²</td>
<td>268,680 km²</td>
<td>9,826,639 km²</td>
</tr>
<tr>
<td>Total Population Density (persons/km²)</td>
<td>2.59 persons/km²</td>
<td>3.26 persons/km²</td>
<td>14.86 persons/km²</td>
<td>30.42 persons/km²</td>
</tr>
<tr>
<td>Percentage Urban</td>
<td>87.2%</td>
<td>79.5%</td>
<td>85.7%</td>
<td>79.1%</td>
</tr>
<tr>
<td>Arable Land (as % of total national landmass)</td>
<td>6.55%</td>
<td>4.96%</td>
<td>5.6%</td>
<td>19.13%</td>
</tr>
<tr>
<td>Percentage of Land Controlled by Indigenous</td>
<td>15%</td>
<td>Approx. 26%</td>
<td>5.6%</td>
<td>2.7%</td>
</tr>
</tbody>
</table>

The data presented above sketch a range of geographic constraints for the cases selected. We can begin to conclude from the relationship between indigenous controlled land, national population densities, and arable land that the more valued the territory is, the less likely it may be to be in indigenous hands. As the percentage of land controlled by indigenous represents one of the key indicators of indigenous land rights, the position of indigenous Australians (with more than double the land holdings of the other groups) may appear surprising given the poor situation sketched out in the political and socioeconomic overviews. A clue may lie in the peculiar geography of Australia—much of the land controlled by indigenous peoples is desert, with little commercial value, and had never been claimed by encroaching settlers or governments. The value of indigenous claims and settlements is further explored in the case studies and comparisons to follow.

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3.1.2 International Context

Some of the potential explanations covered in the previous chapter involve international forces. While the effects of international organizations and changes will be discussed in a domestic context in each case study, this section offers an overview of international trends and timeframes. International attention to rights claimed by and awarded to specific groups (“group rights”) has lagged behind attention to universal and individual human rights. In the wake of World War II and new concerns that states could not be expected to protect the rights of their own citizens (and particularly minorities), the fledgling United Nations quickly developed the Universal Declaration of Human Rights in 1948. This was followed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights in 1966, together known as the International Bill of Human Rights (Niezen 2003, 40). These international precedents focus on rights guaranteed to individuals. This left out the needs of some minority groups, such as indigenous peoples, whose concerns with rights were often based on their group status as sovereign nations.

In the meantime, the International Labour Organization was the first international group to formally acknowledge the specific needs of indigenous peoples with Convention 107 on Indigenous and Tribal Populations in 1957. Many indigenous peoples criticized the Convention language for its pejorative language and for not including consultation from indigenous representatives in its development. Still, the formal recognition of indigenous rights was significant in bringing legitimacy to the complaints of indigenous peoples against states. Convention 169 (passed in 1989) amended many of the problems of the earlier version, although some criticisms of its completeness remain (Coates 2004; Niezen 2003).

The United Nations remained reluctant to acknowledge and protect the specific situation and sovereign rights of indigenous peoples, likely because of its reliance on the sovereignty of states. UN and world leaders were concerned about the tension that would arise from acknowledging the sovereignty of indigenous peoples, which would challenge the supreme authority of the state. As the
UN and its members dealt with the process of decolonization and self-determination of peoples on a global scale, however, awareness of the cultural and political oppression that had been used to treat indigenous peoples was difficult to ignore. Other forces that helped to open the door to the recognition of indigenous peoples’ rights included the evidence from many countries of policy failures to assimilate and forcibly educate indigenous peoples. Indigenous causes were also helped by the proliferation of non-governmental organizations devoted to indigenous rights (Niezen 2003).

The United Nations declared 1973-1982 as the decade for Action to Combat Racism and Racial Discrimination, which helped to set the stage for more intense attention to indigenous peoples’ rights. The UN sponsored conference series included the 1977 International Non-Governmental Organization Conferences on Indigenous Populations in the Americas. The rise in awareness of human rights and the poor situations of many minority groups helped contribute to a burgeoning indigenous activist network. Indigenous individuals who had been pushed into assimilation programs were also now more familiar with legal, cultural, and political practices and able to use this new knowledge to promote their cause in the mainstream and generate further attention (Wilkins 2007). The convergence of these events during the 1970s led to more indigenous activism, a rise of indigenous confrontation with dominant populations, and increased negotiation of indigenous peoples’ rights with state governments (Havemann 1999).

In 1982 the United Nations created its Working Group on Indigenous Populations, establishing a permanent public forum for the grievances of indigenous peoples (Niezen 2003). The Working Group has been significant for disseminating information about indigenous peoples, networking among different groups, and the airing of grievances against states. In many ways, the Working Group has allowed indigenous peoples to gain ground through what some term a “politics

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22 The late 1960s and 1970s saw the development of several key NGOs devoted to the promotion and defense of indigenous peoples’ rights. These indigenous led groups have largely replaced the paternalistic type of pro-assimilationist groups that had flourished at the close of the 20th century. The new body of NGOs strive to take the lead of indigenous peoples themselves, providing financial, logistical, legal and promotional assistance. The most active and influential are the International Work Group for Indigenous Affairs (established in 1968), Survival International (1969), Society for Threatened Peoples (1970), and Cultural Survival International (1972) (Coates 2004, 248-249).
of shame,” where they can publicly embarrass regimes for their poor treatment or situation (Coates 2004; Magallanes 1999; Niezen 2003). The Working Group also encourages connections between NGOs and indigenous peoples, providing a network which further helped promote indigenous causes in an international setting and facilitated media attention and coverage (Bob 2002; Wilkins 2007). Finally, the organizational knowledge and institutional support promoted by the Working Group allow indigenous peoples to capitalize on shared experiences and knowledge to put pressure on elites through lobbying and joint international efforts (Niezen 2003, 15).

1993 was declared the UN’s Year of Indigenous People, conferring further recognition and credibility for indigenous rights (Anaya 2004, Niezen 2003). While a draft document circulated for many years, the United Nations General Assembly did not formally adopt the Declaration on the Rights of Indigenous Peoples until September 2007. The Declaration provides support for the ideas of self-determination, cultural integrity, and land and resource rights. While it carries no means of enforcement- and has had limited numbers of signatories- its passage signals an international precedent in terms of the recognition that indigenous peoples’ rights are legitimate even in the modern system of states.

This development forms the international context in which the four case studies underwent changes in acknowledging the rights of their indigenous populations. Not only were indigenous groups influenced by the networks, support, and international connections that were created during this time, but the governments and elites making policy decisions were also influenced by changing international expectations and norms. The specific attention to the needs of indigenous peoples has lagged behind more general awareness and commitment to civil rights and equality. Very recent changes may set the stage for further changes with additional support for indigenous peoples’ specific goals, but this has yet to be seen.

3.1.3 Expected Findings

The previous chapter establishes a number of potential explanations for the extension of rights to indigenous peoples. This chapter and the next provide the comparative historical
development of land rights and settlements in Australia, Canada, New Zealand and the United States. I have gathered the data from disciplines as varied as law, geography, sociology, political science, and history; state (or provincial) and federal government sources; legislative records and documentation; and legal decisions, cases, and supporting documents. The comparative analysis used is not sufficient to establish definitive causal factors; with only four cases and the extensive number of possible factors involved this is simply not viable. What the comparisons among these four countries can do is identify potential causes that are the most likely- and unlikely- to be explanatory in understanding changes in indigenous rights. The case studies also explore the interactions and combinations of characteristics in each situation.

No award of rights or resources will occur without the weak demanding it or decision makers actually granting it. Actors making demands may have been doing so for some time (without effect), but we expect their action to be based on some, even small, belief that they can win. Mobilization of the weak is assumed to the degree that they are able to make demands. For a change in the treatment of the weak, the cost benefit calculations of the actors responding to demands will have to shift. This change in the estimation of costs or benefits may be due to pressure from the weak group, the dominant population, or external factors that the dominant population either supports or does not oppose.

The discussion below offers a very brief review of the potential explanations for understanding why policy makers reconsider the rights of the weak. No award of rights or resources can occur without the power holders actually granting the award, or without the weak actually demanding it. What motivates either group to make this change?

Demand side explanations: How can the weak demand and win concessions?

We first consider what has mobilized the weak to seek their rights. Those in power and the dominant population are presumed to be comfortable with the status quo, in which the group has
been disempowered and discredited, and it is unlikely for them to offer to change without the weak group demanding it. There may be practical reasons that the power allocation of the weak has changed: pre-existing resources have somehow become more valuable; the group may have an economic hold over a specific industry or region; the population may have increased or their strategic importance in elections may have changed. These changes themselves are not enough, as the group or its leaders must also have a new expectation that there is a chance of success and a normative reason to begin their pursuit of awards from the state. We expect this belief in the possibility of success to be necessary. Without it, the weak will not act. Further, the weak group needs to have internal group cohesion in seeking the award. If they cannot agree on a goals or strategy, or put their collective resources together, their ability to pursue anything is jeopardized.

The weak can make demands through several channels. I do not expect that they will exert much pressure through electoral means, given their small size and apparent lack of previous political power. Also, they are unlikely to have any direct agenda setting power or influence directly on the legislative process. While it is possible that the discovery of new economic resources will allow them some new lobbying leverage (or the lobbying support of others who will be economically advantaged by the change), this again seems unlikely, particularly for groups that are seeking resource rights. The main route for the very weak to gain some institutional support for their demands appears to be litigation. This path may be risky (the judiciary can, and probably has) denied support for the weak, and also may be prohibited. Even with access to the courts and judicial decisions in their favor, the weak still need this to translate into political pressure on policy makers. This explanation therefore requires that the state be committed to the rule of law, and that legislators will respond to the mandates of the judiciary.

Supply side explanations: Why do the strong offer concessions to the weak?

We next turn to the question of why the dominant population would allow or even support changes in favor of the weak. Again, there are likely to be both practical and normative components
to the motivations of those in power. Elites’ calculations of the value of the rights or resources being claimed may have changed. The costs of withholding these rights or resources may have also changed. Legal decisions on behalf of the weak group may have created pressure on decision makers to consider the demands of the weak or change policies. I again expect normative factors to be an essential part of the process. The weak group may have been redefined in some sense to become part of the main body politic, and therefore deserving of equal rights and legal protections. There may be international or domestic changes in norms regarding the treatment of minorities and weak generally. It is also possible that the dominant populations’ understanding of the weak group itself has changed, and that the weak are now considered eligible for the rule of law and equal rights while they were not before.

For these factors to be translated into pressure on decision makers there must be other facilitating forces involved. For judicial decisions to have power there must be a commitment to the rule of law. For international change to be significant, decision makers must be concerned about international attention and their standing with the international community. For any concessions to be made there needs to be the calculation of those in power that this does not threaten their position. Specifically, the weak must be weak enough that it is safe to grant concessions. Further, if this is normatively driven (and the weak have nothing of value to offer in return), the group in question must be considered deserving of the rights. At the same time, the rights they are seeking should be considered morally acceptable or legitimate by the dominant population, and compatible with the authority and legitimacy of the state. Normative change and recalculations over the value of rights are likely to influence decision makers directly as well as the voting choices of the electorate. While decision makers themselves may be able to craft policies based on their own preferences, their interests in staying in power make them unlikely to enact change that is strongly opposed by the dominant population.

There is also the possibility that the extension of rights has somehow come out of unintended consequences. Policy decisions may have made intending to end the demands or claims
of the weak and somehow opened doors of possibility. This avenue is harder to predict, and is only likely to have force if there is a demand for policy consistency and application and where power holders are concerned about following through with their public commitments.

**Spillover effects:**

A final option is that normative or policy changes in support of the rights of other groups are now being extended to the weak. This may be driven by a demand for policy consistency or application by the dominant population or even by the government once the change is enacted. For example, the extension of the equal rights to one minority group (perhaps a larger minority with more power than the weak group in question) may be applied to all minority groups equally. This may be an attempt by the government to offer blanket concessions to all groups who may be making demands. Spillover effects may also be more inadvertent. This may also be cases where the weak are actually being extended rights or resources that they have not themselves sought out.

This discussion points to several characteristics of the government that are necessary for these explanations to hold. There must be a recognized rule of law. The government must be invested in the international community, and have some concern about its international reputation. The government must be attentive to the demands of the dominant population.

These possibilities lead us to expect that there must be some impetus to bring a new consideration of rights to the attention of decision makers. There must be some practical pressure to actually consider the change. Even if the pressure is brought by forces driven by normative change, there must be tangible power being exerted over elites in order to translate this normative shift into power over the strong. Those in power must be normatively comfortable with offering generosity (the extension of rights) to those who are considered suitable targets, and the weak group in question must meet some threshold of being one of these suitable recipients of such generosity. Further, the strong must be strong enough and the weak must be weak enough that the position of those in power is not threatened by the change.
3.1.4 Overview of Comparisons

The comparison of these countries reveals a very similar progress of policies. In each, there was an initial period of the arrival of the immigrant population and conflict over land acquisition. In countries and regions with treaty arrangements between the arriving powers and the indigenous population, this was the period of treaty making. When the indigenous population was no longer physically threatening, policies began to turn toward the denial of rights, assimilation into the dominant population, extermination, and other ongoing attempts to break indigenous peoples’ ties and claims to land. Later, each country moved into a third phase where the extension of equal rights and some minority rights were extended to indigenous peoples after international and domestic standards for the general treatment of minority groups shifted. At the same time, the social and economic dominance of the former immigrant population became secure, and indigenous populations were also beginning to mobilize. And finally, all four countries are now in a policy stage that includes the restoration of sovereign rights and transfers of resources and territory. While the precise timing in each country is different, a rough timeline is: arrival and acquisition- pre- 1850; assimilation- 1850-1950; equal rights-1950-1970; and beginning of sovereign rights- 1970- present. For a closer comparative examination of dates, refer to the international timeline in Appendix A.

The remainder of this chapter provides the qualitative historical comparison and analysis of Australia, Canada, and New Zealand before turning to a comparative evaluation of the potential explanations. The chapter also leads into the more detailed exploration of the United States case, covered in Chapter 4, which in turn sets the ground for the remainder of the work.

3.2 Australia

Australia stands out among the other countries studied due to the government’s long standing refusal to recognize any of the rights of the indigenous population. The invading British power denied the humanity of the indigenous population, declaring the continent unoccupied and setting the stage for 200 years of dispossession and destruction of aboriginal communities. It was not until the 1960s when the government extended the federal franchise and citizenship rights to
Aborigines. Recognition that indigenous occupants had possessed title to the land did not come until the 1992 court case Mabo v Queensland. In response, in 1993 the government created the National Native Title Tribunal to make recommendations on indigenous claims. Despite this late start, the small Aboriginal population is now reported to have control of 15% of the country. However, the areas controlled by indigenous peoples are very low value, often remote desert land, and any future claims to land are severely restricted.

3.2.1 Arrival and Acquisition

The indigenous peoples of Australia are commonly referred to as Aborigines. This encompassing term masks the fact that there are over 500 separate clans with unique political and cultural identities, similar to the situation in Canada or the United States. First contact between Aborigines and Europeans came through whaling expeditions during the 17th century. After the more extensive exploration beginning with the arrival of the “First Fleet” lead by Captain Cook in 1776, the British founded the first permanent settlement at Botany Bay in January 1788, and in 1829 claimed the continent in its entirety (Short 2003). While the Australian colony was initially established as a penal colony, it was quickly expanded into a settlement for all residents. Even on the fertile east coast of the largely arid continent, European settlers encountered an indigenous population that was widely scattered and appeared nomadic.

23 Another common reference is to Aboriginal and Torres Strait Islanders. Torres Strait Islanders are the indigenous group of the Torres Strait Island off of the coast of Queensland. Ethnically and culturally they are more similar to the indigenous peoples of Papua New Guinea than mainland Aborigines, and so are often referred to separately. While these terms are used as the best way to refer to the indigenous peoples of the country collectively, a guide for New South Wales social service workers points out:

The names ‘Indigenous,’ ‘Aboriginal’ and ‘Torres Strait Islander’ are not the original names people used to identify themselves. These names are a legacy of colonization. It is important to remember that before, during and after invasion the First Nations’ people of this land identified themselves by their country, such as Darug, Gandangarra, Tharawal, Eora… The names ‘Indigenous,’ ‘Aboriginal’ and ‘Torres Strait Islander’ are colonial labels imposed on a range of people with diverse cultures and languages (NSW Department of Community Services 2007, 2).
While there are varying estimates of how many indigenous peoples were in Australia at the time of British settlement, the range converges somewhere between 250,000 and 500,000.\textsuperscript{24} This population was organized into about 500-900 separate groups, with each having territories and specific use rights (Hinchman and Hinchman 1998; Jones 1970). Regardless of the starting point, the Aboriginal population was quickly reduced during the 18\textsuperscript{th} and 19\textsuperscript{th} centuries through disease, loss of resources, and violence from the colonial power.

The geography of Australia encouraged the semi nomadic lifestyles of the indigenous population. The vast continent is largely arid and semi-arid, with only a few areas of coastline that are arable. Adapting to this environment, the indigenous population developed a hunter-gatherer lifestyle with seasonal or annual migration patterns. The Europeans response to the geographic constraints of the continent was to settle on the coasts- particularly the eastern coast- for settlements. The large central desert served to block the westward expansion of European immigrants for some time, which meant that indigenous residents of the center, north, and western parts of the continent had later contact with the settler society and were able to maintain their lifestyles and traditional use of land for far longer than those on the coasts (Sharp 1955). Ultimately, however, these areas would also come under the full administration of the British and Australian governments.\textsuperscript{25}

\textit{Terra Nullius and the Denial of Aboriginal Existence}

Despite early contact with the indigenous population, the British established a policy of \textit{terra nullius} (or empty land), refusing to acknowledge the institutions, rights, or even the humanity of the indigenous peoples. This approach, which would have profound implications for the future of the

\textsuperscript{24} Estimates for the numbers of indigenous peoples in Australia at the time of contact vary from 250,000 (Jones 1970) to 350,000 (Vamplew 1987) to 500,000 (Hinchman and Hinchman 1998). It is estimated that the lowest point of population was around 73,000 in the mid 1930s (Vamplew 1987). The range of estimates (and ongoing lack of certainty in estimates of indigenous population in Australia) can be attributed to the delayed lack of contact in most regions combined with the fact that the British and later Australian governments did not officially count- and had a strong incentive to under-represent- any indigenous population until their declaration as citizens in 1967.

\textsuperscript{25} The geographical differences of the continent are still important, as the vast majority of the white Australian population is in urban centers on the eastern coast. The areas where Aboriginal peoples make up the largest percentage of the population are generally remote rural- and arid- areas. As estimated in the 2006 census, indigenous peoples make up less than 4\% of the population of every state except the Northern Territory, where they represent 31.6\% of the population.
aboriginal population, was very different from that in other British colonies such as the United States. The idea that Australia was *terra nullius* or “practically unoccupied” before the British arrived would stand as the legal and political precedent for property rights in Australia until 1992 (Reynolds 1999, 131). This policy and the designation of Australia as a “settled” colony officially meant that the Aboriginal population had no recognized title to land or political identity, and therefore British common law immediately applied to the entire continent with no regard for indigenous institutions.

In contrast, in “conquered” countries (such as in Africa, Asia, New Zealand, and North America) where the British recognized pre-existing sovereign entities, the native title of indigenous inhabitants was recognized and British law had to be explicitly introduced (by the Crown or legislative action) (Brookfield 1999, 50).

A key proponent in declaring Australia unoccupied was Sir Joseph Banks, who sailed on Captain Cook’s ship Endeavor during the first explorations of the east coast and “was widely regarded as the most authoritative informant about Australia” by the British government (Reynolds 1999, 130). Banks argued that apart from a very small coastal population, the continent was unsettled, and that there was no hope of negotiating with the few natives as they were uninterested in any purchase of their land. Even after initial settlements, the scattered, sparse population, limited resistance, and lack of centralized institutions helped confirm the British conception of a politically unorganized population. The Aboriginal population and culture did not meet narrow British ideas of “civilization,” with no readily identifiable political structures, permanent residences, animal husbandry, or any practice of cultivation (which was essential in the British, Lockean based ideas of property rights popular at the time) (Hinchman and Hinchman 1998; Mason 1997; Short 2003).

There were clear practical motivations behind the *terra nullius* philosophy. It was simply far easier for the colonizers to assume all title to land rather than to engage in negotiations or treaties, and there were few obstacles in their way. The Aboriginal population had no overarching

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26 See Seed 2001 for a detailed analysis of how British conceptions of how ownership, cultivation, and use of property played into colonial policies around the world.
organization, individual bands were very small, and with no military technology they were poor
defenders of any territory. As the indigenous population became more aware that the
encroachments would continue and intensify, there were some efforts at resistance. Conflict with
white settlers was ongoing, with violence accounting for more than 20,000 aboriginal deaths (and
2,000 European) between 1788 and 1920 (Reynolds 1999, 132). Settlers were even encouraged by
the government and military at the outset of the 19th century to protect themselves by force against
perceived threats by the native population, exacerbating and spreading conflict, particularly in New
South Wales and Tasmania (Reynolds 1999).

3.2.2 Assimilation

By the mid 1800s, some British officials were concerned about the threat of violence over
land, its effects for colonial security and stability, and what this would mean for their international
reputation and dominance. At the same time, the rise of “shepherd kings” (land owners and
squatters assembling vast land holdings in the interior grasslands), presented a challenge to the power
of the colonial administration. The two separate concerns helped lead to a system of pastoral leasing,
which was to extend and assert colonial administrative control over the land rights of white settlers.
It required land owners to provide reservations for the Aboriginal inhabitants of their property with
the right to enter unimproved areas of the lease for subsistence purposes (Reynolds 1999).

While most regional governments quickly abolished (or simply ignored) the regulation,
colonial governments in Western Australia and the Northern Territory did support indigenous
reserves and continue to the present day to preserve usufruct rights to territory (Reynolds 1999, 136).
These were rights to use only, so this ostensible support made very little difference to the security of
Aboriginal rights to land. Also, the limited number of reserves ultimately offered little protection. A
combination of outright violence and the effects of disease and dispossession quickly decimated the
aboriginal population (Short 2003). Indigenous groups on the southern and eastern coasts had the
most contact with outsiders and therefore suffered the most. Indigenous Tasmanians, subject to
particularly violent tactics, were pushed to near extinction.
In 1887 the British Privy Council officially declared Australia a crown colony. Neither this action nor independence as a separate Commonwealth country in 1901 brought any changes in the treatment of indigenous peoples or their rights. The new Australian government continued the British set precedent of refusing to recognize the humanity of the indigenous population. The wording of the 1887 declaration officially stated that the colony was “practically unoccupied without settled inhabitants or settled law” (Hinchman and Hinchman 1998, 29-30). The 19th and early 20th centuries were characterized by policies that included forced removals, state education programs, and ongoing attempts at the extermination of aboriginal existence. The Commonwealth Franchise Act of 1902 specifically forbade “any aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, except New Zealand” from voting unless they had been named on electoral rolls in 1901. They were excluded from naturalization, citizenship, and voting rights, as well as from welfare provisions such as old-age pensions (Reynolds 1999, 137). Local officials retained the power to decide who was and was not aboriginal (Australian Electoral Commission 2006).

For the most part, Aboriginal populations were confined in remote rural reserves, dependent on authorities for subsistence (Hinchman and Hinchman 1998). Indigenous people who lived on land that was valued by the dominant population were often removed by government agents to reserves (still with no rights over the land on which they were placed) elsewhere in the country. Aboriginal peoples on reserves were often exploited as cheap agricultural labor in support of the pastoral enterprises of whites (Short 2003). Throughout the 18th and 19th century, aboriginal populations were deprived of their own institutions, land, traditions, culture, and lifestyles, but remained barred from participation in dominant Australian political, economic, and social spheres.

The Australian government refused to recognize any aboriginal institutions or acknowledge any legal or political obligations to provide any services for the aboriginal people. The earliest reforms came from (white) social activists. The focus of these early activists and their organizations
was the assimilation and integration of Aborigines into the mainstream population. Similar to progressive movements in Canada and the United States, the Australian progressive reformers believed that the problems of the indigenous population would be solved by their incorporation into the dominant culture, economy, and society.

**Forced Education and the Stolen Generation**

Native welfare boards were first established by progressive reformers and government officials between 1900 and 1920 to “help” the Aborigines through the distribution of food and social services. The boards were also responsible for programs that forcibly removed “half-caste” children from their homes in order to reeducate them and take them away from the influence of aboriginal group life and society. Of course, the education that these children received was woefully incomplete, and often trained them for careers as laborers and servants. The process of removal continued even into the 1960s and early 1970s (Havemann 1999; Short 2003). The Canadian and United States governments also removed indigenous children from their homes to schools designed to assimilate them into the dominant culture.

Recent Australian government enquiries estimate that about 30,000 children were taken from their families, although other sources put the number far higher. The victims of this program are called the “Stolen Generation.” These social programs and their rejection of the value (or even existence) or Aboriginal culture or traditions reflect the same attitudes that prevailed toward native land rights. The dominant population rejected the alternate conceptions of land that aboriginal societies had, and interpreted the Aborigines’ traditional seasonal movements and lack of individual ownership to mean that there were no connections to territory.

Progressive reforms also pressed for the extension of political rights. A few states did pass early laws that would allow some indigenous people to vote during the beginning of the 20th century, although in practice little was done to encourage it (Australian Electoral Commission 2006). While reformers worked to assimilate some indigenous peoples, generally the dominant population believed that Aborigines were still too inept to handle the full rights of citizenship.
3.2.3 Equal Rights

The international conflict of World War II raised elites’ concerns about the rights of minority groups on a broad scale. Globally, concern with respect for sovereignty and self-determination grew. The Australian government sought to distinguish itself and its treatment of the aboriginal population from the Nazi regime’s treatment of the Jews. This potential comparison led to the concern of Australian officials that the extreme poverty, failure of assimilation, and isolation of its indigenous population could become an international embarrassment (Short 2003).

A small number of Aborigines and Torres Strait Islanders had served in the War. The participation of these veterans began to stir questions among the general public as well as political elites as to whether it was appropriate for those who had served their country to be denied basic citizenship rights. The 1949 Commonwealth Electoral Act granted federal voting rights to indigenous people who had completed military service or who had the right to vote in state elections (Australian Electoral Commission 2006). In 1954 those with less than one quarter indigenous blood also got the right to vote in federal elections (Havemann 1999). These early considerations of rights were aimed at bringing Aboriginal Australians to the same status as Australian citizens.

The early extension of voting rights to some came as part of the elite’s attempt to show the international community a visible commitment to equal rights. Prior to World War II there was little mobilization or activism among the indigenous population itself. National scale indigenous mobilization was limited for several reasons, including the fact that the population was very small, isolated, and widely spread. There was virtually no indigenous individual-level identification with an overarching national indigenous identity. Aborigines living on reserves had little or no access to education, a substantial barrier to overcome in communicating with and learning about the outside world. The boarding schools mentioned above were solely for “half-castes,” for children with mixed white and aboriginal heritage. There was little interest in education programs for “full blood” aboriginals, who were seen as hopelessly primitive. Aborigines had no political experience because they had been denied even basic rights or access to political participation (Scholtz 2006).
There were scattered efforts at activism as some Aboriginal bands began to organize and stage localized protests to bring public attention to their concerns. These protests, such as a 1946 strike in Pilbara, Western Australia and a 1951 strike in Darwin, were local in nature but brought at least some attention from the dominant population and mainstream media to mining developments and poor working conditions. The experiences of military veterans in with the dominant population increased Aboriginal understanding of the dominant political framework as well as increased their dissatisfaction with their position. The migration of some indigenous peoples to urban centers in the middle of the century also established connections among many different Aboriginal groups and aided the development of a pan-Aboriginal network. While the vast majority of indigenous peoples remained in remote areas, the experience of urban dwellers in the mainstream society began to reduce the isolation of Aborigines.

Citizenship

With the development (and persistence) of burgeoning indigenous activism and elite awareness of changing international expectations on the treatment of minorities, the government shifted its policies toward Aborigines dramatically during the 1960s. In 1961 the federal government created a Commonwealth Parliamentary Committee to research indigenous voting rights. It shortly recommended that all Aborigines be extended right to vote in federal elections, which was quickly put into law with the 1962 Commonwealth Electoral Act. State voting rights also eventually caught up to federal; Queensland was the last to extend the vote to the indigenous in 1965 (Australian Electoral Commission 2006). The changes in electoral rights were accompanied by a shift in terms of other citizenship rights. A 1967 referendum passed by over 90% of the voting population supported the inclusion of Aboriginal peoples in the census, which would allow them full access to citizenship rights such as federal support and services (Reilly 2000).\(^{27}\) The referendum guaranteed

\(^{27}\) An earlier referendum, in 1944, incorporated the question of extending Commonwealth power to aboriginal affairs. It also included fourteen other items regarding potential social and economic expansion, and was rejected. The common understanding is that the referendum failed because of concern over costs of providing services for the
equal treatment under all state and federal laws and allowed for federal oversight of indigenous peoples and programs. Before 1967, Aboriginal affairs had been an exclusively state responsibility. These changes were a dramatic shift towards extending equal rights to Aborigines.

The precise motives behind these new policies are difficult to fully pin down. International pressure on the government encouraged elites to extend basic rights to minority groups and also contributed to changing awareness and acceptance of the extension of rights among the dominant population. There are few concrete points of evidence for this, however. The heavily favorable vote on the 1967 referendum does show strong public support for the extension of rights. The extension of basic civil rights did not, however, respond to indigenous demands for recognition, self-government, and territorial control. Also, the rights to equality did not transfer much in terms of actual public goods or services. Even voting rights were essentially token rights, given the very low indigenous population, limited registration (which remains a problem), and remote locations.

**Indigenous Activism**

A growing network of indigenous communication (both domestically and internationally) allowed for an exchange of news, information, and tactics from minority groups outside of Australia during the 1960s and 1970s. These connections helped inspire the Aboriginal populations’ hopes, expectations, and tactics. Aboriginal activists were heavily influenced by the Civil Rights Movement in the United States and indigenous protests in New Zealand. One activist, Charles Perkins, organized a group of about 20 urban aborigines and white youths who lead “Freedom Rides” (inspired by black activists in the United States) throughout New South Wales to highlight and protest the practices of racial segregation in 1965 (Short 2003; Chesterman and Galligan 1997). The rides remain a well-known symbol of aboriginal protests.
Another pivotal moment was in 1963, when the Yirrkala people of Arnhem Land sent a bark petition to the House of Representatives in protest of mining activities on their land. This move incorporated traditional and modern methods of protest, and was subject to a great deal of national (and some international) attention. The Yirrkala’s action prompted a parliamentary inquiry that ultimately supported their rights to compensation. It is difficult to determine if the findings to recognize indigenous rights were prompted by parliamentary fears of negative international attention, concerns over the reaction of the dominant population, or the individual normative ideals of inquiry members. Regardless of the motivation behind the decision, it offered indigenous peoples a degree of hope that their rights might be recognized at a national level. The inquiry encouraged the Yirrkala to sue the mining company for compensation.

The subsequent court case (Milirrpum v Nabalco Pty Ltd in 1970) found against the Yirrkala (Chesterman and Galligan 1997, 194; Sender 1999). While the ruling favored the mining company, finding no doctrine of native title evident in Australian history, the language used did open the possibility that native title rights could potentially exist (Bartlett 2000, 12; Sender 1999). Also, the judge allowed Aboriginal elders to introduce Dreamtime stories, rituals, and ritual objects as evidence of title, an important development in a system that had previously excluded any alternative forms of title or presentations of indigenous knowledge as evidence (Hinchman and Hinchman 1998). This shows some evidence of normative change in the judiciary, even if not yet strong enough to support indigenous title.

The case also shows evidence that the Australian judiciary was becoming sensitive to decisions in other countries. This willingness to use precedents from other common law countries related to the legal standing of indigenous peoples supports the idea of the spread of international norms within the judicial world. The Milirrpum ruling relied in part on the first decision in Canada’s Calder v. Attorney General of British Columbia in rejecting the Yirrkala’s claim. While the first Calder decision (referenced in the Milirrpum decision) denied native title rights, the subsequent appeal in Canada in 1973 prompted support for indigenous rights there (Bartlett 2000, 14).
Australian legal logic, however, continued to rely on arguments of the first Calder decision into the 1990s. The arguments and decisions in the Milirrpum case also drew from American legal decisions (Bartlett 2000). While initially going against indigenous title, the use of international standards and legal reasoning set a precedent that encouraged later decisions to do so as well. This set the stage for progressive legal decisions in support of indigenous land rights in the 1990s when Australia still lagged the rest of the world in recognizing native title.

National Attention to Indigenous Rights

The public attention to growing indigenous activism and the Yirrkala case pressed regional and national parties to develop stands on indigenous rights. This was also encouraged by attention to minority rights around the world. In Australia, the Labor party (which had a general commitment to the extension of government support) reacted to the growing public support for extending rights and services to indigenous peoples and began to publicly support indigenous peoples’ rights in the and services Spurred in part by the national trends signaled by the support of indigenous peoples’ citizenship status in the 1967 referendum, the Australian Labor Party adopted progressive policies in support of Aboriginal rights beginning in the late 1960s and early 1970s. In 1972, a widely publicized “Tent Embassy” was set up in Canberra as a protest against aboriginal status (Short 2003). A key event for indigenous activism was its recognition by the head of the opposition (Labor) party, Gough Whitlam, who promised to support Aboriginal land rights (Chesterman and Galligan 1997, 195).

Under Whitlam’s leadership, the Labor Party’s 1972 election platform specifically addressed and supported aboriginal self-determination. They were likely inspired by the widespread public support for extending equal rights to indigenous peoples, as evidenced by the 1967 referendum vote. Support for group specific rights was less clear, but may have been considered a part of this changing public sentiment. When the Labor party won the majority in Parliament, the new government under Whitlam followed through with their public commitment to indigenous rights and established the Aboriginal Land Rights Commission to investigate indigenous needs. While the Labor Party lost power in 1975 to a Liberal coalition government lead by Malcolm Fraser, the new government was
also receptive to the perceived public support for new indigenous policies. While somewhat weaker than what had been initially proposed, the Racial Discrimination Act was passed in 1975 and the Aboriginal Land Rights Act in 1976 (Franklin 2007; Reynolds 1999).

The Racial Discrimination Act of 1975 offered limited support of aboriginal rights by outlawing discrimination based on race (Bartlett 2000, 16). Passed after several failed attempts, the act was publicized as a response to the UN’s International Convention on the Elimination of All Forms of Racial Discrimination in 1965, and prohibited any discrimination based on “race, colour, descent or national or ethnic origin.” The final version of the bill was introduced by Attorney-General Lionel Murray with this statement:

Perhaps the most blatant example of racial discrimination in Australia is that which affects Aboriginals… There are still remnants of legislative provisions of the paternalistic type based implicitly on the alleged superiority of the white race which it is assumed that Aboriginals are unable to manage their own personal affairs and property…. It is clear that past wrongs must be put right so far as the Aboriginal population is concerned and that special measures must be provided (Chesterman and Gilligan 1997, 198).

These statements tap into normative ideas about past mistreatment and present obligations toward Aborigines. The act not only helped combat concerns about the treatment of indigenous peoples, but it also served to alleviate the negative international attention being generated toward Australia’s poor treatment of Asian immigrants. In this case, Aborigines were positively affected by changing policies toward other minorities.

The Aboriginal Land Rights Act of 1976 (ALRA) was influenced both by the Commission’s report and the development of concerns over native title raised by the Miliwrpum case (Hinchman and Hinchman 1998). It applied only to the Northern Territories (which remained under federal jurisdiction, rather than regional governments as in the rest of the states) and was very limited in application. While recognizing the rights of natives to certain land, it also allowed the federal government to take a great deal of land into trust on behalf of the Aborigines- about 18% of the Northern Territories. While there are normative commitments displayed in the passage of the ALRA, it can also be seen as a practical response of national officials. There was a clear trend toward increasing recognition of indigenous rights, and indigenous groups in the United States, Canada and
New Zealand were already regaining rights to territory. The ALRA allowed the government to show a commitment to indigenous rights while at the same time retain ultimate control over the territory in question. Its application only to the federally administered Northern Territories (with virtually no non-aboriginal population affected) also meant that it did not generate strong opposition from the dominant population.

*Government Reluctance to Enact Further Reforms*

In 1979 an indigenous group, the National Aboriginal Conference (established by aboriginal leaders in 1977) initiated a campaign for the development of national treaty recognition that included national land rights and compensation (Short 2003, 494). Government reluctance to accept this position is evidenced in the report prepared in response, “Two Hundred Years Later” (Parliament of the Commonwealth of Australia 1983). While the report can be seen as important for recognizing the Aboriginal account of history and relationship with whites, it offered little in the way of real policy reform or suggestions. Instead the authors placed the burden on “societal attitudes” that needed to be changed through education and cultural shifts rather than advocating redistribution. The report illustrates the fact that while the government was willing to support indigenous rights that were not disruptive for the dominant population, it remained unwilling to commit to broad national changes that would arouse the opposition of the dominant population. This was particularly true for the Liberal led government, whose policy platform rejected special treatment for social groups.

The Labor Party came back to power for an extended period from 1983 to 1996 with the governments of Bob Hawke and Paul Keating. The commitment to indigenous peoples’ rights had remained a part of Labor’s platform, although by the end of his administration, Hawke scaled back the commitment to indigenous rights, arguing that public sentiment had become less sympathetic toward Aboriginal affairs than in the late 60s and 70s (Magallanes 1999, 247). The reluctance of the state governments to support indigenous rights was another factor, and the party abandoned a plan for a national land rights policy during the late 1980s (Havemann 1999).
Still, the extremely dire situation of Australia’s indigenous population was a powerful source of international embarrassment. The growth of the international indigenous network during the 1980s brought a great deal of publicity to the disparities that Aborigines faced. As part of an attempt to show its commitment to indigenous concerns, the Keating government commissioned an investigation in 1987 known as the Royal Commission into Aboriginal Deaths in Custody (RCAIDIC). The resulting 1991 report openly criticized the actions (and inactions) of the federal government. This report stated that the poor social and economic standings of Aboriginal populations were due not only to profound social discrimination but also to the very basic condition of dispossession.

The report explicitly linked the loss of a land base and self-sufficiency to the persistence of present inequality and many other problems, offering 339 detailed policy recommendations. Most of these were never adopted or implemented by the regional governments (Marchetti 2005). The RCAIDIC report illuminated the inconsistencies that existed (and in many cases still exist) between the state and federal governments over attitudes toward indigenous rights and also the absence of enforcement mechanisms to promote institutional change. Media attention to the report also brought more domestic and international attention to the concerns of Aborigines. It encouraged the growing debate among the majority Australian population over whether or not there was a public responsibility to aid the Aboriginal population, and what role the recognition of sovereign rights would play in this. Public reservations about the extension of group specific rights, however, remained prevalent.

3.2.4 Land Rights

As part of the Labor commitment to indigenous rights, the Aboriginal and Torres Strait Islander Commission (ATSIC) was created in 1990 by the federal government to be a primary means for self-determination and a venue for indigenous peoples’ concerns. Local representatives were elected (by indigenous peoples) to 36 regional councils to administer ATSIC federal funding and serve as advocates for aboriginal peoples with other agencies. A separate Torres Strait Regional
Authority (TSRA) was established in 1994 in response to particularized concerns of Torres Strait Islanders. This administrative step was a concession to indigenous (and international) demands for some level of self-administration without granting a great degree of power.

Legal Recognition of Native Title Rights

With little success in regaining land rights through elected officials, Aborigines had continued to attempt to gain recognition through the courts. Aboriginal title to land was finally recognized in 1992 with the court case Mabo v Queensland. First brought in 1982, Mabo v Queensland was a suit by Eddie Mabo (on behalf of the Meriam people) for title over their traditional land in the Murray Islands. The Meriam were ideally suited for such a suit because they not only maintained their residence on portions of the traditional land, but also practiced agriculture on the land. This gave them an advantage in meeting the high standards of occupancy and use that the courts had set in preceding cases, which most aboriginal groups (who often had used the land for hunting, fishing, and gathering rather than permanent residence and agriculture) failed to meet.

By the time of the Mabo decision, the United States, Canada, and New Zealand had already grappled with the questions legally and administratively and each country had established recognition of pre-existing native title, with or without treaties, as well as the obligation to offer compensation for illegal land acquisition (Reilly 2000). The arguments in Mabo referred extensively to precedents established in other countries’ legal decisions, such as Johnson v McIntosh (US, 1823), Calder v Attorney General of British Columbia (Canada, 1973), and R v Simmons (New Zealand, 1947) (Bartlett 2000, 5). The Australian judiciary brought these international arguments in and pointed to the fact that Australia was badly out of step with the rest of the common law world. While the first Mabo decision ruled that Queensland could extinguish native title without compensation, the High Court overturned it on appeal in 1992 with a 6-1 majority. The decision established the existence of native title within Australian common law and rejected terra nullius as a flawed doctrine that was both racially discriminatory and contradictory to international law, and argued that the lack of formal recognition did not prevent the existence or recognition of native title (Bartlett 2000; Sender 1999).
Following the Mabo decision, Australian legislators recognized the potential for future claims (since every aboriginal band now had the potential to sue) and began to develop a negotiation policy. The Native Title Act (NTA) of December 1993 established a National Native Title Tribunal (NNTT). In creating the NNTT, the Keating government cited the Mabo decision for prompting an "opportunity to negotiate a new relationship between indigenous and other Australians." (Chesterman and Galligan 1997, 208). The NNTT was charged with mediating native title claims under the oversight of the Federal Court. Members are appointed by the federal government. The NNTT has the power of review and acknowledgement regarding native title, but any transfers must be adjudicated through the federal government.

The federal government restricted the claims that can be brought before the NNTT in several ways. While native title can be recognized to land anywhere on the continent, the NNTT cannot recommend transfers for areas that are subject to other interests. Claims for transfers therefore cannot include land owned under: residential freehold; freehold farms; pastoral or agricultural leases with exclusive possession; residential, commercial or community purpose leases; or publicly owned works like roads, schools or hospitals (www.nntt.gov.au). In other words, indigenous groups can only seek the return of land that is not contested by other owners or leasers.

Compensation claims are administered by the federal court, although the NNTT is generally responsible for overseeing the negotiations to determine settlement funds. The NNTT also administers a registry of Indigenous Land Use Agreements (ILUA) between interested parties (such as indigenous peoples, land owners, and state governments). These may establish specific rights or compensation for indigenous groups with mining or other corporate interests. Essentially, the NNTT is a facilitator, with the power to acknowledge the existence of native title and oversee negotiations of monetary compensation, land use, and land management schemes (Scholtz 2006). At present, the NNTT has found that native title exists to 872,648 square kilometers (the vast majority of it in Western Australia and the remote northern regions of the Northern Territory and
Queensland) and there have been 347 ILUAs registered with the NNTT with 405 claims outstanding (www.nntt.gov.au).

Federal authority is limited by the formal framework of authority over indigenous affairs. State governments in Australia must approve the lease or return of land to indigenous peoples. At present, laws are in place to regulate this process in the Northern Territory (1976), Queensland (1993), New South Wales (1983), South Australia (1981) and Victoria (1987). Because of this checkered jurisdiction between the federal and state governments over negotiations and agreements, there is little incentive or strong institutional pressure on Australian state officials to transfer property or resources even with a federal commitment to indigenous rights. The ongoing results of native title negotiations within the established administration have been disappointing for indigenous participants— the process is exceedingly slow, and many supposed settlements have stalled in court appeals (Reilly 2000).

*Changing Administrative “Moods”*

Early advances in addressing indigenous issues that had developed throughout the 1980s and early 1990s were stalled during the rule of the Liberal-National party coalition under Prime Minister John Howard (1996-2007) (Reynolds 1999, 129). This administration was characterized by an emphasis on equal rights and a rejection of group rights (Nobles 2008). After ongoing claims of mismanagement and corruption by the federal government, ATSIC was dissolved in 2004. This action was the culmination of several years of allegations and conflict over the accountability of the Commission (Ivanitz 2000; Cunningham and Baeza 2005). It was replaced by a National Indigenous Council (NIC). Rather than being elected by indigenous peoples (as ATSIC had been), the NIC was a federally appointed advisory body, taking away even the limited indigenous involvement of the prior body.

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28 The creation of ATSIC had been strongly opposed by the Liberal-National Coalition parties. The ascent of the coalition to power in 1996, a change in administration which is frequently cited as the cause of the demise of ATSIC (Cunningham and Baeza 2005).
Changing administrations in Australia have brought national policy “mood swings” toward indigenous rights based on administration and party preferences (Fletcher 1999, 336-7). Key statements of leaders illustrate this. In a 1992 address in Redfern (an Aboriginal neighborhood in Sydney), Labor Party leader Paul Keating expressed great remorse for the treatment of the indigenous population, stating “…it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders.” This stands in stark contrast to a statement of Liberal- National leader John Howard in 1996:

Now, of course, we treated Aborigines very, very badly in the past- very, very badly- but to tell children whose parents were no part of that maltreatment, to tell children who themselves had been no part of it, that we’re all part of a, sort of, a racist bigoted history, is something that Australians reject (Fletcher 1999, 336).

These contrasting statements show the normative tensions that characterize Australia, both among the dominant population and political elites.

3.2.5 Current Situation

Because Australia did not formally recognized sovereign indigenous rights until the 1990s the pace of change appears far more dramatic than in the other cases. Still, this late start and the lack of consistent or overarching public and elite level support for group rights means that the current land policies are limited. The burden of establishing proof of title lies with the indigenous group, which must demonstrate its “distinctiveness” and traditional and continuing physical and spiritual connection to land. In addition, native title can only be recognized for those groups that continue to occupy the land in question (Short 2003). The multiple layers of federal and state jurisdiction and administration, discontinuity in the primary aboriginal representative body, and restrictions of land that can be claimed all hinder the process of land reclamation. These limitations are reflected in the ongoing concerns of the Aboriginal community. Aboriginal leader and legal scholar, Noel Pearson, titled his response to the Mabo decision “204 Years of Invisible Title: From The Most Vehement Denial of A People’s Rights to Land To A Most Cautious And Belated Recognition.” (Pearson 1993).
In the 15 years since the Mabo decision, indigenous leaders, activists, political scientists, and legal scholars continue to question the commitment of the government to a real effort at reconciliation and redress. The changes that have taken place are accused of being superficial, designed to publicly show change without any substance. Indigenous peoples are left to shoulder the burden of claiming, pressing, and pursuing their rights in a system with little institutional support.

The claims to special rights and services have lead to a situation where some whites, particularly in rural areas, now argue that they are being discriminated against. Paradoxically, because Aborigines appear to have been granted formal and legal equality, the ongoing social and economic problems of indigenous Australians are now blamed on faults of the population itself rather than on any inequality of opportunity or resources (Morris and Cowlishaw 1997). Yet these continuing disparities disable aboriginal groups in their struggle to claim the rights that they supposedly already have. A prominent example of this ongoing conflict lies in the success of the One Nation party, lead by Pauline Hanson, in the 1998 Queensland and federal elections. The label of the party signified the belief that every citizen deserved the same rights. Party leaders argued that the government extension of specialized rights to indigenous and immigrant populations was inherently unfair (Gibson et al 2002). The arguments about special treatment ignore the fact that social and economic inequalities for indigenous Australians are both persistent and glaring. As shown in the comparisons earlier in the chapter, their position is far worse than the general population and even compared to the other indigenous groups studied.

The current political environment has also shifted with the return of the Labor party to power. Once again, political leadership (at least in the majority party) made a public commitment to address indigenous issues. In February 2008, newly appointed Prime Minister Kevin Rudd offered a public apology for the forced removal of indigenous children to state schools. This apology was controversial, and several members of Parliament boycotted the session (Welch 2008). The ongoing conflict over the appropriateness of group rights continues to pervade Australian society. A public opinion poll showed that 66% of the Australian population supported the apology, illustrating a
growing acceptance of indigenous peoples’ rights. Another question, however, identified the fact that 65% of the population did not support providing any form of financial compensation (www.newspoll.com.au). This has brought criticism from the Aboriginal and Torres Strait Islander community similar to concerns about land claims: while acknowledging previous harm done is positive, tangible redress and resources are also needed for the true recognition and practice of indigenous sovereignty. In other words, the Australian government (and people) may be more willing to acknowledge the existence of past wrongdoings and theoretical rights of indigenous peoples, but remain reluctant to transfer real resources, property, or services.

3.2.6 Conclusion

The indigenous population of Australia was virtually powerless for much of the country’s history, with a very small, isolated and scattered population, no recognized rights, and no way to credibly threaten the interests of the majority population. Normative change at an international level around the middle of the 20th century put pressure on elites to provide a public commitment to support for minority rights. Pan-indigenous activism and connections were increasing, domestic and international attention to the poor social and economic situation of Aborigines were on the rise, and the dominant population appeared to be growing more comfortable with the extension of citizenship rights. These changes encouraged the adoption of policies that extended equal rights to indigenous peoples. It took the pressure of judicial support for native title in 1992 to prompt the Australian government to recognize indigenous peoples’ land rights, however.

In the Australian case, the main motivations for change appear to come from external forces and normative commitments and concerns of elites. Aborigines’ main access to gain the consideration of those in power has come through the court system. Indigenous activism may have been significant in attracting public attention to their cause, but in this case it does not appear to have prompted change on its own. The recognition of land rights has not necessarily lead to real success in terms of indigenous goals. The main federal body for administering claims, the National Native Title Tribunal (1993), has few real powers, leaving the power to transfer to the states. Restrictions on
land available for transfers means that indigenous control is limited to very low value territory. What may appear as great strides in land recognition in Australia, therefore, must be tempered by the fact that national elites have transferred few rights or resources of real value.

3.3 Canada:

The success of indigenous people of Canada in pursuing their rights has varied. Different regions of Canada had very distinct patterns of settlement. While some indigenous groups were initially granted treaties as sovereign entities, others spent much of their history virtually ignored, and others had all rights to land or recognition of title purposefully denied. As the country expanded throughout the late 1800s and early 1900s, the government established more uniform and oppressive administration of its indigenous peoples. Federal authorities controlled indigenous reserves, denying them security of title even to the few areas promised to them. As part of this era the government denied indigenous peoples citizenship rights and even access to legal counsel until changes in the 1950s and 1960s. The Calder legal decision in 1973 challenged the failure of the Canadian government to recognize indigenous land rights and prompted a reevaluation of native title policy. The Office of Native Claims was created in 1974 and has overseen several very large and valuable transfers to indigenous peoples.

3.3.1 Arrival and Acquisition

Canada has three main indigenous groups. The Inuit (or Eskimo) of the north are considered ethnically distinct from the Indians to the south, often referred to as the First Nations. There was little European interest in settling in the arctic parts of Canada, and the Inuit were largely left alone until the 20th century. Most contact- and conflict- came in the southern parts of Canada with the First Nations. There are a large number of culturally and politically distinct First Nation peoples, with more than 600 separate bands (Havemann 1999). As in the case of Australia and the United States, each of these groups was politically, culturally, and historically unique until they were joined under similar policy arms with colonial administration. Many tribes and bands reassert this unique sovereign identity, preferring to identify by their own names rather than calling themselves
“First Nations” or “Aboriginal” (Jenson 1995). Unlike the other countries, Canada also has a recognized and socially distinct ethnic group based on intermarriage. The Métis people have their origins in marriages between European fur traders (predominantly French, Scottish, and English) and aboriginal women (most often Cree, Ojibwa, and Salteaux). These groups (Metis, Inuit and First Nations) make up the indigenous peoples of Canada.

Prior to European contact and settlement, Canada was home to a wide variety of indigenous cultures, from the Inuit in the far north to the Iroquois in the Saint Lawrence River Valley. Many were hunter-gatherers, but there was a vast range of cultural, linguistic, political, and economic practices. Estimates of the indigenous population at the time of contact with the Vikings, around 1000 AD, range from 500,000 to 2 million. The Vikings are believed to have traveled much of the eastern seaboard, from Labrador to Nova Scotia, but did not maintain permanent settlements. By the 1400s, Canada’s coast was known as a rich fishing ground, and Portuguese, Dutch, Swedish, French, and British ships all fished off of the east coast. Russian fishing boats made contact on the northwest coast, and some Spanish expeditions may have had contact on the southwest coast as well (Dickason 1992). The predominant forces in Canada were the British and the French, both of which began settlement in the 1600s.

Canada, the world’s second largest country, has a number of very diverse geographic zones. The southeastern region, bordering the United States, is made up of rich forests, while the expansive north is primarily frozen arctic tundra. The central region of the country is made up of the rocky Canadian Shield and an expansive region of plains. The far west is extremely mountainous, with a number of dormant volcanoes. Because of these environmental challenges, the British and French

29 The term métis, a French adjective meaning “mixed,” came into use in the late 1700s to refer to the culturally and socially distinct people descended from these early unions (Brown 1993). As Brown (1993) notes, the population also extends into the United States, although it is virtually ignored in this country. At a national level, some disagreements remain over the exact components, requirements, and membership within Metis identity as well as their position as part of Canada’s indigenous population (Sawchuck 2000). The Metis were formally recognized by the federal government as part of the aboriginal population in 1982. The Constitutional Act of 1982 recognizes three Aboriginal groups—Indian (which would be First Nations), Inuit, and Metis (Fleras and Elliot 1992, 13; Jenson 1995).

30 As in the other countries, there are a range of available estimates and archeological estimates. The early timing of these make them even more flexible (Dickason 1992, 63, 433).
engaged in rapid and concentrated settlement in the southeast of the country, but few settlers went west of the Shield until the 19th century, and the European population remained quite small well into the 20th century (Sharp 1955). The northern reaches of Canada remained out of contact with Europeans for far longer, with some Inuit groups not having contact with the settler population until the early 20th century (McPherson 2003).

Early Contact and Colonization

The British and French used sites in Newfoundland and Nova Scotia as bases for their fishing enterprises. The first French settlement, Quebec City, was founded in 1608. The British also claimed Canadian lands at the same time. The economic importance of the fur trade as well as the competition between the French and British for control quickly made alliances with the indigenous peoples very important (Nichols 1998). Tensions between the French and British resulted in a string of wars with indigenous peoples recruited as allies by each side. The fur trade also quickly became central to the relationship between natives and Europeans and was important for both Britain and France to secure their economic dominance in Canada. While the French did not develop a system of formal agreements with indigenous peoples, the British policy tended towards treaty making. Treaties were often disputed over concerns about the language and translations, the authority of signatories, and multiple revisions of treaties. After the final surrender of French Canada in 1760 to the British, the indigenous peoples in the newly unified colonies were subject to rapidly increasing numbers of British settlers (Dickason 1992). Indigenous populations began to decline as contact with Europeans increased, bringing both conflict and disease.

Treaty Making

King George III affirmed the rights of indigenous ownership with the Royal Proclamation of 1763, and declared that title to Indian territory was not to be considered extinguished or transferred merely by conquest, but only by voluntary cession (Roth 2002). The proclamation recognized the sovereignty of Aboriginal nations as equal to the British crown (Tully 1994, 170). Voluntary cession came through treaties establishing a sovereign to sovereign agreement.
territorial control was limited at this time, so this principal was not applied universally across Canada. Outside of the formal frontier and in certain areas controlled by other entities, such as the Hudson Bay Company, settlers acquired territory through squatting, force, or simply ignoring the indigenous population in place while resources or game were harvested. No formal relationship was established, and there were no formal or legal mechanisms in place for the transfer of land. The way that land was transferred remains an important distinction in modern Canada—there are both specific land claims (“dealing with problems arising from previous agreements including Indian treaties”) and comprehensive land claims (“based on traditional land use by Indians who did not sign treaties and have not been displaced from their traditional lands”) (Plant 1994).

Treaty making was most common in the southeastern part of the colony, where the British had control. This region had a relatively concentrated indigenous population and was also the most popular for white settlement. The high settler demand for land encouraged colonial officials to seek peaceful and relatively quick means of acquiring territory, which was thought to be treaty making. The earliest treaty affecting the indigenous peoples of Canada was signed in 1713 in present day New Hampshire (Dickason 1992, 178). Setting land aside as Indian reserves as part of formal treaty arrangements was an ad hoc practice until the mid 1800s, when it became more standard. Officials located many of these reserves in remote, isolated, and often unfertile regions, although some were placed near towns by administrators who believed that this would be the best means to assimilation (Dickason 1992, 253).

Most of the settler population remained concentrated in the southeast, but by the end of the 19th century, the influx of European immigrants and the discovery of gold encouraged westward expansion. In British Columbia treaties were not made and the land was taken and sold by the government to whites without agreement of the native residents (who were sometimes forcibly removed by the government). As a result of this, British Columbia has seen a high number of claims brought by indigenous groups. These groups argue that, according to the Royal Proclamation of 1763, indigenous lands in British Columbia were never legally acquired by the colony or the Canadian
government (Roth 2002). The government also rarely used treaties to acquire land in the north of Canada, where the vast territory and tiny indigenous population made it expedient for the government to simply assume control (McPherson 2003). As a result, Arctic areas have also seen heightened activity in terms of comprehensive negotiation processes. The territory of the Hudson Bay Company was taken over by Canada during the 1870s and the government began to negotiate late treaties with the First Nations in the central prairies. By the end of the 19th century, the indigenous partners were generally resigned to their losses and more receptive to the treaties. They saw the decline of buffalo and other game and the violent struggle of American Indians in the west, and believed an agreement offering support and services was key to their survival (Coates 1999).

3.3.2 Assimilation

Throughout the 1800s the colonial government followed a policy of assimilation, although with inconsistent application and results. In practice, each colony was administered separately and in some (such as British Columbia) the Aboriginal population was simply pushed off of their land and into remote areas, encouraging isolation rather than any effort at assimilation or peaceful coexistence. The 1839 Crown Lands Protection Act made all tribal or band lands Crown lands and effectively barred most indigenous peoples from political rights based on individual property qualifications (Dickason 1992). A formal registry of Indians was created around 1850 by the British to keep track of Indians bound by treaties. The Act to Encourage the Gradual Civilisation of Indian Tribes (1857) stated that indigenous peoples who did not register as members of tribes were entitled to the federal vote- those who registered as Indians, however, were barred from the franchise (Havemann 1999). These (and other) actions asserted an increasing level of government control over indigenous peoples and isolated the indigenous population both physically and in terms of their political rights.

Canadian Independence

British North America (and the beginning of modern Canada) confederated in 1867 and the new government gave indigenous peoples a brief- but significant- mention. The federal government
assumed full jurisdiction over “Indians and lands reserved for Indians.” (Scholtz 2006, 39).

The centralization of administration brought more consistent treatment for indigenous populations across the developing nation. The new government followed the British precedent of treaty making for land acquisition, although indigenous people at this point had very little negotiating power. Most often, indigenous representatives saw signing treaties as the only way to gain any services, compensation, or land base, and feared that refusing to participate would result in either total dispossession or violence. Prior to 1867 about 123 treaties had already been negotiated. After confederation, hundreds more were signed between the government and indigenous peoples.

The Administration of Indigenous Peoples and Lands

A number of reserves were created through this series of treaties, ostensibly providing some security for Aboriginal Canadians. According to the terms of the most agreements, the reserve land could only be taken from the indigenous occupiers if a majority of its male residents over 21 called for it in a special meeting. In 1879, however, the federal government authorized the Superintendent General in charge of Indian Affairs to lease “undeveloped” reserve land. At the turn of the century, the government empowered the Superintendent General to remove Indians from reserves that had been located near towns and allowed the sale of the emptied land to municipalities and companies (Dickason 1992). It appears likely that the government was responding to the demand of the dominant population for more land as well as the recognition that indigenous peoples had few avenues for meaningful resistance and presented no physical, economic, or political threat.

Another major development of federal administration was the passage of the Indian Act of 1876. Registered Indians (also known as “status Indians”) were those enrolled in groups recognized by treaties and registered on the official roll kept by the federal government. The Indian Act encouraged, and in some cases forced, an end to tribal affiliations in an attempt to push indigenous peoples to assimilation. By renouncing Indian status, an individual gained the rights to federal

31 While many of the regional governments complied quickly (and for federal territories administration was immediately transferred) British Columbia was the last to comply. The provincial government did not transfer control over reserves to federal authority until 1938 (Dickason 1992).
citizenship. Until 1960, those who retained their status as Indians were barred from participating in federal elections. Those who chose to remain designated as Indian could remain on reserve land and were subject to the civil control of Indian agents (Champagne et al 2005).

Registered status could be lost in many ways, sometimes involuntarily. For example, a female individual married to a man who was not a status Indian, an individual with a mother and paternal grandmother without registered status, or a child born out of wedlock to a father without status would not be eligible for registered status as Indians. All of these individuals were not eligible for or lost any services or support available for status Indians. They were pushed into the dominant population, where they were often discriminated against and had little social, cultural, or economic integration. These rules changed in 1985, when the federal government passed legislation stating that those who had lost status due to these discriminatory practices could petition for its restoration. An estimated 100,000 individuals did so (Champagne et al 2005). These attempts to push indigenous group members into roles as “citizens” rather than tribal members echo policies seen in both the United States and New Zealand during the 19th and early 20th centuries.

The Indian Act also gave the Minister of Indian Affairs the right to determine the use and boundaries of reserve land. Between the Indian Act and the 1879 extension of powers mentioned above, indigenous leaders lost all remaining control and authority over reserve lands to provincial and federal authorities. The Indian Act authorized an allotment process (very similar to the allotment policy that took place in the United States). Reserve lands were broken into individually owned plots and allotted to Indians (from 120 to 640 acres per family). This segmentation created a large surplus of former reserve land not assigned to indigenous families or individuals. Lands designated as surplus were portioned out or sold off to white settlers or commercial interests by the government. The few reserves that were not allotted were still subject to the encompassing power of the provincial and federal authorities (Scholtz 2006).

*Support for the Power of the Government over Indigenous Peoples*
The authority of the government over any sovereign rights of indigenous peoples to land (well established in practice by this time) was legally supported in the 1888 court case St Catherine’s Milling and Lumber Co. v. The Queen. The St. Catherine’s case set a precedent that held for over 80 years. The Privy Council’s decision found that aboriginal title over land was at the Queen’s pleasure, as derived from the 1763 Proclamation, and could therefore be taken away at any time. This decision rejected the idea that indigenous peoples retained any sovereign powers, argued that any indigenous rights to land were subject to the desire of the government, and influenced legislation and legal decisions until the 1970s (Dickason 1992).

By the turn of the century Canada’s indigenous peoples had little recourse for protecting any of their rights. The government had ultimate and legally unquestioned authority over nearly every aspect of indigenous life for the first half of the 20th century. Individuals did not have access to the rights of Canadian citizens unless they were willing to deny their indigenous identity and live apart from their native communities. There were few (or no) means for tribes or bands to seek the return of their rights or territory. From 1927 to 1951, Canada went so far as to prohibit First Nations from even retaining legal counsel for claims. The Indian Act had been amended in 1927 “to make it a punishable offence for a lawyer to receive payment from a First Nation to bring a claim against the Crown without the Crown’s consent.” (Lickers 2004). Even after the law was formally changed, the government still refused to negotiate any land claims agreements for several years, so legal action would be of little value to indigenous claimants. As an example of the reach of the law at this time, in 1944 an act was passed that required Indian Agent permission for First Nations members to wear traditional attire in public events (Havemann 1999, 36). The federal government exercised total control over indigenous peoples, denying those who chose to resist the pressure to assimilate even the most basic of rights.

Early in the 20th century the government established a policy of “free entry” that allowed prospectors to go anywhere on Crown land (which included much of the traditional land of the Inuit in the far north). The policies were officially to encourage exploitation of resources and increase
economic progress, but also served to further decrease the rights and security of indigenous residents. Areas such as the far northern territories of the Inuit (who, due to their remote location had no treaty protection, and in fact had sometimes not even had prior contact with whites) often drew prospectors hoping to find mineral caches (McPherson 2003). Exploration of the full reaches of the Canadian Arctic over the course of the beginning of the century and the two World Wars covered the last reaches of Canada. Indigenous peoples in the far north were subject to the land loss, loss of subsistence, disease, and poor labor conditions that those in the south of the country had experienced in the last century.

3.3.3 Equal Rights

Federal Indian policy confronted several challenges in the middle of the twentieth century. The population of Indians was increasing, rather than disappearing as the government had anticipated (Fleras and Elliot 1992). The growth further exacerbated the poor economic and social conditions on reserves and began to draw the attention of white social reformers. While some residents left the reserves as part of the urban migration of the 1950s, they were poorly educated and unequipped for life in the dominant culture, bringing indigenous poverty to the cities. The increasing populations and persistence of tribal affiliations also clashed with the idea that the assimilationist policies of the 19th century had worked.

Military Service

During the First World War, many indigenous men volunteered for service in the military. While perhaps surprising (as non-citizens, they were exempt from conscription), this may have been due to the extreme lack of opportunity available on reserves. The federal government recognized the morally difficult position of withholding basic citizenship rights from those willing to serve their country in war and extended the right to vote in federal elections to status Indians actively serving in the armed services in 1917 (Fleras and Elliot 1992, 42). In 1920, this right was extended to all indigenous veterans (Havemann 1999).
The position of the veterans of the World Wars remained important, as they often had experience in both indigenous and mainstream society as well as a degree of credibility and respect conferred by their service. Due in part to the activism and organization of World War II veterans when they returned to reserve life, the federal government was persuaded to create a committee on the Indian Act which held hearings about the social and economic problems on reserves from 1946-48. As was seen in Australia, the sudden attention of the government to indigenous concerns was also partially driven by political motives and concerns about negative reactions from international attention to minority rights. The hearings represented a large step forward not only for recognizing the problems of the Act but also for including Indian witnesses in testimony (the first time they had been part of consultations at that level) (Dickason 1992, 329; Nichols 1998).

In response to the hearings, in 1951 the federal government revised the Indian Act and granted very limited political and economic authority to indigenous bands, although the government still retained most of the power (Nichols 1998, 289). These concessions were likely tokens, conferring little autonomy but allowing the government to show an effort at better treatment. The hearings had also brought attention to the particularly dire situation of Inuit peoples in the north, who were not recognized by treaties and had no access to even the poor services offered to the rest of the indigenous population. Seeking to expand social and health care services for natives in the far north, the federal government created the Department of Northern Affairs and Lands in 1951 (Havemann 1999, 42). Probably as a response to changing normative concerns about equal rights for minority populations, the federal franchise was extended to all indigenous peoples in 1960 (Havemann 1999, 42).

Organization and Public Attention

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32 The Department of Northern Affairs and Lands became the Department of Northern Affairs and Resources in 1953, and in 1966 the administration moved to the Department of Indian Affairs and Northern Development (also known as Indian and Northern Affairs Canada).
The success of veteran organizations during the 1940s and 1950s inspired further indigenous associations. Urban indigenous populations were increasing during this time, bringing individuals from a variety of indigenous backgrounds together and encouraging broader associations between bands. Activism helped to bring the dominant populations’ attention to indigenous causes. During the 1967 centennial celebration of Confederation, indigenous Canadians erected a pavilion at the Expo in Montreal to publicize their concerns against the government. It was the first time many Canadians, who had little contact with or knowledge about remote reserve populations, became aware of indigenous concerns with poverty, education, land rights, language rights, and sovereignty (Dickason 1992, 383). The late 1960s also saw the first pan-Inuit organizations and protests about their treatment and loss of land, and specifically their concern that the Inuit had never been recognized by treaty (McPherson 2003, 51).

The federal government commissioned a study of indigenous policy and the status of indigenous peoples in the late 1960s. In 1969 the Liberal government, led by Prime Minister Pierre Trudeau, issued a report known as “the Statement of the Government on Indian Policy” (also simply called the “white paper”). The white paper argued that Indians should be quickly structurally integrated into mainstream Canadian society, and that this would require the abandonment of any special legal status, federal supports, or “discriminatory” special treatments for indigenous peoples (Long et al 1982, Nichols 1998). The paper clearly supported equal rights, arguing that any group based rights were actually perpetuating the problems of indigenous peoples and encouraging poverty and dependency.

Quebec Nationalism and Indigenous Sovereignty

It is significant to note that at the same time as the Trudeau government was criticizing rights related to group status and decrying indigenous self government, it was also dealing with the claims of the nationalist movement in Quebec. Many of the arguments against special status and self-government rights were developed as part of a response related to the Quebec crisis (Scholtz 2006, 54). Political elites during the 1960s and 1970s focused on a commitment to multiculturalism,
arguing that all different social groups should be treated similarly and should share in the same rights and assimilate as Canadians. This perspective ignores the dissimilarity of indigenous identity and history to those of other immigrant ethnic groups (Coates 1999, 155). This is evidence of a spillover effect, in the sense that policies and arguments developed around the Quebec nationalist movement were also applied to indigenous peoples.

Indigenous reaction to the white paper attacked the government paper for being discriminatory and promoting policies that would amount to cultural genocide. Confronted by the solid and organized condemnation of the indigenous community, the government rescinded the white paper in 1971 and began to formulate new recommendations (Dickason 1992; Long et al 1982; Plant 1994). The reaction showed the agreement of the burgeoning indigenous organizations such as the National Indian Brotherhood, the Union of Ontario Indians, and the Indian Association of Alberta. The organization of activism in opposition to the white paper helped crystallize indigenous networks. The potential for continued group action and cohesion began to raise concerns among the regional and federal governments over the potential for ongoing unrest and unwanted negative media attention to the plight of indigenous peoples (Scholtz 2006, 72).

3.3.4 Land Rights

*Legal Support for Native Title*

In the environment of developing indigenous activism and protest in the late 1960s the Nishga Indians in British Columbia brought a lawsuit against the government (in Calder v Attorney General of British Columbia). They argued that their rights to their traditional land had not been extinguished by conquest (Plant 1994). The first decision from the High Court in British Columbia ruled that there was no native title. The appeal went to the Canadian Supreme Court and was decided in 1973. While the decision ultimately rejected the Nishga’s claim, it affirmed the existence of aboriginal rights to land where no treaties had been negotiated.

The Calder decision ruled that the aboriginal population of Canada had and has ownership and interest in lands (and resources) traditionally occupied and used, and that rights to these lands
were not ceded unless they are specifically and knowingly surrendered (Anderson et al 2004; Bartlett 2000). Importantly for comprehensive claims, the ruling argued that indigenous title to land was not based on the 1763 Royal Proclamation, but on occupancy since “time immemorial,” and therefore an inherent, rather than granted, right. The justification for the decision given by the court relied on the Marshall decisions from the United States as well as the settlement procedures established in the Native Alaskan claims during the 1960s. The judicial decision in Calder made an enormous contribution to indigenous land rights by acknowledging the legal standing of indigenous claims to land, and exerted an almost immediate pressure on the federal government.

The Office of Native Claims and Land Rights

Within a week of Calder decision, Trudeau and his cabinet started addressing the potential consequences of the decisions and began to meet with native leaders over land claims (Dickason 1992, Scholtz 2006, 69). The legal support for native title helped tip the administration, which had already begun considering a shift in indigenous policy direction, toward the recognition of land rights (Fleras and Elliot 1992, 51). Six months after Calder, the federal government formally invited those who had not signed a treaty with the Crown to enter into negotiations with a comprehensive land claims negotiation process (Alcantara 2007a; Kersey 1994). The Department of Indian Affairs established the Office of Native Claims in 1974, a separate entity with the responsibility to review claims to land and resources. This setup was criticized because the Office of Native Claims was responsible for the evaluation of the claims and also was supposed to serve as the representative of the federal government, creating a serious conflict of interest (Lickers 2004).

In this new environment a number of First Nations began to negotiate claims with the government. While not all have reached agreement, there were several large (and, for those indigenous groups contemplating claims, inspiring) agreements reached. The landmark 1975 St James Bay agreement conveyed $225 million and title to 150,000 square kilometers, along with some self-government rights (Foster 1999, 358; Havemann 1999; Nichols 1998). The Cree claimed land being used for a hydroelectric project, slowing its progress through legal action. The Cree also used
international indigenous networks and UN forums for indigenous peoples to generate substantial international attention to the personal and environmental problems caused by the project. The combination of pressures from developers, the dominant population concerns about ongoing title claims, and negative media attention encouraged the federal government to resolve the claim quickly.

**Comprehensive Claims Settlements**

There are several other examples of the success of indigenous comprehensive claims. The 1984 Inuvialuit (“Western Arctic Claim”) Agreement gave the Inuit people control over 90,000 square kilometers and financial compensation of $152 million over 15 years. 15% of the territory included rights to subsurface mineral (Havemann 1999; McPherson 2003, 130-139). The Gwich’in Land Claim Settlement in the Northwest Territory (1992) gave the Gwich’in title to over 20,000 square kilometers of surface and about 6,000 square kilometers of subsurface rights, as well as equal representation in federal decisions on land, water, and wildlife management (Plant 1994, 16). Both the Inuit and the Gwich’in used tactics similar to those of the Cree, including lawsuits that tied up potential development during the settlement negotiations process. The commitment of the Canadian government to the rule of law remains important in understanding the outcomes of indigenous claims; before the legal environment was willing to support native title there would have been little institutional reason for the federal government to recognize indigenous peoples’ rights.

Despite these significant settlements, inconsistency in legal recognition of indigenous title remains, particularly in British Columbia. In 1987 The Gitksan and Wet’suwet’en Nations sued for recognition of ownership and jurisdiction in Delgamuukw v the Queen. The High Court of British Columbia’s decision in 1991 denied the existence of an indigenous legal and political system and argued that the Royal Proclamation did not apply to British Columbia. The Delgamuukw appeal went to the Canadian Supreme Court, which reversed the lower court ruling and found that the Royal Proclamation did and does apply to the First Nations in British Columbia (Roth 2002). The attention brought by the case contributed to the creation of the British Columbia Treaty Council in
1993, an administrative provincial body designed to negotiate treaties with the First Nations in the province, but its progress has been minimal at best.

While the general public has been supportive of (or indifferent to) transfers in remote northern areas where transfers are largely of public government territory, resistance to land rights is more pronounced where there is more individual level demand for land. An armed standoff between the military and Mohawks occurred at Oka, Quebec in 1990. The planned expansion of a golf course by developers (with the approval of town administration) included land to which the local Mohawk community of Kanesatake had laid a claim. The Mohawk claim to land had been asserted (without success) several times and went back in history almost 300 years, to when the French had given the title over a sacred segment of territory to a Catholic seminary. Before the proposed expansion began, members of the Mohawk community set up a blockade that lasted 78 days. The armed confrontation between the police and the indigenous warriors (who were soon joined by indigenous supporters from other communities) resulted in the death of one police officer. At its end, the town and developers agreed to halt the expansion and the Mohawk were granted access to the site. The Oka conflict has become a symbol of indigenous resistance in Canada because of the Mohawks’ persistent- and frustrated- efforts at various administrative land claims actions prior to the armed barricade. Further, it was widely publicized and received both international and domestic press (Fleras and Elliot 1992, 93).

One of the most politically significant actions taken by the Canadian government has been the creation of the new territory of Nunavut in 1999 after over 20 years of negotiations. Nunavut was created from carving out a segment of the eastern part of the Northwest Territory that constitutes about 1/5 of the landmass of Canada. The final terms of the agreement included a 2.2 million square kilometer territory, with indigenous peoples gaining clear title to 18% of surface and 2% of subsurface, and a settlement fund of approximately $580 million (Légaré 2002; Kersey 1994; McPherson 2003). The division of the Northwest Territory had some support from the general population of the territory, although the non-indigenous population was small enough (and
concentrated in the western portion that would not be affected by the agreement) that there was a low turnout among non-natives for the deciding vote. The area that is now Nunavut is made up of a population that is 85% native, while the entire population is less than 30,000. This demographic situation, combined with the decentralized regional government structure, means that Nunavut has a substantial degree of self-government.

3.3.5 Current Situation

The dual role of the Office of Native Claims continues to generate complaints from the indigenous community and its supporters. In November of 2003, the Specific Claims Resolution Act was passed to establish a center for the (supposedly) independent resolution of native claims. This action has still drawn condemnation from some indigenous leaders. The Minister of Indian Affairs still determines the validity of the claims and the federal government continues to appoint commissioners and tribunal members (Lickers 2004). The independence of the new body from the federal government is therefore debatable.

Another concern of First Nations and Inuit leaders has been the restrictive oversight of the federal government, even in land supposedly ceded to the sovereign rule of indigenous governments. The Canadian government has recently begun to provide recognition and flexibility that allows for indigenous peoples to develop and practice their own property rights. In 1999 the federal government passed the First Nations Land Management Act (FNLMA) which allows Indian bands to develop land codes and assume administration of their own lands. 41 bands have opted into the FNLMA, and 18 have their land codes in operation. This program allows for the reduction of federal involvement on reserves, strengthens the authority of tribal government, and allows for a more flexible, cultural, and environmentally appropriate system of land tenure and property rights (Alcantara 2007b).

Despite the concerns mentioned above and the painfully slow pace in some specific regions (such as British Columbia) in acknowledging native title, Canadian elites have given attention to indigenous rights and have in some cases restored valuable rights. The Canadian public is also aware
of and concerned about claims- polls in 2007 and 2008 show that more than 70% of the dominant population wants the government to find solutions to land claims (these numbers, of course, do not tell us where opinion falls on how the claims should be settled). The February 2008 poll also found that 42% of respondents thought that Canada should make an apology to indigenous people forced into boarding schools, similar to the apology in Australia (www.angus-reid.com).

3.3.6 Conclusions

Canada has been characterized by great variety both in early treatment of indigenous rights to land and in its policies over time. Some groups had treaty recognition as the basis of their relationship (and the recognition of their rights) with the federal government, which contrasts sharply with those who did not have any formal relationship established. Even those groups with treaties, however, were subject to total subjugation to the state during the 19th century, with even their most basic rights denied. Demographic change, indigenous activism, and the new international climate after World War II increased attention to the situation of Canada’s indigenous population and some basic rights were extended. Even with normative changes that increased support for indigenous rights, it again took the prompt of legal recognition of native title in 1973 to cause the government to establish formal recognition of indigenous land rights and an administrative path for land claims. The Office of Native Claims (1974) was established to consider and negotiate claims and several large and valuable settlements have been transferred to indigenous control. As in Australia, the country offers vast expanses of land that are relatively unpopulated, with the opportunity to award land transfers that create few conflicts. In several cases, the ability of the indigenous claimants to prevent commercial and governmental development projects was significant, as it added a dimension of practical costs for delaying the settlement of claims. Even with significant advances, the indigenous population continues to raise concerns about the fairness of the administration of claims and demand more access to rights and resources.
3.4 New Zealand:

New Zealand’s indigenous population, the Maori, stand out as one of the most powerful groups of indigenous peoples in the world. They are advantaged by a relatively large population size (almost 15% of the total population), relative unity as a national indigenous group, the establishment of their political relationship with the colonial power through the Treaty of Waitangi in 1840, and their modern status as partners in the New Zealand government. Still, it was not until the 1970s that the government created the Waitangi Tribunal to consider the claims of the Maori. Despite elements of this partnership, such as guaranteed representation in Parliament, there is still government reluctance to fully meet claims of the Maori to the restoration of disputed land. The strength of the Maori allows the comparison to evaluate the difference in outcome when the politically weak group does have some potential for strength.

3.4.1 Arrival and Acquisition

The term Maori is most often used to describe the entire indigenous population of New Zealand. While the Maori as a group are linguistically, ethnically, and culturally similar, just as in the other countries there was little identification as part of a pan-indigenous (in this case, Maori) identity prior to the settlement of whites (Walker 1999). Maori society is ordered (from the bottom up) as extended families (whanau), which compose tribes (hapu), which in turn form a confederation of tribes (iwi). The iwi, are also grouped into “canoe confederations” (waka) which are groups descended from the ancestors arriving in the same canoes that brought the original inhabitants to New Zealand between the 9th and 14th centuries. The hapu were the primary landholders, and were often known and identified by prominent features of the territory that they occupied. Prior to European arrival the hapu did fight one another in matters of “defense of territory, resources, and women,” but related hapu had the tradition of alliances in conflicts with outsiders (Walker 1999, 109).

Early Contact and Colonization

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Captain James Cook’s arrival in New Zealand in 1769 began a period of limited contact and trading between the Maori and British (Havemann 1999). While not initially considered as a place for settlement, New Zealand was used as an economic outpost after the penal colony at Sydney was established in 1788. The Maori population at time of contact was smaller (about 100,000) than the indigenous population of Australia but appeared far more formidable to the British. The concentration of the indigenous population, clear zones of territory, political organization, and evidence of agricultural practice and settlement are among key reasons that the Maori were seen as much closer to “civilization” than the indigenous peoples in Australia and were recognized as an existing political entity by the British (Banner 1999). This distinction resulted in much different political treatment. In addition, no immediate interest in settlement meant that the British were more comfortable acknowledging indigenous rights, property, and political legitimacy of Maori. The Maori were considered trading partners, and in some cases even served as sailors on British ships. The increasing interaction lead the Maori to adopt some European practices and technology even while indigenous traditions and political organization persisted.

New Zealand is made up of two main islands, North Island and South Island, with a number of small islands as well. Both main islands are mountainous. The North Island is less rugged than the south, however, and has richer natural resources. It had a much higher indigenous population at the time of early contact, and would later also become the primary area of settlement for the British. Because of the generally difficult terrain on both islands, hapu did not control large amounts of land and travel between different areas could be very slow (Walker 1999). This geography was also a deterrent to Europeans, and initially there was little effort to develop permanent settlements (Sorrenson 1999, 163).

By the early 1800s, the British government was seeking new colonies for settlement. The arrival of British settlers began in earnest and demands for lands increased, putting a strain on the previously peaceful relationship between the Maori and few British residents. Land speculators, spurred by rumors of annexation, began to arrive from Great Britain during the 1830s, which further
aggravating the situation (Sorrenson 1999). The competition for land resulted in the “Musket Wars”
between around 1820 and 1835, when the Maori iwi fought against the British and one another for
the control of territory. (Ausubel 1961; Statistics New Zealand 2002). Even with the decline, the
Maori were a serious physical threat to the security of the British settlers (Coates 2004). In 1840 the
total Maori population was been estimated at anywhere from 80,000 to 200,000, while there were
only about 15,000 Europeans.

The Treaty of Waitangi

In 1839, William Hobson was sent from London to treaty with the Maori for the annexation
of New Zealand as the latest British colony. Parliament authorized Hobson to offer protection and
concessions to the Maori to help stop the ongoing conflict. At the time, unrest continued both
between the Maori and the British and among the Maori iwi. The military threat to the colony was
reduced by the fighting within the Maori. The agreements reached between Hobson (as the
representative of the Crown) and the Maori became the Treaty of Waitangi, signed in 1840
(Sorrenson 1999, 162).

The treaty is the only legal document establishing the relationship between the Maori and the
British, unlike the United States or Canada where there are multiple treaty arrangements. While the
terms of the Treaty was not fully followed for over a century, its existence places the Maori in a
much different political situation than indigenous peoples in the other countries. The Treaty remains
a potent source of controversy. 43 chiefs initially signed on to the document, although it was later
taken around New Zealand to collect a total of 540 signatures (Walker 1999, 112). The authenticity
of some signatures is disputed, some representatives are argued to have acted without authority, and
there were many leaders who never agreed or signed on to the Treaty at all. The Treaty was applied

33 New Zealand’s census figures from the 19th century are far from reliable. See Bloomenfield 1984, Briggs 2003,
Reedy 2000, and Statistics New Zealand 2002 for divergent estimations. An excellent summary table is provided
online by Statistics New Zealand (www.stats.govt.nz) in their long-term data section of tables. The spreadsheet also
provides details regarding the techniques used by different sources in establishing their data.
universally to the entire indigenous population, even while many Maori argued that they were not a part of the agreement (Duffié 1999; Statistics New Zealand 2002).

There are two versions of the Treaty, one in English and one in Maori. The major source of disagreement lies in the different interpretations of the treaty. While the English version states that the Maori agreed to rescind sovereignty, the Maori version only cedes governorship to the British. The Maori argue that in signing they not only retained their sovereignty, but were also granted equal rights and partnership as British citizens (Brookfield 1999; Charters 2006; Duffié 1999; Statistics New Zealand 2002).

Another disagreement regards the portion of the document that states that the government was the only party that could buy Maori land (similar to arrangements in the United States and Canada) (Banner 1999, 822). This clause was frequently ignored and settlers continued to lease or buy land from any willing agents—often without ascertaining who the true owners were (Coates 2004; Sorrenson 1999, 167). When the government maintained its duties as the purchaser of land, its agents often offered extremely low prices (Loveridge 1996, Statistics New Zealand 2002). The Maori were very disorganized during the 1830s and 1840s and there was little agreement over how to challenge the British actions. Recognizing the lack of cohesion, the colonial government showed little interest in following through with their promises of the Treaty.

The court case R v Simmons (decided in 1847) stands out as a lone legal affirmation of the existence and legitimacy of native title in New Zealand during this time. The case ultimately affirmed the power of the crown and common law, but also recognized that the Treaty of Waitangi placed binding obligations on the Crown to offer “fair purchase” before extinguishing native rights (Bartlett 2000, 9; Hickford 2004). The decision was the first in the common law world to that referenced the legal standing of land rights of indigenous peoples in another country. The ruling relied on the Marshall decisions in the United States to support the inherent rights of Maori to land as political entities (Hickford 2004).
This support for the rights of the Maori did little good in practice, however. The influx of settlers continued and colonial disregard for the promised rights of the Maori persisted. The government offered superficial concessions to the Maori which gave the illusion of rights without any real power. For example, the 1852 Constitution Act gave all adult males (including Maori) the right to vote if they met a nominal property requirement. Many Maori were unwilling or unable to individualize their communal land holdings in order to be recognized by English law, leaving them largely without voting rights (Dow and Gardiner-Garden 1998; Fleras 1985, 554).

**3.4.2 Equal Rights and Assimilation**

New Zealand policies have differed from the other three cases in that the drive to assimilate the Maori tended to follow the limited extension of equal rights. As noted above, these rights were often illusory, but they represent a different tactic than the extremely paternalistic policies of Canada, for example. The Maori have also maintained an ongoing concern with the equal rights promised in the Treaty of Waitangi. This is also a different situation than indigenous peoples elsewhere, who tend to focus on their rights to distinction as sovereign entities.

*Dispersal of Land*

Maori leaders recognized that their power was limited by the conflicts between the iwi. Some leaders organized a series of assemblies in 1854 to promote a stronger pan-Maori identity through the unification of all of the iwi (Walker 1999, 113). The plan backfired when two different movements for unification developed. One group coalesced around the election of a king to help stop intertribal fighting in Waikato, while another group would eventually form a loose confederation under the Maori Parliament at Waipatu in 1892 (Walker 1999, 114). This division kept the Maori from forming a united front well into the 20th century. Even beyond these larger divisions, many small segments of the Maori population also began to resist the loss of their land through armed conflict with the settlers that lasted from 1860 to 1872. The slow defeat of the Maori led to increased dispossession, disillusionment, and de facto segregation as they withdrew into isolation in rural areas (Ausubel 1961).
During the era of armed resistance and conflict, a Native Land Court was established in 1865 by the colonial administration to assign individual titles to Maori land (much of which remained in collective ownership). Most of the remaining land was then sold either to individual English settlers or to the government (Scholtz 2006; Sorrenson 1999, 167). The loss of land over the next century was enormous. In 1800 the Maori had controlled over 60 million acres; by 1911 they were down to 7 million acres (Banner 1999, 844). By 1970, Maori owned only about 3 million acres (Scholtz 2006, 77).

Maori Representation

Throughout the 1850s and 1860s a group of Maori leaders pressed for dedicated political representation in Parliament, arguing that representation was guaranteed by the Treaty of Waitangi. Some whites also believed that allowing Maori to participate in government could help lead to the end of the ongoing violent conflicts over land. The Maori Representation Act of 1867 created a dual system of representation and allowed Maori to vote for four designated seats in Parliament (three for the North Island, one for the South). An 1876 law fixed the seats permanently. (Dow and Gardiner-Garden 1998; Fleras 1985, 554). The 1867 Act was drafted with intentions to:

… pacify a defeated, yet formidable, adversary whose co-operation was useful in the orderly development of New Zealand society; assimilate the Maori as quickly as possible…; safeguard settler interest for as long as it took to acquire Maori land and to secure the frontier against unfriendly Maori; preclude any attempt by the Maori to set up a separate power base with which to circumvent parliamentary authority; and placate the British Colonial Office over government confiscation of Maori land following the land wars of 1865 (Fleras 1985, 556).

While this guaranteed representation is in great contrast to the other countries covered, it is important to note its limitations. The electorate was divided into two wholly separate groups, a practice of political segregation which continued until 1975 (Scholtz 2006, 79). Further, there was a huge imbalance in the assignment. In 1876 the four seats represented a total population of approximately 60,000 Maori, while 250,000 white settlers voted for 72 members of Parliament (Fleras 1985, 557). To be proportional, the Maori would have needed about 16 seats. Critics argue that these voting arrangements represented a form of gerrymandering, ensuring that the Maori had
influence over only the minimal four seats and reducing any potential power in Parliaments (Fleras 1985; Nobles 2008).

By 1900 the Maori population had reached an all time low of about 40,000 (or 5% of the national population of 800,000). The majority of the Maori population lived in remote, rural, Maori-dominated villages and was effectively segregated from white populations (Ausubel 1961; Coates 2004, 183; Duffié 1999). The dwindling number of Maori and their isolation served to reinforce dominant views that they were dying out or assimilating. Government policies continued to take land from the Maori. In 1900 the Maori Land Administration Act established the short lived Maori Councils, which assumed control over the leasing of Maori lands (Fleras 1985; Loveridge 1996). Between 1906 and 1908 these were converted to Land Boards, which were given exclusive authority to both lease and sell land. The Land Boards lasted until 1952 and served to alienate even more Maori land, particularly “idle” property that was not being put to obvious agricultural use (Loveridge 1996). The loss of land and the complexity of leasing arrangements reduced the land base dramatically and made it difficult for indigenous owners get full use or value from their property even when they theoretically retained ownership (Coates 2004).

By the middle of the 20th century nearly all of the fertile land in New Zealand had passed into white ownership. The Maori were seen as “a small and rapidly diminishing minority safely withdrawn in their villages.” (Ausubel 1961, 223). The dominant population’s image of the Maori became romanticized as their physical and economic threat diminished. This would soon change during a massive Maori urban migration that began during the 1950s.

Urbanization and Activism

Maori population growth continued to put pressure on the limited rural economy. Those seeking employment were pushed toward urban centers (Coates 2004, 239-240). The growing transportation infrastructure and communications in New Zealand brought the rural areas into greater contact with the dominant population and the opportunities outside of Maori villages.
who had served in the Second World War also came back with experience in the mainstream culture and awareness of the economic and educational options elsewhere (Ausubel 1961, 222).

It is difficult to overstate the demographic and political importance of Maori urbanization during and after World War Two. While urban drift was a national (indeed, global) phenomenon, rates of Maori urbanization far eclipsed those of the non-Maori population over the same time period (Scholtz 2006, 86).

In 1926, 8% of the Maori lived in urban areas (58% of non-Maori did so), and even in 1945 only 16% of Maori were urban (63% of non-Maori). By 1971, 70% of the Maori population lived in urban centers (and 81% of the total population) (Scholtz 2006, 86). The population shift was dramatic, renewing contact with whites and increasing indigenous awareness and experience in the dominant society. The new urban indigenous population helped to develop and expand pan-Maori activism and organization by increasing contact between different iwi and hapu. This population shift also brought much greater public awareness of Maori issues and concerns to the dominant population.

A major effect of urbanization was a growing pan-Maori sense of shared experience and a surge in activism. As noted previously, attempts at the creation of tribal assemblies and the assertion of a national indigenous identity had begun in the mid 19th century. This early experience at organization (even if unsuccessful at the time) gave the Maori population and leadership experience with ongoing activism. The development of an international indigenous network also supported and inspired Maori protests throughout the 1960s and 1970s. The Maori’s main concerns were the loss of their land and their sovereignty (Charters 2006). Nationally oriented organizations such as the Nga Tamatoa grew from new connections in the increasingly urban, well educated indigenous population. Key events in the development of Maori protest included a 700 mile protest walk across the North Island in 1975 known as the Land March, a tent embassy in front of Parliament, and other forms of protests such as the occupation of Bastion Point for over 500 days in 1977 and 1978 (Coates 2004, 240; McHugh 1999; Scholtz 2006). These events also generated media attention and publicity, which brought both domestic and international awareness of Maori concerns and the promises of the Treaty of Waitangi.
Unlike other countries, the Maori did have the limited political strength of the four guaranteed representatives in Parliament. The slim majority of the Labor party in controlling Parliament during the 1940s led Labor leaders to court the Maori representatives, giving them the power to raise attention to Maori concerns. In 1967 Maori individuals were allowed to stand as candidates for election in the “general election” (those elected by whites), although Maori voters were still only allowed to vote for the designated Maori seats (Fleras 1985). In 1975 (the year the first two Maori members of Parliament were elected under this new option), the Labor government created an option that allowed Maori to choose which electorate they would be a part of after each census.

### 3.4.3 Land Rights

*Waitangi Tribunal and Land Rights*

Several changes pressured lawmakers to offer a shift in their policy towards Maori land rights. The ongoing activism of the indigenous community and international attention encouraged change. In the wake of international changes in the treatment of minority groups and sizable settlements in Canada and the United States, international precedents were being set for Maori land rights (who had a much stronger case than indigenous peoples in the other countries). Public resistance to acknowledging land rights and the promises of the Treaty of Waitangi was fading, although there was still concern over the realities of land transfer. Further, many changes in support of indigenous rights took place under Labor administration leadership, which had developed a tentative alliance with Maori interests during the 1940s (McHugh 1999). The federal government established the Waitangi Tribunal in 1975 to deal with claims of the Maori about Colonial and New Zealand violations of the Treaty (Charters 2006; Scholtz 2006).

The Waitangi Tribunal was authorized to make recommendations to Parliament regarding the claims of the Maori. Its power was very limited; its decisions were neither binding nor enforceable without the final approval of Parliament. It was further restricted by inadequate resources. From 1975 to 1985 there were only three appointees, very limited funding, and a mandate to only hear contemporary claims. After protests from the Maori community over the many
limitations, the Tribunal was modified in 1985. Membership rose to 16, funding was dramatically increased, and the tribunal’s scope was extended back to 1840. Still, critics have argued that the main function of the Tribunal is to serve as a diversion— it creates the illusion of partnership and fair hearings while at the same time marginalizing more radical elements of protest within Maori society (Fleras 1999, 208-210).

While the Waitangi Tribunal provides a public forum and makes recommendations on claims, iwi must negotiate settlement with the Office of Treaty Settlement (part of the national government). There are no requirements that iwi must participate in both processes, although many seeking land transfer do. While its purpose is mainly to offer a forum for conciliation, the Tribunal continues to function. A key social function of the Tribunal is that it provides an opportunity for the Maori and other community members to air their grievances (www.waitangi-tribunal.govt.nz).

Maori as Partners in Government

A major victory for Maori rights came with the 1987 Court of Appeals decision in New Zealand Maori Council v Attorney General. The specific context of the case was whether or not the government could take over land subject to Maori claims without Maori agreement for the purposes of developing state owned enterprises. The court ruled against the government’s unilateral power, and argued that the compact between the two partners required them both to act “reasonably and in good faith.” Further, the government was obligated to provide “active protection of Maori people in the use of their lands and waters to the fullest extent practicable” (New Zealand Maori Council v Attorney-General 1987, 664). The decision found that the principles of the Treaty of Waitangi covered sovereignty, partnership, protection, and consultation of the Maori in legislation or administrative acts which might affect them, and ultimately found that, based on the terms of the Treaty, the Maori are equal partners in government. This dramatic finding has had far reaching consequences in the structure of the government and the extension of rights. The same year, as an example of the new commitment to partnership, Parliament passed the Maori Language Act of 1987 which declared Maori a state language along with English (Havemann 1999, 53). The government
also worked to establish a more coherent policy of negotiations over land and resource claims (Scholtz 2006; Statistics New Zealand 2002).

**Partisan and Electoral Changes**

When the National Party ousted the Labor administration in the 1990 elections, the new government sought to limit the resources available to the Maori. In 1994 legislation set a maximum payout for land claims at $1 billion (NZ) over a period of 10 years. The plan was rescinded in 1996, when political powers shifted again and the National Party was forced to join with a more moderate governing coalition (McHugh 1999, 458). The Maori cause was also helped by the establishment of a National Maori Congress in 1991, which organized protests against the attempted limits on compensation (Fleras 1999, 211).

The 1996 election brought other changes that benefited the Maori. After a history of a “first past the post” electoral system, in 1996 the country moved to mixed member proportional system. The designated Maori seats, voted on by those who chose to participate in the Maori roll, were now tied to the number of voters in the special “district” and the number increased from four (which had stood since the creation of the Maori seats a century before) to five. In 2002, as more Maori chose to vote in the special Maori elections, the number further increased to seven. The new proportional voting system also allowed for greater Maori representation in the general district elections. In the 1996 election 15 members of the parliament in total were Maori, compared to seven in the previous electoral cycle (Havemann 1999; Scholtz 2006). Currently there are eight members of Parliament who are Maori (out of 121 total), seven representing the Maori special electorate and one elected from the general population. While this is still an imbalance compared to the general population (only 7% of the seats, versus 14% of the population), the flexibility of the new system allows for more minority representation than before. This translates to greater electoral strength as well as agenda setting power for the Maori seat holders.
In 1999 the Labor party, which had historically supported Maori rights, resumed power (which it would hold until 2008). Public sentiments against large scale transfers to the Maori were increasing, and the Labor leadership was increasingly conservative. Parliament voted to override both court decisions and recommendations of the Waitangi Tribunal that supported Maori rights. These actions alienated many Maori supporters. The conflict is illustrated by the conflict over foreshore and seabed rights. A 2003 Court of Appeals decision granted these rights to the Maori. Public opinion among the dominant population saw this as unfair, with special advantages and rights being allocated to the Maori that were not available to the rest of the population. In response to the public pressure from the dominant population, Parliament overturned the decision by enacting the Foreshore and Seabed Act of 2004 which nullified the court decision and gave the Crown the absolute ownership of all foreshore and seabed land not held in fee simple. The government had already rejected a report by the Waiting Tribunal on Foreshore and Seabed rights that was critical of the government’s policies. Maori leaders appealed to the United Nations (which strongly supported their position) but the Prime Minister dismissed the UN recommendations (Charters 2006). In response to the new direction of the Labor party leadership, the Maori Party formed in 2004 and gained 5% of the vote in the September 2005 elections (Charters 2006).

### 3.4.4 Current Situation

As of 2007, the Office of Treaty Settlement has finalized 20 settlements since 1989. Most involve formal apologies, financial compensation, and the transfer of publicly held lands. While private land owners are allowed to come to agreements on their own with iwi leadership, government negotiations do not include private property. In addition, there are two “Deeds of Settlement” which have been negotiated but are yet to be finalized as land settlements in legislation, and nine agreements waiting to be formalized. (www.ots.govt.nz). One of the most comprehensive settlement agreements reached was with the Ngai Tahu iwi in 1997. The settlement transferred $170 million in compensation, transferred title to land over several different parcels, authorized the renaming of several sites to Maori, and allowed exclusive access rights to other sites. Other
agreements have been met with less enthusiasm by the native community because of the limitations of the Waitangi Tribunal and OTS. The Taranaki settlement, for example, was primarily made up of financial transfers because most of the contested land was privately owned and therefore off of the table for transfers (Scholtz 2006).

As this indicates, there are still improvements to be made. The Waitangi Tribunal has been dogged by a lack of funding and delays in its proceedings. The Tribunal has recently publicized commitments to speed up and facilitate the process (www.waitangi-tribunal.govt.nz). The new process may also streamline the efforts of the negotiation process with the Office of Treaty Settlement. In addition to the administrative problems, the Tribunal’s findings remain subject to and restricted by the decisions of the Crown. The government can (and has) reject the tribunal’s reports and proposed settlement arrangements (Charters 2006). Further, settlement agreements stipulate that they are final, and that all potential claims of the iwi (tribe) will be formally extinguished even if they were not considered in conjunction to the claim being settled.

3.4.5 Conclusions

The Maori in New Zealand have far greater leverage than most indigenous groups in the world. Their relatively large size, sustained collective organization, and level of representation in government give them advantages in seeking specialized rights and land (Havemann 1999, 333). Still, the Maori have struggled to gain recognition of their rights to land. As in the other cases, the convergence of events in the middle of the century brought the consideration of Maori rights before those in power. The dramatic urban migration of Maori, Maori activism (which was a much more disruptive force in New Zealand than the activism of indigenous peoples elsewhere), and increasing public support for the extension of rights all encouraged those in power to begin to extend recognition to the special demands of the Maori. The Waitangi Tribunal (1975) offered an arena for Maori to air their grievances and gain acknowledgment of their title claims. Settlements came through the Office of Treaty Settlement, and were at the discretion of Parliament. The limitation on land that can be returned and the overarching power of the government which can choose to
overturn or deny settlements have been the cause of many concerns of the Maori. Even though the Maori have legal, political, and demographic power that many other indigenous peoples do not have, they still remain institutionally weak in many senses.

### 3.5 Comparison and Evaluations:

We can see from the comparative historical development of these three countries that there are several similarities in the pattern of indigenous rights recognition. Despite some very different historical, institutional, and demographic situations the three countries have had significantly similar trajectories and timing. In each country, a major impetus for change was the shift in international norms after the close of World War II and concerns about the treatment of minority populations. While the norms may not have been immediately internalized by the strong in these countries, those in power were concerned with their international standing and reputation, which helped to lead to a redefinition of citizens and “humans” in Australia and Canada, and more recognition for the equal rights of the Maori in New Zealand. By this time each country’s dominant population was secure in its dominance; the weak were in a position from which they were not a threat to the political or economic security of whites. This facilitated the extension of rights greatly.

The following table and section summarize an evaluation of the proposed explanations for the extension of rights and resources for indigenous peoples.
<table>
<thead>
<tr>
<th>Initial Causes</th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
</tr>
</thead>
</table>
| **Factors motivating the weak** | - No electoral or resources strength  
- Inspiration and tactics of other minority rights activists | - Regional electoral strength in north  
- Inspiration and tactics of other minority rights activists | - Relatively large population, national and regional voting strength  
- Labour party need for Maori representatives support in Parliament in 1940s  
- Inspiration and tactics of other minority rights activists |
| **Factors motivating the strong** | - No practical factors  
- International attention to minority rights after WWII, new normative environment  
- Concern about international standing  
- Concern about rule of law and application to indigenous  
- Redefinition of “human,” i.e. extension of citizenship in 1967 | - No practical factors  
- International attention to minority rights after WWII, new normative environment  
- Concern about international standing  
- Concern about rule of law and application to indigenous  
- Redefinition of “human”, i.e. post war extension of rights and resources, amendment of Indian Act in 1951, extension of franchise in 1960 | - No practical factors  
- International attention to minority rights after WWII, new normative environment  
- Concern about international standing  
- Concern about rule of law and application to indigenous  
- Group was somewhat advantaged by recognition of Treaty of Waitangi, had recognition in Parliamentary seats, etc, became more so with electoral changes in 1960s and 1970s |
| **Features of the weak that affect mobilization** | - Some cohesion among individual groups in 1940s and 1950s, limited national cohesion in 1960s and 1970s | - Cohesion of military veterans in 1950s, regional and national cohesion from 1960s on | - Ongoing pan-Maori attempts since 1850s, Maori cohesion from 1960s on |
| **Features of the strong that facilitate concessions** | - Strong were VERY strong; indigenous peoples were never a threat to dominance  
- Concern about international standing | - Strong were secure by mid-century; indigenous population and landholding had decreased, by early 1900s government exercised almost full control  
- Concern about international standing | - Indigenous population at its low around 1920, military threat gone and population isolated, most landholdings passed into white hands  
- Concern about international standing |
| **Major Outcomes** | Mabo case (1992) recognizes native title  
National Native Title Tribunal (1993) | Calder case (1973) recognizes native title  
Waitangi Tribunal/ Office of Treaty Settlement (1975) |
Factors Motivating the Weak to Seek Concessions

The weak can be motivated to act and demand concessions for several reasons. Perhaps they are not as weak as before and realize their newfound strength. The weak may discover that they have access to new resources, perhaps the discovery of valuable resources on territory that they control. The population of the weak may grow, or perhaps have a strategic strength in a particular region or election, and be able to exercise electoral influence. The weak may have become concentrated in a particular economic sector, and able to exercise the power of disruption. They may also have learned new methods or skills from the tactics of other weak groups who have also sought concessions from the strong. In order to make demands, the weak also need to have a belief in their ability to reach success; they will not seek concessions if they have no expectation of ever succeeding.

The evidence presented in the case studies above shows little consistent support for the role of an increase in the electoral, resource, or economic position of indigenous peoples as the impetus for seeking concessions. It does, however, reveal the fact that indigenous peoples have learned, borrowed and been inspired by the activism of other minority groups and indigenous peoples around the world.

In the case studies analyzed above, practical factors do not appear to be a motivating force for the weak. Only in one case, New Zealand, has the indigenous population had strategic political power. The Labour party relied on the support of the four designated Maori representatives in order to maintain its majority status in the 1940s. While this drove those in power to give more attention to indigenous issues, it did not result in substantive gains or concessions at the time. The Maori’s guaranteed representation in Parliament has been significant in keeping their presence known and at least giving them a superficial voice in government, establishing indigenous experience in politics, and at times in maintaining the ruling coalition’s power. On the other hand, the separate Maori roll can be seen as a form of vote dilution, effectively keeping those elected from the general population with no electoral incentive to consider Maori concerns or positions. While changes to the electoral
system in 1967, 1975, and 1996 have altered this arrangement, most of the recognition for Maori rights came in the 1970s and 1980s.

The experience of other weak groups in gaining concessions from the strong does appear to play a powerful role in each of the country’s indigenous movements. Indigenous activists were inspired both by the experiences of other minorities (such as the inspiration of the African American led Civil Rights Movement in inspiring protest activities in other countries) and other indigenous peoples around the world. Further, the success of other groups through the courts encouraged litigation as a means of bringing some institutional attention to indigenous peoples’ rights as sovereign entities. The spillover effect included a normative component of support for seeking change; not only were indigenous peoples learning how to seek concessions, they also believed that there was a possibility that they could reach their goals.

Features of the Weak Facilitating Concessions

We expected group cohesion to play a large role in determining the groups’ ability both to make demands and reach their goals. While cohesion alone is certainly not sufficient as a facilitating factor, it is expected to be necessary. For the very weak, their ability to work together and towards an agreed upon goal is essential for political elites to consider the claims serious enough to answer.

For indigenous populations, which are often made up of distinct tribes or bands, the cohesion can be both at the level of the tribe or at a national level. In order to reach national concessions, I anticipated that national or regional cohesion (rather than tribal or band cohesion) was a facilitating factor.

In all three countries, group cohesion was a major force in enabling the activism and mobilization of the 1960s and 1970s. New Zealand’s indigenous population has been advantaged by a stronger historical and cultural connection as a pan-Maori group, giving them an advantage in terms of cohesion. Further, the basis of their claims rest on the same legal basis in the single treaty, whereas in Canada (or the United States case to come next) treaty arrangements have been with individual groups and so their claims often rest on individual tribal merits. Each of the cases points
to the experiences and connections of military veterans and indigenous peoples in urban areas as promoting national cohesion.

In New Zealand and Canada there were strong indigenous movements on a national scale during the 1960s and 1970s. This likely contributed to their success in gaining some recognition of land rights, as they were able to demonstrate a strong and consistent presence in the national arena. In Australia, that sort of national cohesion did not come into play until much later. The tendency of Australia’s indigenous organization and activism to be more regional or local in nature is likely due to the extreme discrimination against them and the long period of time without any national indigenous policy or administration. This regional tendency is likely to also have contributed to the late recognition of native title, as there was less national cohesion and organization among the Aboriginal population in its claims against the government.

In all cases, the development of international supports and networks among indigenous peoples throughout the 1970s and 1980s were also significant. This international context offered a venue for indigenous peoples to learn from other groups’ experiences, air grievances, and gain media attention for their cause. The international indigenous movement did not cause group cohesion at a national level, but it lent the national movements’ strength, support, and attention.

Factors Motivating the Strong to Offer Concessions

There may also be factors that motivate the strong to step away from the status quo and offer the weak concessions, although they have previously ignored or suppressed the same weak group. We have few reasons to expect indigenous peoples to be able to offer practical incentives to the strong on their own. It is possible that the weak gained some access or opportunity inadvertently through the actions of the strong. Perhaps rights were recognized for the purpose of extinguishing them, and the weak are then able to exploit this opening. Such an explanation would require a great deal of background and evidence, and it does not appear relevant in this case. The object of the weak’s claim may have become burdensome or expensive for the strong. In this were true, the concession would actually be a cost-cutting measure. This also does not appear to be the case here.
The second group of potential factors that might motivate the strong to reach out to the weak were normative. Central was understanding the redefinition of indigenous peoples as inferior outsiders to equal “humans,” deserving of the application of the rule of law and other rights of the dominant population. This redefinition would extend to them legal supports and policies that had not previously been available because of their reduced status.

In the three countries studied, the changes in international norms after World War II are essential for understanding the trajectory of change. The development of international attention and concern over the treatment of minority groups pushed power holders in each country to consider the treatment of the indigenous population. Even if those leaders were not converted to the new normative scheme themselves, those driven out of concern for their position in the international community were pressed to offer a public recognition of the “humanness” of their indigenous peoples. This has been true in each of the three countries. At times, the leadership in each has shown reluctance to embrace international standards in terms of their treatment of indigenous peoples, but overall this has been a major factor in understanding why the strong would allow, or even initiate, a change.

The extension of equal rights and changes in legal norms as part of this redefinition of indigenous peoples was also significant for indigenous peoples’ rights. Historically, the courts have been one of the few places that indigenous peoples (as well as many other minority groups) have been able to press their claims. In these three countries, the willingness of judicial actors to recognize the legal standing of their claims has been key to the development of land rights. In both Canada and Australia, government change and the establishment of a designated body to settle land claims followed key legal decisions in support of indigenous title to land. The Australian National Native Title Tribunal (1993) immediately followed the Mabo decision of 1992. In Canada, the landmark Calder case in 1973 was immediately followed by the creation of the Office of Native Claims (1974). In both examples, decision makers were quite clear that the legal decisions prompted their evaluation of and changes in land claims policy. The rights of the Maori have also been
bolstered by legal decisions in support of their rights as sovereign entities. The 1987 New Zealand Maori Council v Attorney General case established the rights of Maori as partners in the New Zealand government, recognition which has strongly supported land rights as part of the sovereign rights of the Maori.

The judicial recognition not only of the humanity of indigenous peoples, but of their inherent (or recognized, in the case of treaties) powers and rights as sovereigns has been incredibly important. The specific causes of changing norms among judicial actors is not well understood, and is an area for more research. The experiences of the indigenous peoples here also illustrate another important legal development. These commonlaw countries appear to “share” decisions, with both judges and legislative officials citing decisions from other countries to justify their policies toward indigenous peoples (Bartlett 1996; Brookfield 1999). There is a legal dissemination of norms in support of indigenous peoples’ rights. In the absence of domestic precedents, judges ruling in favor of expanding recognition of native title to land have looked to the case law in other commonwealth countries.

*Features of the Strong Facilitating Concessions*

In order to consider any concessions to the weak, the strong must be assured in their own dominance. As the numbers and resources of the strong rise and those of the weak decline, it becomes potentially easier and less expensive for the strong to offer rights or resources. This changing ratio of power is necessary, but in no way guarantees any moves toward concessions. The apparently entrenched weakness of the weak will allow the strong to view them as non-threatening, and may also encourage a new perception of the weak. Groups that were once labeled “primitive,” for example, as part of the justification for their subjection, may now be considered “innocent” or even “noble.” As this shift happens, and a group that was once considered threatening is reduced to such weakness that it does not appear a possible threat any longer, the strong are able to recalculate the “affordability” of concessions.
Certainly, the weak position of indigenous peoples in the three countries studied became very weak. In Australia, the group had never posed a credible threat to the interests of the dominant population. In Canada, indigenous peoples were dispossessed, isolated, denied basic rights, and subject to the near authoritarian rule of government agents by the early 1900s. The Maori may have remained a larger group than the others, but their dispossession and isolation (also by the early 1900s) supported a dominant image of a weak, disappearing group. In each country, therefore the weak appeared exceedingly weak at the time when early concessions were being made. It also deserves note that the Maori have not been granted more rights to tangible goods or resources than indigenous peoples in other countries, despite their large population size and legal standing. In fact, the Maori have less than indigenous peoples in Canada and Australia.

The chart below relates the indigenous proportion of the total population to their proportion of the total national land holdings (both are rudimentary proxies, but they provide some indication of both the potential electoral significance of the group and their success in gaining transfers of resources). While not yet covered as a case, the United States has been included as a basis of comparison.

**Chart 3.2: Indigenous Percentage of Population and Land Ownership**
The evidence here is cursory, and limited with the small number of cases, but it does point to the possibility that Maori may have actually seen less success in securing the return of land not because they are too weak, but because they are not weak enough for those in power to offer more.

As a group becomes less threatening to the dominant population’s interests, it may also be perceived differently by the dominant population. Unfortunately, there is little concrete evidence to evaluate this with. The few resources available are often localized in nature and hard to generalize. Polls of a more national perspective can be so broad that they give little information, and are also almost never asked across periods of time. The lack of consistent public attention- whether in the media or by political elites- at a national level also makes this difficult to track. It does appear that in all three countries images of indigenous peoples became more romanticized and historical during the period of indigenous population decline. This made indigenous peoples as a broad national population an acceptable “target” population for concessions.

The security of the strong allows a recalculation of the affordability of concessions to the weak. These may be seen as more affordable than before. Even very low value transfers, however, are a move away from the status quo, where no concessions were made. Without a motivation for doing so, the strong will still not make any moves to meet the demands of the weak. Once some impetus takes hold, rational understandings of the costs and benefits of negotiation prevail. Rights or resources that are low value, have little interest, and will have few effects on the dominant population or other stakeholders are far easier to transfer than those that are high value and/or contested.

This explanation certainly holds in the cases covered above. In terms of broad rights, those that have been most readily extended to indigenous populations are civil rights which extend equal access to participation and services of the state. These extensions of equal rights are part of the redefinition of indigenous peoples as part of the citizenry, as discussed above. Rights to equality and to non-rival public goods are also relatively low cost. The extension of group specific rights,
particularly when they are related to the transfer of tangible and potentially private goods, is more costly.

In each country, despite advances in recognition of the sovereign rights of indigenous peoples, the dominant population- and elites- have hesitated at the transfer of resources or property. Even very recently- such as in the seabed and foreshore issues in New Zealand, or in the success of the One Nation Party in Australia- there is the idea that at some point indigenous peoples have gotten “too much” or have too many rights. When it comes to the specific issue of land rights, similar sentiments pervade. Government negotiations tend to (if they are not limited exclusively to) the transfer of public lands, which are often the same areas that have the least interest of the dominant population. It bears noting that the countries with the most indigenous controlled land have the lowest population densities and the largest amount of relatively low value land. The Australian continent is largely desert; the bulk of Aboriginal territory is in this arid space, often in the federally governed Northern Territory. A similar situation exists in Canada, where the largest single indigenous area is Nunavut- a territory encompassing one fifth of the country’s landmass, with such a barren environment that it supports only about 30,000 people in remote and isolated settlements.

The chart below shows the relationship between the population density and the percentage of land controlled by indigenous peoples.
Chart 3.3: Population Density and Indigenous Land Ownership

There is a clear inverse relationship here; the countries with the lowest population density have much higher percentages of indigenous controlled land than the two with higher population densities. The next chart illustrates percentages of arable land and indigenous control over land.

Chart 3.4: Arable Land and Indigenous Land Ownership
Australia and Canada, with high percentages of indigenous controlled territory, have a relatively low percentage of arable land. In the United States, with its high percentage of arable land (and high population density, as seen in the previous chart), land is relatively more valuable. This may be one contributing factor as to why there is a small percentage of land controlled by the indigenous population in the United States.

3.6 Conclusions

Indigenous peoples stand out from other weak minority groups because of their distinct historical and political status as pre-existing sovereign entities. Indigenous peoples also stand out in terms of the concessions that they seek from states. They are not only interested in “corrective” justice, but instead aim to create autonomous political institutions. These very different goals color the way that their claims to rights are received by the dominant populations and treated by political elites. In many ways, the pursuits of indigenous peoples are harder than those of other weak groups. Not only do indigenous peoples seek their basic rights as “humans” to equality within the state, they also seek their sovereign rights as distinct political entities. This can makes them even less likely to gain concessions from the strong. As Fleras writes:

Indigenous peoples are not multicultural minorities. Their interests or concerns are not those of multicultural minorities, who comprise immigrants and descendents of immigrants in search of social and cultural equality within the existing framework of the host society. By contrast, indigenous peoples represent peoples. They are descendents of the original occupants of the land, whose inherent and collective rights to self-determination over the jurisdictions of land, identity, and political voice have never been extinguished by conquest, occupation, or treaty, but only need to be reactivated as a basis for redefining their relationship with the state (Fleras 1999, 219).

These very different goals color the way that their claims to rights are received by the dominant populations and treated by political elites.
The case studies above present some of the complexities in understanding change in favor of indigenous groups. It is readily apparent that the countries are connected in many ways, not just through their institutional and legal histories. The political, social, and legal conceptions of native title and rights have all borrowed from one another. In addition, the experiences and tactics of indigenous groups in each country have clearly been informed by the experiences of the others. The struggle for minority, and specifically indigenous, rights is now a global experience.

While the Maori in New Zealand have the strongest political recognition and political rights as well as the most demographic strength of any of the groups discussed, but still saw little formal acknowledgement of land rights until the Waitangi Tribunal in 1975. More substantive advances were made in the 1980s, but this has not translated into proportional gains in land holdings.

Canadian policy has fluctuated between respect and disregard for indigenous sovereignty rights. The Canadian case is also complicated because of the divergence of treated groups with formally defined relationships and rights and non-treatied groups. Indigenous groups in Canada have seen some large and valuable settlements that include both self-governance rights and control over land. Australia has lagged all of the other countries in its recognition of land rights. Limited negotiation proceedings were opened in 1976 (although only in the federally administered Northern Territory). This was extended somewhat in the 1993 Native Title Act, although the Act has been amended- and weakened-by later legislation and was primarily federal.

Even with this range of outcomes, each country faces similar criticisms. In each case, there has been reluctance among policy makers to extend rights beyond those of equality to the services promised in treaties and to full rights to self-government and sovereignty. Ongoing concerns of indigenous peoples often involve the authenticity of the rights transferred. In the case of land rights, the federal government retain ultimate authority and land is frequently held “in trust” for the
indigenous peoples. This means that final title still rests with the government, impeding truly sovereign territorial control. Indigenous control over a large amount of land (such as in Australia, which has a large amount of territory supposedly in indigenous hands) may therefore not be full control.

Another concern that comes out in the three cases (and will be seen again in the United States) is how well the government can be trusted to act as the arbiter for claims against itself. The proceedings of the Office of Native Claims (Canada), National Native Title Tribunal (Australia), and Office of Treaty Settlements (New Zealand) each charge a government appointed body to act on behalf of the government as well as evaluate the case of indigenous peoples against the government.

A further complaint against these administrative bodies is that they marginalize demands of the weak that occur outside of the government proscribed pathways. There have been concerns raised by indigenous leaders in each of these countries that the institutionalization and federal administration of indigenous claims, particularly claims to territory, can marginalize other means of activism. For example, a group with a territorial claim that persists in active public protests or lawsuits, rather than filing paperwork with the government for an evaluation that may take 20 years to complete, can be then be dismissed by powerholders as disruptive because they are not using the established institutional paths. This allows those in power to offer a superificial concession of poor quality and also delegitimize future claims of the weak. These concerns of indigenous peoples are significant, and deserve more attention, study and evaluation.

The comparisons here have established several explanations that appear to be strong factors in understanding the evolution of indigenous rights and policy, and specifically land rights. The progression of land rights in each country can be seen as the response of political elites to changing incentives. Similar global forces during and after World War II contributed to an environment in
which the benefits of addressing indigenous claims (at least superficially) began to outweigh the costs of continuing to ignore them. These changes occurred despite the fact that the historically weak political and economic position of indigenous peoples had generally not changed. Instead, the primary changes in the position or perception of indigenous peoples were normative. In the next chapter we turn to a detailed study of the United States, which will use the data gathered to further evaluate the conclusions generated here.
4. Recognizing Indigenous Rights: The United States

This chapter continues the comparative assessment of forces behind changes in the recognition of indigenous peoples’ rights. The United States case is used to further construct the comparative historical analysis and evaluate how changes in indigenous rights in the United States support or contradict the findings from the other three cases. The historical development is also more comprehensive than in the other cases, as it will provide the context for the second half of the dissertation, which focuses on causes behind different outcomes in indigenous peoples’ land claims in the United States.

4.1 The United States of America

American Indian policy in the United States has undergone dramatic variations over time. Policies have ranged from sovereign to sovereign treaty making to various attempts at assimilating all American Indians into the dominant population and terminating tribal existence entirely. The wide swings make the cumulative history of developing indigenous rights in the United States complex. At present, American Indian tribes are able to exercise some of their sovereign rights, although there are concerns that there should be a more encompassing recognition of their autonomy. There have also been returns of some territory, although there is currently no comprehensive or consistent system of administering claims (unlike each of the other cases).

The pattern of land acquisition, assimilation, and a recent move toward recognizing rights reflects the changes over time that we saw in the other countries. The United States has undergone many shifts and reversals in policy toward American Indians. Early on, treaties between the indigenous populations of the east coast and the settler government ostensibly recognized the tribes as sovereign nations. As the white population increased and pressure for territory grew, tribes were pushed westward, sometimes in disregard for earlier treaties. The white population continued to grow, spurring armed conflict as the population moved westward. American Indian tribes were forced onto reservations during the 1800s, which served to isolate the population and often rendered
them dependent on the government for support. From the 1880s to 1930s, the allotment of reservation land into individual parcels and the government acquisition of the surplus land took a large amount of indigenous property away from the tribe. The reorganization of tribes during the 1930s stopped this practice. These chronological shifts in policy have created different possibilities for the emergence of later claims. Some American Indians have legal claims based on broken treaty arrangements, others legally sold or traded their territory for lands the west, while others have never entered into any formal relationship with the federal government. Even when the government has recognized that indigenous lands had been improperly taken, it generally refused to consider the transfer of land. During the 1970s, however, new social legal and political pressures encouraged legislators to enable land returns in a few cases. While the United States Congress created the Indian Claims Commission to offer financial compensation for land claims, it stands alone among the four countries as it has not established any administrative body to consider claims for the return of land.

4.1.1 Arrival and Acquisition

There is no single identifying term that all indigenous peoples in the present United States agree upon. Most indigenous leaders, indigenous individuals, policy makers and scholars agree that it is best, when possible, to use the specific tribal or nation’s name as an identifying designation. When speaking generally, the two most commonly used terms are American Indian and Native American. This research uses American Indian, following the precedent of McClain and Stewart (2006) and Wilkins (2007). While both are equally accurate (or inaccurate), American Indian is most commonly used in the present day and also was and remains the predominant term in treaties, statutes, and government language (Corntassel and Witmer 2008; Wilkins 2007). Native American could truly be applied to any one born in the Americas and also attained negative connotations from its use during the nativist movement and the Ku Klux Klan resurgence of the early 1900s (McClain and Stewart 2006, 6; Wilkins 2002, xix). It can also be interpreted more broadly, to refer to anyone born in the United States, native Hawaiians, and those from other parts of the Americas as well (Corntassel and
Witmer 2008). In contrast, the term American Indian is generally only used to refer to the indigenous peoples of the continental United States, so it is more accurate for use here.

The dissertation also makes repeated use of the word “tribe” in discussing American Indians. Tribe can be used to describe an ethnological group (connected by descent, culture, language, or other features). Here I use the term to refer to an indigenous political or legal entity and identity as defined by the group itself. One of the many conflicts in American Indian politics is who has the power to define the boundaries or authenticity of a tribe. The federal government acknowledges tribes through a formal diplomatic “recognition,” which also entitles the group to specific services. Some states also extend political recognition to tribes. Public administrative branches (such as the Indian Health Service) have also developed their own definition of tribes and tribal members. Tribal leaders argue that, as sovereign bodies, tribes themselves are the only legitimate powers to determine membership and boundaries (see Wilkins 2007, pages 1-32 for a detailed discussion of the varied definitions of “tribe”). The dissertation recognizes the rights of the tribes to self definition, and uses the term tribe to refer to the cultural and political entities as they identify themselves, even without federal recognition.

Early Contact and Colonization

The indigenous peoples of what is now the United States had contact with a variety of European explorers and power, including the Spanish, Dutch, British, French, and Russians. The British and French were the most influential over the east coast. The Spanish also exerted power over portions of the south and southwest. The European powers were all guided by the underlying concepts of the doctrine of discovery, as discussed in previous chapters. This “doctrine of discovery” established the rights of Europeans to acquire territory because of their superiority, and was embraced as justification for conquest by the French and British. The idea of conquest was supported by the proliferation of images of conflict between the civilized, religious Europeans and the heathen, barbaric indigenous peoples (Corntassel and Witmer 2008; Deloria 1974). While the French tended to interact closely and ally with American Indian tribes for trading purposes, they
were not as involved in treaty making as the British, who were more concerned with establishing permanent settlements and land title (Corntassel and Witmer 2008; Nichols 1998; Wilkins and Lomawaima 2001).

The geography of the United States shaped the settlement patterns of both the indigenous population and the immigrant-based population. The territory of the 48 continental states ranges from coastal plains and forests along the eastern coast, fertile plains in the center, the Appalachian and Rocky mountain ranges running from north to south, and a low lying desert region in the southwest. These different environments encouraged a diversity of adaptations among the indigenous populations. Further, Hawaii and Alaska, as separate geographical spaces entirely, introduce more human and physical diversity.

As in Canada to the north, the British and French concentrated their early colonization and trading efforts on the east coast during the 16th and 17th centuries. The British eventually gained dominance over the eastern coast of the modern United States, establishing colonies and pursuing a tactic of interaction that focused on segregating the indigenous and settler populations (Wilkins and Lomawaima 2001). The British (and French) sought the tribes as allies in their ongoing conflict with one another over control of the territory, providing an incentive for recognizing the tribes with treaties to maintain alliances. The British leaders favored treaty making as a way to formally recognize alliances as well as to demarcate territorial boundaries.

*Treaty Making and the Establishment of Federal Authority*

After declaring independence in 1776, the new nation followed many of the precedents set by the British colonial government, including its treatment of indigenous peoples. Treaties recognized the individual territories and existence of different tribes, recognizing each as an independent entity and setting up a future of tribes having individual relationships with the government (rather than operating as a more unitary group). A major impetus for British, and later American, policies of treaties was the physical presence and organization of the tribes. The tribes presented a threat to the security of the white settlers. While the white population and military
presence grew rapidly, the potential for conflict was a major reason behind the establishment of a
treaty making. Treaties establishing territorial boundaries also initially seemed a good option for
tribal leaders, who were also concerned about ongoing conflict over land and believed that this would
preserve their rights.

Treaties reaffirmed indigenous rights to particular territories, as long as they remained
peaceful and friendly in their relationship with the American government (Wilkins and Lomawaima
2001). In exchange for the cession of other lands, the federal government asserted its role as the
protector of American Indians in the areas that they retained. One of the early laws of the new
country, the Northwest Ordinance of 1787, states:

The utmost good faith shall always be overserved toward the Indians; their lands
and property shall never be taken from them without their consent; and, in their
property, rights, and liberty, they shall never be invaded or disturbed, unless in just
and lawful wars authorized by Congress; but laws founded in justice and humanity
shall, from time to time, be made, for preventing wrongs being done to them, and
for preserving peace and friendship with them.

This idea of protection helped form the “trust” relationship, in which the federal government was
the protector and guarantor of Indian property, rights, and services. This relationship, as indicated in
the language above, also establishes a degree of responsibility for preventing wrongs against the
indigenous population. The federal government has not always held up this promise (and sometimes
been the wrongdoer itself) (Wilkins and Lomawaima 1999, 65). The idea that American Indian tribes
need of federal protection would later be used to discredit their capacity to operate as independent
sovereign nations, reducing them in public perceptions to groups that are wards of the state, not its
equals.

When the American Constitution was adopted in 1789, it gave Congress the power to make
treaties as the supreme law of the land, which also recognized the tribes as legally and politically
sovereign entities on par with other nations (Deloria and Wilkins 1999; Sutton 1985; Wilkins 2007). As
conflict over land grew with the influx of more and more settlers, the transfer of land in exchange
for other protections or services was increasingly seen as a possibility to reduce violence between
settlers and American Indians by identifying territories for both groups. This exchange became the focal point of treaties. From an indigenous perspective, the tribes were granting rights to their territory. This contrasts with the federal government’s perspective that rights were being granted to the tribes by the United States (Wilkins and Lomawaima 1999, 117).

While it appears that the earliest treaties were conducted with the idea that tribes were authentic independent political entities, the perspective appears to have changed as contact increased and the United States developed its policy further. Tribes were no longer seen as legal equals to the United States, but as vastly inferior groups. Even within this group, some tribes were viewed as more “civilized” and others as more “savage.” Those that were seen as more civilized were often treated far differently and with the appearance of greater political respect (at least for a time). As time went on, and relationships deteriorated (and the federal government began to assert its military dominance) treaty making negotiations would become less authentic and even one sided, with the American Indian tribal leaders having few other options but signing or fighting (Nichols 1998). Further, it often appears as though treaties were created with the primary purpose of defining the tribes’ territory only so that it could be purchased.

Legal and political conceptions of tribal authority as asserted through treaties continued to place it beneath that of the federal government, meaning that the law has generally supported the right of the government to exert its power the tribes. By asserting the power of the federal government over tribes and creating a relationship where tribes were in some ways administered by the government, treaties also established the standing of tribes as wards of the states. The wardship status has had a strong influence over the political conceptions of tribes, as well. With public and political conceptions of American Indians as wards of the state, tribal authority as second to the authority of the state, and no means for adjudication between the government and the tribes, there was no mechanism to support the enforcement of treaty arrangements when the government no longer saw treaties as necessary to keep the peace.
The new government was concerned with controlling trade as well as territory (Deloria and Wilkins 1996). This was part of exerting federal authority over the states after the problems under the Articles of Confederation, where much power had rested with the states. It also reinforced federal power over tribes by asserting that they could not deal with whichever political entity they chose, but only those designated by Congress. Congress passed the first of a series of Trade and Intercourse Acts in 1790. The Acts regulated treaty making with the tribes and forbade state governments from making treaties or conducting transactions with tribes without the oversight and approval of the federal government. The Acts restricted individual whites’ access to Indian lands and preserved federal ability to generate profits from the sale of former Indian lands (Dippie 1982; Sturgis 2007).

*American Indian Removal from the East Coast*

The settler population of the United States began to expand westward at the start of the 19th century. With federal power consolidated, a rapidly growing population, and no outside military threats to the security of the country remaining, the tribes were no longer needed as allies. Whites began to encroach on areas previously promised to the Indians by squatting or illegal sales. The American Indians seeing their land base erode often sought the protection of the government to no avail, and they were left with few alternatives other than leaving the area, allowing the loss of their territory to continue, or resisting with violence. Increased (and often hostile) interactions between Indians and whites generated national public concerns about providing greater protection for whites in areas proximate to Indians. Asserting the federal role as a protector, government agents pressured tribes to move further west as their best path for survival and avoiding conflict. These new arrangements modified or abandoned earlier treaties.

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1 Despite the Trade and Intercourse Acts, federal jurisdiction over Indian affairs was ignored by several of the original thirteen colonies into the 1800s. The state governments continued what they had practiced under the Articles of Confederation, conducting land cession treaties with Indian tribes without federal oversight. The repercussions of these violations will be explored in the analysis of contemporary land claims cases in later chapters.
This new policy direction, which began during the early part of the 1800s, is known as removal. The basic idea of removal was to take American Indians from their territories on the east coast (which were in high demand) to lands west of the frontier of white settlement. Removal was intended to free up more land for settlers and keep the populations separate and, reducing conflict. Government officials were also driven to remove Indians by the discovery of new resources, such as gold and minerals, on Indian Territory. The convergence of white concerns about security and federal and state interests in resources gave federal authorities the ability to authorize the taking of land for their own benefit, but at the same time appear to be protecting the interests of their constituents (Deloria and Wilkins 1999, 24). To do this under the guise of adhering to treaties, new ones were “negotiated” with tribes who had few alternatives, or whose representatives were not authorized by tribal members to make such agreements. These new treaties often went against the terms of earlier treaties which promised security in reserved territories.

With the support of President Andrew Jackson, the Indian Removal Act was passed by Congress in 1830. Affecting the Cherokee, Chickasaw, Creek, Choctaw and Seminole tribes (also collectively known as the “Five Civilized Tribes”), The Act provided for the removal of the tribes via new treaties. The treaties and land sales were resisted by most of the tribal members involved, and treaties that were signed “willingly” may not have been signed by those fully authorized to give assent. Under Jackson’s administration nearly 70 removal treaties were signed and 45,000 American Indians relocated. By the end of the entire removal process in the late 1830s, approximately 100,000 American Indians were relocated- often forcibly- to Indian Territory in present day Oklahoma (Sturgis 2007, 37).

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2 The Treaty of New Echota, which ceded Cherokee land, was signed by representatives who were not part of the recognized Cherokee government. This internal rift, its development and its repercussions are explored at length in Sturgis’ 2007 work.

3President Andrew Jackson is most frequently associated with the removal process, although the origins of a formal federal policy to remove American Indians to lands further west developed in earlier administrations (the idea was broached before Presidents Jefferson and Madison) and were fully carried out in later administrations (for example
Legal decisions during this time period were complex and meant that the legal status of American Indian tribes and their political sovereignty were unclear (Dippie 1982; Sturgis 2007). Three Supreme Court decisions (lead by Chief Justice John Marshall) in Johnson v McIntosh (1823), Cherokee Nation v Georgia (1831) and Worcester v Georgia (1832) established the position of American Indian tribes as “domestic dependent nations.” This contradictory concept stated that the tribes maintained limited powers as nations, but that these powers were secondary and dependent in ways to the federal government. The idea of domestic dependent nations has stood, and remains a potent source of contention for American Indians who argue that their national sovereignty is equal to, not less than, that of the United States (Mason 1998). The Johnson decision also ruled that while American Indians might have rights to occupation, title rested with the federal government by virtue of the doctrine of discovery.

Still, by legally recognizing the fact that there were enduring tribal nations, the decisions gave some recognition to the position of tribal governments, particularly in their rights to the promises of treaties and in asserting their authority in relation to state governments. These ideas have since been used to support the extension of rights over different policy eras and, as seen, the recognition of title has been used to support the extension of land rights in other countries. At the time of the decisions, however, the limited protection and recognition offered by the Marshall decisions was unenforceable with only court support (Scholtz 2006). This became glaringly apparent over the course of the decade, when the legislature passed the Indian Removal Act and the executive branch used its power to execute the Act over the objections of the court.

although Jackson pushed the Indian Removal Act through Congress in 1830, the forced Cherokee removal that was authorized did not start until 1838, under President Van Buren), (Sturgis 2007; Wilkins and Lomawaima 1999, 47).
The 1840s brought even more expansion by settlers, reaching territory that the federal government had considered far beyond the frontier a mere decade earlier. The press of white settlers westward meant that the government could no longer isolate Indians unless they were confined to even smaller areas. Increasing contact and conflict with whites over land also resulted in further violence between American Indians and settlers (Wilkins and Lomawaima 1999, 47). A new commitment to establishing reservations for American Indians on a national scale took place throughout the 1840s and 1850s and lasted through the late 1880s (Dippie 1982; Wilkins 2002). The Homestead Act in 1862 encouraged westward expansion and brought large numbers of immigrants to settle and farm the central plains. This further put pressure on American Indians to accept reservations. The timing of reservations as a central part of Indian policy had the most influence on groups in the plains and the far west, who were often entering into their first treaties with the government. Because of the later contact, tribes in the west did have the advantage of being more likely to retain a portion of their original territory as their reservation, although those located in the choicest areas were still often removed to reservations elsewhere (Larson 1997).

The peak time for treaty ratification and the creation of reservations was in the mid 1850s. As the non-indigenous population grew, American Indian territory continued to shrink (Kelley 1979). The federal government had little incentive to honor past promises where they compromised the economic or political interests of the dominant population or government itself. There were no repercussions for going against past treaties to move tribes to new reservations. Except for a few ongoing pockets of resistance, there was no longer any real military threat from the tribes. Further, the idea that tribes were the wards and subjects of the federal government became more widespread, particularly as the population became almost totally confined to reservations and supported by federal services. For policy makers, it was no longer necessary, practical, or even legally mandated to treat tribes as sovereign nations, and American Indian tribes were treated as more of a domestic population group. The fact that they were physically located within the boundaries of the United
States reinforced this idea. “Because of their location, then, and solely because of this geographical dimension— even though politically and legally tribal nations remained foreign to the United States— Indians became, in the eyes of many people, a matter of domestic concern” (Deloria and Wilkins 1999, 28). In 1871 Congress passed legislation that ended treaty making, putting even the façade of a sovereign to sovereign relationship to an end (Hertzberg 1971; Wilkins 2007; Wilkinson 1987).

The reservation era also brought a change for the administration of American Indians. From the country’s inception, Indian affairs had been handled under the War Department. In 1824, a Bureau of Indian Affairs (BIA) was created to consolidate the administration of treaty obligations and spearhead efforts of assimilation. In 1849, the Bureau of Indian Affairs moved to the Department of the Interior as a signal of the intention to reduce the conflict between tribes and settlers (Wilkins 2007, 91). The BIA had authority over all Indians that had an established treaty relationship with the federal government across the country. The BIA remains the key administrative body for the handling of all Indian affairs.

The creation of reservations and the rules that governed them all were, for the ease of federal administrators, streamlined. The Bureau of Indian Affairs exercised administrative control over all services, such as food distribution and medical care (Wilkins 2007). The territory of reservations was created as tribal trust property. In this property arrangement, tribal members had the collective right to use and occupy reservation land, but the title was held in trust on their behalf by the federal government (Anderson 1995). The federal government therefore assumed all power over the tribes; the government owned the land and administered almost all aspects of their lives.

The government designation of tribal land as communal and without full tribal ownership hindered the ability of American Indians to develop any economic base. Individual Indians could not sell property to generate revenue, had few incentives to develop land that was ultimately controlled by the government, and therefore remained dependent on the government. The use of plans designed to benefit the power of administrators and the government, while keeping American Indians “in continued dependency and need,” is a theme in federal policy towards American Indians.
Tribal, or communal, rights to land also conformed to the dominant public perception (which was a misconceptions) that all American Indians had traditionally used land in common, with no private property rights and no concept of the value of land (Rodriguez, Galbraith, and Stiles 1996).

American Indian tribes had little recourse against the dispossession of the reservation era. Unrelated to American Indian affairs, in 1855 Congress had created the federal Court of Claims, an administrative body, to provide a forum for citizens seeking redress for wrongs committed by the federal government. Few American Indians were citizens at this time, so they were not even considered in the creation of the Court of Claims, and had little access to it. A few tribes did seek access this way, however, and in 1863 Congress changed the jurisdiction of the Court of Claims so that it specifically excluded Indian tribes, intentionally barring tribes from seeking their rights guaranteed in a treaty. The only way that tribes had access to sue the government in the Court of Claims was if they were given the right to do so by a specific act of Congress. Claims were allowed to be brought against tribes, but tribal entities remained excluded from seeking relief or compensation through the judicial system (Deloria and Wilkins 1999).

### 4.1.2 Assimilation

By the 1880s, the settlement of the country had begun to reach the boundary of the west coast, and the demand for land (by settlers and commercial interests, such as the railroads) continued. Further, the government had a goal of establishing power over the expanse of the country in its entirety. Now that treaty making was no longer necessary, government officials again began to seek a new alternative in dealing with the “Indian problem” and getting control over tribal land. A new federal policy began to develop. Rather than segregating American Indians, legislators began to consider means to encourage Indians to assimilate into the dominant population.

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4 American Indian tribes had in fact developed a variety of property rights arrangements, including private ownership of resources, according to the constraints of their specific environments. See Anderson (1996), Alchian and Demsetz (1973), and Rodriguez, Galbraith, and Stiles (2006) for a variety of discussions on American Indian property rights.
The goal of assimilation was not just political. Progressive reformers advocated the education of American Indians in western ways, arguing that continued tribal influence would only perpetuate the problems of poverty and dependence. The political and social forces interested in assimilating American Indians aligned. Advocates of assimilation perpetuated a very paternalistic treatment of American Indians; they were still seen as incompetents who needed the guidance of whites to be introduced into the dominant society. Starting in the 1870s, the Bureau of Indian Affairs authorized boarding schools. Children were taken from their homes (sometimes with the consent of their parents, but sometimes without), forbidden to speak their native tongues or practice their culture, and educated in English (Szasz 2002). Similar to schools in Australia and Canada, these schools aimed to turn the indigenous population into docile members of the dominant population.

Allotment

The history of interactions between American Indian tribes and white settlers until the end of the 19th century revolves around the acquisition of land and the denial of the authority of tribes. Shifting policies continually scaled back the self-governing powers and the recognition of tribes, as the federal government moved from treaty making to removal and reservations to allotment. Policies of allotment broke up tribal land holdings into individually owned parcels, or allotments. These policy shifts can be seen as the result of policy makers responding to expected benefits for changing their treatment of indigenous peoples. The significance of land puts it at the center of these calculations - as the demand for land increased from various sources, legislators increasingly scaled back the territory and rights of American Indian tribes. The period of allotment, from 1887 to 1934, was a low point for American Indian tribes and individuals, with tribal authority challenged by allotment, populations dispersed, lands lost, and social and economic problems rampant.

As the government sought ways to open up even more land for white occupation and ownership, the concept of allotment gained popularity among legislators and social reformers. The Dawes Act of 1887, also known as the Allotment Act, broke up communally held Indian reservations
into individually owned parcels of land. The idea was that American Indians could each be given an
individual plot (an allotment) of land that had formerly been part of the reservation. After the
government apportioned land for the Indians, the majority of reservations lands were left as
“surplus,” which government agents controlled. Tribes were supposed to “accept” the terms of
allotment. But, just as in the treaties of the removal and reservation eras, the acceptance was often
little more than a farce, as tribal leaders were forced to sign or authorization was given by those
without the authority of their people to do so. And as was also seen in the policies of removal and
reservations, there were no real means for tribes to protest.

The original Allotment Act stipulated that the land assigned to each Indian would be held in
trust on their behalf by the federal government for 25 years, after which it passed into full fee simple
ownership and the Indian owner could keep or sell the property to whomever he wished (McDonnell
1991, 4). The Burke Act in 1906 later changed the trust requirement and allowed for fee-simple
ownership to be conveyed to those deemed “competent” by federal agents prior to the expiration of
the trust period. This did not require the approval or even knowledge of the American Indian owner
in question (Larson 1997; McDonnell 1991).

The allotment of native held lands had been an idea long before, proposed as early as the
seventeenth century (Wilkins 2002). At the close of the 19th century, allotment was attractive to
legislators because of the vast expense of maintaining reservations, where government policies had
taken away or discouraged Indians from developing their own livelihoods and reduced tribes to a
state of dependence (McDonnell 1991). By moving American Indians to their own parcels, it was
hoped that tribal ties would diminish and tribes (and their insistence that they remained sovereign
entities) would disappear. It also offered the government the opportunity to acquire most of the
reservation territory through “legal” transactions.

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5 Head of Indian families were allocated 160 acres a piece, single adults or orphans were allocated 80 acres, and non-
orphans under the age of 18 were to be given 40 acres each (McDonnell, 1991: 2). This was later changed when
Congress became concerned that different “classes” of persons were allotted different amounts of land. It was
equalized in 1890 to allow for 80 acres per person (Prucha, 1976: 258).
Allotment would convey citizenship to American Indians when the trust period of land ownership expired. They would thus become citizens and full property owners at the same time. Proponents of assimilation believed that citizenship was an essential component. This was also among the first wide scale efforts to extend citizenship rights- and therefore potential equal recognition of individuals as fully deserving of the rights and privileges granted to the dominant population. Citizenship rights had previously been denied to American Indians. The court decision of Elk v Wilkins (1884) found that Indians could not voluntarily expatriate themselves from their tribes and become citizens without a specific act of Congress. After allotment, as citizens, American Indians would be further encouraged to leave tribal life behind and become acculturated as mainstream Americans.

Breaking up reservations and apportioning the land into individual properties for American Indians to farm was seen as a potential panacea. The government would oversee the distribution of lots to individual American Indians or Indian families and control the property that would then be left over. Allotting tribal lands would also promote assimilation by encouraging Indians to engage in staples of American civilization, property ownership and farming. Allotment would help “Americanize” the Indians by encouraging them to work on their own farms, developing traits of industry and self-sufficiency (Sutton 1975, 125). This self-sufficiency would reduce growing government expenses in providing services for American Indians (Prucha 1976). When the government allocated the set acreage for Indians, there would still be large areas of land for the government to control and distribute to individuals or commercial interests (Dippie 1982, 163; Gates 1936; Kelley 1979; Scholtz 2006).

The government formally pledged to set aside any funds from selling or leasing lands to white individuals or commercial interests as trust funds for American Indians. The control and administration of these funds was (and remains) a point of contention for American Indian tribes, who argue that much of the money was taken from them or misused. Elected officials in the new states and territories also expected to benefit from the creation of new jobs that could be used as
patronage (McChesney 1990). Support for allotment at the end of the 19th century came from many sources—white eastern reformers, commercial interests (particularly railroads), individual landowners, state and federal administrators, and federal legislators.

The authority of the federal government to break up reservations into allotments (against the cumulated support of formal treaty agreements and laws) was supported on all fronts. The virtually unlimited extension of Congressional powers over American Indian tribes was supported not only by public and political sentiment, but also by legal decisions such as United States v Kagama that reinforced the power of the government over tribal authority. The decision, on whether or not the Major Crimes Act of 1885 could extend federal criminal regulation over major crimes (such as murder, rape, or arson) in Indian Country, argued that Indian peoples were “weak.” Not only were they in need of protection from themselves, but also needed the protection of the communities around them. This reinforced the ideas of incompetence and ward status discussed earlier, and asserted the power of the government over the tribes (Wilkins and Lomawaima 1999).

The legal status of tribes was even further reduced in 1903. The Supreme Court decision Lone Wolf v Hitchcock (1903) found that the federal Congress had full plenary power over Indian lands and property, and was not restricted in any laws that it made. Lone Wolf, a principal chief of the Kiowa nation, sought an injunction against Congressional ratification of a 1900 agreement that allotted tribal lands in violation of earlier agreements. The decision asserted that Congress could disregard Indian property rights as defined in treaties because federal powers were supreme (Deloria and Wilkins 1999, 29; Wilkins and Lomawaima 1999, 110-111). In the wake of this decision, tribes making allotment agreements with the federal government were often pressured into accepting compensation for surplus lands far below market value. Leaders feared that if they tried to negotiate for higher prices they could instead find their land seized (McChesney 1990, 313).

The effects of allotment were myriad and devastating for the tribes. The land declared “surplus” (often the choicest or most valuable) was taken by the government. It could be sold to states, kept by the federal government, and sold or leased directly or indirectly to private owners or
corporations. As noted above, the money generated by these sales or leasing arrangement was
supposed to be kept by the government on behalf of tribes, although these funds were often not
appropriately tracked or administered. Allotment also failed to produce a new generation of
economically independent farmers. For the new American Indian farmers, small scale farming was
not environmentally or technologically feasible on the parcels allotted to them. Most of the tribes
who had been relocated to the plains (where much of allotment took place) were not originally from
the region, and had little cultural knowledge of how to make a living in that environment. Combined
with changing technologies and the agricultural economy, many of these farms were simply
unsustainable even for subsistence. As business ventures, they often failed to the competition of
white farmers. Those properties that could legally be sold by Indians to whites (after passing out of
trust) often were. When sale was not possible, leasing was (Gates 1936; Sutton 1975). What had
been reservation property became a checkerboard of state, federal, commercial, individual, and trust
land. Because of the 25 year trust period, heirship became- and remains- an issue. If an individual
died with the land in trust, it could never be alienated but instead was to be divided among heirs and
held in trust into perpetuity (Anderson). Finally, because of the failure of subsistence farms and the
sale or leasing of land, Indians continued to rely on federal services and support. If anything, the
allotment system caused poverty to increase on former reservations, but with populations split up
there were fewer tribal community support mechanisms.

The allotment policy produced a dramatic reduction in American Indian land holdings inside
and outside of reservations. By the close of the allotment period in 1934, 118 of 234 federal
reservations were allotted and 90 million acres had been removed from reservation status into the
government and non-Indian ownership (Larson 1997; Wilkins 2002). Inheritance rights and trust
status were- and remain- serious problems of ownership for American Indians in allotted areas.
Tribal life and identity were also targeted- by moving individuals and families into their own (often
isolated) properties, the proximity of tribes and tribal practices were reduced. Tribal authorities lost
even limited control over their members.
The allotment period came to a slow halt during the 1920s and officially ended with the Indian Reorganization Act (IRA) in 1934. At its close, allotment was regarded as a remarkable failure by the Bureau of Indian Affairs, social reformers, Indian tribes, and even its former advocates (Carpenter 2000). Rather than creating a new class of American farmers, the policy produced an even more embittered and dependent American Indian population. The privatization of property (frequently believed to maximize and generate wealth) in this case appeared to create poverty and heighten social problems. The fact that ownership was not fully transferred, but that land distribution was administered (with bias) by the government and title was retained weakened the potential effects of rights (McChesney 1990, 39). The government also often purchased tribal land for far less than its market value.

Citizenship

At the turn of the century allotment policies still reigned and the predominant belief was that American Indians would soon assimilate into the dominant population. Citizenship, and the ability to participate in the political life of the government, was considered important by influential Progressive reformers. The small (and, after Allotment, even more scattered) population of American Indians meant that their potential vote did little to threaten the dominance of whites. The Allotment Act had extended citizenship to those whose property was transferred to fee simple status as part of “Americanizing” the Indians. Over the late years of the 19th century other laws conferred citizenship on specific groups, such as Indian women who married white men (1888) or members of tribes in Indian Territory (present Oklahoma) who petitioned in federal court for citizenship (1890). After World War I Indian veterans (who had served alongside whites, rather than in segregated regiments like African-Americans) who were honorably discharged were also naturalized as citizens (Wilkins 2007, 55-58).

The Indian Citizenship Act, passed in 1924, conferred citizenship on all American Indians while allowing them to maintain their tribal affiliations (Dippie 1982, 195). It is important to note that this act did not require in any way the consent of those that it affected (without citizenship,
American Indians had not even voted for those who passed the Act). Even those individuals who had refused to accept federal citizenship previously were still included (Wilkins 2007, 59). This extension of citizenship to American Indians stands in contrast to policies towards other groups at the same moment in time. The Immigration Act of 1924, for example, set limits on the number of immigrants that could enter the country and completely excluded Asians from entry. McClain and Stewart (2006) note that a key reason for this Act was the economic success of Japanese in California. The exclusion of Japanese (and other Asians) was a result of this economic threat to white dominance. This fits with the explanation of extending rights to American Indians, with the passage of the citizenship act when American Indians were no longer viewed as a threat to the economic or social position of whites. For American Indians, policy makers felt that tribal influence was the root of ongoing problems and without it the individuals could be assimilated as citizens with allegiance to the United States.

White reformers began to bring attention to the ongoing and increasing poverty of American Indians. Some Congressional and administrative officials were also concerned about the failure of American Indian economic progress that had been expected after the enactment of allotment. The Department of the Interior commissioned a report on the Bureau of Indian Affairs, its services, and the conditions of American Indians. At the same time, in the 1920s, there were a handful of other studies and a long term congressional investigation (by a subcommittee of the Senate Indian Committee) also being conducted into the living conditions of Indians and administration of allotment. The Senate investigation gave Senators personal experience with problems and poverty facing American Indians. Prior to this point, few members of Congress had any first-hand knowledge of American Indian issues (Wilkins 2007, 119).

The Department of the Interior report, “The Problem of Indian Administration,” is the most widely known output of these investigations and has been cited as a primary source of information for the revisal of federal Indian policy (Jorgensen 1978; Meriam et al 1928). Known as the Meriam Report, the outcome of the investigation was submitted in 1928. The report states that
Indians were trapped in a “vicious cycle of poverty and maladjustment” due to the utter failure of agricultural self-sufficiency (Meriam 1928 et al). The Meriam Report gathered an extensive amount of data from reservations, marking one of the first times that the real effects of Indian policy were studied. While the findings covered everything from the effect of administration on religion to health care, the authors also reported that many of the main problems came out of dispossession, and most recently, allotment:

In justice to the Indians, it should be said that many of them are living on lands from which a trained and experienced white man could scarcely wrest a reasonable living. In some instances the land originally set apart for the Indians was of little value for agricultural operations other than grazing. In other instances part of the land was excellent but the Indians did not appreciate its value. Often when individual allotments were made, they chose for themselves the poorer parts, because those parts were near a domestic water supply or a source of firewood, or because they furnished some native product important to the Indians in their primitive life. Frequently the better sections of the land originally set apart for the Indians have fallen into the hands of the whites, and the Indians have retreated to the poorer lands remote from markets (Meriam et al. 1928).

The report argued the need for urgent reform to address the ongoing failures of the current policies.

*Indian Reorganization Act*

As part of the large platform of new policies under the New Deal, Congress passed several laws to end allotment, restructure tribal government, and preserve existing resources and any remaining tribal land. The central piece of legislation was the Indian Reorganization Act (IRA) of 1934 (Wilkins 2007). This was a dramatic reversal from Allotment and was the culmination of several factors. By the beginning of the 1930s there was widespread criticism of allotment, as discussed above. Social reformers as well as congressional members were concerned about the proliferation of poverty and other problems. New research linked these problems to the allotment and the unrealistic expectation that American Indians (or anyone) could have developed sustainable farms on the amount of land portioned out. The influential Meriam Report also opened the door to criticism of the administration of the Bureau of Indian Affairs, finding that its poor services were responsible for many problems. The beginning of the Depression also led to widespread social reforms.
The election of Franklin Roosevelt as President in 1933 brought a major shift in administration. Roosevelt’s New Deal platform of policies included a huge number of reforms designed to give aid to the poor and unemployed across the country. The President also brought in a new administration, including John Collier as Commissioner of Indian Affairs. Collier was a longtime advocate for the rights of indigenous peoples, and had been involved with the pursuit of land rights for the Taos Indians in New Mexico. Collier was also a strong opponent of allotment. While he believed in assimilation as an ultimate goal, he argued that allotment had tried to do so too quickly, and that the role of tribal government and culture were necessary to allow American Indians to slowly assimilate into the dominant society without the sort of economic and social fallout of allotment (Olson and Wilson 1986).

Collier was a key force behind the Indian Reorganization Act. He researched and drafted the Act, found sponsors to introduce it before Congress, and sought out Congressional support. Even with his primary role, several other forces interacted to make it more feasible for legislators to pass the Act. The economic and social environment had dramatically changed from the passage of the Allotment Act 50 years before. The rapid pace of allotment meant that most of the targeted reservations, including the most desirable areas, had already been broken up. Changing agricultural techniques, the poor economy, and urban migration meant a radical fall in the value of land and a decline in livestock and agricultural prices. The public image of American Indians on a national scale had changed, and they were no longer seen as threatening in any way. Instead, the dominant population tended to view American Indian tribes as nearly extinct and romanticized images of them as noble savages (Deloria 1998). Further, the proliferation of social reforms beginning in 1933 meant

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6 Collier sought out the input and support of tribal leaders, as well. He held a series of meetings with tribes across the country, trying to answer concerns of tribal leaders and even modifying the bill over some concerns (Olson and Wilson 1986). Tribal leaders were pressing for the restoration of tribally held property. These leaders were not only concerned about the loss of territory through individual sales, but also the loss of their power (and tribal populations) as those who were able to sell or lease their lands often left the area to join the urban migration of whites (Sturgis et al nd). While these inputs are not necessarily important in understanding the legislative decisions over the bill, they are important for showing the input of tribes themselves into federal policy toward Indians.
that the public (and legislature) were accustomed to the redistribution of resources to different social
groups.

The Indian Reorganization Act was passed in 1934 with four main components: self-
government, education reforms, the end of allotment, and the creation of a special American Indian
court. All those on each reservation were allowed to vote on whether or not they would participate
with the provisions of the act, although the voting mechanisms have been soundly criticized since
then. Each reservation or former reservation could hold only one vote on the Act (regardless of how
many tribes were in residence). In order to reject participation, a majority of people needed to vote
against the act. Individuals who did not cast a vote (there were many) were counted by the Bureau of
Indian Affairs as votes in agreement. While many reservations (a total of 181) “accepted” the
provisions of the IRA, 77 voted against it (Wilkins 2007).

Tribes who agreed to the provisions of the IRA were authorized to a degree of self-
government with the creation of a constitution and the approval of the Department of the Interior.
The requirements for the restricted tribal governments stressed European style governmental
structures, elections, and the use of the English language (Larson 1997). These new political systems
compromised the role of traditional political structures and in many cases lead to situations where
tribes had both an elected and traditional governments. This dual governance has continued to be a
source of tension of authority in many tribes, and on occasion resulted in conflict between those who
support the different systems of authority. The Secretary of the Interior retains ultimate authority
over the constitutions and even operating laws of the tribes, meaning that the BIA continued to have
a hand in many aspects of tribal administration.

The IRA also ended the allotment of land and prohibited land that remained in trust from
being transferred into fee simple ownership. This provision, which continues into the present day,
institutionalized the land tenure on reservations as collective and inalienable trust land with title held
by the federal government. While this has served to prevent land loss, it also hinders the economic
development on tribal land. In a national economy built on European systems of private property
rights, tribes and tribal members often find it difficult to compete with an entirely different system of property ownership and management on tribal territory (Galbraith et al 2006). Individuals may have difficulty securing mortgages or other loans, for example, if they do not have title to land to use as collateral. Further, tribes themselves have never voted for or against these federal rules regarding land ownership (McChesney 1990, 314). The federal government imposed the structure on all groups that accepted the provisions of the IRA in its entirety (Wilkins 2007, 140). The IRA aimed to restore tribal ownership over any surplus land and authorized a long-term land acquisition program (Carpenter 2000).  

Reorganization offered a definitive break from and rejection of the past Allotment policy. With the wane of demand for land and other changes described above, the end of allotment coincided with the end of the dominant populations’ perception of American Indians as an economic or social threat. Policy makers still expected that American Indians would assimilate, just that it was a process that needed to be undertaken at a more gradual pace.

Claims Against the Government

During the middle of the century the social and political environment was more receptive to American Indians. American Indians had volunteered to serve in both World Wars and generated public attention for their service. A public image of American Indians as “patriotic warriors” became prominent (Corntassel and Witmer 2008). Increasing urban populations of American Indians also brought more contact between whites and American Indians. At the close of the Second World War, international attention to the rights of minority groups increased dramatically. As in the other countries discussed earlier, political officials became more aware of how their treatment of the indigenous population appeared to the outside world.

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7 The land acquisition has not had a great deal of success- Sturgis et al (nd) estimate less than 10% of land lost during allotment has been reacquired by tribes.
At the same time, tribes saw the opportunity of the anti-allotment political sentiment after the 1920s and 1930s to press claims against the government for violating treaty agreements during allotment. In order for tribes to have their claims heard by the Court of Claims, as noted above, they needed to be specifically authorized by an act of Congress. By the early 1930s, Congress was passing more and more of these enabling acts to allow tribal claims before the Court of Claims. Elected officials were more responsive to these demands, given the Senate investigation, the Meriam Report and (after 1933) the new administration (Hagan 1988; Rosenthal 1990). The extension of citizenship in 1924 also gave indigenous individuals more access to the courts in general, meaning an increase both in the administrative Court of Claims and in the general judicial system. These claims were very demanding for both the legal court system and the administrative system of the Court of Claims. Understanding and evaluating claims to territory or resources based on historical treaty rights was immensely complex, time consuming and financially costly to investigate and evaluate (Jorgensen 1978; Lurie 1957).

By the mid 1940s, Congress was faced with growing numbers of tribal petitions seeking access to the Court of Claims as well as complaints from court administrators over the resources involved in the hearings. There was also international pressure related to the claims of American Indians. The close of World War II pushed American leaders to establish an image as a liberal, morally superior nation within the international community. Publicly recognizing and resolving indigenous claims would help meet this goal (Rosenthal 1990). The treatment of American Indians and their attempted eradication was the same cultural extermination now being condemned in the international community (Hauptman 1986). As was seen in the other cases, the past treatment of indigenous peoples remained a problem in this context, and the government struggled to make it appear to the international community that they had done justice to claims of American Indians. Federal legislators began to consider the creation of dedicated body for hearing and solving the claims of American Indian tribes.
Congress created the Indian Claims Commission (ICC) in 1946 as an administrative body with the specific purpose of evaluating American Indian tribal claims for compensation related to violations of treaty agreements. It was created as a subsidiary of the Court of Claims. The establishment of the ICC acknowledged the responsibility of the government to settle claims about the seizure of land promised in treaties, the forced sale of land at unfair prices, and other violations of its responsibility to American Indians. The ICC established recognition of land rights that had not been clearly laid out before, even if its purpose was to extinguish those rights.

The ICC was created to resolve valid claims with financial compensation only. Legislators did not want to be responsible for creating a body empowered to take land from the dominant population and transfer it to American Indians (Washburn 1985). Claims that were evaluated by the ICC would be extinguished; title rights would be completely and irreversibly guaranteed to the federal government and tribes would have their rights to the land in question extinguished. This was true whether the ICC found in favor of the tribe and awarded compensation or found against them and offered no compensation. For legislators at the time, this move appeared to be the best way to concentrate federal efforts at ending any potential international or domestic questions about having taken property from a weak group without compensation. It would also resolve any legal questions about the legitimacy of federal acquisition of American land.

The ICC began hearing claims in 1948. Its supporters in Congress anticipated that the ICC would complete its work within a ten-year span, be a final solution to the “Indian problem,” and “ease the collective conscience of the American people” by laying to rest the legal and political tangles of challenged land title, closing the government’s debt to tribes for past seizure of property, and forestalling future problems (Hagan 1988, 24). Rosenthal writes of the ICC:

Its goal was to end finally the Indian’s tribal claims that had so long been pressed on the courts, the Congress, and the Executive Branch and had been such a source of frustration to all parties involved in Indian Affairs. Their final resolution, proclaimed the optimistic, would allow Congress more time for other matters, save the government money, ease the burden on the Justice Department, give America a
source of pride in its system of justice, and, of course, greatly benefit the Indians (Rosenthal 1990, ix).

The creators of the ICC dramatically underestimated the number of potential claims. The enabling act limited the time period in which tribes could file their claims, closing the window in 1951. The ICC was flooded with claims from nearly all of the federally recognized tribes authorized to file. These individual claims were compiled into 614 dockets to be evaluated (Parker 1989). The investigation and evaluation of these claims were slowed by the inadequate resources and staff of the ICC. Once the claims had been filed, there was a legal obligation for the government to evaluate them, and Congress extended the time frame of the ICC four times until it closed in 1978 – with a few claims still unheard thirty years later (Rosenthal 1990). The ICC was kept open for those additional years because if it closed, claims would then need to be processed by the federal Court of Claims, and Congress had created the ICC intentionally to keep Indian treaty claims from clogging the Court of Claims.

The rush of tribal claims came for several reasons. After the history of inconsistent federal treatment of American Indian tribes, tribal leaders were concerned that this might be their best opportunity to seek compensation for lands that had been taken. While all tribes would have preferred return of their territory, the opportunity to seek some redress provided by the ICC was generally thought to be the only option that would ever be available (Parker 1989).

To quiet title to tribally claimed lands by means of the payment of money has not rested well with most Indians. Yet few Indians ever expected to get a morsel of land back. If they entered the claims process with expectations that the establishing act embodied provisions for land restoration, they were quickly disappointed and angered by the narrow interpretation of justice (Sutton 1985, 207).

The ICC also set payment for tribal attorneys at 10 percent of awards, which may have also contributed to the number of claims. Lawyers were known to solicit tribes for bringing claims before the ICC even if tribal leaders did not fully understand the process. Regardless of the tribe’s reasons

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8 Of the cases heard by the ICC, there were 342 awards to tribes totaling over $800 million in compensation. Almost $100 million of that amount went to attorney’s fees.
for filing, whatever the intentions, understandings, or ultimate goals of groups, the completion of the
claims hearing process resulted in the legal extinguishment of any future territorial claims. This was
ture whether claims were compensated or rejected. At its close in 1978, 546 of the dockets had been
resolved by the ICC. There were few enough left (68) that Congress chose not to extend the tenure
of the ICC any further and the remaining dockets were passed on to the Court of Claims, which
resumed jurisdiction over tribal claims against the federal government as part of its jurisdiction over
claims against the government (Parker 1989).

While the ICC brought closure to many claims, those that remained untried were left in a
very different legal and political environment from what had existed before its tenure. The
proceedings of the ICC did not extinguish title claims for those groups that did not participate in its
process. When Congress created the ICC it was for tribal claims specifically against the federal
government. Thus the ICC provided no avenue for tribes that had made treaties with the British,
colonial, or various state governments, and those tribes were left with unheard claims. Other tribes,
adamant about the return of territory, never entered into proceedings with the ICC at all. The legal
standing was less clear for those groups that refused to accept settlement terms because they wanted
restoration of lands, rather than financial compensation, and feared that an acceptance would nullify
further claims. There are several examples of tribes refusing to accept the financial settlement
because it would jeopardize their claim for actual land (such as the Suquamish, Puyallup,
Stillquaamish, Western Shoshone, Sioux, and Oneida).

In establishing the ICC, the federal government acknowledged responsibility in settling
claims and set precedents for doing so. The settlements were for money, not land, but the creation
of a body solely designed to evaluate American Indian claims provided a more comprehensive
acknowledgement of title rights than had existed before. Those tribes that were jurisdictionally
excluded (such as tribes with claims against states) had a new complaint against the federal
government. It had exercised a degree of responsibility in treating the claims of many tribes as the
trustee and protector; they argued that they deserved the same consideration. As one scholar writes,
“To some degree, engaging in a negotiation process legitimizes the claim that the authority of the state rests on shaky ground, and opens up the Pandora’s Box of historical wrongs perhaps best left undisturbed.” (Scholtz 2006, 2).

**Termination**

During the tenure of the ICC, House Resolution 108 was passed in 1953, which allowed the federal government to end the recognition of tribes opened up reservation land for settlement and development (a process known as termination). At the same as the ICC was extinguishing American Indian’s historical claims, the federal government was also selecting tribes that would have their modern status as tribes (and any claims on the government) formally ended. These groups, such as the Menominee in Wisconsin, were considered acculturated enough to no longer need the protection of the trust status or the services provided by the federal government. Also in 1953, Congress passed Public Law 280, which extended state criminal and civil jurisdiction over Indian reservations, curtailing the sovereign rights of tribal governments. The final aspect of termination was the relocation of rural and reservation dwelling American Indians to urban centers (Wilkins 2007, 120-121).

**4.1.3 Equal Rights**

The dominant populations’ perception of American Indians changed during the middle of the 20th century with an increase in contact after a history of extended de facto segregation. American Indians volunteered to serve in both World Wars, and by the end of World War II there was a new public perception of Indians as “patriotic warriors.” These images were used to help promote the goal of assimilation, showing that American Indians wanted to serve and protect their fellow Americans (Corntassel and Witmer 2008, 12-13).⁹ During the war efforts American Indians at home joined the general population in an urban migration to work in factories and find other employment. An estimated 40,000 reservation dwellers left for urban areas (Holm 2002). Those

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⁹ Between 10,000 and 17,000 American Indians served in World War I, and over 25,000 in World War II (Dippie 1982; Holm 2002).
numbers were quickly augmented by American Indians relocated by federal programs during the 1950s (Wilkins 2007). These demographic shifts contributed to the popular belief that tribes and tribal life had ended and Indians were assimilating into the dominant population.

At the same time, the population changes prompted a very different response from American Indians themselves. The experiences of American Indians in the armed forces and the broader wage economy during the war heightened their own frustrations with discrimination and the absence of opportunity or support after the war (MacDougall 2004; Smith 1985). Urbanization allowed the interaction among American Indians from a variety of tribes. These connections formed the early basis for larger tribal connections as well as creating a network of urban, pan-tribal individuals. These networks would serve as the foundation for indigenous activism on a regional and national scale during the 1960s (Deloria 1970; Holm 2002, 95-98; Johnson 1994; Nagel 1996).

Activism and broader connections were supported by the changes in infrastructure and technology on reservations, such as improved roads, the spread of phone lines, and the growth of radio and television media (Deloria 1970; Scholtz 2006, 176). As part of the New Deal, the Indian Emergency Conservation Work Program (akin to the Civilian Conservation Corps) had employed American Indians to work on the reservations and completed many of these projects during the 1930s and 1940s (Olson and Wilson 1986).

Civil Rights Movement and American Indian Activism

The African American led Civil Rights Movement was a central force in demanding equal rights for minority groups in the United States. While many of the larger and well known events took place between the 1940s and 1960s, social groups and reformers had been active since the turn of the century (McClain and Stewart 2006). The Civil Rights Movement played a large role in inspiring the activism of other minority groups, both in the United States and abroad. In the case of American Indians, the success and attention that African Americans were generating through activism helped to inspire a new trend in terms of tactics, organization, and even aspirations. The American Indian Movement, for example, was strongly influenced by the tactics of more militant
African American organizations such as the Black Panthers in the 1960s. American Indians were also inspired by the media attention that the protests of African American organizations generated. Because of the small size and relatively isolated American Indian population—along with the ongoing attempts of the federal government to extinguish tribal claims—the dominant population appeared to have little perception of the problems that American Indians still faced. There was even less public awareness of the group specific rights of American Indians as promised by treaties.

American Indian leaders were aware of their limited strength as individual tribes. The dynamics of the American Indian population, made up of hundreds of tribes with their own interests and goals, was a challenge for organization. Earlier attempts at organizing a pan-Indian body to influence national policy had either failed due to criticisms that they were controlled by whites and not responsive to Indian needs (such as the Society of American Indians) or the failure to generate widespread Indian support (National Council of American Indians) (Cowger 2001; Herzberg 1971).

The first enduring pan-Indian organization was the National Congress of American Indians (NCAI), founded in 1944. The NCAI unified leaders for the purposes of influencing federal policy, specifically in response to the federal threat of ending its obligation to tribes through termination policies (Cowger 2001). One of the early successful goals of the NCAI was the establishment of a claims commission. While the group still often faced problems of factionalism and policy disagreements, it represented a major turning point for American Indian organization (Hertzberg 1971; Scholtz 2006). The NCAI showed that it was realistic and possible for different tribal members to organize together and attain goals.

The NCAI was seen as too conservative in its goals by younger, more radical Indians. The National Indian Youth Council was founded in 1961. It was followed by the more militant American Indian Movement (AIM) in 1968. These groups were influenced by the broader minority rights movement of African-Americans (Black Power) and Latinos (La Raza) as well as the Feminist movement. The groups borrowed and modified tactics used by other groups to highlight their
particular demands, such as staging “fish-ins” to assert fishing rights in the Northwest (Singleton 1998).

In the American Indian case, then, spillover from other minority groups is very significant. The Civil Rights Movement and its successes gave hope to American Indian claimants that minority groups might be able to gain some recognition from those in power. It also helped inspire tactics and generated attention to the plight of all minority groups, not just African Americans. National changes encouraged equal rights for all minority groups, which opened up equal rights for American Indians even if the changes were prompted by African American demands. This was helpful in creating a new public understanding of the needs and rights of all minority groups, even if American Indians were often seeking very specific (and very unequal) rights (Johnson 1994).

This distinction between equal rights and group specific rights is essential, and it points to the reasons that, despite spillover effects in terms of equal rights and greater awareness of the needs of minority groups, American Indians have often seen a great deal of inconsistent treatment toward their group specific rights even in the present day. While the dominant population and those in power have committed (at least publicly) to the equality of all citizens and redefined “humanness” to include all racial and ethnic groups, American Indian demands are often to rights outside of this framework. When American Indian tribes seek sovereign rights to territory or to the promises made in past treaties, they are demanding rights based on their citizenship in independent tribal nations rather than as American citizens.

The occupation of Alcatraz Island in November 1969 by American Indian protestors was a first major step toward generating media attention and raising the dominant population’s awareness of special concerns of American Indians, such as land rights (Deloria 1970; Johnson 1994). Inspired by the attention generated, AIM organizers continued with a series of over 70 demonstrations, including an occupation of the BIA buildings in Washington DC and the occupation (and later standoff) at Wounded Knee in 1972 (Wilkins 2007). These actions form the basis of what is known as the Red Power Movement and were responsible for drawing attention to the continued existence
and resistance of American Indian tribes in the face of termination policies. At the same time as public protest was being used to draw attention, individuals and tribes also pursued lawsuits in the court system to force the federal government to exercise its trust responsibilities (Singleton 1998).

4.1.4 Land Rights

During the period of ongoing activism, yet another shift of American Indian policy began to take shape during the 1960s. President Lyndon Johnson's (1963-1969) policy platform of the War on Poverty, which brought a number of reforms for publicly funded support across the nation, included some specific attention to the needs of American Indians. The newly created Office of Economic Opportunity, for example, had “Indian desks” in each of its programs to provide for the separate administration of funds to tribes. Johnson also used his executive power to create the National Council on Indian Opportunity in 1969 (Castile 1998). This was the beginning of an administrative trend that recognized the distinct need of tribes and also began to offer tribal governments more say and control over the use of federal resources. This political support for self-determination continued into the next administration, under President Nixon (1969-1975), and Congress passed several major victories for American Indian rights. The Indian Self-Determination and Educational Assistance Act (1975) was a key piece of legislation, allowing tribes to contract with the government in order to provide their own services.

Land Returns to the Taos and Alaskan Natives

Nixon publicly supported self-determination for American Indians, and even advocated the return of the Blue Lake and 48,000 acres to the Taos Indians, which Congress passed in 1970 (Cook 1998; Johnson 1994). The Taos Pueblo had participated in the ICC process, seeking compensation for territory taken by the federal government to create National Forest land. Part of the area claimed was Blue Lake, which was a central part of their religion. The ICC recognized the rights of the

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10 In Chapters 5 and 6, the dissertation goes on to argue that claims to land based on religion are actually hindrances to land claims. The challenge to the dominant paradigm of Judeo-Christian values as well as the sectarian division of church and state can make it very difficult for Congress to return land based on religious appeals. Opponents argue that
Taos Pueblo and offered settlement funds to extinguish their claim, but the Taos Pueblo did not accept the funds. Instead, they continued to petition Congress for the return of their land. The Taos were supported by indigenous organizations, such as the NCAI, and also had the support of white activists, who had become involved in the Taos cause as early as the 1920s (including John Collier). The image of the Taos disseminated by the white activists and the media was of a peaceful, innocent group that struggled to maintain their historical lifestyle. They had several advantages in their petition: a romantic, deserving, and non-threatening public image; media attention to their cause; the ongoing support of several current and former high ranking government officials; and the fact that the area claimed was all publicly owned land. Further, the ICC decision made it clear that the government had abused its power in taking land from the Taos.

Also during Nixon’s leadership, Congress passed the Alaskan Native Settlement Act in 1971, offering 44 million acres to Alaskan Natives and compensation for ceded lands of almost $1 billion dollars. The Taos settlement and Alaskan settlement were significant because the government was returning land, as opposed to solely offering compensation. While both of these returns heralded a significant shift in land rights policy, the victory of the Alaskan Natives was even more so because the Alaskan Natives were never federally recognized. The Act therefore recognized and extended the responsibility of the federal government toward the land rights of indigenous peoples who did not have the benefit of federally recognition. Until that point, all federal support had relied on the relationships and rights established through treaty making or agreements between the tribes and the federal government.

The Alaskan Natives had come under the authority of the United States when the territory was purchased from Russia in 1867. Natives were not involved in the transfer, and their title claims this action privileges a specific religion. The Taos representatives took a specific approach to developing their case to the religious site. Because Blue Lake was part of National Forest land, they needed to get permission from the government to access the site and perform religious and cultural rituals. In the Congressional hearings, Taos representatives argued that this restricted their rights to freedom of religion (US Congress Senate 1969).
were never addressed. Their status as political members of the new territory was also unclear. They represented a relatively large percentage of the population, became involved early on in the political system, and organized across tribal groups. In 1960, for example, there were 10 Alaskan Natives in the newly created state legislature and the group represented 20 percent of the voters (Mitchell 2001). The 1959 Statehood Act recognized Alaskan Natives title and Congress included the provision that the state could select about one third of the unoccupied territory of the state to become state property, and the Alaskan government immediately began selecting land for development (Getches 1985; Mitchell 2001). Native Alaskans, however argued that they had title to the land which had never been extinguished, and the areas claimed by the state were not “unoccupied.” Through a series of petitions and lawsuits natives began to lay claim to almost 90% of the state.

In response to ongoing legal concerns over title questions as well as the organization and activism of the Alaskan Natives the Secretary of the Interior ordered a “land freeze” on the selection of property by the state until the status of native title could be resolved (Korsmo 1994). State officials continued to press for quick settlement in order to allow for mineral development. When oil was discovered in 1968, it introduced enormous pressure from the state, Alaskan residents, and commercial interests to settle the claims and free up land for development and infrastructure to transport oil (Zelnick 1970). These groups all had interests in quick settlement, and it became rapidly apparent that the well organized Alaskan Natives would not accept anything less than title to 44 million acres. The history and decisions involved in the Alaskan Natives claim and settlement are discussed in greater detail in Chapter 7. The case points to the convergence of multiple factors in making it politically feasible for Congress to transfer territory to indigenous peoples.

Despite the distinct legal and historical position of Alaskan Natives, American Indian tribes with potential claims (and indigenous groups around the world) were inspired by the victory, as it showed the willingness of the government to recognize indigenous rights and return land. With support from the judiciary and the Department of the Interior that prevented the state from taking native lands, the Alaskan Natives worked together to assert that, even without formal federal
recognition, the government had an obligation to recognize and settle their claims against the state based on their status as wards. The passage of the Alaska Native Claims Settlement Act (ANCSA) recognized the same right to federal protection of those groups that had not been involved in formal treaty making or had complaints against non-federal actors. For groups that had been kept out of the ICC proceedings, this showed that they had a valid claim to pursue against the government. The government had now also set a precedent of allowing claims to be settled with the transfer of land.

Unextinguished Claims

Unlike the other countries studied, the United States has not created a forum for the evaluation of claims for the transfer of land. Land and resource claims were evaluated far earlier in the US than in the other countries, and the ICC proceedings had extinguished the vast majority of claims, whether by rejecting the claims to title or finalizing title transfers to the federal government with financial compensation. The small number of open, or unextinguished, claims left meant that there was little pressure to devote permanent resources to their consideration. This is in contrast to the situation in Australia or Canada, where national level legal decisions opened up the legal possibility of a huge number of claims all at once. Further, the experience of the ICC, with the unexpectedly large number of claims filed and the time and resources in considering them, may have deterred the government from opening up another body for hearing claims.

In the Taos case and the Alaskan Natives case, Congressional officials were encouraged to act by the supportive decisions of the ICC in recognizing their title to the land, public attention to the claim, the organization of the indigenous groups in question (and the support of white) and, in the case of the Alaskan Natives, the economic costs for delaying development by not settling the title dispute. Most of the tribes with outstanding claims at this time were those with claims against the states, which had not been allowed into the ICC.

The federal government remained reluctant to grapple with these claims to transfer land, despite petitions to both the legislative and executive branches, arguing that the claims were against the states. The state governments also refused to engage the claims, arguing that the settlement of
Indian claims was a federal responsibility. Tribal governments and America Indian individuals had long used the courts to seek their rights. This tactic was sometimes the only option for a group without connections to elected officials. Results were inconsistent, but for many the risk of a negative decision was the price of possibility of a favorable one.

Encouraged by the success of the Alaskan Natives, the Passamaquoddy Indians in Maine petitioned the Department of the Interior to file an action on their behalf in order to regain territory lost through treaties with the state of Massachusetts (the treaty later transferred to the state of Maine). The Department refused to intervene, however, arguing that the tribe was not federally recognized, which was the same argument that had kept them out of any previous compensation efforts. The Passamaquoddy (joined by the Penobscot Indians) initiated a law suit in federal court. They argued that state actions to take their land had been an infringement of the Trade and Intercourse Acts, and that the federal government had the obligation to protect the tribes (Campisi 1985). The legal argument was new, and the judge in the case found that it was valid. He ordered the Justice Department to file a suit on behalf of the Indians against the state of Maine (Brodeur 1985).

This decision set the precedent that tribes who had lost land to treaties or actions of the states were entitled to federal protection. It also questioned the validity of title to land in all states that had been transferred from American Indian tribes to states and to the dominant population without the oversight of the federal government. The principle that federal treaties were legally binding and that the government was responsible for compensating tribes if they were broken was now extended. The federal government had a responsibility to protect all tribes against the loss of land through broken treaties, even if the federal government itself had not established a direct relationship with the group. Further, because the federal government had not fulfilled its responsibilities in protecting tribes against the actions of states, it now had to act on their behalf. The decisions also argued that while the legal system could recognize the legitimacy of claims and the responsibility of the government to consider them, Congress would be best suited to settle the claims.
because of the widespread economic and political implications of the possibility of land transfers (Rapp 2006a; Shattuck 1991; Weiner 2005).

For many tribes on the east coast, this new legal support was the first opportunity for their claims to be taken seriously. The 1972 decision marks the time when many current or recently settled claims had an obvious and recognizable public path for the settlement of their claims. Tribes seeking land transfers were encouraged to go before the courts to establish their right to sue as well as the obligations of the federal government to act as trustee (Campisi 1985). More discussion on the role and standards of legal cases is introduced in Chapter 5. There has been a wide range of transfer over the past 30 years. Some transfer a few hundred acres from private, state or federal ownership into tribal trust property (such as transfers from private owners to the Pequot in 1983 or from the state and private owners to the Narragansett in 1994) to a hundreds of thousands (from commercial and private owners to the Penobscot and Passamaquoddy settlement in 1980).

Even with legal support for their claims, however, many tribes have not reached a settlement with the federal government for the return of land or compensation. For example, the Oneida Indians of New York, whose rights to make claims have been supported by Supreme Court decisions in 1974 and 1985, have not reached a settlement agreement. Even direct legal support and precedents for transfer for these previously excluded claims, therefore, does not appear to be strong enough on its own to pressure lawmakers to transfer land to American Indians. The second section of the dissertation focuses on the question of understanding why, once the precedent of land transfer had been set, some claims were successful in attaining transfers of land while others have been denied or stalled in unsuccessful negotiations.

Ongoing Policy Change and American Indian Gaming

While many of these land claims were under ongoing negotiations, federal administration and policy towards American Indians shifted again. Two of the most significant policy changes, over federal recognition and gaming facilities on tribal land, illustrate ways that the government continues to exert its authority over tribal governments. In 1978 Congress created the Office of Federal
Acknowledgement (OFA) under the Bureau of Indian Affairs. The OFA was established as the administrative body to formally recognize a federal relationship with tribes (or “acknowledge” them) and therefore allow these tribes access to certain federal services. The OFA also developed specific guidelines that tribes that had to meet to gain acknowledgement. Previously, there were multiple paths to gaining federal recognition. The primary one was treaties or historical agreements, but other groups had also reached federal recognition through individual acts of Congress. The establishment of the OFA was intended to streamline the process, but has been subject to long delays in processing applications (Cramer 2005). It has also had an influence over land claims, as tribes seeking land transfers who were not federally recognized are rerouted through the OFA before their claims can be settled.

Another of the most significant laws related to American Indians was the Indian Gaming Regulatory Act, passed by Congress in 1988, which institutionalized and regulated tribal gaming enterprises. The right of tribes to develop facilities for gaming was recognized, although the Act included a strict set of requirements. Tribes interested in gaming were required to establish gaming compacts with the state government. These compacts involve determining the oversight and criminal jurisdiction that states have over gaming as well as determining payments from the tribe to the state (in lieu of taxes, which tribes are exempt from). Through the IGRA, several tribes have been able to develop very lucrative casinos developments. Many others, while less successful, are able to reach a degree of self-sufficiency or at least supplement many of their tribal services with profits. A primary goal of the Act as advertised by President Reagan and Congressional advocates was to stop the flow of federal funds to the tribes. There have also been concerns raised by tribes and opponents of gaming, as the terms of the IGRA force tribes to cede some powers of regulation and oversight to the states, compromising their own authority, and may even set them in positions where tribes have incentives to compete against one another (Sturgis et al nd).

As gaming becomes a more prominent aspect of federal policy toward American Indians, it has also begun to influence elite and the dominant populations’ perceptions of American Indians in
general and their claims to territory. More and more, American Indians are portrayed as “greedy” and “rich,” undeserving of additional transfers or federal services (Cramer 2005). Detractors argue that all American Indians are now rich, and no longer need government services or further transfers. Another aspect of this negative imagery is the idea that Indians are no longer a distinct culture or entity, but only use this identity as a tool to get access to the rights to develop gaming (Spilde 1999). While gaming enterprises (and the accompanying misrepresentations) did not flourish until the 1990s, when many transfers had already completed or claims been initiated, there are likely to be repercussions and very different dynamics for ongoing and future American Indian claims to any resources, land, or rights.

4.1.5 Current Situation

Several tribes without land or recognition are still pressing the federal government for recognition of their rights. After a relatively supportive legal environment during the 1970s and 1980s that favored the rights of indigenous peoples to claim land in the United States, two legal decisions in 2005 may have challenge the legal standing of ongoing land claims. The Supreme Court ruling in City of Sherrill v Oneida Indian Nation of New York (2005) and the Circuit Court ruling in Cayuga Nation v New York (2005) both found that too much time had passed for the tribes to assert their rights now. These rulings, which disregard the extensive history in which tribes had no forum or resources to bring claims, have generated a great deal of concern from the indigenous community and cast doubt on the future of land claims and transfers (Wilkins 2007). Both are discussed in greater detail in Chapter 8. Several tribes have persisted in pursuing their land claims during this time, and two new claims were even brought in New York in 2005.

With no formal administrative process for land claims seeking transfers, American Indians’ claims are settled on a case by case basis by Congress. No specific set of rules, requirements or guidelines have been laid out for tribes seeking claims, and the range of decisions in favor or against the restoration of territory can be difficult to understand at face value. There are many claims based on similar arguments, for example, with similar legal supports and context. The next chapter of the
dissertation turns to offering an explanation of why, once rights are broadly recognized, the pursuit of specific resource claims may have very different outcomes. Before moving on, however, this chapter concludes with a review and evaluation of the potential causes behind the recognition of indigenous peoples’ rights in the United States and how it compares with the other three countries.

**4.2 Evaluating Explanations**

The forces motivating and facilitating concessions confirm many of the conclusions of the previous chapter. It appears that the strong were willing to consider the claims of the weak and offer concessions when the weak could no longer threaten their own dominance. The maintenance of the positions of power and weakness appear to be an underlying force behind the many shifts in policy towards American Indians. Even when change may have been driven by normative forces ostensibly in support of American Indians, policies were generally crafted to keep them American Indians in a state of political weakness or with the expectation that the future outcome would be assimilation.

*Factors Motivating the Weak to Seek Concessions*

Many of the practical factors we considered motivations for the weak to make demands do not fit the pursuit of American Indian claims. American Indians remain weak; except for a very few states or locations where they are a large part of the population they do not have electoral strength. The resource base has not changed, nor has their ability to disrupt large sectors of the economy. The main factor that appears to have contributed to American Indian demand for rights during the 1960s and 1970s was the experience of other, larger, minorities in seeking rights during the Civil Rights movement.

American Indians had been seeking their rights for generations—even centuries—before this, however. One of the most compelling features of the quest for land rights is that American Indians have persisted, despite clearly overwhelming odds, in the pursuit of their sovereign rights to territory. This will be seen more clearly in the case studies of individual claims in Chapters 7 and 8. So at least in the American Indian case (although there may be similar tendencies in the other countries as well)
the group appears to have continued to hope that there was a chance of success. The belief that they would win was much stronger after seeing the successes of other groups, however. Further, the creation of the Indian Claims Commission and the blanket admission of the government that it had a responsibility to resolve American Indian claims brought a degree of hope to those with ongoing claims. The settlement of the Alaskan Natives’ claims invigorated this hope for those groups without a federal relationship. And finally, the success of the Penobscot and Passamaquoddy in court was a clear impetus for other tribes with a similar standing to bring their claims before the courts. So while there had always been a remote hope for success, changes in the middle and late 20th century offered American Indian tribes with ongoing claims for land transfer a new belief that they could reach success.

*Features of the Weak Facilitating Concessions*

Internal group cohesion appeared to be fundamental in the analysis of the other three countries. While there had been some attempts at national scale mobilization earlier, the first truly successful and enduring group was the National Congress of American Indians in the 1940s. One of the first goals of this group was the creation of a claims commission to compensate American Indian claims. Congress’ creation of the Indian Claims Commission in 1946 was due to many factors, but the organization of American Indians was a part of it. More widespread national groups also were a large part of the activism in the 1960s and 1970s. American Indian claims are often based on and evaluated on a tribal basis. This means that for many of the concession that American Indians seek, they may be acting on their own. Tribal level cohesion would be fundamental here, and is addressed at length in the next section of the dissertation.

*Factors Motivating the Strong to Offer Concessions*

Practical motivations for the strong to act did not appear influential in the other case studies. Instead, normative motivations were at the forefront of the reasons that the strong would chose to act in favor of the weak. In the United States, indigenous peoples had their rights to land recognized earlier than in the other countries. The establishment of the Indian Claims Commission came out of
a mix of factors including the demands of the weak for compensation and the belief among those in power that to compensate them would alleviate normative demands and end the possibility for future claims and the potential costs of settlements. The Indian Claims Commission represented an outcome in terms of land rights- the formal and consistent recognition of the responsibility of the government to settle claims against the federal government. It was also expected to be the end of indigenous claims. Instead, it appeared to open an opportunity that those American Indian tribes with unsettled claims could exploit; by recognizing the need to resolve some claims, the federal government inadvertently opened itself up to others.

The ICC itself, as well as the unintended consequences to follow, was driven by normative factors. The federal government had opened up citizenship rights to American Indians in 1924, extending the understanding of what rights American Indians were entitled to as individual members of society. The Indian Reorganization Act in 1934 extended a degree of recognition to the rights and capabilities of American Indian tribes. These measures served to redefine the dominant population’s understanding of what rights the weak were entitled to. The international pressure of the Second World War drove elites to offer a public attempt at recognizing the past misdeeds toward American Indians, the ICC was the result. The national (and international) commitment to the rule of law and in some degree of policy consistency towards those weak meant that when tribes with outstanding claims began to seek resolution those in power had some pressure to respond. There were few practical costs or benefits that the weak could impose directly, but their ability to make demands in the new arena meant that ignoring the claims would risk embarrassment or even shame for those in power.

*Features of the Strong Facilitating Concessions*

The case of American Indians confirms the belief that as the power of the strong is consolidated and that of the weak dwindles, concessions become more feasible. The rights of the weak were extended during the 1920s, near the same time the indigenous population was at an all time low. American Indian land holdings had been broken up by allotment. The weak in this case
were therefore weaker than ever before. Indigenous peoples were no longer any possible threat to the strong, and public perceptions of American Indians as a defeated, dwindling population had been more prevalent since the turn of the century. Making some concessions through the Indian Claims Commission to this very weak group in order to prove moral superiority appeared a more “affordable” possibility to the strong. Later claims against the government (or those insisting on the return of land), took place outside of this administrate body and were evaluated independently. This means that the calculation of affordability would take place at claims level, rather than national level. The specific components of calculations over the costs of negotiating and settling individual land claims are the subject of the second portion of the dissertation.

The Role of Spillover Effects

Unlike the other countries studied, the indigenous population in the United States appears to have been directly influenced and possibly advantaged by the successes of other domestic minority groups. The other countries pointed to the role of the inspiration and encouragement of an international network of indigenous peoples, legal decisions, and activists networks. In the United States, the activism of African Americans and the Civil Rights Movement offered inspiration and encouragement for American Indians. It also created a social and political awareness of minority groups and demands for equal rights. The general American population and those in political power grew more supportive of legal and policy consistency, redefining those deserving of basic rights to include minority groups.

This situation had sometimes contradictory effects for American Indians and their pursuit of group specific rights to sovereignty. Much of the history of interaction between tribes and the federal and state governments involved varied attempts at “Americanizing” the Indians, which would end tribal existence and assimilate Indians into the dominant population. Attempts at extending equal rights can often be seen as part of the project of extinguishing any claims that tribes might have had to sovereign (and inherently unequal) rights. Even with this tension, the Civil Rights Movement and changing norms about the treatment of indigenous peoples after World War II brought about a
new environment where native claims were taken far more seriously and given more attention than before.

The two timelines presented below show some of the major events in African American and American Indian rights history. Both cover periods between 1860 and 2000. The timelines also show a surge of activity and important events in the 1960s and 1970s. For African Americans, primarily concerned with attaining equal rights and opportunities, many of the most significant events occurred throughout the 1950s and 1960s. For American Indians, bolstered by the success of African Americans but still seeking very specific rights, their key period of activity appears to be in the late 1960s and 1970s.
Chart 4.5 Timeline of African American History

1860 1880 1900 1920 1940 1960 1980 2000

14th Amendment requires all states to grant citizenship regardless of race

15th Amendment bars states from denying right to vote because of race

Civil Rights Act declared unconstitutional

Plessy v Ferguson upholds separation of races

Southern states begin to officially sanction segregation

Guinn v US says grandfather clause is unconstitutional

19th Amendment gives women right to vote

Civil Rights Act

19th Amendment declared unconstitutional

Eisenhower dispatched troops to enforce desegregation

First black labor union formed

Truman desegregates military

Commission on Civil Rights created

Brown v Board of Education of Topeka rules separate facilities are inherently unequal

Montgomery bus boycott

Truman declares war on Germany

South Vietnam begins to rise to independence

First blacks elected mayors of major cities

First black governor in VA

24th Amendment bans poll taxes in federal elections

First black commander in chief

Civil Rights Act

Nixon v Condon declares white only primaries unconstitutional

ML King Jr leads March on Washington

Shirley Chisholm is first black to run for president

Civil Rights Act

Korean War ends

Harper v VA Board of Elections declares state poll taxes illegal

Civil Rights Act

Bakke v California offers complex ruling on affirmative action

Shirley Chisholm is first black woman elected to Congress

First non-white appointed to Supreme Court

ML King Jr assassinated

First black governor in VA

Current Afro-American data have been gathered from McClain and Stewart 2006.
Chart 4.6 Timeline of American Indian History

Data for the timeline have been gathered from McClain and Stewart 2006 and Wilkins 2006.
4.3 Conclusion

Understanding the victories of the weak (in this case the extension of rights to indigenous peoples) is a challenging task. The extremely weak social, economic, and political position of indigenous peoples adds to the complication of explaining their victories in the extension of rights. The comparative historical analysis of Australia, Canada, New Zealand and the United States reveals that normative changes are essential for understanding the extension of rights to the very weak. As indigenous peoples became redefined as deserving of the rights and privileges of the state, they were able to appeal to norms such as the consistent application of the rule of law. Normative change at an international and domestic level also encouraged changes in the treatment of the weak. As the ratio of the strong to the weak grew and the weak could no long threaten any aspect of the dominance of the strong, it became more “affordable” for the strong to make concessions related to these normative changes.

The next portion of the dissertation turns to a claims level comparative analysis. Chapter 5 develops explanations for why individual claims for potentially valuable concessions may be considered affordable by the strong. Chapter 6 goes on to test these predictions in 17 American Indian land claims cases, and extends the conclusions generated in the first half of the dissertation. Chapters 7 and 8 offer detailed narrative case studies of each of the cases analyzed.
5. Explaining the Outcomes of Indigenous Land Claims

The previous chapters offer a comparative analysis of the recognition of indigenous peoples’ rights in Australia, Canada, New Zealand and the United States. I argue that the acknowledgement of property rights for the weak after centuries of denying or ignoring them can be understood primarily because of normative pressures for power holders to do so. Power holders have been prompted to extend rights through changes in external forces (such as changing international norms and expectations), the redefinition of the basic rights of indigenous peoples, the mobilization of indigenous peoples and other minorities, and their own security in power. The recognition that indigenous peoples even have title rights to land is a significant step for governments built on the acquisition of that territory. In each of these countries, governments have gone beyond this recognition to allow some transfers of property as well.

The recognition or apology of past wrongs is difficult (morally and politically) in and of itself, and it would not be surprising to see policy makers stop there (Scholtz 2006; Weiner 2005). If political power equates to control over resources, transferring or sharing control over property cedes some of this power. As discussed, there are few real practical threats that a groups as weak as indigenous populations can make against power holders, and few incentives for governments to agree to their demands (Alcantara 2007a). Despite this, in each of the case studies there are examples of power holders extending transfers of land back to the indigenous group. It is true that the worth of some of the transfers can be debated; the land transferred is sometimes low value, with little development potential or competition from the dominant population. Further, the national government in each case retains some powers over the property. At the same time, any transfer is surprising (and more expensive than no transfer). Further, there are also several transfers that of are high value. Just as the acknowledgement of indigenous rights after a history of denial needed explanation, the transfer of property to indigenous peoples also needs to be better understood.
The second half of the research offers an explanation for why, once the precedent of recognizing rights to land has been established, policy makers are sometimes willing to offer land transfers. Specifically, it answers why some claims are settled with the return of land while others, even those relying on apparently similar arguments, are denied or ignored. In this chapter I identify expectations for the conditions that prompt and facilitate the transfer of land itself. This section is geared toward understanding the broader situation where not only are the weak winning moral concessions, but also gaining control over tangible and even valuable resources.

5.1 Land Claims and Settlements in the United States

In the United States, claims for the restoration of land are settled on a case by case basis. Unlike the other three countries studied, the United States has not established a specific administrative forum for the evaluation or settlement of land claims seeking transfers. Instead, tribes have generally had to gain the approval of Congress to legislate the return of land. While other means of land return (such as executive orders) are possible, other branches of government have deferred the settlement of land claims with property transfers to the legislature. These potentially valuable awards to American Indians are being made by legislators elected primarily by the dominant population- the same population that the land is often being transferred from. This provides an excellent test for understanding why and when power holders would make decisions in favor of the weak.

The previous chapter detailed the historical efforts of the United States to end American Indian claims to land. Transfers are particularly unexpected because of the ongoing goal (even when policies may have appeared supportive of indigenous rights) of assimilating American Indians and extinguishing any claims to land. It is also a question of authority; claims to land (and other sovereignty rights) compete with the overarching sovereignty of the United States. The most concerted effort at ending claims came in the middle of the 20th century with the creation of the Indian Claims Commission. The ICC extinguished hundreds of land claims through its hearings.
between 1948 and 1978. It also formally acknowledged the obligation of the government to consider and compensate American Indian claims on a national scale, although it was only enabled to offer financial settlements. This opening of federal responsibility, along with legal support for the rights of American Indian tribes, lead to a situation where tribes that had not had their claims extinguished were more willing to try to seek the return of land.

Congress has been uninterested – or unwilling- to address claims for land on a broad scale. Instead, each claim is settled independently. This is due to each tribe’s political status as independent entities which have unique patterns of interaction with the colonial, state and federal government, and historical relationships based on formal treaties or arrangements. These diverse experiences as distinct political entities and their historical recognition form the basis for much of the inconsistency in Indian policy. Because land claims are based in separate political relationships and treaties, each land settlement also tends to be treated independently. In practice, while there are no formal procedures or requirements for a land claim, many do follow a relatively similar process and face similar standards.

The vast majority of land claims are settled with Congressional acts. There are several reasons for this, the most significant being the designation of Congress as the body of government empowered to regulate commerce with the Indian tribes and the power of Congress to make treaties with the tribes. A law enacting the settlement of a land claim is a form of a treaty arrangement, and also involves transferring land from one form of property (either publicly held or privately owned in fee simple) to trust land, a designation where the tribe’s right to title is recognized while the government remains as trustee over the land itself. Transfers involve taking land from the dominant population, and the potential use of all citizens, to a designation where only one specific tribe may have rights to it. This has lead to a general understanding that Congress, as the body elected as representative of the citizens, must approve the transfer.
Land transferred to the tribe is placed in tribal trust status. It has been the practice of the federal government since the creation of reservations early in American history to maintain its possession of ultimate title, while allowing tribal governments to administer the property. This particular status means that there are no individual owners of tribal land, and that while individuals may be able to own aspects of property (such as a house or business) on the land, they do not have access to the title of the physical territory and it cannot be bought or sold. Federal implementation of this policy, as noted in Chapter 4, disregards the different histories, geographic constraints, and economic needs of tribes.

Tribes must be federally recognized to control federal trust land. Federal recognition acknowledges a tribe as a cultural and political entity and allows the group access to federal services and specific reserved privileges. As in the case of land claims settlement, the route to recognition can take various paths. Many tribes have been granted federal recognition through treaties negotiated with the federal government. Others were given recognition via legislative acts. The courts have also grappled with recognition. Beginning in 1978, the Bureau of Indian Affairs has been home to the Office of Federal Acknowledgement, which is responsible for the acknowledging a federal relationship with tribes, which enables tribes to seek out specific services and rights recognized by the federal government (Cramer 2006). This has become the primary route for recognition. Administrative recognition involves meeting seven key requirements. These requirements are not

1 The seven main mandatory criteria for federal recognition through the administrative process are:
(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group’s character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met.
(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.
(d) A copy of the group’s present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.
(e) The petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.
only difficult to fulfill, they are also biased in favor of western tribes and several components may involve proving attachment to specific territories (Cramer 2006; Wilkins 2002). For tribes on the east coast who may be seeking territory and federal recognition at the same time, this can add difficulty to their pursuits of both. Congress has treated recognition as essential for the transfer of land.

In the United States, tribal land rights are recognized by treaties or formal agreements. As has been discussed, the majority of claims based on the failure of the United States to honor the terms of those treaties have been ended or settled in other ways. The claims of interest here are those that were not extinguished. Many of the claims left open were and are on the east coast. This is due to regional variations as well as political ones. Tribes on the east coast had much earlier contact, and dealt with colonial governments, state governments, the federal government under the Articles of Confederation, and the federal government under the Constitution. Indian policy was still evolving while these tribes were establishing their relationships, and they were more likely to be subject to multiple arrangements and engage with multiple levels of government. Tribes in the central and western part of the country only had dealings with federal government.

While in the center and west of the country tribes have claims against the federal government for failing to honor its treaty arrangements, on the east coast many claims rely on the failure of the federal government to protect the tribes from the states. Even after the federal government declared its power over making arrangements with tribes in the Constitution, and again with the Trade and Intercourse Acts, many states continued to make treaties with tribes without the

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.
intervention or approval of the federal government. The government refused to admit to the failure of its oversight for an extended period of history. During the 1970s, encouraged by the commitment of the ICC and a large federal settlement that returned control over land to native populations in Alaska, several tribes that had been excluded from earlier settlement proceedings began to pursue lawsuits to force the government to recognize their claims.

Lawsuits over land claims have tended to revolve primarily around questions of the legal standing of tribes and the obligations of the federal government to consider tribal claims to land, and not offered any rulings on the merits of the claim or settlement itself. These suits and ongoing decisions do appear to have set some precedents in terms of the requirements for establishing a legitimate claim. Tribes must establish a historical right to the territory in question, a legally recognizable agreement (ie treaty or law) that was violated in its taking, and their own existence as an entity as a legitimate recipient of potential transfer. Most recently, judges in Connecticut have argued that federal acknowledgement via the administrative process is the first step toward ascertaining the legitimacy of tribal identity and continuity, and have not been willing to offer rulings on land claims until the process of acknowledgement has been completed.

A series of legal rulings in the 1970s found that tribes with claims against state governments were entitled to have the federal government’s protection against those states. The government was obligated to consider and negotiate claims to land made by the tribe because it had not fulfilled its duties as outlined in the Trade and Intercourse Acts from the 1790s. Recall that the Trade and Intercourse Acts stated that the federal government had to make or oversee all transactions with Indian tribes. States did not have the power to treaty with tribes or take their property because the right of native title “sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act” and the federal government was responsible for enforcing this restriction (Wilkinson 1987, 36). This legal precedent opened up the possibility of land claims and transfers for a handful of tribes that had not been able to get their claims (based on treaties with the
states) heard in earlier proceedings. A handful of other American Indian tribes also have outstanding
claims because they refused to enter into settlement proceedings that only offered financial
compensation or, after a settlement fund was offered, they refused to accept it.

While there are theoretically many pathways through which to pursue a land claim, this
research focuses on those that begin with legal action and are evaluated in Congress. This group of
outstanding claims has generally followed the same framework. Even without any formal criteria,
route, or evaluation process for land claims the process has been remarkably similar. Some tribes
have met with great success and been awarded the land that they argued was rightfully theirs, while
others have had their claims denied and title extinguished. The fact that such a similar path is taken
also allows for greater comparability among cases and allows the research to begin to understand the
causes behind different outcomes.

This common progression is laid out below.

- A tribe (or on rare occasions, a group of tribes) with an unresolved claim to land decides to
  pursue this claim. There are obviously many tribes who chose not to pursue claims to land
  or simply cannot generate the group agreement on how to proceed. There are also groups
  who do not have valid claims for various reasons.² The present research consciously leaves

² The Lumbee of North Carolina is an example of a tribe that does not have a valid land claim. The Lumbee is one of
the largest tribes in the country, and the most populous group east of the Mississippi (Padget 1997; Wilkins 1993). The
tribe is recognized by the state but does not have full recognition from the federal government. In 1956 (during the
time period when termination was the goal of Indian policy) they were recognized in an Act of Congress. The Act,
however, precluded all special rights associated with recognition, stating that “Nothing in this Act shall make such
Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none
of the statutes which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.” Since
that time, the Lumbee Indians have continued to fight for full federal recognition.

The historical situation of the Lumbee puts the tribe at a distinct disadvantage. Their origins are debated, but
they migrated from the coast into what is now Robeson County in North Carolina around 1650 to avoid disease and
conflict with incoming whites (Padget 1997). A main theory of the origins of the Lumbee Indians is that they are
descended from a mix of the Hatteras Indians and the remnants of the “Lost Colony” a group of English settlers who
disappeared from a settlement in coastal North Carolina. Another common belief is that they were descended from
Cherokee and Cheraw Indian tribes, and there are several others as well (Padget 1997; McCulloch and Wilkins 1995).
The various names associate with the tribes reflect this uncertainty. The original North Carolina recognition was for
the Croatan Indians of Robeson County. After the nickname (Cro) became associated with Jim Crow laws, the tribe
petitioned for a change of name to Croatan Indians of Robeson County (1911), then the Cherokee Indians of Robeson County
(1913). This designation was met with opposition from the Eastern Band of Cherokee. In 1950s the tribe designated a
new name, the Lumbee, in reference to its physical location near the Lumber River (McCulloch and Wilkins 1995).

The area that they settled in was largely swampy and of little interest to Europeans. As the group was not
considered a military threat and their territories were not valuable, no treaties were ever signed with the state or federal
government. After the Civil War the state created segregated schools for black and white children. The Lumbee
leaders petitioned the state for their own school, an action which ultimately resulted in the recognition of the tribe by
the state in 1885. In 1888 they initiated their first contact with the federal government for educational aid (Padget
these aside and focuses only on active claims to answer why, when claims are pressed, some are resolved and others not.

- Often, the claimant group will try to initiate a settlement and transfer of land by petitioning various branches of government for attention. These efforts may be directed at a wide variety of officials- federal legislators or President, agents of the Bureau of Indian Affairs, or state legislators or governors. These actions do not tend to generate any response, nor are they required for the later progression for legal claims.

- The next step is for tribes to seek support for their claims through the federal courts. This has become even more common after the success of the Penobscot and Passamaquoddy in court and the Oneida in the Supreme Court in 1974. Both decisions asserted the rights of tribes to the evaluation of their claims and the responsibility of the federal government in doing so. While the courts have sometimes ruled to support these aspects of claims, they have also argued that it is the duty of the federal Congress to evaluate and approve the terms of transfers.

- If the courts support the validity of the claim and the obligations of the federal government, the finding prompts the consideration of the claim at a national level. The evaluation and negotiation process often involves representatives from the tribe, Bureau of Indian Affairs, Congress, state government (if part of the suit) and sometimes other government offices or public forums. In some cases negotiations begin during the court case and there may even be an out of court settlement.

- With no criteria for land claims or requirements for land transfer, each claim is negotiated independently. Depending on the specific claim, the final agreement may need to be subject to a vote by the tribe or the state legislature. In all settlements involving land transfers of federal or private land, the final agreement must be passed into law by Congress.

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(1997; McCulloch and Wilkins 1995). After ongoing organization and contact with the state throughout the first half of the 20th century, the Lumbee petitioned for federal recognition. This came in 1956, although it at once recognized the tribe and ended any federal responsibilities for them. The past 50 years have seen ongoing attempts by the Lumbee to reach full recognition (McCulloch and Wilkins 1995). Opponents include many other tribes, particularly the Eastern Band of Cherokee, who are concerned with the power that the recognition would convey to the tribe as the largest east of the Mississippi (Wilkins 1993). Not only is the Lumbee a very large tribe, it is also very geographically concentrated. 90% of the Lumbee population is in Robeson County, North Carolina, where it makes up about a third of the population (Wilkins 1995). Many of the Lumbee own property and businesses in the area, establishing a strong land base. Despite this, the Lumbee have not pursued a land claim along with their recognition bid. The tribe never signed a treaty with either the federal or state government. Further, from early on the Lumbee Indians engaged in private property. The sale and transfer of Lumbee property was done on an individual basis and not transferred as part of tribal property. This makes the transactions- and any claims springing from them- individual, not tribal. Land claims in the US rely heavily on the existence and continuity of the group itself, and on the fact that there were improper, immoral or illegal takings from the group, which still exists.

3 The work presented here does not actively consider the legislative decision at the state level. This is not a consistent factor- some settlements agreements have required this vote while others have not. None of the cases studied (and none outside of the study that the author is aware of) have situations where the state legislature has passed the settlement to have it die in federal Congress. While not explicitly addressed, it is expected that the same factors that explain settlement outcomes at the federal level would be relevant to state level decisions as well.
• If the settlement act passes into law, the land transferred is held as tribal trust property, with the federal government maintaining ultimate title. Each separate act may convey particular rights or restrictions to the tribal government.4

The progress introduced above shows a reliance on legal decisions as an access point for tribes to gain some recognition for their claims. The courts have rarely been willing to decide the terms of a settlement (the Cayuga case, as discussed below in Chapter 8, is an exception). Rather, judges have generally made rulings on whether or not tribes have standing to sue the federal government or states, whether the federal government has a responsibility toward the tribe, and/or whether the claim itself is supported by legal standing. Legal support for a land claim therefore offers support for the tribe in pursuing the claim and rules that the executive and legislative branches of government must consider and evaluate the claim, but almost never includes any details or even requirements for settlement of that claim. These details are left to the legislative branch to negotiate.

Each settlement involving the return of land is negotiated independently between the tribe or claimant group, state government representatives, federal government representatives, and sometimes other representatives (such as county or city officials). Because of their independence, some settlement terms require the assent of the state legislature; all settlements involving the transfer of land from federal hands or private citizens are legalized through an act of the federal Congress. This requirement is because all land transactions between the federal government and a tribe (a sovereign entity) need the approval of Congress. Many settlements that transfer land also transfer funds. The money can be a single time payment or a series of transactions to be paid out over a set period of time, and can also have various requirements in terms of the use of funds (i.e. for development purposes or to purchase additional land). Again, because each claim is settled independently the stipulations vary from case to case.

4 This work also does not actively consider the role of the presidential veto in the settlement outcome. In only one case, the settlement of the Mashantucket Pequot, President Reagan did exercise the power of the presidential veto. The settlement plan was redrafted to redistribute financial responsibility between the state and federal government, and he signed it into law. The exercise of presidential powers does not appear enough in the small number of land claims settlements to be useful in understanding different outcomes.
The process discussed above reveals several key junctures: the decision of the tribe to bring a claim against the government; the legal decision on the validity of the claim; and the legislative decision on whether to consider and support a settlement. The research focuses on the cause of the third, the final decision of the legislature to both consider and enact a transfer of land. The focus on elected power holders has implications for the way that the other two aspects are treated. Rather than looking at claims-making and studying the agency of tribal groups, the research asks the question of why such claims are evaluated in a relationship that has historically enforced the denial of those rights and the exploitation of the indigenous peoples’ property and resources. Instead of asking why certain legal decisions are made, the research looks at whether or not those decisions restructure incentives for elected officials to act. These questions of perspective are of fundamental importance in understanding the structure of the approach and arguments offered here. This research choice is in no way intended to discredit the agency of claimant groups or the significance of understanding legal decisions. The choices made were done so in order to evaluate hypotheses on how awards to the weak can be understood in the context of decisions made by elected policy makers.

5.2 The National Context of American Indian Land Claims

What are the incentives that encourage legislators to enact decisions in favor of the very weak? The second half of the dissertation research asks when and why legislators return land and control to indigenous peoples who do not have the means of pressuring them to do so. This section looks at the general situation of American Indians before evaluating the potential explanations developed in Chapter 2.

American Indians are an economically disadvantaged group at a national level, with over 25% of the population living below the poverty line, a statistic more than three times that for non-Latino whites (7.7%) (Census 2000). Reservation dwellers are particularly prone to poverty. The average per capita income for American Indians on reservations in 2000 was $7,942, one third of the US average of $21,587 (Taylor and Kalt 2005). While advances are being made towards improving
the economic and educational situation of American Indians, these changes are still minimal when considering the socioeconomic disparities that face tribal members (Taylor and Kalt 2005). Many land claims are justified in part by the tribe’s need to develop economic self-sufficiency.

Gaming enterprises after the passage of the IGRA in 1988 have brought economic success to a handful of tribes, although the majority of gaming operations make only a small profit. Less than 40% of American Indian tribes engage in gaming (Anders 1998; D’Hauteserre 1998; Wilmer 1997). The location of most of these groups (and the vast majority of those without gaming as well) is remote enough that they are extremely unlikely to be able to generate any more than modest profits. The legal requirement that gaming must be conducted on trust land held by federally recognized tribes pursuant to state gaming agreements means that the development of gaming operations generally comes after settlements, rather than prior to them. While outside interests have helped to provide funds for the pursuit of a land claim in a very few recent cases (notably the Schaghticoke in Connecticut and the Shinnecock in New York), this is extremely rare. Other tribes are also rarely involved in supporting a tribal land claim. Because each claim is distinct, there tends to be little or no intertribal collaboration or resource sharing for the pursuit of claims.

American Indians also have little conventional electoral power. Only in a very few places do American Indians have a large enough presence to be electorally significant, particularly in local elections. In these specific areas elected officials may have more incentive to court the vote of the American Indian population. This is not common, however, because of the very small and dispersed population. Further, factors that are known to reduce level of political participation (poverty, poor education, and youth) are prevalent in Indian populations. While some tribes, such as the Navajo, encourage voting in state or federal elections, many others, such as members of the Iroquois

5 The states with an indigenous population of more than 5% in 2000 were: Alaska, Arizona, Montana, New Mexico, Oklahoma, and South Dakota. In some situations concentrated pockets of American Indians are able to form a decisive force in elections. In 2002 Senator Tim Johnson of South Dakota was reelected to Congress with a narrow margin of about 500 votes. The American Indian population provided crucial support for Johnson (Melmer 2003). To learn more on Indian voting behavior and patterns see Wilkins 2007, 205-209.
Confederacy, consider state and federal elections largely irrelevant and have very low levels of participation (Corntassel and Witmer 2008, 62-63; Wilkins 2007). A 1992 figure puts American Indian participation in tribal elections at 85%, while participation in federal elections was only 20% for the same population (Wilkins 2002, 189-190). In other words, there are very weak ties between American Indians and their elected “representatives.” There are also few American Indians in elected positions outside of the tribe, limiting their power even at a descriptive or symbolic level. In the federal Congress Ben Nighthorse Campbell of Colorado was the only American Indian official for many years, serving as a representative from 1987 to 1993 and then as a Senator from 1993 to 2005. Oklahoma Representative Tom Cole, also an American Indian, was first elected to the House in 2002 and is now the lone American Indian representative.

The United States stood out from the other three countries because its major parties have not developed coherent stances on indigenous rights. At the same time, American Indians as a group have not aligned behind a specific party, instead supporting candidates on an issue by issue basis. The central context for understanding minority rights in the United States- and the alignment of the parties- came out of African Americans quest for civil rights and equality. The very small indigenous minority and their distinct concerns about rights to sovereignty and autonomy have simply not been addressed in national platforms. Federal votes on American Indian policy or awards have tended to be based on regional alignment, rather than partisanship. When decisions are focused on one particular tribe or location, deference is often given to the local representation and the state delegation to; their support or rejection of a measure sets the stage for the federal vote (Wilkins 2007). For American Indian land claims, then, the final outcome of claims relies on the forces that shape the opinion of the state delegation for the area affected.

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6This is evidenced by the fact that Senator Ben Nighthorse Campbell switched parties (Democrat to Republican) in 1995. He argued that his positions were the same, and that the Republicans were a better fit. His support among the American Indian population remained secure, and he was reelected to the Senate under his new party.
American Indian mobilization has been significant for raising public awareness of indigenous concerns and claims to land on a national scale. The involvement of activism from the American Indian Movement during the 1960s and 1970s was significant for putting American Indians into the national eye and combating the public image that the group had assimilated and was seeking the same rights of equality and opportunity that other minority groups were. Because of their demands for indigenous rights and sovereignty, American Indians have generally not been able to generate long term alliances or coalitions with other minority groups. While pan-Indian mobilization has been essential for generating greater attention to the demands and mistreatment of indigenous peoples, it is not necessarily a factor in more tribal specific claims. Tribes may be involved with pan-tribal organizations or supports (such as the Congress of American Indians or the Indian Law Resources Center), but with very few exceptions, tribes pursue their land claims independently. In some cases, tribes see themselves as competitors and have actively opposed other tribe’s pursuit of specific rights or resources.7

Many of the common explanations for generating political support do not appear to apply to the settlement of American Indian claims seeking land transfers. Tribes seeking land transfers are not likely to have the economic resources or electoral strength to pressure legislators. There is little or no commitment to indigenous rights by the national parties. Tribal ability to mobilize as part of a larger pan-minority or even pan-Indian group is hindered by the tribal specific nature of land claims. This limitation also means that without concerted and very expensive effort, tribes are unlikely to be able to generate widespread (national or international) attention to their specific claims. Finally, neither spillover effects nor miscalculations in policy appear to apply in understanding specific outcomes in land claims. While both may have played a role in the institutional opening for the

7 There are many examples of this: the Hopi and Navajo have had an ongoing dispute over territory that extends back to extensions of Navajo territory in the 1800s; the Eastern Band of Cherokee have actively opposed the recognition of the Lumbee in North Carolina; and as a final example the Oneida in New York (operators of a casino) have been active in opposing the off reservation acquisition of land for other tribes in New York to develop gaming.
consideration of demands to return land, the claims specific consideration and settlement means that each case is independent in many ways.

The explanations introduced in Chapter 2 and tested in Chapters 3 and 4 will also be utilized to understand the specific outcomes of claims. Just as before, the mobilization of the weak needs to be explained. Particularly in the case of land rights, power holders are not expected to offer any change on their own. For indigenous peoples seeking land rights, it is also unlikely that their resource allocations have changed; in fact they are seeking land rights often precisely because they do not have access to resources. They are unlikely to be prompted by any change in their practical situation, and are also unlikely to be able to offer power holders and practical benefit in exchange for their concessions. There is the remote possibility that, because land claims are localized, the group is concentrated enough to exert electoral pressure on local or regional representatives. Indigenous peoples’ normative beliefs in the possibility of success for their specific claim may not only be essential, then, but may be the primary factor behind the initiation of the claim. Group cohesion is still considered to be necessary for success.

The demands of the weak need to be met with the support of those in power for change to occur. As I have discussed, this may be particularly difficult when claims are for tangible private goods, such as land. Next for consideration, then, is why those in power are allowing and even supporting this transfer. Again, there may be both practical and normative components. Normative standards are expected to be significant in redefining not only the status of indigenous peoples, but what the obligations of the government are toward them. Because land claims cases are settled on a claim by claim basis, this normative judgment may be more localized than for understanding outcomes in national policy. Normative concerns are related not only to the responsibilities of the strong, but also to an evaluation of the characteristics of the weak. Specifically, the weak group in question must be considered deserving of the transfer of resources and non-threatening to the interests of the dominant population. At the same time, the rights they are seeking should be
considered morally acceptable or legitimate by the dominant population, and compatible with the
authority and legitimacy of the state.

These changes encourage those in power to calculate or recalculate the dynamics of granting
concessions. The possibility of normative reward or security may be more appealing once the
practical security of the dominant population is established. Still, we expect that practical costs of the
final award are part of the consideration of concessions; claims that are lower cost will be more likely
to reach settlement than those that are more potentially disruptive.

While unintentional consequences and spillover effects were seen as potential causes of the
opening up of rights at a broad level, they are not anticipated to play a role in specific resource
claims. Because each decision is being made individually and is only applicable to the specific
claimant group, there is far less chance for that decision to reward an outside group. The next
section turns to a more detailed development of these potential factors and how they can be
identified and measured to offer a test of their explanatory power.

5.3 Explaining American Indian Land Claims Outcomes

As noted above, American Indian land claims and their settlement outcomes are often
treated as though they are unique, idiosyncratic events. While each claim is decided on a case by case
basis, most follow a relatively similar process and share basic social, economic, and political contexts.
The present work argues that settlement outcomes and processes can be systematically compared. In
order to understand land claims outcomes, we need to identify and evaluate the role of legal pressure
as a prompt for legislators to consider claims and the facilitating conditions that encourage legislators
to act in favor of or against transfers of land.

One of the arguments offered throughout the work has been that legislators are generally
uninterested in changing the treatment of indigenous populations and the denial of their rights to
land without some external pressure and some support from the dominant population. In the case
of American Indian land claims, a major source of this pressure to consider claims has come from
the legal system. There is a gamble for tribes in pursing this venue for their claims; the inconsistency of legal decisions and lack of coherent legal doctrine means that tribes may be denied support. Further, even with strong support there are no guarantees that legislators will consider or even award transfers. There are no punishments or requirements regarding the failure to act. I expect that lawmakers act in response to their calculations over the strength and commitment of the claimant tribe, the economic costs and benefits of settlements, and the expectations of support or opposition from their electorate.

5.3.1 Legal Support for Claim

American Indian tribes have long used the federal court system as an access point and to pressure the legislature to give attention to their claims (Wilkinson 1987; Williams 2005). Because of the distinct political history of each tribe, legal decisions are often inconsistent and there is generally no coherent doctrine in terms of precedent. Tribal claimants therefore face a great deal of uncertainty in initiating a lawsuit. Even with this risk of uncertainty, the courts often present the best option for a group that is otherwise excluded from the political process. This has been particularly true in the past 40 years. For a period of time from the 1970s to the early 2000s there have been a large number of claims brought before the courts to generate support.

The legal environment has frequently been supportive, recognizing that tribes may have rights to seek compensation from the states and federal government over improper land acquisitions, which has encouraged other tribes with outstanding claims (and no response from the government) to seek this route. The power of judicial review in this situation has often focused on standing—whether or not tribes have the right to bring claims, and whether or not the government is obligated to hear them (or, in the case of suits against states, whether or not the federal government is also responsible for evaluating tribal claims against the state). Even when supportive of tribal rights, judges have not been willing to require settlement or mandate the actual terms of transfer in cases involving land title, deferring this task to Congress which has Constitutional authority over Indian
treaties (Hagan 1988). In other words, while judges have been instrumental in affirming indigenous rights to make claims and the responsibility of the executive and legislative branch to evaluate and settle claims, judges have almost never ruled in determining the details of settlements.

Legal support for a land claim is relatively straightforward to determine. While in the other countries single court decisions have precipitated the development of administrative systems for evaluating claims, the United States has largely continued to deal with claims individually, without standardized procedures. If a tribe has brought a suit before the courts, the preliminary and final rulings establish the status of legal support for their individual claim. A decision is either in favor of the tribe’s rights or against them. A decision in favor of the claim, asserting the responsibility of the federal government to evaluate a settlement, is expected to prompt the negotiations procedures to begin. There is no guarantee that this will actually result in a settlement. For a western government with reliance on the rule of law, elected officials are pressured to appear responsive. Entering into negotiations, even without a conclusion, may satisfy that appearance in cases where there are reasons to avoid a settlement or simply no incentives to actually reach a claim.

In some cases, settlements may be reached while the legal decision is still being evaluated. It is expected that these negotiations were precipitated by a legal environment and standards in which a decision in support of the American Indian tribal claim seemed likely and the expected expenses of dealing with ongoing claims was high. This situation appears the most likely to consistently result in transfers of land. There may also be legal decisions that are deferred pending the outcome of another aspect of the claim or an administrative decision. These claims are not expected to reach a settlement, nor are those cases where the judge has ruled against the rights of the tribe. Legislators are reluctant to bring controversial claims and potential settlements to the public eye even when pressed to do so- there is little reason to expect them to enter into land claim negotiations on their own.
Table 5.8: Expectations for Legal Support and Land Transfers

<table>
<thead>
<tr>
<th>Legal Decision</th>
<th>Positive Court Decision/ Legal Support</th>
<th>Out of Court Settlement</th>
<th>Deferred Decision</th>
<th>Negative or Reversed Court Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expected Outcome</td>
<td>Transfer possible</td>
<td>Transfer likely</td>
<td>No Transfer</td>
<td>No Transfer</td>
</tr>
</tbody>
</table>

Legal support may be necessary for the settlement of claims, but it is far from sufficient. Even with legal pressure to evaluate land claims, rational elected officials still face numerous influences in their decisions over potential awards. They must consider and weigh the realities of their bases of support and available resources as well as the potential policy implications. Assuming that tribes have claims based on equal or similar legal merits, there are other factors expected to play a role in the outcome of land claims.

5.3.2 Group Cohesion

The ability of a tribe to act as a cohesive group is essential to their ability to pursue a land claim and be seen as a credible claimant group by the government. Because claims are tribal, the very small size of most tribes means that they are already limited in terms of their political strength and resources that can be brought to bear. Land claims involve a great deal of effort, time, and resources; a group that is not able to work together or agree on clear and consistent goals may simply not be able to maintain the claim (Shattuck 1991; Korsmo 1994; Mitchell 1997, 2001; McPherson 2003). The government is also unlikely to respond to a group without clear demands or boundaries. If there are multiple claimants to the same land or under the same name, for example, they will use their energies against each other while the legislature has an easy excuse for not expending their own resources on considering the claim. Internal divisions or disagreements can also result in inconsistent demands, again reducing the chance for real consideration by power holders. Group cohesion (or its
absence) may also influence the government perception of the group’s capacity for both negotiation and later management of the transferred land (Alcantara 2007a).

There are several reasons that American Indian tribes may be prone to fragmentation. Resettlement policies split many tribes as some moved west (particularly on the east coast), so there may be multiple groups with the same origins and traditional lands that have operated independently for generations. For many tribes, a history of assimilation as well as shrinking reservations means that there is a significant proportion of the population dispersed off of the reservation as well as those who remained as reservation dwellers. Further, the reorganization of tribal governments after the Indian Reorganization Act and ongoing pressure from the United States to develop “western” style elected tribal governments means that many tribal groups maintain dual governing systems, one traditional and one under the new arrangement. This has created conflicts of authority as well as affiliation among tribal members.

For the purposes of this work, group cohesion is measured by the number of organized groups maintaining that they are the rightful negotiating/recipient party to the claim. A fully unified and unchallenged tribe is scored as a 1. The more claimants there are, the higher the score. For example, if there are two internal factions of a tribe maintaining that they are the ones entitled to negotiate and ultimately control a land claim settlement, the tribe is scored as a 2. If an outside group intervenes, claiming to be historically tied to the tribe and therefore entitled to part or all of the settlement, this also counts as a division. As an example, the Oneida tribe faces both splits—the Oneida Indian Nation of New York has been challenged by the Oneida Nation (also of New York) as well as the Oneida Nation of Wisconsin and the Oneida Nation of Thames (Canada) as the rightful claimant. The Oneida would therefore score a 4.

Recent research supports the idea that the timing of indigenous mobilization and strength of cohesion influence overall government strategy toward the negotiation of settlements (Scholtz 2006). The cohesion in this argument refers to pan-indigenous identity and cohesion as opposed to tribal, but it illustrates the effects of group cohesion of indigenous actors and its role in determining policy.
Table 5.9: Expectations for Cohesion and Land Transfers

<table>
<thead>
<tr>
<th>Group Cohesion</th>
<th>Expected Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cohesive Group</td>
<td>Transfer possible</td>
</tr>
<tr>
<td>Fragmented or Challenged Group</td>
<td>Transfer unlikely</td>
</tr>
</tbody>
</table>

5.3.3 Expected Economic and Resource Costs and Benefits of Settlement

Once legislators actively consider the settlement of a land claim, they will act based on expectations regarding the affordability of settlement. A claim that is very small and compact in size and can be resolved with public land is much easier for legislators to settle than a claim that is large, scattered, very high in value, or involves private owners. Specific components of costs of the anticipated settlement award might include size and contiguity of potential settlement land, whether the claim is to public or private land (and the number of property owners), population density, and the resources contributing to the economic value of the land.

The physical constraints mentioned are quite intuitive. A claim that can be settled with a small, geographically concentrated settlement, rather than one that is very large or involves scattered parcels will be more economically feasible for government officials. It will also likely involve fewer non-Native property holders and reduce the potential for opposition and political costs of negotiation involved in reaching a settlement. Further, if the claim can be resolved through the transfer of public land it reduces the conflict over negotiations with private citizens and also reduces the moral and normative conflict involved in land transfer. The transfer of land from private owners is highly contentious, expensive to purchase, can alienate potential voters, and also involves the difficult moral proposition of potentially creating a new injustice by dispossessing modern property owners (see Hendrix 2005a and b and Waldron 1995 for more).

The population density and economic value of the land are linked markers that concern the overall economic and political costs of settlement. Unsurprisingly, it would again be expected that the higher the land values and demand for land in the area, the more difficult it will be for ownership
to be transferred to the claiming tribe. Location is also part of this valuation (Alcantara 2007a). It is worth noting that, based on limited public opinion data, local support does not appear to be altered by whether or not one's property is actually claimed. A 1993 poll in Connecticut (specifically referring to the Golden Hill Paugussett claim) found that about 70% of respondents thought land claims were unfair, whether or not they believed that they would be affected (Hartford Courant 1993).

In special situations or in light of new information, however, lawmakers may see benefits to the transfer rather than costs. Perhaps the claim is to property that has no real value or is even expensive to maintain. There may also be a potential loss of resources involved in not settling the claim or anticipating a lengthy legal battle. The dispute over title may force a halt to development, for example. It is also possible that outside interests will benefit from the transfer and they are exerting their own pressure on the government to settle. While many of the possible contributing factors to the value and potential costs of the claim are based on the geographic extent of the claim itself, the costs for delay may be more difficult to determine.

Table 5.10 Indicators of Potential Settlement Costs and Expectations for Land Transfers:

<table>
<thead>
<tr>
<th>Cost of Claim and Components</th>
<th>Low Cost</th>
<th>High Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Small, contiguous</td>
<td>• Large or scattered</td>
</tr>
<tr>
<td></td>
<td>• Public (state or federal) property</td>
<td>• Privately owned property</td>
</tr>
<tr>
<td></td>
<td>• Rural, low population density</td>
<td>• Urban, high population density</td>
</tr>
<tr>
<td></td>
<td>• Low property value with few (known) resources for development</td>
<td>• High property value or resources present</td>
</tr>
<tr>
<td></td>
<td>• Costs for delay</td>
<td>• No costs for delay</td>
</tr>
</tbody>
</table>

Expected Outcome: Transfer likely | Transfer unlikely

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9 This is particularly true after the passage of the IGRA. For tribes to consider lucrative casino development the land settlement must involve property with easy access to infrastructure as well as large populations. These factors are also likely to make the area claimed more contentious and therefore harder for the tribe to attain.
This variable is probably better understood as a scale, rather than discrete categories of low or high. The extremes are shown here to illustrate the ranges of the values in each possible contributing factor. The lower the costs of negotiation and a potential final award are, the easier it will be for lawmakers to support transfers. The higher the costs, the less likely a transfer is to happen.

5.3.4 Perceived Identity

Dominant public perceptions provide a crucial context in the outcomes of policies toward minority groups. Schneider and Ingram (1993) describe the recipients of specific transfers as “target populations.” The perceptions of political elites- and their constituencies- toward the deservingness of the target population provide a foundation for policy decisions. This is particularly true for weak groups, who can offer little practical incentives of their own and so rely on the support of the strong. For a group as politically weak as American Indians, the support, or at least lack of opposition, of the dominant population may be essential for those in power to authorize transfers.

The role of the perceptions and stereotypes of minority populations has been show to be important both for other minority groups and for other sorts of indigenous claims. For example, work on welfare argues that stereotypes of African Americans as lazy are more predictive of support for welfare than other commonly used indicators such as self-interest or individualism (Gilens 1995, 1999). American Indian conformity to dominant stereotypes has been proven instrumental in understanding outcomes in other aspects of federal American Indian policy making, such as the tribal recognition processes (Cramer 2005; McCulloch and Wilkins 1995). McCulloch and Wilkins argue that “tribes whose members exhibit the most cultural and physical attributes of the mythic, aboriginal “Indian” will have the greatest likelihood of being acknowledged with federal recognition” (McCulloch and Wilkins 1995, 369).

Work on resource rights and tangible outcomes also finds that the perceptions of the threat that the group offers to the dominant population is significant. Research on treaty based fishing rights in Wisconsin points to the conflicts that arose when whites felt that their social and economic
dominance would be threatened by the extension of rights to American Indian and restriction of rights to white access (Bob and Tuan 2006; Perry and Robyn 2005). White reactions were based on their concerns about the consequences of resource transfer as well as more abstract considerations. The historical dimension of American Indian stereotypes as threatening—economically, physically, and even morally—is likely to be ingrained in these perceptions of threat.

American Indian tribes have long been associated with a variety of core stereotypes by the dominant population. Their small population, specific history, and the general lack of knowledge and interaction means that for much of the dominant population, even in areas close to tribes and subject to claims, these images are the main source of the way the group is perceived (Doble et al 2007). Different histories, relationships with the dominant society and political choices have lead different tribes to be associated with different stereotypes. These differences play a large factor in understanding which tribes are seen as groups that are non-threatening and deserving of transfers and those that are seen as threatening to the dominant population’s position. These two dimensions of deservingness and threat appear likely to work together in painting the image of a group that is deemed a good (or poor) recipient of transfers.

There are a core group of stereotypes that the dominant population holds of American Indians that are commonly identified by historians, anthropologists, sociologists, political scientists, and scholars of literature and media studies (Baylor 1996; Cramer 2006; Deloria 1998; Garroutte 2001, 2003; McCulloch and Wilkins 1995). These stereotypes have developed over the cycles of American history in its relationship with American Indians. Certain groups are associated more strongly with some stereotypes than others based both on their historical and more modern relationships with the government and the dominant society. I group these stereotypes into two broad categories, those that paint American Indians as threatening and non-deserving and those that portray them as deserving and non-threatening. This work considers the categories of non-threatening to be supportive of land transfers and have positive effects and threatening stereotypes to
have negative effects on the possibility of land transfer. As such, the designation as “positive” or “negative” refers to the influence that a specific idealized identity or stereotype will have on the success of the claim.

There are several possible ways to identify the stereotypes associated with each tribe. Unfortunately, public opinion polls of the general population rarely ask questions regarding American Indians, particularly in relation to individual tribes. When available and relevant, these are a valuable source of information. The statements, arguments, and opinions of public officials reveal the core perceptions and sentiments about each tribe and their claim. Another key source of understanding the way that tribal stereotypes are perceived and perpetuated is through the local and regional media, both in reporting and in opinion pieces. The specific techniques I have used to gather and code data are addressed in the next chapter.

I acknowledge that all stereotypes are potentially harmful as perpetuating unrealistic representations of dynamic, complex groups. As other work on American Indian policy reveals, however, these perceptions and stereotypes are often more powerful than reality (Corntassel and Witmer 2008; Cramer 2005; Spilde 1999; Weaver 2001). While this research does not intend to endorse stereotypes, it recognizes that they are both commonly used and have profound political implications, providing an essential component in understanding land claims settlements.

Positive or Non-Threatening Stereotypes Held by Dominant Population

- **Primitive/ Childlike**- Indigenous peoples are often characterized as innocent of modern ways and incapable of understanding or relating to the complex social, economic, or political world of the dominant population. This common stereotype goes back to early contact with natives during the conquest of America and also comes out in portrayals of Indians falling prey to unfair treaty arrangements because of their ineptness and childlike trust. This stereotype paints American Indians as very non-threatening. It also portrays them as deserving of land, not only because they lost it out of ignorance, but also because the separate territory may help protect them (Deloria 1998; Hertzberg 1971; Weaver 2001).
  - Example: “But the Atka people are not a warlike people…Their future here is one with the future of the white man in the Western Hemisphere. But that is hard to explain to a people who have no comprehension of a world that is anything but misty and bare and far from things like “sticks with grass”” (Hoffman 1942).
- **Connected to Land**- American Indians have long been characterized by their connections to land, culturally, physically, and spiritually. Those groups that are seen as closely tied to the
territory they are claiming are seen as more deserving, legitimate, and authentic. Their claims may also be seen as less threatening because they are likely to already be established in the area where they are claiming land (Garroutte 2003; Hamilton 1974; Hertzberg 1971).

- **Example:** “The Mohegans, descendants of the great sachem Uncas, have lived here on Mohegan Hill for centuries... ninety-eight percent of the tribe’s adults are at least fourth cousins to each other. A third live within several miles of Mohegan Hill, the site of the tribe’s most important institution, the Mohegan Congregational Church.” (Judson 1994c)

- **Noble Savage.** This is a common image of American Indians- honorable, proud, but doomed to assimilation or dying out while trying (futilely) to preserve their ancient traditions. Indians are seen romantically as noble people untouched by the temptations of civilization. This stereotype became popular during the time of the American Revolution and has persisted in popular myth as well as in literature and on film. An association with this stereotype helps a tribe in their claims because they are seen as non-threatening (because the tribe is fated to die out) and deserving (because of their “noble” intentions and characteristics) (Deloria 1998; Doble et al 2007; Garroutte 2003; Hamilton 1974; Mandell 1998).

  - **Example:** “Deprived of his ancestral birth rights, driven to the ends of his earth and finally segregated, slandered and blackened by his white conqueror, the man of bronze skin, with a spirit of sportsmanship born of the wilds and the gameness of a cornered mountain lion, fought almost to the point of annihilation and then philosophized over his fate” (“We Want Our Own Star in the Flag!” 1922).

Negative or Threatening Stereotypes Held by the Dominant Population

- **“False” Indian.** Some tribes- particularly those on the east coast, subject to long histories of dispossession and intermarriage with the dominant population- are subject to accusations and stereotypes of being “false” Indians. As has been noted, this is part of the goal of assimilation- when tribes and populations are no longer distinct, the federal government no longer need honor sovereignty or provide promised services. Those subject to this stereotype are believed to be pretending or falsifying their identity to get special status or services. These groups are seen as imposters, undeserving of any special designation, rights, or resources (Barsh 2002; Forbes 1983; Garroutte 2001, 2003; Hanson 1997; Lawlor 2006; Mandell 1998; TallBear 2003).

  - **Example:** “But mainly the "Paugussetts" arguments are twaddle because they seek to overturn and deny history. The tribe some centuries ago lost its lands, and its people were, by and large, assimilated into the conquering culture.” (Bruce 2002)

- **Lazy/ Greedy.** Indians have long been stereotyped as lazy and greedy, a belief that came into force after American policies subjected them to living as wards of the state (without the proper resources to be self-sustaining). Tribes even today are often subject to this stereotype, with a vast ignorance about the nature of treaty arrangements, federal obligations to provide certain services, and the effects of land loss. In essence, tribes associated with this stereotype are perceived as undeserving of the funds and resources they already have and therefore even more undeserving of further transfers. Further, tribes subject to this stereotype are also often portrayed as morally threatening because of their refusal to engage in honest labor (Garroutte 2003; Spilde 1999).

  - **Example:** “The historic roles have been reversed in upstate New York. The white landowners now say they are victims of greedy property grabs by Indians, backed by the federal government.” (Egan 2000)

- **Lawbreaking/ Dangerous.** This is also very common and steeped in history; it holds that American Indians are wild, violent men who ignore the bounds of “civilized” laws and
regulations. This stereotype has persisted since early contact between Europeans and America Indians. While always prevalent, there has been a recent resurgence of this after the success of AIM in gaining media attention during the 1960s and 1970s was used to highlight the role potentially violent protest. This is a very threatening and undeserving stereotype (Dippie 1982; Baylor 1996; Hamilton 1974; Reed 2001).

Example: “The Fire Department had been ordered not to respond alone to fires in the Indian Nation by Oneida’s Mayor Herbert D Brewer, who said he feared for the safety of the city’s firemen. He said that because guns had been seen in the hands of some of the Indians on occasion he wanted policemen to accompany firemen.” (Ferretti 1976)

It is worth noting that many portrayals of American Indians, particularly those on reservations, involve descriptions and associations with abject poverty. Certainly the vast majority of the cases covered here have been subject to lurid descriptions of the conditions of “despair” on reservations. The stereotype of the poor and impoverished Indian is not included as a category here, however. This is because the condition of poverty itself is relatively impartial in terms of understanding perceptions of deservingness. What is consequential is why the group is believed to be in poverty. If they are in such conditions because they are childlike and incapable of understanding and operating in a western economy, they may be deserving of land transfers (perhaps to allow them a chance to resume or keep a traditional lifestyle). If, however, the stereotype is that the tribe remains mired in poverty because its members are lazy and prefer living off of government services rather than working, the dominant population will see them as very undeserving of any further transfers.

The question of race adds another level of complexity in understanding the dominant populations’ perceptions of Indian identity. While African- Americans have been defined and bound by the tradition of the “one-drop rule” in which individuals were often classified as black on the basis of descent with as little as 1/32 African blood, American Indians have been forced to meet a high burden of proof to be legally identified as Indian. As one scholar, Jack Forbes, has said, America is always finding blacks and losing Indians (Garrouitte 2001, 2003).

These different standards come into play in the discussion of American Indian identity and identification because of the history of intermarriage with both blacks and whites. Following the
American Revolution there was extensive intermarriage between blacks and American Indians, due in part to similar social, demographic, economic, and legal positions in society. As early as the turn of the 19th century there were already few “pure blood” Indians in New England (Mandell 1998, 471). Intermarriage with whites, particularly those at the lower end of the socioeconomic spectrum, was also common. In public discourse, it is often hinted that the other racial group supersedes heritage as American Indian. An individual that has a combination of African American and American Indian heritage will be said to be black, for example. Just as American culture assigns mixed race individuals to either black or white categories, often ignoring the fact that their heritage may be just as much of one of the other, American Indians are often forced into one category, be it white, black, or Indian, rather than a combination (TallBear 2003).

The category of “false” Indians reflects the repercussions of this. Tribes are labeled as false if the dominant population does not see them as authentically Indian enough, which includes concerns over racial ancestry. For tribal groups with high rates of intermarriage with blacks, this is a particularly common association. These groups are perceived by the dominant population as being black and not Indian enough, and therefore ineligible for any rights that are associated with tribal sovereignty. Ironically, these groups are also often perceived by the dominant population as ineligible for any services targeted at blacks (and are often challenged by African American communities themselves), because they are also not fully black.

Using the main categories introduced above, each tribe involved in land claims case will be evaluated to determine which of these common stereotypes they are associated with. The more that a tribe is associated with positive perceptions, the easier it is for lawmakers to award them settlements without repercussions from the dominant population. Conversely, the closer a tribe is in association with negative stereotypes, the less likely they are to reach settlement.
5.3.5 Justification for Claim

The justification for the claim is also important in understanding the perceptions of the dominant population, and therefore the motivations of their elected officials. The way that claims to territory are legally and morally justified is a different element of the claim that the perceptions of the group itself. The term “justification for claim” is used to refer to the cumulative arguments used by the tribe in their claim to land and includes legal arguments used by the claimant groups as well as public statements about the claim and justifications for its validity used during negotiations. Land transfers are expected to be supported when the claim itself is seen as non-confrontational and morally compatible with dominant values and ideologies. Claims that are justified in ways that fit within commonly held and accepted norms and values are much more likely to be settled than those that may be seen as threatening to their moral dominance.

Claims to land are inherently difficult for legislators to settle with land transfers. There is not a great deal of public support for such transfers, either. A 1999 poll in central New York State found that 22% of respondents were opposed to any form of settlement, 42% favored monetary reparations, 16% thought that public land was appropriate and only 11% believed that private land was appropriate as part of a settlement transfer (Zogby 1999). Claims that specifically seek land are likely to be particularly challenging. To support the return of territory to an indigenous group as part of a land claim recognizes the past wrongdoing of the government, challenges the security of the dominant population in their own property rights, and raises questions about the legitimacy of a government with its origins in the illegal dispossession of its indigenous population (Weiner 2005; Waldron 1992). These concerns form an already difficult moral ground for land claims even before the characteristics of tribal claims are considered.

Many minority rights claims in the United States rely on moral arguments that appeal to norms of personal equality (King and Smith 2005). The basic framework of western liberalism relies on the essential equality of each individual; in contrast, indigenous rights are based on the distinct
status of a particular group and are therefore very difficult to enmesh in the western framework (Ali 2003; Kymlicka 1995; Waldron 1992). So indigenous claims to land, seeking potentially exclusive rights to a territory that will be governed by a distinct set of property rights, the standard frames for minority rights in the United States do not fit. As there are no standard procedures for land claims, each is positioned and argued independently. The way that each claim is justified by the group (and how it is perceived by the dominant population) may either fit well with the dominant populations’ values and beliefs, or it may challenge them. Just as the stereotypes of the tribes that are less threatening are more likely to see success, claims that are more compatible with the dominant framework are likely to be supported by the majority population and therefore reach land transfers. As in the previous variable, I have grouped the categories as “positive” or “negative” based on how they are expected to influence the outcome of the land claim.

The categories for justifications come from an evaluation of all available claims documents. The categories identified reflect the dominant justifications used by tribes across the country to support their rights to the land. These basic categorizations are also supported by how land claims have been portrayed in other scholarly works (Scholtz 2006; Sutton 1985). The main body of sources for evaluating each tribal claim includes lawsuits and legal evidence, tribal petitions, and the public statements of tribal leaders. The justifications themselves are clearly important, but there is also the dimension of the perceptions of the justifications. For this reason, media reports on the justifications of claims are also included.

Positive Influence on Settlement:

- **Concerns over Environment**- Some claims are based on an appeal to environmentalism and concerns over the health of the land. These match well with both the image of American Indian tribes as “original conservationists” and concerns over environmental pollution that have proliferated since the 1970s. This is a non-challenging and easy to accept justification. Further, environmental issues are often seen as shared, so these appeals may be seen as more of a shared arrangement rather than a zero sum transfer (Anderson 1996; Clifton 1990; Hertzberg 1971; Lawlor 2006).

- **Economic Self-Sufficiency**- A claim based on the tribes’ need or desire to become economically independent and productive matches well with public values and work ethic. The justification is often incorporated with the argument that with self-sufficiency will come an
end to reliance on state and federal services, reducing their social service burden. This will be bolstered if the tribal group has already begun to demonstrate their earnestness in economic development. This justification is very compatible with dominant values.

- **Tribal Cultural Survival** - Beyond economic survival, claims often argue that a land base is needed to keep the members of the tribe together for traditional practices and cultural survival; this can be related to liberalism and respect for minority rights and culture. This argument for a claim fits well with the idea that tribes are not viable on their own, reinforcing ideas of them as non-threatening and needing the protection of the dominant society. There are a few moral elements that can be linked to here, including a commitment to cultural diversity as well as an element of guilt from the dominant population for the tragedies that befell tribes in the past (Kymlicka 1995; Hendrix 2005a).

**Both Positive and Negative Influence on Settlement:**

- **Justice/ Fairness** - The demand for justice is essential to land claims. The use of this argument can involve both positive aspects (an appeal to core American values of justice and fairness) and negative (the appeal implies that the government acted illegally, and the transfer of land may be seen as inflicting injustice upon current landowners). As one theorist writes: “In many regards, treaties with Indian nations seem to form the very legal basis for the existence of the United States- what legitimacy can a country have if founded on force and fraud? At a minimum, it seems essential that the United States keep those agreements it has made, even if those agreements themselves were often signed by Indian leaders lacking proper authority to do so or who signed them at gunpoint.” (Hendrix 2005b, 543). (Hendrix 2005b; Scholtz 2006; Waldron 1992). Despite this ambiguous position, it is included in the categorical measurements because of its significance as a central argument for land transfers.

**Negative Influence on Settlement:**

- **Religious Connections to Land** - Some land claims are based on the sacred value of the site. Physical places are not only powerful symbols and objects of reverence themselves, but also sites for religious rites. This justification goes against deeply ingrained dominant Judeo-Christian beliefs. Opponents argue that a federally sanctioned transfer would equate to (unconstitutional) support for religion (Deloria; Hendrix 2005a).

- **Trickery/ Deceit of Whites** - While rarely part of the formal claim language, some claims have gone on to the point that the loss of land (and its continued refusal) is publicly attributed to the trickery or deceit of whites and their government. This is a more antagonistic approach than reliance on calls for justice and accuses the white population and government of trickery, deceit, and illegal practices. This justification is not well received by the dominant population.

Just as in the hypothesis on stereotypes in determining settlement outcomes, the more a claim is justified through “positive” factors the more likely it is to reach settlement. At the same time, the closer it aligns with “negative” justifications, the less likely the tribe is to success in their claims. Claims based on arguments that tie in to and endorse popular myths are far less contentious than those that outright challenge the non-native population and their view of history and entitlement.
5.4 Conclusions:

The policy history of extinguishment, small number of existing claims, and lack of national knowledge on Indian rights or claims in general mean that the general American population is largely ignorant of the ongoing existence of land claims. While many American Indians might argue that they have a legal or moral claim to much of the land on the continent, many non-Indian Americans, particularly in areas with no active claims, are surprised to know that land ownership remains an issue, much less that transfers are a possibility. Because of this widespread ignorance and the use of individual claims level evaluations, national level factors that are useful in understanding a broader shift toward recognizing rights are not often applicable in understanding the outcomes of individual claims. The causes behind different settlement outcomes are best analyzed through tribal and claim level characteristics.

The table below offers projections for settlement outcomes based on the hypotheses developed above. Legal support is not included in the table; it is hypothesized that any claim that has been denied legal support will not reach settlement. The table shows that the interaction and combinations of cases are expected to be important; even with the normative support of a legal decision in favor of a tribe a positive combination of other factors is necessary to establish the affordability of settlement.
This chapter argues that land claims will only be considered when they are backed by legal support (or expected support) in favor of the claims to offer normative pressure on the legislature to act. This prompt is far from sufficient. Those in power need to consider settlement to be normatively and practically affordable to consider offering concession. The next chapter goes on to test these expectations.

### Table 5.11 Expected Outcomes

<table>
<thead>
<tr>
<th>Cost</th>
<th>Cohesion</th>
<th>Identity</th>
<th>Justification</th>
<th>Expectation of Transfer</th>
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<tbody>
<tr>
<td>High</td>
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<td>Positive</td>
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**Bold** type indicates a combination of variables where settlements are considered possible or likely.
6. Analyzing American Indian Land Claims Settlements

The first section of the dissertation has established that not only can the weak win symbolic concessions, but at times they can also win control over valuable resources and property. The second section seeks to understand why, when this opportunity opens, some claims of the weak are successful in gaining control over resources while others fail. The research has focused on land claims of indigenous peoples in western democracies, and now it specifically turns to American Indian claims for the return of land. This chapter evaluates the hypotheses developed in Chapter 5 through an analysis of American Indian land claims and outcomes.

6.1 Case Selection and Methods

The research focuses on demands for the transfer of land (rather than other forms of compensation) because of the challenging nature of these claims and the stiff test that they offer for understanding outcomes in favor of the weak. Many indigenous land claims in the United States have been settled (or denied) in the process of seeking financial compensation from the federal government. The universe of claims that have remained open and seek the transfer of land is therefore relatively small. The majority of these fall on the east coast, in the original thirteen colonies. There are several reasons for this geographical distinction.

Regional variations in history and the development of policy mean that tribes in the east were subject to contact and political relationships with the colonies, the states, and the government under the Articles of Confederation before the establishment of the Constitution. Unlike tribes in the west, who had relationships only with the federal government with an organized (if inconsistent) federal policy, tribes in the east were subject to relationships with multiple entities, often without any overarching policy or established procedures. Even after the enactment of the Constitution, the eastern states often continued to interact directly with American Indian tribes. In order to assert federal power, the Trade and Intercourse Acts were passed. The 1790 Trade and Intercourse Act (and following Acts of the same name) state “that no person shall be permitted to carry on any trade
or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of
the superintendent of the department or such other person as the President of the United States shall
appoint for that purpose…”

Many of the thirteen states, particularly New York and in New England, violated this Trade
and Intercourse Act and continued to treaty directly with American Indians tribes, just as they had
done in the past. This early political relationship and the ensuing violated treaty arrangements were
considered for most of history to be outside of federal jurisdiction because they were violations of
state treaties rather than federal. This excluded these tribes from bringing their claim before the
Court of Claims or ICC, which only covered federal claims. This exclusion had the ironic result of
leaving their claims intact for later pursuit. The opportunity for these claims opened up in the 1970s
with legal decisions that supported the rights of tribes to seek land based on state treaties and the
responsibility of the federal government to evaluate the claims.

Other ongoing claims include those where a monetary settlement had been decided upon
and offered by the federal government, but the tribe refused to take it. In these cases, an
acknowledgement that federal actions were not legal was made, but the refusal of the tribe to agree to
the terms of extinguishment offered or accept the offered compensation left the status of the claim
in doubt. Another area where indigenous claims to land remained unclear in status was Alaska,
where the federal government had never fully defined its relationship with the indigenous population
during its acquisition of the state. This particular history is discussed in Chapter 7.

The universe of tribal claims for the transfer of land is relatively small. As I discussed in
Chapter 5, many tribes follow a roughly similar path in seeking their claim. Within this group, I have

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1 There is no comprehensive listing of open claims desire land return. It is particularly difficult to identify claims that
may exist but have taken no formal action. Land claims can be raised by both recognized and unrecognized tribes,
which also makes the pool hard to identify. Further, in many instances potential claims are not considered possible,
and therefore never explored, until a particular situation arises (such as the legal environment that encouraged eastern
tribes to bring suits based on violations of the Trade and Intercourse Act). For this reason, the work limits the natural
universe to claims that have been asserted. To the best knowledge of the author, approximately 40 claims for the
transfer of land have been raised and/or settled since 1970.
chosen several cases in order to include groups of cases from within the same state. The historical development of government-tribal relations and treatment has varied from state to state and region to region; by clustering cases within states political and historical factors for these cases can be held roughly constant, or at least comparable, for that subset of the sample. The selection of tribes and claims provide a range over the possible outcomes (with land transferred, denied, or ongoing claims) as well as variation over the proposed independent variables. The concentration also introduces the possibility of selection bias if there is something specific only happening in these two northeastern states; the incorporation of several cases from outside of the clustered ones is intended to counter this.

The sample selected covers 12 tribes and claimant groups. This sample includes all potential cases from Connecticut (Mashantucket Pequot, Mohegan, Golden Hill Paugussett, and Schaghticoke) and New York (Oneida, Cayuga, Seneca, and Mohawk), the two states that have seen the most activity in terms of land claims brought by various tribes. In addition, the research includes several settlements with land transfers: the Alaskan Natives (Alaska), the Penobscot and Passamaquoddy (Maine), and the Narragansett (Rhode Island). It also includes what is perhaps the most well known failed land claim to date, the Sioux claim to the Black Hills (South Dakota). These cases are selected for their notoriety, value as precedents, and finally the availability of data.

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2 The Shinnecock and Onondaga tribes (both in New York) both brought land claims before the courts in 2005. These cases are discussed in the conclusion of the paper, but they are not included in the analysis. Neither case has progressed beyond the court system at the time of this writing.
Table 6.12: List of Claims:

<table>
<thead>
<tr>
<th>Tribe</th>
<th>Date of Claim¹</th>
<th>Approximate Size (acres)</th>
<th>Date of Outcome</th>
<th>Predicted Outcome</th>
<th>Actual Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaskan Natives*</td>
<td>1966</td>
<td>340,000,000</td>
<td>1971</td>
<td>Possible</td>
<td>44,000,000 acres $962 million⁴</td>
</tr>
<tr>
<td>Cayuga</td>
<td>1978</td>
<td>64,000</td>
<td>2005</td>
<td>Very unlikely</td>
<td>denied</td>
</tr>
<tr>
<td>Golden Hill Paugusset 1</td>
<td>1992</td>
<td>91</td>
<td>2005</td>
<td>Unlikely</td>
<td>ongoing</td>
</tr>
<tr>
<td>Golden Hill Paugusset 2</td>
<td>1993</td>
<td>17,000</td>
<td>2005</td>
<td>Unlikely</td>
<td>ongoing</td>
</tr>
<tr>
<td>Mashantucket Pequot</td>
<td>1975</td>
<td>800</td>
<td>1983</td>
<td>Very likely</td>
<td>800 acres $900,000</td>
</tr>
<tr>
<td>Mohawk</td>
<td>1978</td>
<td>14,000</td>
<td></td>
<td>Unlikely</td>
<td>ongoing</td>
</tr>
<tr>
<td>Mohegan</td>
<td>1978</td>
<td>2,500</td>
<td>1994</td>
<td></td>
<td>250 acres $35 million</td>
</tr>
<tr>
<td>Narragansett</td>
<td>1975</td>
<td>3,200</td>
<td>1978</td>
<td>Very likely</td>
<td>1,800 acres</td>
</tr>
<tr>
<td>Oneida 1</td>
<td>1974</td>
<td>250,000</td>
<td></td>
<td>Very unlikely</td>
<td>denied</td>
</tr>
<tr>
<td>Oneida 2</td>
<td>1978</td>
<td>5,000,000</td>
<td></td>
<td>Very unlikely</td>
<td>denied</td>
</tr>
<tr>
<td>Penobscot and Passamaquoddy</td>
<td>1972</td>
<td>12,000,000</td>
<td>1980</td>
<td>Unlikely</td>
<td>300,000 acres $81.5 million</td>
</tr>
<tr>
<td>Schaghticoke 1</td>
<td>1985</td>
<td>43</td>
<td></td>
<td>Unlikely</td>
<td>ongoing</td>
</tr>
<tr>
<td>Schaghticoke 2</td>
<td>1998</td>
<td>1,900</td>
<td></td>
<td>Unlikely</td>
<td>ongoing</td>
</tr>
<tr>
<td>Schaghticoke 3</td>
<td>2000</td>
<td>148</td>
<td></td>
<td>Unlikely</td>
<td>ongoing</td>
</tr>
<tr>
<td>Seneca 1</td>
<td>1993</td>
<td>51</td>
<td>2005</td>
<td>Unlikely</td>
<td>51 acres</td>
</tr>
<tr>
<td>Seneca 2</td>
<td>1993</td>
<td>18,000</td>
<td></td>
<td>Very unlikely</td>
<td>denied</td>
</tr>
<tr>
<td>Sioux</td>
<td>1980</td>
<td>7,300,000</td>
<td></td>
<td>Very unlikely</td>
<td>ongoing</td>
</tr>
</tbody>
</table>

*Claims marked in **bold** type are those that have been successfully settled with the transfer of land.

The table above offers an overview of the claims and their outcomes. Several of the tribes have made more than one claim to land, which are differentiated numerically, such as Seneca 1 and Seneca 2. Each claim’s history, development, and outcome are covered extensively in detailed case studies in Chapter 7 and Chapter 8.

The use of qualitative case study analysis as a methodological approach has been chosen for several reasons. The subject represents a natural affinity for case study analysis, which “allows

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³ This work dates the start of claim from the time when a claim specifically seeking the transfer of land was instigated. Many of the tribes listed here began their claims to compensation decades, if not centuries, before these dates.

⁴ The money involved in the settlement may involve money to be transferred in a single lump sum or over a period of time. The Alaskan settlement involved both.
investigators to retain the holistic and meaningful characteristics of real-life events” and is particularly appropriate when context and surrounding conditions are essential to the analysis (Yin 2003, 2).

Qualitative comparative work is very appropriate to deal with the complex historical and institutional environments in which indigenous claims operate (Scharpf 2000). The small number of possible cases and the lack of coherent quantitative measures for many of the hypothesized factors mean that quantitative analysis is not well suited.5

I have also chosen this mode of analysis to allow the inclusion of and respect for multiple sources and varying accounts of the history, causes and trajectories of land claims. Native scholarship, sources of knowledge and perspectives are often overlooked (Fixico 1996; Mihesuah 1998). The research here seeks to incorporate these sources, when available, in understanding the histories of the tribes and the measurement of the relevant data. The use of history and contemporary accounts that rely heavily on opinion, social phenomenon, and multiple interpretations of the same events can leave the research open to problems of selection bias (Lustick 1996; Yin 2003). In order to counter this, the data collection has been done with explicit attention to both the theoretical basis (and biases) of the accounts used, whether historical or contemporary, and an attempt to balance varying accounts where possible. As Lustick (1996) suggests, the research also presumes some “normal distribution” of historical accounts and looks for recurring regularities and overlaps that appear despite differences. As such, multiple perspectives are incorporated and compared as often as possible.

Each land claims case has been extensively researched using local (or regional) and national newspapers, tribal resources, legal documents, state and federal legislative records, historical and political academic work, and (when possible) public opinion data and interviews with tribal and state

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5 Preliminary statistical testing using a Cox proportional hazard model (to predict the “life span” of each claim) was conducted by converting the categorical variables into a numerical scale. The results conform to the basic expectations for each variable. The Cox proportional hazards model was chosen to test predictions on the duration of each claim because it does not require the researcher to specify the shape of the underlying hazard. In other words, this is most appropriate for use when the risk of the event occurring over time is not known (Cox 1972).
representatives. The data have been used to construct the comparative analysis as well as to compile
detailed case studies of each of the claims. The specific mechanics for measuring each variable are
discussed below. The narrative histories, even abridged, are lengthy and have therefore been placed
in two chapters following this one. The key causal factors for each case have also been summarized
in Appendix B.

This section analyzes the expectations that were presented in Chapter 5. The data are tested
categorically, with a truth table type format used at the end to compare overall predictions with
outcomes. The discussion that follows is organized around each proposed variable. The concluding
section of the chapter offers an overview of the causes behind different American Indian land claims
outcomes and what this may say about understanding the broader realm of victories of the weak.

6.2 Legal Support

We expected legal support to be a necessary but not sufficient condition. For this to hold
ture, there should be no transfers in cases with negative court decisions or deferred decisions. The
ability of the legal system to make normative decisions independent of the direct influence of the
dominant population allows judicial actors to make decisions that are based on principles and norms
rather than electoral or practical considerations. The judicial system has also been a main venue for
American Indians in seeking their claims.

I have argued that in order for a claim to be actively considered by elected lawmakers, it
must have strong legal support. In addition, in situations where lawmakers feel a positive legal
decision is imminent they will act as though the decision has already been given, resulting in an out of
court settlement. In fact, it is argued that this may be the strongest position for tribes to be in, as
political power holders may feel pressured to craft a quick settlement in order to avoid any practical
resource costs involved in an ongoing legal dispute and to save face by offering the first move toward
concessions (rather than being shamed into doing so).
The cases are evaluated based on existing legal decisions. For decisions in favor of or opposed to the transfer, the final ruling in each (as opposed to lower court decisions) is used as the final categorization. Deferred decisions are coded based on the announcement of the court to hold further evaluation. Out of court settlements are based on the public statements of officials citing their reasons for negotiating, as there are no final legal decisions in these cases.

Table 6.13: Expectations and Outcomes for Legal Support and Land Transfer

<table>
<thead>
<tr>
<th>Expected Outcome</th>
<th>Legal Support</th>
<th>Out of Court Settlement</th>
<th>Deferred Decision</th>
<th>Negative Court Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Transfer possible</td>
<td>Transfer likely</td>
<td>No transfer</td>
<td>No transfer</td>
</tr>
<tr>
<td>Land Transfer</td>
<td>Alaskan Natives Mohegan Penobscot and Passamaquoddy Seneca (1)</td>
<td>Mashantucket Pequot Narragansett</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No Land Transfer</td>
<td>Cayuga (pre 2005) Oneida (all) (pre 2005)</td>
<td>Mohawk (pre 2005) Schaghticoke (all) Golden Hill Paugussett (all)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As expected, a positive legal decision and normative support is not a sufficient condition for settlement, although a negative decision is definitively prohibitive. Claims subject to deferred decisions do not reach settlements, as there is no pressure on elected officials to act. According to the hypothesis presented, it is surprising that all of the claims with attempted out of court settlements are not met with land transfers. The particulars of the Mohawk case can be read in Chapter 8, but it is worth noting here that intense conflict between internal and external tribal factions plays a large part in the withdrawal of two proposed settlement transfers before 2005.

While, as mentioned, each case is judged on evidence particular to the tribe, its history, and its attachment to the land in question, there are some overarching similarities. Tribes need to
establish several things: their connections to the territory in question; their physical control over the area; that there was some state or federal recognition of this use or occupancy; that the present claimants are part of this original tribe; and that they territory was illegally taken. Legal decision makers have also considered whether or not there may have been past actions to settle the claim; a claim must be unextinguished to get legal support for its future settlement. If the tribe’s title to the land it has already been extinguished in some way, there is no legal standing for any further transfers. To make any recognition of tribal rights possible, the judiciary must be also be willing to recognize the rights of indigenous peoples to land and the right of indigenous peoples to access the courts.

Many of the supportive legal decisions followed the same argument. Supportive decisions on the Oneida, Penobscot and Passamaquoddy, Mashantucket Pequot, Mohegan, and Cayuga claims all followed the same legal reasoning, that the Trade and Intercourse Acts established a federal responsibility to protect tribes from the taking of their land by the states. Decisions that supported this argument found that the federal government had failed its duties, and had an obligation to negotiate settlements for compensation to the tribes. In some cases, the government initiated negotiations based on the anticipation that legal support for a claim was imminent (Cayuga, Narragansett, Mohawk). Even with strong legal support, as the research shows, there are no guarantees that a settlement will actually be reached.

In cases where there are legal decisions against the tribe’s claim or the case is deferred, no negotiations or settlements are expected. Decisions against the claims of tribes appear to hinge on their inability to establish clear and exclusive ties to the territory in question. While in early cases the legal system did engage in questions of confirming identity, in recent years the judiciary has instead deferred to the Federal Office of Acknowledgement. This has resulted in the deferment of lawsuits of the Golden Hill Paugussett and the Schaghticoke.

Two recent decisions in 2005 have changed the legal standing of claims in New York. Because of this, three of the New York cases (the Cayuga, Oneida and Mohawk claims) are listed as both pre and post 2005. The Supreme Court had originally supported the rights of the Oneida and
the responsibility of the federal government to evaluate their claims in Oneida Indian Nation v County of Oneida (1974) and County of Oneida v Oneida Indian Nation (1985). These decisions were based on the application of the Trade and Intercourse Acts, and offered strong legal support for the claims of the three tribes, based on logic similar to that discussed above. The Sherrill and Cayuga decisions (discussed in greater detail in the case studies in Chapter 8) both found that tribal claims to territory were jeopardized by the passage of time. The land in question could not be considered tribal land any longer because the tribes had waited too longer to assert their rights over it; the passage of time invalidated their claim. The circuit court Cayuga decision threw out the award being considered for the Cayuga settlement, and the Supreme Court declined to review the case.

The Sherrill decision was related to the Oneida tribe’s actions in purchasing land (which was in the area that they have claimed as part of their ancestral territory) and treating it as tribal trust property, exempting businesses from state taxation. The Supreme Court found that the Oneida’s authority and ability to use the land as sovereign territory was invalid because of the passage of time. These rulings have called into question the validity and legal reasoning for all land claims in New York State, which are understood to be based on similar legal standing. Of course, this argument reflects a misunderstanding or disregard for the fact that these tribes had to arena in which to pursue their claims, and many tried various paths before resorting to the courts.

6.3 Costs of Negotiation and Final Awards

We also expect that the practical costs of the potential settlement are important in understanding the outcome of land claims. The lower that elected officials’ anticipated costs are of both engaging in negotiations and the final award, the more likely they are to consider the transfers affordable. If there are costs related to avoiding settlement and prolonging claims, this will also be included in the calculations of affordability.

I have estimated the practical costs of potential settlement based on a variety of factors. Those relating to the territory claimed include its size, contiguity, population density, land value,
timber or mineral resources, and development potential. Data on each aspect may not be available for each claim, so the consideration of all available factors is used to form the estimation of costs. The other dimension is the possible cost of not reaching a settlement. As an example, development might be hindered because of legal concerns about title related to the claims. When there are other interests (beyond the weak group) who are facing economic losses due to ongoing claims, it is expected that these actors (land owners, developers, commercial interests, etc.) will also pressure legislators for settlement. Evidence for this is compiled based on accounts, particularly from legislative sources, of the causes behind the decision. Sources for the estimation of costs include claims documentation, legal evidence, Congressional hearings, and media reports.

The research uses the territory claimed as the proxy for potential cost of negotiation and final award. I argue that the claim itself forms the original public and political understanding of the future costs, so is therefore an appropriate marker. Further, the territory claimed is the main way of understanding the objective. This is significant because the territory claimed may be strategic; tribes may press from a very large amount in the hope of gaining only a small portion, for example. This rarely comes out at the outset, however. Tribal leaders also tend not to divulge their minimal amount until after negotiations are well established. Further, the amount of land that group is willing to accept may change over time.

The table below offers a quick ranking of the claims by size, approximate costs, and outcome.
Two of the claims are marked with asterisks, the Golden Hill Paugussett 1 claim and the Mohawk claim. The Paugussett claim by size appears small, but it is to 91 acres of downtown urban Bridgeport, Connecticut, making it a very expensive claim. The Mohawk claim is left indeterminate. Although it is appears more fitting in the high value claims group, the acreage claimed is in a very rural area with low land value and low development potential. For the rest of the clams the determination of cost was relatively straightforward to determine. The size of the land is the main factor. The categorizations have been supported by other data as well. For example, when the population densities of the claimed area are estimated (to determine how many people are affected),

Table 6.14: Land Claims by Size of Claim

<table>
<thead>
<tr>
<th>Case</th>
<th>Acres Claimed</th>
<th>Acres Transferred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low Value</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Schaghticoke 1</td>
<td>45</td>
<td></td>
</tr>
<tr>
<td>Seneca 1</td>
<td>51</td>
<td>51</td>
</tr>
<tr>
<td>GH Paugussett 1*</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>Schaghticoke 3</td>
<td>148</td>
<td></td>
</tr>
<tr>
<td>Pequot</td>
<td>800</td>
<td>800</td>
</tr>
<tr>
<td>Schaghticoke 2</td>
<td>1,300</td>
<td></td>
</tr>
<tr>
<td>Mohegan</td>
<td>2,500</td>
<td>250</td>
</tr>
<tr>
<td>Narragansett</td>
<td>3,200</td>
<td>1800</td>
</tr>
<tr>
<td>High Value</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mohawk *</td>
<td>15,000</td>
<td></td>
</tr>
<tr>
<td>GH Paugussett 2</td>
<td>17,000</td>
<td></td>
</tr>
<tr>
<td>Seneca 2</td>
<td>18,000</td>
<td></td>
</tr>
<tr>
<td>Cayuga</td>
<td>64,000</td>
<td></td>
</tr>
<tr>
<td>Oneida 1</td>
<td>256,000</td>
<td></td>
</tr>
<tr>
<td>Oneida 2</td>
<td>5,000,000</td>
<td></td>
</tr>
<tr>
<td>Sioux</td>
<td>7,600,000</td>
<td></td>
</tr>
<tr>
<td>Penobscot and Passamaquoddy</td>
<td>12,000,000</td>
<td>300,000</td>
</tr>
<tr>
<td>Alaskan Natives</td>
<td>424,490,880</td>
<td>44,000,000</td>
</tr>
</tbody>
</table>
this statistic reinforces the estimates of high value versus low value claims (with the exceptions of the Paugussett and Mohawk claims, as noted above.6

Practical costs alone do not appear to be explanatory in determining the affordability of claim settlements. The addition of legal support helps to explain the distribution of the low value claims, as the Golden Hill Paugussett and Schaghticoke claims were all subject to legal deferment pending the results of their federal recognition petitions. There is a great variation in the legal status among those on the high value group. It does appear surprising that the two largest claims were settled for such vast amounts of territory. In the Alaskan case, delay would have involved substantial costs. The discovery of oil put pressure on state and federal officials to settle claims quickly so that land could be distributed and the exploitation and transportation of oil begun. The oil companies involved or interested in development also provided pressure on the federal government to reach a quick agreement. In this case, then, while the settlement was still very expensive, there were additional incentives for the government to offer transfers because of perceived costs in delay.

Some of the claims that were settled also included financial compensation for land claimed that was not transferred back to the group. This also represents a broad distribution, although it correlates to the land transferred. The chart below illustrates these arrangements.

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6 A rough estimate of the population affected by claims is calculated using the amount of land claimed and the census data on the population density of the state during the time when the claim is open. Even with a very wide range of population densities (from 0.5 persons per square mile in Alaska in 1970 to 906 persons per square mile in Rhode Island in 1980), if the number of people potentially affected is used to estimate low value (less than 5,000 people) and high value (more than 5,000), the cases fall in the same distribution. While state level data is not accurate in predicting variations from urban to rural areas, it was chosen as the best approximation because claims do not follow any politically defined demographic lines, so there are no other census groupings that make sense. It does provide a useful approximation that, when compared to documents about the populations affected by claims, appears relatively accurate. The only exceptions are the Golden Hill Paugussett’s first claim and the Mohawk claim, with very urban and very rural areas that are outside of the projected estimates and have been noted in the discussion above.
Ultimately, we can see that practical cost of claim does not appear to be predictive of outcomes on its own. It is expected to work in tandem with other factors to create a situation where the claim is seen as more or less affordable by those in power.

### 6.4 Group Cohesion:

Indian tribes vary greatly in social cohesion. Many are hopelessly fragmented due to the political pressures that they have encountered for decades and even centuries. We would expect those tribes that have managed to retain social cohesion to be better able to present a united front in making their claims. It might be expected that any tribe that has managed to put forth the effort to initiate a claim or meet with negotiators is able to generate a substantial amount of cohesion in leadership and/or goals. Still, the political context surrounding American Indian tribes, as discussed in Chapter 5, lead to high levels of group fractionalization. So even if the tribe has managed to hold together at the start of or during a portion of a claim, there are many that are vulnerable to disintegration. Those claimant groups that are able to maintain their cohesion are expected to see far more success in reaching land transfers than those that are fragmented or challenged.
I have developed a method to measure group cohesion based on the number of groups that argue they are the rightful claimants to the territory (and rightful recipients of any transfers). A group may be split into internal factions and/or have external challengers. The groups are scored based on the number of claimants, so a fully unified tribe is a 1, while a tribe that has two internal factions is a 2. As an example, the Cayuga are scored as a three, with the New York tribal members split between support of two leaders and an external challenge to their claims from the Seneca-Cayuga of Oklahoma. The data to establish group cohesion have come from a range of sources, including congressional hearings, tribal accounts, academic work, and media reports. While Appendix B and the case studies note the numbers of contesting groups, the results are easiest to see in binary form, and are presented here as tribes that are either unified or lack cohesion.

### Table 6.15: Group Cohesion and Land Claims Outcomes

<table>
<thead>
<tr>
<th>Non cohesive: more than one group claiming to be proper recipients of potential settlement</th>
<th>Won Land</th>
<th>No Land Transferred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mohegan</td>
<td>Oneida (all)</td>
<td></td>
</tr>
<tr>
<td>Seneca 1</td>
<td>Sioux</td>
<td></td>
</tr>
<tr>
<td>Cayuga</td>
<td>Seneca 2</td>
<td></td>
</tr>
<tr>
<td>Golden Hill Paugussett (all)</td>
<td>Schaghticoke (all)</td>
<td></td>
</tr>
<tr>
<td>Schaghticoke (all)</td>
<td>Mohawk (pre-2003)</td>
<td></td>
</tr>
<tr>
<td>Mohawk (pre-2003)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Unified claimant group</th>
<th>Narragansett</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mashantucket Pequot</td>
<td>Mohawk (post-2003)</td>
</tr>
<tr>
<td>Alaska Natives</td>
<td></td>
</tr>
<tr>
<td>Penobscot and Passamaquoddy</td>
<td></td>
</tr>
</tbody>
</table>

This table shows a strong relationship between group cohesion and settlement outcome. Tribes that cannot maintain a unified front in claims-making are unlikely to reach settlement; it is worth noting that the two that did had extremely low cost claims. A major reason for the need for cohesion is that fragmented tribes cannot sustain the stressful, lengthy, and expensive process of

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7 In 2003, new leadership among the three claimants in the Mohawk case (the Canadian Mohawk Council of Akwesasne, the St. Regis Tribal Council, and the Mohawk National Council) met and formed a new alliance to pursue land claims as a unified group. This new position led to a proposed agreement between the tribe and New York State that was passed by the State Assembly in 2005 (US Congress House 2005). The change in legal environment in New York State after the summer of 2005 has left the settlement in legal limbo.
claims making. Additionally, negotiations disintegrate (or do not happen) when state or federal officials are not sure if they are negotiating with the correct party or if their transfer will fully extinguish the claim. Further, when a tribe appears to be strong and very committed to their claim, there may be concerns over the potential for ongoing costs and resources fighting a legal battle or dealing with the claim. It may be seen as a more efficient use of resources to negotiate early.

Two groups with low cohesion were awarded land. The Seneca claim is unique in many ways (as well as being extremely low cost in terms of both negotiation and final award) and will be discussed both in the conclusion of this chapter and in depth in Chapter 7. The Mohegan's outcome is harder to explain, but it may be that the division within the group was not well known or understood by public officials (and the dominant faction now appears to deny that any legitimate challenger ever existed). The Mohawk, the only unified group that did not reach a transfer, were hindered in their progress because it was not until 2003 that the three different Mohawk claimants were able to agree on objectives and work together to negotiate a land claims agreement. In 2005, however, the legal environment shifted strongly against Mohawk claims, halting their settlement plans immediately.

McCulloch and Wilkins (1995) have argued that there may be a relationship between group cohesion and the dominant population’s perception of the tribe’s identity. Strong group leadership and agreement among members allows the tribe to better disseminate positive images and information. Borrowing data from the next section, the chart below confirms that there may be some correlation between positive associations and group cohesion, although with the limited number of cases available the relationship does not appear particularly strong.
Table 6.16: Group Cohesion and Perceptions of Identity

<table>
<thead>
<tr>
<th>Dominant Population Stereotypes of Tribal Identity</th>
<th>Strong Group Cohesion</th>
<th>Poor Group Cohesion</th>
</tr>
</thead>
<tbody>
<tr>
<td>More Positive images</td>
<td>Alaskan Natives</td>
<td>Mohegan</td>
</tr>
<tr>
<td></td>
<td>Narragansett</td>
<td></td>
</tr>
<tr>
<td>Balanced or Unclear</td>
<td>Penobscot and</td>
<td>Sioux</td>
</tr>
<tr>
<td></td>
<td>Passamaquoddy</td>
<td>Mohawk</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Seneca</td>
</tr>
<tr>
<td>More Negative Images</td>
<td>Mashantucket Pequot</td>
<td>Cayuga</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Golden Hill Paugussett</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Schaghticoke</td>
</tr>
</tbody>
</table>

Group cohesion may have multiple effects, therefore. Not only does it directly influence the group’s ability to agree on goals and make it through the intense and expensive process of claims making and negotiating a settlement, cohesion may have indirect effects (even if weak) and influence the way that the group is perceived by the dominant group.

6.5 Perceptions of Identity:

The social context of American Indian claims is also expected to be significant in understanding outcomes. Perceptions of the strong are considered a driving force in understanding the identification of some groups as more deserving than others, particularly when the “target” of policy in question has little power. In the case of American Indian claims for land transfers, which are of very high local salience and very low national salience, I expect that in areas where land claims are active the dominant population has strong views of the claimant group. This is thought to be driving force in understanding the decisions of elected officials (who are in turn expected to be responsive to their electorate). As has been noted, with little overarching knowledge, policy commitments, or preferences, Congress as a whole will generally follow the lead of local representatives and the state delegation.
We predicted that the claimant groups that are seen as deserving of rewards and non-threatening to the position of the dominant population are the most likely to see transfers in their favor. In contrast, claimant groups viewed as threatening or somehow undeserving are less likely to gain concessions. Chapter 5 laid out a group of common stereotypes, sorted based on where they would fall to have positive or negative consequences for land transfer. These are not exclusive categories. Claimant groups can easily be associated with more than one or even many different stereotypes.

I have measured these stereotypes through extensive content analysis from legal documents, legislative debate, testimony, and evidence, public statements and press releases from tribal leaders and local, state, and federal officials, national, regional, and local newspaper articles, existing academic work on each tribe, and interviews (when possible). They categories represent the stereotypes that the dominant population consistently associates with the tribe or claimant group. These categories are often not accurate in what they say about the real identity of the group, nor are they those that tribal members or leaders would agree are legitimate portrayals of the tribe. They are, however, reflections of how the group is perceived by the dominant public. There is a general agreement (even among tribal members and leaders) that these stereotypes are powerful even if they are incorrect. It is the perception of the “target population” held by the dominant population and by political decision-makers that is most important in understanding the actions of elected officials, not the realities of the perceptions.

This variable is measured by claimant group; while some tribes have more than one claim the image of the group remains the same. The criterion for the association of a group with a particular stereotype is that it is consistently applied by the range of sources available. It may not be referred to in every newspaper article on the group or claim, for example, but it must appear repeatedly and over

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8 For the Alaskan Natives, the author was unable to access local or state papers. The early timing of the claims and settlement put the period of interest before electronic access is available. Travel to access physical archives was prohibitively expensive. Understandings of local opinion in this case therefore rely heavily on the seminal works of Mitchell (1997, 2001) which extensively document the land claims process and settlement.
a period of time. No specific threshold number has been set because of the disparities in available information. This is due to the fact that some claims were not given much attention, while others have been of widespread interest and subject to lengthy public debate. Records of the sources used and calculations of data are available on request from the author. For each claim, there are two key periods of interest. Sources have been inspected from prior to the claim itself as well as the duration of the claim. This was of particular interest to determine if the context of the claim altered perceptions of the group. In many cases, it did not.

The only exception to these relatively static stereotypes is an increase in dominant population perceptions of American Indians as greedy since the mid 1990s. This is the period where Indian gaming (institutionalized with the passage of the 1988 Indian Gaming Regulatory Act) became a part of the way that American Indians (and their claims) are seen by the dominant population. As noted earlier, this is inaccurate. Only about 40% of tribes engage in gaming; many forcibly reject it as an option. Furthermore, for the vast majority of tribes across the nation that participate in gaming, the profits are minimal at best. Whether accurate or not, this perception of tribes as “greedy” and the perception of economic threat offered by gaming successes may affect the outcomes of the several ongoing claims, despite the fact that most originated long before gaming was a consideration.
Table 6.17 Claimant Groups, Claim Status and Gaming Status

<table>
<thead>
<tr>
<th>Group</th>
<th>Land claim status</th>
<th>Group engagement in any gaming</th>
<th>Estimation of revenues from gaming</th>
<th>Group pursuit of gaming rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaskan Natives</td>
<td>Settled</td>
<td>Yes</td>
<td>Low</td>
<td></td>
</tr>
<tr>
<td>Mashantucket Pequot</td>
<td>Settled</td>
<td>Yes</td>
<td>Very high</td>
<td></td>
</tr>
<tr>
<td>Mohegan</td>
<td>Settled</td>
<td>Yes</td>
<td>Very high</td>
<td></td>
</tr>
<tr>
<td>Narragansett</td>
<td>Settled</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Penobscot and Passamaquoddy</td>
<td>Settled</td>
<td>Yes</td>
<td>Low</td>
<td></td>
</tr>
<tr>
<td>Seneca (Cuba Lake)</td>
<td>Settled</td>
<td>Yes</td>
<td>High</td>
<td></td>
</tr>
<tr>
<td>Golden Hill Paugusset</td>
<td>Ongoing</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Mohawk</td>
<td>Ongoing</td>
<td>Yes</td>
<td>Low</td>
<td>Yes</td>
</tr>
<tr>
<td>Schaghticoke</td>
<td>Ongoing</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Sioux</td>
<td>Ongoing</td>
<td>Yes</td>
<td>Low</td>
<td></td>
</tr>
<tr>
<td>Cayuga</td>
<td>Denied 2005, reopened 2008</td>
<td>No</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Oneida</td>
<td>Denied</td>
<td>Yes</td>
<td>High</td>
<td></td>
</tr>
<tr>
<td>Seneca (Grand Island)</td>
<td>Denied</td>
<td>Yes</td>
<td>High</td>
<td></td>
</tr>
</tbody>
</table>

As the table above indicates, there does appear to be a common interest in gaming among those tribes who have or are pursuing land claims. What this information does not reveal, however, is that the timing of claims means that most were formally initiated long before the passage of the Indian Gaming Regulatory Act. Further, the dates at which this research officially “starts” claims reflects a formal recognition by the government or the courts and does not record the time when the tribe may have been asserting land claims without any reception from government actors.
Gaming therefore may not have been a motivation behind most land claims, but it is now frequently part of land use. Gaming has also become inextricably involved in the way that the dominant population now perceives claims, resulting in the increase of perceptions of tribes as greedy. This topic will be the subject of future research.

For the other categories of stereotypes, however, there appears to be relatively little change over time. Stereotypes associated with different tribes are both distinct (even in central New York, subject to multiple and overlapping claims, the tribes are portrayed very differently) and relatively unchanging over the course of claims making. This was a surprising finding, as other research has advocated the idea that stereotypes of American Indians are subject to an ongoing evolution (Corntassel and Witmer 2008). Just as the role of gaming begs for more research, so does this discrepancy with other work.

The table and chart below offer a view of how groups have “scored” in the different categories, including a ratio of “positive” and “negative” stereotypes (recall that these denote the
anticipated effects on the transfer of land, not a normative judgement). The winners tend to share associations of “connections to land” and “noble savage,” while those who have not won transfers are commonly associated with stereotypes of “dangerous” and “lazy or greedy.” The chart provides a more visual overview of the ration of positive and negative stereotypes, and reveals that those who win land are generally those associated with the stereotypes labeled “positive” for being non-threatening and deserving and have fewer associations with threatening stereotypes.

Table 6.18: Perceptions/ Stereotypes of Identity

<table>
<thead>
<tr>
<th></th>
<th>Primitive/ Childlike</th>
<th>Connected to Land</th>
<th>Noble Savage</th>
<th>“False” Indian</th>
<th>Lazy/ Greedy</th>
<th>Lawless/ Dangerous</th>
<th>“Score” (P-N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>WON LAND</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska Natives</td>
<td>X</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td>3-0</td>
</tr>
<tr>
<td>Narragansett</td>
<td></td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td>2-1</td>
</tr>
<tr>
<td>Mashantucket Pequot</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>0-1</td>
</tr>
<tr>
<td>Penobscot and Passamaquoddy</td>
<td>x</td>
<td>X</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>3-3</td>
</tr>
<tr>
<td>Mohegan</td>
<td></td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td>2-0</td>
</tr>
<tr>
<td>Seneca^</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td>x</td>
<td>2-2</td>
</tr>
<tr>
<td>DID NOT WIN LAND</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sioux</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>2-2</td>
</tr>
<tr>
<td>Oneida</td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>2-2</td>
</tr>
<tr>
<td>Mohawk</td>
<td></td>
<td>x</td>
<td>x</td>
<td></td>
<td>X</td>
<td></td>
<td>2-2</td>
</tr>
<tr>
<td>Cayuga</td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td>x</td>
<td></td>
<td>1-2</td>
</tr>
<tr>
<td>Seneca</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>2-2</td>
</tr>
<tr>
<td>Paugussett</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>1-3</td>
</tr>
<tr>
<td>Schaghticoke</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>2-3</td>
</tr>
</tbody>
</table>

Bold, upper case X indicates a very strong association with a particular image

^9 Because one of the Seneca claims was settled and the other denied they have been listed twice, once with groups that won land and once with groups that did not.
These findings support the conclusion that dominant perceptions of the claimant group are related to outcomes in American Indian land claims and transfers. The chart offers a good visual approximation of the fact that those groups who have more associations with positive stereotypes are more likely to see land transfers in their favor. The Mashantucket Pequot stand out as distinct from this pattern. This may be because the tribe had lost most of its connections to the area before the assertion of their claims and the dominant population therefore had little awareness and few longstanding associations with the group. Dominant perceptions of tribes as “false” due to questions over their cultural or racial authenticity were primarily found in groups in New England, where tribes have intermarried with African American populations for centuries.

This analysis does indicate that groups seen as more deserving and non-threatening are more likely to be viewed as worthy recipients of resources by the dominant population and elected elites. Lawmakers are hesitant to award transfers to tribes with negative public images, as the dominant population (and the primary electorate) will not be supportive.
6.6 Justification for Claim

The second dimension expected to be important in understanding the social context of American Indian land claims were the justifications of the claim itself. Just as the perception of the group is relevant to calculations of the affordability of concessions, so is the way that the claim itself is justified. The logic of the argument is similar to that offered above. If the claim is viewed as morally legitimate and acceptable to the dominant population, the dominant population and policy makers will be far more supportive of a transfer than if it is seen as contradictory or even confrontational to dominant values and ideas. Those in power are not only concerned about the perceptions of the target population, but also with the normative implications- and potential obligations- related to the settlement of the claim itself.

I have used similar techniques to those described above to gather data on the justification of claims. Careful attention was paid to the way that the tribe has justified and grounded their claim in any law suits, public statements on the claim, petitions to officials, or in hearings related to the negotiation of claims. At the same time, I also noted the way that the justifications are portrayed in the dominant media and public statements of elites. When there are enough data from both groups of sources to offer a meaningful comparison, there does not seem to be a substantial difference between the two sources. The timing in this case is limited to the duration of the claim for land. While several tribes brought multiple claims, there does not appear to be differentiation between different claims in the way that they are justified. For this reason, the cases are again grouped by claimant group rather than specific claim.

The data for the justification of claims are presented in the same format as for the perception of identity. Again, the categories are labeled as “positive” and “negative” because of their anticipated relationship with the legitimacy and moral authority of the position of the strong. Equally, these designations show the relationship with expected claim outcomes. All of the claims are based in language of justice and fairness, an appeal which is noted in the previous chapter as
having both positive and negative connotations for settlement. The cases in the group that won land (with the exception of the Seneca) all involved appeals for land for the purpose of economic self-sufficiency and cultural survival.

<table>
<thead>
<tr>
<th>Table 6.19: Justification for Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Concerns with Environment P</strong></td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td><strong>WON LAND</strong></td>
</tr>
<tr>
<td>Alaska Natives</td>
</tr>
<tr>
<td>Narragansett</td>
</tr>
<tr>
<td>Mashantucket Pequot</td>
</tr>
<tr>
<td>Penobscot and Passamaquoddy</td>
</tr>
<tr>
<td>Mohegan</td>
</tr>
<tr>
<td>Seneca</td>
</tr>
<tr>
<td><strong>DID NOT WIN LAND</strong></td>
</tr>
<tr>
<td>Sioux</td>
</tr>
<tr>
<td>Oneida</td>
</tr>
<tr>
<td>Mohawk</td>
</tr>
<tr>
<td>Cayuga</td>
</tr>
<tr>
<td>Seneca</td>
</tr>
<tr>
<td>Paugussett</td>
</tr>
<tr>
<td>Schaghticoke</td>
</tr>
</tbody>
</table>

Bold, upper case **X** indicates a very strong association with a particular image.
We again see support for the relationship between “positive” justifications and land transfers. As in the other facilitating factors, the evidence shows the expected relationship with outcomes. The logic behind this is similar to that presented above: both the public and lawmakers are more likely to see claims based on more “positive” than “negative” justifications as amenable to mainstream values, less threatening, and more deserving of being met with special land rights and resources. Of course, it needs to be taken into consideration that some tribes and their advisors may intentionally use language in their claims to make them more amenable to elites (particularly in more recent years as media attention to land claims increases with controversies over casino development).

### 6.7 Additional Considerations

We also must consider the fact that there are other potential factors that have influenced the complex consideration and evaluation of American Indian land claims. The New York and Connecticut cases were purposefully chosen to consider the statewide political, economic and social context of claims. Two major considerations appear relevant when considering cases as a state group: the role of gaming and the role of federal recognition. In many ways these are connected: a
tribe must be federally recognized to have control over federal trust property and act with any
sovereign powers and gaming must be conducted by a federally recognized tribe on trust land.

As noted, concerns over gaming rights may be an increasingly significant factor in
understanding land claims outcomes. For the earlier claims and settlements in the cases studied here,
this has not been an issue. Particularly after the mid 1990s, however, gaming has come increasingly to
the forefront of public awareness of American Indians and their claims. One scholar noted in 1998
that gaming has affected “about five percent of American Indian people with newfound wealth.
Ninety-five percent of American Indians are only affected by how gaming has changed the public
perception of their economic situation” (Stein 1998, 89). Spilde names the phenomenon “Rich
Indian Racism” (Spilde 2000). She discusses the disparity between tribal members’ perceptions of
change from gaming (such as better employment and the ability to make a living on the reservation)
and non-Indian members of the surrounding community (that all Indians are now rich). Further, the
perception seems to abound that all Indians are now wealthy, even though the majority of tribes do
not have gaming and the majority of those who do are not drawing in large revenues. This idea of
universal wealth is used to discredit the need for any more special rights or transfers to Indian tribes,
and increases images of American Indians as greedy. It is also directly related to perceptions of
threat and dominance- as (some) American Indians reach economic success it may be seen as
threatening the economic dominance of the strong.

Federal recognition has become an overarching concern when dealing with indigenous
claims to resources and sovereignty rights. Since the creation of the Office of Federal
Acknowledgement in 1978, Congress and the executive have been increasingly reluctant to convey
recognition themselves. Instead, tribes are pressed to pursue recognition through the administrative
path offered by the OFA. This has been a challenge for tribes both because of the strict
requirements (some of which appear to disadvantage eastern tribes) as well as the incredibly long and
complex process. The chart below shows that tribes with recognition have failed to meet their goals,
just as tribes without recognition at the start of their claims have been able to gain transfers. What
should be noted is that the legislative recognition of the Mashantucket Pequot and Penobscot and Passamaquoddy (settled in 1983 and 1980 respectively) were the last; the political environment appears to have shifted against tribes without federal recognition. The revocation of the Schaghticoke’s recognition in 2004 (discussed in Chapter 8) is an extreme case. Prior recognition is certainly not a guarantee of supportive outcomes, but it may become more of a necessary step prior to claims making.

Table 6.20: Settlement Outcomes and Federal Recognition

<table>
<thead>
<tr>
<th>Recognized prior to land claim</th>
<th>Recognized via legislation</th>
<th>Recognized via administrative process</th>
<th>Not recognized</th>
</tr>
</thead>
<tbody>
<tr>
<td>Won transfer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Seneca (1)</td>
<td>Mashantucket Pequot</td>
<td>Narragansett</td>
<td>Schaghticoke</td>
</tr>
<tr>
<td>Alaskan Natives</td>
<td>Penobscot and Passamaquoddy</td>
<td>Mohegan</td>
<td>Golden Hill</td>
</tr>
<tr>
<td>Did not win transfer</td>
<td></td>
<td></td>
<td>Paugussett</td>
</tr>
<tr>
<td>Oneida</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sioux</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cayuga</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Seneca (2)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mohawk</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The role of recognition is so significant because it indicates the extension of particular obligations of the state toward indigenous peoples. In recognizing a tribe and establishing a federal relationship, the government extends the population to which it must offer concession. It may also be related to normative trends that are now recognizing the economic threat of American Indians. As a national body, they may be seen as more threatening and less deserving of group rights or other concessions from the strong. This would certainly change the calculations of elites in terms of the affordability of extending recognition to additional groups.

6.8 Conclusions

The analysis presented here supports the expectations developed in Chapter 5. Legal support for a claim conveys normative recognition, which is a necessary prompt to get a claim considered by the government. It remains far from sufficient, however. The four facilitating factors
of cost, cohesion, identity, and justification interact to determine the affordability of offering concessions (or settlements) in response to those claims.

The chart at the end of Chapter 5 can be seen as an array of positive and negative facilitating factors in determining this affordability. High practical costs, low cohesion, negative perceptions of identity, and negative understandings of justifications for the claim are all negative factors for the transfer of land. Conversely, low costs, high cohesion, positive perceptions of identity, and positive justifications for the claim would all make it more affordable for legislators to offer transfers to the American Indian tribe. It is expected that when there are at least three favorable factors, transfers are possible. In contrast, if two or more factors weigh negatively on the case, it is unlikely to see a transfer of land.

The chart below compares the predictions of Chapter 5 with the actual outcomes of the cases. This chart shows that the hypotheses developed here do provide reasonable predictions for land claims settlements. It also shows the range of factors involved in understanding outcomes. The complexity of each case and the way that the variables interact are discussed in the detailed case studies that follow in Chapters 7 and 8.
There are two cases that were considered unlikely to reach settlement that did so. The Seneca’s claim to Cuba Lake (denoted as Seneca 1), reached settlement despite poor indicators in terms of group cohesion, justification of claim, and perceptions of identity, was unusual in many ways. The 51 acres in question had been seized in 1858 by the state for a canal project that never

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**Table 6.21: Actual and Expected Outcomes**

(arranged by expected likelihood of transfer)

<table>
<thead>
<tr>
<th>Cost</th>
<th>Cohesion</th>
<th>Identity</th>
<th>Justification</th>
<th>Expectation of Transfer</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>High</td>
<td>Positive</td>
<td>Positive</td>
<td>Very likely</td>
<td>Narragansett</td>
</tr>
<tr>
<td>Low</td>
<td>High</td>
<td>Positive</td>
<td>Negative</td>
<td>Very likely</td>
<td>Mashantucket Pequot</td>
</tr>
<tr>
<td>Low</td>
<td>High</td>
<td>Negative</td>
<td>Positive</td>
<td>Very likely</td>
<td>Pequot</td>
</tr>
<tr>
<td>Low</td>
<td>Low</td>
<td>Positive</td>
<td>Positive</td>
<td>Possible</td>
<td>Alaskan Natives</td>
</tr>
<tr>
<td>Low</td>
<td>Low</td>
<td>Positive</td>
<td>Positive</td>
<td>Possible</td>
<td>Mohegan</td>
</tr>
<tr>
<td>High</td>
<td>High</td>
<td>Positive</td>
<td>Positive</td>
<td>Likely</td>
<td>Penobscot &amp; Passamaquoddy</td>
</tr>
<tr>
<td>High</td>
<td>High</td>
<td>Negative</td>
<td>Positive</td>
<td>Unlikely</td>
<td>Golden Hill Paugussett</td>
</tr>
<tr>
<td>High</td>
<td>Low</td>
<td>Positive</td>
<td>Positive</td>
<td>Unlikely</td>
<td>Schaghticoke Mohawk</td>
</tr>
<tr>
<td>Low</td>
<td>High</td>
<td>Negative</td>
<td>Negative</td>
<td>Unlikely</td>
<td>Seneca (1)</td>
</tr>
<tr>
<td>Low</td>
<td>Low</td>
<td>Positive</td>
<td>Negative</td>
<td>Unlikely</td>
<td>Sioux Oneida Cayuga</td>
</tr>
<tr>
<td>High</td>
<td>Low</td>
<td>Negative</td>
<td>Negative</td>
<td>Very unlikely</td>
<td>Seneca (2)</td>
</tr>
</tbody>
</table>

**Bold** type in the Expectations column indicates where transfers are considered likely or possible. **Bold** type in the Cases column indicates where transfers actually happened.

There were several groups that had “indeterminate” ratios for the identity or justification variable (i.e. 2 positive stereotypes and 2 negative stereotypes). These are treated here as negative values.
materialized. The land never left state ownership, and the few residences on the acreage were leased by the state. The terms of negotiation were quickly established by tribal, federal, and state parties, and it was agreed that no legislative approval was necessary. This left the settlement largely out of the public eye and away from scrutiny (Coffey 2006). The closed-door nature of the Cuba Lake Settlement, without legislative involvement, meant that social perceptions of the tribe and the claim were not an issue. In addition, tribal representatives were quick to come to agreement on what was demanded despite disagreements elsewhere, an outcome made easier by the particularly clear history of the land in question. This made it a very affordable claim for the strong to offer.

The Penobscot and Passamaquoddy claim and settlement were neither small nor quiet, however. The initial claim to 12 million acres was ultimately settled with a transfer of 300,000 acres and $81.5 dollars. The land transferred came out from the properties of timber and paper companies and a few families with large landholdings in the far northern part of the state. The case is considered unlikely because of its placement in the “negative” perceptions of identity category. The Penobscot and Passamaquoddy, while two separate tribes, appear to be similar in terms of the public assessment of their identity, and are measured here as one group. This is the only claimant group that is associated with all of the categories of identity. In other words, the evidence shows consistent associations across the range of possible stereotypes. Because of this, the research labels their “indeterminate” status as negative. However, the single most dominant image is one of tribes that are intensely connected to the land- physically, spiritually, culturally and economically- which is expected to be positive for land claims outcomes. Settlement therefore may have been more amenable to the dominant population than the measure of deservingness indicates.

The data presented in this chapter show that it is possible to predict the general outcomes of land claims by understanding the practical and normative contexts of the claim. Normative support for the rights of the weak is necessary for their claims to be considered. In these cases, support has been offered through judicial decisions. While no single facilitating factor is necessary or sufficient in determining the affordability of claims, the combination of three or more positive factors is enough
to encourage elites to settle claims in favor of the weak. The lone exception above is the Mohawk case, which has been discussed above as unique. With only a short period time when legal support and a cohesive group aligned, the Mohawk were near reaching a settlement agreement when their case was called into question by a dramatic shift in the legal environment.

The development of the expected causal factors and analysis of the data presented in Chapter 5 and Chapter 6 are tailored to the study of American Indian land claims. They remain relevant to understanding indigenous claims in a broader spectrum as well as the claims of the weak around the world. For groups with little or no power to pressure the strong practically, normative changes that support the rights of the weak are necessary. Further, when the claims of the weak are seen as affordable by those in power and concessions will not threaten their own dominance, the strong may be willing to extend access to rights or resources to the weak.

These arguments are geared toward understanding the dynamics of victories of the weak in western democracies. In a country without concern for the rule of law or where decision makers have little connection to the dominant population, these theories are unlikely to carry much purchase. In the western world, however, the concepts and expectations presented here may well prove to be useful in predicting or understanding outcomes for the claims of small, politically weak groups.
7. The Weak as Winners

The next two chapters offer detailed narrative case studies of each of the claims cases. They are divided according to the claimants who have won the return of land and those who have not. One tribe, the Seneca in New York, have had one claim denied in the courts and one end in the return of claimed land; they are included in the “winners” category with a discussion of why the other claim failed. As anticipated and explained in Chapter 6, all of those claimants who were awarded land were bolstered by legal support, which does appear to be a necessary condition for settlement. Other than that similarity, there is a wide range of variation in the case histories and across the given causal factors. The narratives illustrate how the combinations of facilitating conditions interact. Those with at least two “positive” rankings are most likely to see success; even those with very high costs (Alaska and Maine) can be settled if the social contexts, group cohesion, and anticipated resources lost by not settling push legislators to award land and end the claim.

A major contribution of this research is the compilation and comparison of these histories. While a handful of American Indian land claims have generated media and/or academic attention and have been studied and documented (the Alaskan Natives, the Sioux, and the Pequot claims have all been the subject of multiple books, for example), others are little known outside of their region and have not been covered by publicly available work (such as the Schaghticoke). Finally, several claims in New York were studied during the proliferation of land claims in the 1970s and 1980s, but have not been the subject of research since then, despite dramatic changes in their political standing. Not only does this work offer the first time these claims are discussed and grouped together, it also represents one of the first attempts to set up the trajectory of individual land claims in a comparable manner.
7.1 Alaskan Natives:

The Alaskan Native Claims Settlement Act (ANSCA) of 1971 represents the largest land claim settlement ever reached in the United States. The agreement gave Alaskan Natives control over a mixture of surface and subsurface rights to 44 million acres and nearly a billion dollars in compensation. It also required the reorganization of native political structures into native corporations, a requirement that has not been repeated and which continues to have repercussions for the administration of Alaskan Natives’ lands. The Alaskan Natives had several strengths that other groups did not have advantage of (relatively large size, experience in state government, and the ability to stop development on claimed land), which helped encourage legislators to reach a settlement.

7.1.1 History of Acquisition

Rather than English, French, or Spanish colonial legacies, it was Russians who first established contact with Alaskan natives, beginning with Vitas Bering’s “discovery” of Alaska in 1741. The Russians were mainly interested in the area for furs and mineral potential and had very few settlements. They came into contact primarily with the Aleuts and other coastal dwellers, ignoring those further north and inland, such as the Athabascans and Eskimo (Korsmo 1994). The 1867 Treaty of Cession sold Alaska to the United States and referred to three groups: Russian subjects who chose to remain Russian and had three years to return; Russian subjects who chose to remain in Alaska and would enjoy rights and immunities of US citizenship; and finally the “uncivilized” tribes who would be subject to the laws of the United States. The rights of these “uncivilized” tribes remained unclear, and there was no discussion of the rights to land title. The

1 Unlike the other land claims cases to be considered where the group pressing claims is identified by tribal name, the Alaskan Natives case comprises a group of all of the indigenous peoples of Alaska. “Alaskan Native” commonly refers to Eskimos, American Indians, and Aleuts (Mitchell 1997, 2; Korsmo 1994). In the same way that referring to “American Indians” as a group can be problematic, “Alaskan Natives” carries the same potential of glossing over the differences within those referred to. The federal historical experience of all Alaska Natives is, however, far more similar than the varied tribal relationships developed with the federal government in the continental 48 states.
indigenous population was uninvolved in and generally unaware of the transfer, so they had little opportunity to question these oversights.

After the sale, there was very limited interaction between natives and the American government for two decades. The only real government presence was scattered military outposts. Federal officials saw little need to make treaties or formal arrangements with the native population, as there were no hostilities and extremely limited contact. The 1884 Organic Act ended military occupation of Alaska and made it a customs district governed by the federal government. It states that the “Indians … shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them…” (Korsmo 1994; Parker 1989). The Organic Act (and later Statehood Act) specifically provided for Congress to settle transfers of these rights (Parker 1989). The second Organic Act in 1912 made Alaska into a federal territory. During this transition the rights of the natives based on “use and occupation” were never clearly defined. The sovereign status of Alaskan Natives remained unclear, as the indigenous population still did not agree to any of the transitions.

The federal government did not include Alaskan Natives in the development of the Organic Acts because of the idea that the population was not politically savvy enough to understand the proceedings. From the outset of contact with Americans, Native Alaskans had been characterized as childlike and inept at handling the realities of western lifestyles or politics. An 1880 report notes of the Eskimos that:

The hunters are kind-hearted, good-natured, and very improvident. After they have been successful, they spend all their money, take to drinking, and remain at home until they can no longer get credit… they will not listen to good advice, so that there is much suffering in Winter for lack of food. Capt. Bailey says they are like a family of children, and should be dealt with as such (“Alaska and Its People” 1880).

Even when Alaskan Natives became involved in the wage economy, their low pay and dependent status reinforced the dominant populations’ ideas of natives’ economic ineptness and poverty. Most of the population remained isolated away from whites, maintaining traditional lifestyles which the dominant population saw as primitive and innocent.
Unlike the continental United States, where settler numbers soon overwhelmed the decimated native population, natives in Alaska remained a large percentage of the population. Native Alaskans also maintained use of much of their native territory. The harsh geography and huge expanse of Alaska meant that much of it went unclaimed by white homesteaders, oil companies, or developers. With the exception of a few urban areas (where most of the white population was concentrated), the vast expanse of Alaska was (and remains) virtually unpopulated. The lack of conflict over land and generally good relations between Alaskan Natives and whites meant that the indigenous population was never seen as threatening.

Much of the native territory was seen as so “undesirable” that even when offered for free to homesteaders or developers the area was not settled (Zelnick 1970). Reservations were not routinely established, in part because there were so few whites and not enough demand for land to make such an effort worthwhile (Mitchell 1997, 69). At the same time, commercial fishing and cannery interests were opposed to reservations, which would clearly define boundaries and potentially restrict commercial access. Alaskan natives themselves often resisted the idea of reservations with the fear that it would limit their territory and use of the land (Korsmo 1994). Therefore, although there were three reservations prior to the Alaska Reorganization Act of 1936 and six additional reservations after, they remained remarkably few given the size of the population.

Even with their unclear legal status and characterization by politicians and the dominant population as naive innocents, Alaskan Natives became involved in territorial politics early on. The organization of the Alaskan Native Brotherhood (ANB) in 1912 offered an official start to native activism and territory wide political identity. The ANB, founded by educated natives, was formed with the intention of uniting and “uplifting” the native population (Mitchell 1997). Unlike other parts of the country, the small white population and relatively large indigenous population (particularly in the beginning of the century) gave them far greater political power. In 1920, for example, Alaskan Natives made up over 48% of the population (www.census.gov). As early as 1916, Native votes were important in determining the outcome of local and territorial elections. In
addition, Alaskan Natives had significant experience at the state government level. William Paul (a Tlingit) was the first Alaskan Native elected to territorial House of Representatives in 1924 (Mitchell 1997, 213-220). In 1959 ten Natives served in Alaska’s first state legislature, and at the time of ANSCA they controlled six out of 40 seats in the state’s House of Representatives and 2 of the 20 Senate seats (Brown 1971, Mitchell 2001). While this representation was not a federal level, it does indicate both the degree of state power and engagement of Alaska’s indigenous population. Even the limited degree of political, economic, and demographic incorporation of the Alaskan Natives stands out in marked contrast to the situation of most of the rest of the country. The numbers, political experience, and organization made them a far more powerful and experienced indigenous group than indigenous peoples elsewhere in the country.

7.1.2 The Pursuit of Land Rights

Indigenous questions and concerns over their rights to land had persisted since Alaska came under the jurisdiction of the United States in 1867. Federal agencies paid little heed to indigenous concerns and appropriated land for National forests or to grant to commercial interests and individual homesteaders. By the early 20th century there was some recognition that industrial and mineral development could be hindered by the lack of clear title to land. In 1935 Congress passed a special act to allow the Tlingit and Haida to sue the government for compensation in the Court of Claims over land that had been taken by the government to create the Tongass National Forest. A 1940 National Forest Service report estimated that the Forest contained 78 billion board feet of harvestable timber, and that indigenous possessory rights would need to be settled in order to encourage outside capital and investment (Davies 1954; Mitchell 1997, 320). In 1947 and again in 1959 the Court of Claims found that compensation was due to the Tlingit and Haida, and in 1966 the Commissioner recommended $16 million for market value of land. This amount was seen as inadequate by the indigenous claimants, but was highly significant for recognizing that native title had persisted during the transition from Russian to American rule and did not rely on government
treaties. While the Tlingit and Haida’s title was transferred through a specific treaty of cession, the decision carried the implication that indigenous peoples might have intact title rights to the remainder of Alaska.

The Tlingit and Haida case was being decided around the same time as the 1955 decision by the Supreme Court in Tee-Hit-Ton Indians v the United States. This decision found that the Organic Act did not recognize absolute ownership by Alaskan Natives, and that federal recognition was needed to create full rights (Wilkins and Lomawaima 2001, 23). This decision clearly asserted federal authority over Alaskan Natives (Getches 1985; Mitchell 1997, 358). While the decision found against the group, it also emphasized a Congressional responsibility to recognize title (Mitchell 1997).

Statehood

The Alaskan Statehood Act of 1958 reiterated the promise that the natives would be secure in rights to the lands that they used and occupied. The question of the extent of those rights, and the way that use and occupancy were defined, however, remained open. The admission of Alaska as the 49th state was part of a compromise and ongoing debate over the admission of Hawaii as a state at the same time. Both territories had relatively large indigenous populations, but Hawaii was also home to a growing population of Japanese descent (Fuchs 1995). Unlike Alaska, where whites and natives did not interact a great deal during the 19th century and there was little white interest in much of the vast territory, in Hawaii land and control were constantly in the forefront. When whites became involved as advisors to the Hawaiian monarchs in the middle of the 19th century, they put pressure on Hawaiian leaders to change the system of land management to allow for private ownership. By the end of the 19th century a European style system of land ownership had been introduced and whites controlled the majority of the islands’ land through leases or ownership (Cooper and Daws 1990).

Attempts to bring Hawaii in as a state began in the early 1900s. There was opposition at a national level because of concerns over bringing in a state that had such a large minority population. The Hawaiian Islands were home to a large and rapidly increasing Japanese population and as the
population grew so did the numbers of new Japanese-American citizens. By the 1950s approximately 40% of the population was of Japanese descent (Fuchs 1995, 234). Many whites in Hawaii opposed statehood and the self-government that it would bring because they feared the control of the Asian American minority. Native Hawaiians themselves also opposed statehood because they argued against their inclusion in the United States. This was part of the national context for elites in understanding the statehood of Alaska, because it was understood that the admission of one of the territories would set a standard for the admission of the other.

By the 1950s there was widespread support among the general American population for bringing both Hawaii and Alaska in as states. Many Southerners in Congress such as Strom Thurmond opposed the admission of Hawaii, as they had for the past decades, because of the potential for the (largely minority population) state to elect pro-civil rights Senators. There was also concern over the precedent of allowing self-government as a state to a population that had the potential for a majority minority population, and how this would reflect on the validity of ongoing segregation and white rule in the south (Fuchs 1995, 234). Southern opposition was eventually worn down through the leadership of House Speaker Sam Rayburn. As a compromise, Alaska (which was controlled by Republicans) would be admitted first, to be followed by Hawaii as two separate statehood acts (Daws 1974, Fuchs 1995). In order to get the support of the state population as well as a passing vote in Congress, the Hawaiian statehood bill did not recognize native rights to land. For Alaska, where the value of the land and demand for it was very low in the 1950s, the rights mentioned above were recognized.

The Alaska Statehood Act also agreed that the new state government could select one third of Alaskan territory, or 102.5 million acres, as state property. The state began immediately selecting lands for development, prompting concerns and petitions by the native population who argued that they were guaranteed primary rights. The Secretary of the Interior, Stewart Udall, responded to the legal and political responsibility for title issues laid out in the Statehood and Organic Act as well as the Tlingit and Haida and Tee-Hit-Ton decisions and ordered a “freeze” on land distribution in 1965.
This prohibited the Bureau of Land Management from offering any leases until Congress could settle the natives’ claims (Korsmo 1994).

Various regional groups of natives began to organize and press lawsuits asserting their rights to land against the state in 1966 and 1967. The Alaska Federation of Natives (AFN), founded in Anchorage in 1966, helped unify the regional organizations that had mobilized to deal with competition over land. The primary goal of the AFN was the settlement of native claims (Korsmo 1994; Wilkins 2007, 158). With the coordination of the AFN, native villages eventually brought claims across 340 million acres or 90% of the state, arguing that they had never ceded any land (Roberts 1970).

In January 1968 the largest deposit of oil ever discovered in the United States was found in Prudhoe Bay. The oil reserve was estimated to be larger than all those in the other 49 states combined (Zelnick 1970). The incredible amount of revenue possible prompted immediate attention from oil companies as well as the state and federal governments. The land claims and Udall’s land freeze suddenly took on much greater urgency. Congressional officials first offered a settlement of a few million acres in 1969, but native leaders refused to accept it and continued to press for a goal of 40 million acres. Elected officials, such as Senator Stevens, feared for the repercussions from their white constituents if they offered such a huge settlement (Mitchell 2001, 299).

The claims of the natives were based on ideas of justice as well as an argument for their economic needs for survival. President Johnson’s war on poverty and the passage of Civil Rights Acts “dramatically altered the nation’s perception of the legitimacy of the demands of African-Americans and other marginalized citizens for social and economic justice” (Mitchell 2001). For Alaskan Natives, stereotyped as childlike and innocent, and at a “sharp disadvantage in the competitive world,” this brought some attention to their needs to reach some level of economic security (Bigart 1968). The poverty of much of the population was given a great deal of attention:

Native needs are great. About 70 percent of them live in 200 isolated, miserably poor villages. At present, they have a per capita income of about $1,000 a year. Their average life
span is under 35 years. Infant mortality is the highest in the nation. Unemployment in most villages reaches 80 percent and even higher. (Roberts 1970).

The Native Alaskans’ claims argued that the only way populations could survive was through clear title to land and security in its use. They also argued that they needed a share in the development funds from oil and mineral exploitation to reach a goal of self-sufficiency.

Another element of claims revolved around environmental concerns. Educated native leaders, particularly the younger generations, were attuned to mainstream middle class values and environmental concerns over industrial and mineral development. A report on the July 8, 1968 hearing before President Johnson’s Public Land Law Review Commission in Fairbanks states of the native leadership’s arguments: “They say they only want to prevent the rape of the land and the pollution of the streams.” These arguments linked the health of the land, flora, fauna, and water to the health and survival of the native population (Bigart 1968).

A few road and construction projects did continue despite the requirements of the land freeze (using justifications such as right of way for road construction). A plan for a pipeline for oil drew opposition from Alaskan Natives whose traditional lands would be crossed. At the same time, environmental groups began to file suit for a study of the environmental consequences of the proposed projects. In 1970 the federal district court judge, George Hart, issued a restraining order prohibiting the Department of the Interior from issuing road construction permits crossing native lands and followed this by an injunction against the entire pipeline project.

As it became clearer that Native claims would continue to hold oil development and the pipeline project hostage, the oil companies also became advocates of reaching a settlement. Atlantic Richfield (later Arco), British Petroleum, and Humble Oil and Refining (later Exxon) pressed for a settlement so that they could move on to development (Mitchell 2001, Korsmo 1994). With mounting pressure from the oil interests, the federal government, and continued strength of the

2 Very similar descriptions of poverty among Alaskan Native communities appear in Bigart (1968), Brown (1971) and many other articles and scholarly works.
Natives, the Alaskan population began to support the idea of settlement. With support from the Alaskan delegation to Congress, the demands of the Natives were met and in 1971 both houses of Congress passed the Alaskan Native Claims Settlement Act, which called for the payment of $962.5 million and the transfer of 44 million acres in exchange for the extinguishment of claims to the rest of the state. The House voted 343-63 in support and the Senate 76-8, President Nixon signed, and the Alaskan Native leadership approved.

7.1.3 Potential Causal Factors

Legal Support:

The unique historical situation of the Alaskan Natives, their support from Secretary Udall, and their ability to tie up hugely valuable oil development all provided prompts for the federal government to act in settling their claim. No other American Indian claimant group has been in such a strong political position. Still, the claims of Alaskan natives needed the support of legal decisions to further spur legislators to action. Decisions in the Tlingit and Haida and Tee-Hit-Ton cases pressed federal responsibility to treat indigenous claims to title. The judicial decision to support a federal injunction against the pipeline development also recognized that title claims needed to be settled before development could proceed, which may have been the final straw in pushing the federal Congress to meet the demands of the indigenous population.

Cost of Settlement:

The benefits of settlement and the potential ongoing costs for prolonged claims pushed legislators to award Alaskan Natives a large settlement. While the value of a 44 million acre settlement, settlement funds, and the rights to mineral revenues were very high, the very low overall population density of Alaska, the high proportion of indigenous, and the undesirable nature of a great deal of the frozen tundra made the transfer easier than it would have been anywhere else in the country. An important element of the pressure for rapid settlement is the effect the land claims had on potential development. The discovery of oil escalated the urgency of an agreement. Alaska, long
a poor and remote region, had the potential to harvest unimaginable amounts of oil wealth- if the
claims could be resolved and land freed for selection and development in order to start the oil
pipeline project. It was legally clear that the natives had some claim to the land and rapidly apparent
that they were not willing to be pushed aside. Without a settlement of some sort, everyone was stuck-
state officials, oil developers, Alaskan Natives, and even white residents who could not benefit from
the potential public wealth. So in this case, there were factors that ameliorated the costs for land
transfer and very clear costs for delaying settlement.

Identity:

The dominant population’s stereotypes of Alaskan natives do not appear to have evolved
much between the American acquisition of Alaska and the time of the land claims settlement.
Alaskan Natives have primarily been characterized as innocent, childlike, and unfamiliar with the
dominant culture. Many- particularly among older generations- maintained as many traditions as
possible and eschewed Western contact and lifestyles. Their connection to land was also well
established, and in many cases they still remained on their traditional territory with traditional
subsistence lifestyles. There are also dominant stereotypes of the Alaskan natives as noble savages,
the last proud holdouts of the indigenous peoples of the country (Brown 1971). Despite the fact that
Alaskan Natives were a larger portion of the population (almost 20%) than in any other state, the
dominant population never saw them as a real threat to their own social, political, or economic
dominance.

Justification for Claim:

Alaskan Natives’ claims to land argued that they were the rightful owners- to them, it was
not a question of the government granting them rights, but a question of natives granting the
government rights over territory that was never ceded. Calls for justice were common in Alaskan
claims. The indigenous spokesmen stressed that the land was integral for the cultural survival of the
native peoples of Alaska. These appeals also involved concerns about natural resources,
environmental protection and their concerns for the safety of the land. Further, spokesmen for the
claims and media reports link the justification for claims to the depressed state of the state’s native populations. The omnipresent descriptions of the poverty, health problems, poor housing conditions, unemployment (and so on) were tied into the argument that the transfer of land and sharing of oil revenues would help Alaskan Natives become economically self-sufficient.

Group Cohesion:

The Alaskan Natives had early experience with political organization and activism, which contributed to their ability to present a united front and clear and consistent goals in negotiations. The existence of the large, pan-native AFN and their ongoing activism— including trips to Washington— caught the attention of public officials. ANCSA did not specify the property that would be transferred, and instead set a period of time for negotiations over specific territories to take place. Because of this the various native groups did not have to reach agreement over the precise lands in question, facilitating their cooperation.

The claims were given more power as Congressional officials and candidates realized that there was the real possibility of natives acting as decisive, organized voting group (Mitchell 2001, 79). Alaskan Natives have had far more political influence and involvement than in any other land claims case that will be discussed. While public officials were clearly concerned with the reaction of white voters to the settlement and its negotiations, they also had a legitimate concern with holding the support of native voters and leadership. Alaskan natives constituted nearly 20% of the voters in the 1960s, a significant proportion (Bigart 1968; Mitchell 2001, 12). This situation is contrary to the very weak position of most of the indigenous peoples in the United States.

7.1.4 Current status of settlement

The Alaskan Native Claims Settlement Act was incredibly complex. It conveyed title to 44 million acres, $462 million for ceded lands, and additional funds of up to $500 million from annual royalties on mineral development. Unlike nearly all Indian land in the United States, the act granted land in fee simple (Wilkins 2007, 158). Alaskan Natives organized into 12 regional and nearly 200
village native corporations, which turned indigenous social and political groups into for-profit enterprises. All individuals with at least ¼ native blood on December 18, 1971 from these divisions were enrolled as individual shareholders (Parker 1989). Initially, shares could not be sold until 1991 and corporate owned lands were free from state and local taxation for the same period. In 1988 Congress extended the restrictions on tax and stock sale indefinitely. Native corporations continued to issue and sell stock to non-Natives (Wilkins 2007, 159).

Certainly, ANSCA conveyed a great deal of property to indigenous peoples that allowed them a measure of security. The complex arrangements as native corporations and the requirements of the act have often come under criticism, and many of the native corporations struggle to make any profits. There have also been many questions about the selection of land. Some villages were left out of consideration, as natives were allowed to choose their sum from about 100 million acres chosen by the Secretary of the Interior in 1972. Another concern is over the degree of control and self-government that may have been granted. The 1998 Supreme Court case Alaska v Native Village of Venetie Tribal Government found that the 1.8 million acres of village property was not “Indian Country” and so the village did not have the authority to tax non-native businesses (Wilkins 2007, 160). This has generated questions on the authority of villages over their territory and the status of the governments as “sovereign” indigenous entities.

7.2 Penobscot and Passamaquoddy:

The Maine case was one of the first claims based on the legal argument that state actions to reduce Indian land holdings in violation of the 1790 Trade and Intercourse Act were illegal. Prior to this case, the “previously obscure” law had been virtually forgotten (Knight 1980). The law has since become the foundation for land claims conducted on the eastern seaboard against the original

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3 These native corporations were charged with distributing the settlement funds (some of which were to be disbursed over time as part of oil revenues from state lands). Village corporations were given title rights to surface lands, while regional corporations were given some rights to subsurface lands as well. Revenues generated from any native corporation’s economic development is also distributed to share holders.
thirteen states, where treaties with states or land purchases were often conducted without the federal oversight required by the Act.

### 7.2.1 History of Acquisition

Prior to European contact, present day Maine (also known as Acadia) was home to the Wabanaki Confederacy, which joined the Micmac, Malecite, Passamaquoddy, and Penobscot Indians. Each tribe had a definable territory but migrated within their boundaries. Both the French and British had contact with the Maine Indians and, at different times, political control over the territory. Indian leaders were often unaware of the transfers, and did not understand how their land could be “given away” without their permission or even consultation (MacDougall 1994, 84). The British colonists and later Americans encroached steadily on the Indians’ territory. The pattern is similar to that of many other eastern tribes—tribal territory was rapidly lost while populations declined from conflict and disease. Despite the requirements of the Trade and Intercourse Act of 1790 requiring treaties to be made with or supervised by the federal government, in 1794 the Passamaquoddy were coerced into signing a treaty with the state of Massachusetts, ultimately ceding control of over twelve million acres. In 1796 the Penobscot signed a treaty that gave up two hundred thousand acres. By 1818, the Penobscot had ceded all remaining lands to Massachusetts with the exception of islands in the Penobscot River and four townships of six square miles each (later bought by the state of Maine in 1833) (Benedict 2000; Brodeur 1985, 78).

When Maine became a state in 1820 it assumed control of the tribes from Massachusetts and broke up most of the remaining tribal land holdings with leases to settlers (Campisi 1985, 342; O’Toole and Tureen 1971, 4). The new state “came to look upon Indians as mere recipients of charity, as enclaves of disenfranchised citizens bereft of any special status” (O’Toole and Tureen 1971, 2). Through a series of legal cases over disputed title and hunting rights, the state pressed the idea that the Passamaquoddy were no longer a tribe. In the State of Maine v Newell (1892) the court found that the tribe had lost its political organization, existence, continuity and succession of political
power, and therefore it was totally subject to the state with no sovereign powers (O’Toole and Tureen 1971, 17).

In addition to the diminishment of the legal status of American Indian tribe, state policy continued to encourage assimilation and civilization via European lifestyles, farming, and education (MacDougall 2004, 146). These measures largely failed, and the rural indigenous populations struggled to subsist with western agricultural practices. Logging was a primary means of employment for tribal members, although poor wages and discrimination kept many in poverty. In 1969, for example, the Passamaquoddy were among the poorest residents of the entire country with average annual per capita income of $400 and an unemployment rate of 75% (Benedict 2000). The Maine tribes were left without many alternatives because of the remote location of their state reservations and no access to federal services as they had never been federally recognized.

7.2.2 The Pursuit of Land Rights

The decision for the Passamaquoddy tribe to press land claims came after the return of Passamaquoddy tribal member John Stevens from the Korean War, when he encountered historic documents preserved by his elderly aunt in 1957. Upon review of the original 1794 treaty, he realized that the state reservation had originally been six thousand acres larger, and was concerned as to how the missing land had been taken (Campisi 1985, 342; Knight 1980b). The Passamaquoddy began to pursue a legal case against the state and federal governments. This was the first case to use the legal argument that the actions of the states without federal oversight violated the conditions of the 1790 Trade and Intercourse Act. At the same time as the development of their lawsuit, tribal members also began to engage in organized protest regarding the sovereignty of their territory. In 1969, 50 tribal members staged a protest on former tribal land, stopping vehicles and charging tolls for motorists passing through. State troopers intervened and the protesters quickly dispersed, but the tribe had made a public point that they were interested in asserting sovereignty over their traditional land.
In February of 1972, tribal leaders petitioned the commissioner of Indian Affairs to file a federal action on their behalf, arguing that the 1794 state treaty violated the Trade and Intercourse Acts and the federal government had a responsibility to compensate the Passamaquoddy for failing to protect their rights. Their request was initially declined because the tribe was not federally recognized. The Justice Department quickly also declined to act and the tribe went to court. The legal argument was that while Indian tribes were prevented from bringing a suit against the state in federal court, the federal government could act on behalf of the tribe as part of its trust responsibilities (Campisi 1985, 343). The Penobscot were added to the suit later, bringing the total land claimed close to two thirds of the entire state of Maine. The claim at this point encompassed 12 million acres of land, one billion dollars in trespass fees, and potentially affected title for thousands of landowners (Benedict 2000; Knight 1980a).

In June of 1972, Judge Edward Gignoux ordered the Justice Department to file a protective land claim suit against the State of Maine on behalf of the tribe, rejecting the argument that the government had no trust relationship with the tribe. Gignoux said that “without the protective suit the Tribe would suffer irreparable injury if the courts decide, after the statue of limitations on land claims cases expires, that the Passamaquoddies are entitled to federal protection.” (“Judge Backs Indians in Maine Suit” 1972). Gignoux followed up with a January 20, 1975 ruling in which he argued that the Trade and Intercourse Act did apply broadly and covered the Maine Indians. The federal government had a trust responsibility toward the tribes even without formal federal recognition. He ordered the Justice Department to file a lawsuit on the Indians’ behalf, which constituted two $150 million suits against the state (Benedict 2000, Brodeur 1985).

Despite the breadth and implications of the decision, it generated little concern among the dominant population. There was no precedent of land claims settlements with land on the east coast, particularly for unrecognized tribes. Further, the remote location and poor socioeconomic status of Maine’s indigenous population made them an “invisible minority.” As will be seen again in New England, the dominant population often held reductionist stereotypes of Indians as largely romantic
historical figures without any real current presence on the east coast. This changed in 1976 when a law firm specializing in municipal bonds questioned ability of town in disputed area to raise taxes because of the Gignoux decisions (Benedict 2000, Brodeur 1985). This was followed by a January 1977 report prepared by the Interior Department for the Justice Department (as required by the legal ruling). The report recommended that eviction actions be filed on behalf of the Passamaquoddy and Penobscot tribes against the 350,000 residents estimated to be living in the twenty five and a half million acres claimed as well as the large paper and timber companies possessing land in the claim area (Brodeur 1985). These developments (and media attention to them) made it clear to the state government and landowners that the land claim was far more serious than they had believed.

In 1977, in response to the Justice Department report and concerns from Maine officials who wanted the claims resolved as quickly as possible, President Carter appointed a Special Representative, William Gunter, to investigate the case. Gunter and the Justice Department argued that a congressional rather than judicial solution was the proper way to resolve the claim because the case represented the “most complex litigation ever brought in the Federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties.” (Kifner 1977a; Brodeur 1985, 101). A White House Work Group was established to begin negotiations with tribal representatives in late 1977. The Penobscot and Passamaquoddy representatives argued that not only were they due land transfers and compensation for the illegal actions of the state government (and for the failures of the federal government), but that they needed a large land base in order to become economically able and self-sufficient.

The initial plan called for a transfer of 300,000 acres and was met with reactions in Maine that “ranged from expressions of outrage to calls for violence.” (Brodeur 1985, 107). The state’s Congressional delegation was split on whether or not to support the proposed settlement- some thought it better to settle and preclude further potential problems, while others followed the lead of their white constituents and argued that the amount of land was too large. However, further legal support for settlement came with another court ruling in 1979, this time from the Supreme Court on
the State of Maine vs. Dana case. Two tribal members, Allen Sockabasin and Albert Dana were charged with arson for setting fire to a school. The accused argued that because the crime was committed on tribal land, they were subject to federal as opposed to state law. The court ruled in their favor, supporting the idea that the Passamaquoddy tribe was a sovereign entity in the federal sense (Campisi 1985, 345; MacDougall 2004, “Indian Claims Bolstered in Maine.” 1979).

This additional legal support for tribal sovereignty helped push public sentiment and elected officials towards reaching an agreement because of a fear that if the claim was left to the courts the transfer might be much larger. Despite the Justice Department’s inflammatory report referring to homeowners, both the tribes and the federal government worked to keep small private property owners out of the suit. Eventually they reached an agreement to leave the most heavily populated and valuable land, about 2 million acres, outside of the settlement (Kifner 1977b). Instead, they focused on 300,000 acres of land that were owned by large multinational paper and pulp companies and three families, all of whom were willing sellers (US Congress Senate 1980).

The area proposed for transfer was “average” value woodland in the largely uninhabited northern part of the state (Knight 1980a). Small private home and landowners were not affected, which helped reduce the opposition to the claim settlement. The commercial interests involved were supportive of a settlement. They were concerned that an ongoing claim would continue to leave the security of title across the state of Maine in question, and could lead to problems with using the land for economic use (“Around the Nation” 1980). Special Representative Gunter was argued for rapid resolution, arguing that the claims “create a cloud on the validity of real property titles; and the result is a slowdown or cessation of economic activity because property cannot be sold, mortgages cannot be acquired, title insurance becomes unavailable, and bond issues are placed in jeopardy.” (Kifner 1977b).

Federal officials carefully crafted the way that the terms of settlement were publicized. Eventually both a publicly announced and a private plan were developed. According to the public plan, the settlement would include 100,000 acres and $25 million dollars (Kifner 1977b). The
unannounced portion of the settlement plan revolved around an agreement made with timber and paper companies to sell an additional 200,000 acres for sale at fair prices to the Indians. The negotiated agreements included detailed arrangements over legal jurisdiction, which was a sticking point for the state government (Brodeur 1985, 115). The tribes ceded some authority and agreed that serious crimes would be tried in state court; tribal members would be subject to state income tax and basic state regulations. The state agreed that tribal governance, organization, and membership decisions would be left to the tribes.

The two tribes were advantaged by their ability to work together as a cohesive unit. At the time of settlement, there were approximately 1400 Penobscot and 1500 Passamaquoddy Indians. The maintenance of their traditional tribal governing structures as well as a long history of loose confederation between the two tribes made it easier to work together. The Penobscot had gained experience with public activism as a group during protest in the 1960s over the development of summer homes on part of their traditional territory (MacDougall 2004). At the very end of negotiations, as tribes were planning to vote on the proposed settlement, some disagreement over settlement terms did erupt. The members of the Penobscot tribe split over approval of the settlement, with about one third against the final terms because they believed that they could have gotten a larger settlement in court and they were also concerned about issues of sovereignty (US Congress House 1980). The opposition was relatively small, however, and the agreement was accepted by representatives of the Penobscot and the Passamaquoddy in March. The state legislature also agreed to the terms in 1980. In federal Congress, the Maine delegation responded to increasing public support for resolution of the claims. With their leadership in support, the rest of Congress followed to pass the final Settlement Act in 1980 (Brodeur 1985, 128). The Act provided for federal recognition for each tribe, $81.5 million dollars, and the purchase of 300,000 acres of land with settlement funds (Knight 1980a). It also included the recognition of the Maliseet Indians (Wilkins and Lomawaima 1999, 73).
7.2.3 Potential Causal Factors

Legal Support:

The success of the Indian tribes in court surprised Maine residents and officials, as the claims were among the first to be based on the legal argument that tribes who were not federally recognized were still entitled to the protection of the federal government, and that the federal government therefore had a responsibility to consider their claims. The Gignoux decisions and the State of Maine v Dana decision were strong legal prompts, as they were among the first to assert the federal government’s obligations to protect tribes that had treated with the states. Further, the government had trust responsibilities even to tribes that were not federally recognized. Other groups whose treaties with the states violated the Trade and Intercourse Acts were quick to follow, and during the ongoing development of the Maine claims there was a settlement in Rhode Island, a Supreme Court decision in favor of the Oneida claim, and the birth of several new land claims. This situation encouraged the Penobscot and Passamaquoddy to press for settlement from Congress.

Cost of Settlement:

The potential value of the claim was extremely high. The area initially claimed encompassed over 60% of the state and affected thousands of homeowners. The tribes’ willingness to keep the holdings of small landowners out of consideration lowered these costs, but even the reduction of the claim to a settlement of 300,000 proposed acres was met with reactions that “ranged from expressions of outrage to calls for violence.” (Brodeur 1985, 107). The later reduction to 100,000 in the public version of the final settlement eased tensions somewhat. The only private property holders ultimately affected were large paper and pulp companies and three private families with large property holdings in the northern part of the state, all willing sellers (US Congress House 1980). Another aspect of minimizing costs of negotiation was the dissemination of the publicized plan to only transfer 100,000 acres of state land. While the remaining 200,000 came from the willing sellers listed above, public belief that no private land was changing hands contributed to more favorable
opinions toward the settlement. A final aspect of the costs and benefits was the growing concerns over the effect of ongoing lawsuits and negotiations. The public (and many elected officials) were concerned that ongoing claims would cloud titles and stall development, which encouraged settlement of the claim.

Identity:

It is important to note that the two tribes involved in this claim, while members of the same ancient confederacy, had different tribal identities and specific experiences. The dominant population, however, tended to view both tribes as very similar. The joint land claim further entwined the two groups in the public eye. Both tribes had populations that remained on their state reservations, establishing a strong connection to land. This was the strongest association. The Penobscot and Passamaquoddy are unique among the cases covered in that there have been consistent associations with the full range of stereotypes offered: connections to land, noble savages, childlike, false identity, lazy, and even (after the protests of the late 1960s and early 1970s) dangerous. This is a situation that is difficult to explain.

Justification for claim:

While the initial claim was met with little publicity, it gained momentum and attention over time. The tribes repeatedly assured residents that they would not ask for peoples’ homes, but many public opponents, such as Governor Longley, insisted on referring to this potential (Brodeur 1985, 97). The primary reliance on the argument that the land had been taken illegally and unjustly also struck a nerve with homeowners, who felt that not only their investments and property, but their integrity were being threatened. The claim was helped by the fact that it was often linked to the need for economic development to help the tribes become self-sufficient. Maine provided few services to the tribes and they were not eligible for federal funding, so their need for assistance in developing some sort of economic base was seen as legitimate. Their claims to both recognition and land had the potential to relieve Maine of its burden as well as allowing the Indians to develop their own
productive economic base. The claims were also linked to the necessity of land for ensuring the cultural survival of the tribe.

Group Cohesion:

The small size of each tribe, their history of ongoing traditional tribal government, and their experience working together as part of the Wabnaki Confederacy aided in their coherence as a group and their ability to agree on goals. The only visible rift was the split among the Penobscot on the settlement vote, and those against were small enough to not influence the tribal vote. The Passamaquoddy, in contrast, voted nearly unanimously to approve the terms of the settlement. (“Maine Indian Tribes Confronting Era of Abundance” 1979). Despite being two tribes, the group therefore maintained a great deal of group cohesion, which clearly affected the way that the government saw their ability to maintain and persist in their claim.

7.2.4 Current Status of Settlement

Even before the settlement was accepted, several members of the Penobscot were concerned about the extension of state laws over the established reservation territory. These concerns have increased since the settlement, as the state encroaches on the sovereign powers of the tribes through criminal and civil legal jurisdiction. Further, the remote location of the tribes has meant continued problems with poverty and an ongoing struggle to reach any degree of self-sufficiency. In 2008 a meeting of the Wabnaki Confederacy drafted a petition to the UN, calling for intervention to protect tribal sovereignty from the incursion of the courts and states. While the original settlement outcome can be seen as a success- the tribes did, in fact, gain back a precedent setting and extremely large land transfer- the real effects have been far less than had been hoped.

7.3 Narragansett:

The 1978 settlement in the Narragansett case was the first settlement actually reached in the group of land claims involving the assertion of the Trade and Intercourse Act. While the claim was brought forward in the wake of the Maine court decisions, its rapid negotiation pre-dated (and likely
influenced) the final settlement and negotiations with the Penobscot and Passamaquoddy. Unlike the Maine case, however, the Narragansett claim and settlement were relatively small.

### 7.3.1 History of Acquisition:

The Narragansett tribe’s territory in present Rhode Island put them in early contact and conflict with white settlers. By 1675, white animosity towards Indians grew in eastern Massachusetts and Rhode Island. During King Phillip’s War colonists killed hundreds of Narragansett in an attack on one of their winter camps near South Kingstown. The tribe was decimated and its remaining members scattered. At this point many took refuge with a related group, the eastern Niantic Indians, and the two groups combined. A reservation for the surviving Narragansett was established when the Chief, Ninigret, sold all but 64 square miles of their former territory to the colony in 1709 (Boissevain 1956). The reservation shrank as the rapidly growing white population took the land through sale, theft, or occasional gifts. By 1880 only about 1000 acres remained of the reservation (Boissevain 1956).

The Narragansett began to interact more and more with the dominant population as their traditional lifestyle and economy deteriorated along with their land base. Some became indebted or bound as servants. Many converted to Christianity. Others intermarried with non-Indians and assimilated into the dominant population. Intermarriage with African Americans eventually became common enough that local officials in the second half of the 19th century stopped identifying individuals (even, in some cases, the same individual) as “Indian” and instead recorded them solely as “blacks.” (Herndon and Sekatau 1997).

The Rhode Island House of Representatives, looking to cut services to the Narragansett, formed a committee to look into the political and economic situation of the tribe in 1879. The committee found that the population on the reservation was only 119 with a handful of tribal members living elsewhere. The committee reported that there were no more “pure Indians” but people of color from “Caucasian to the Black Race,” and argued that tribal life encouraged
pauperism and vagabondism.” (Boissevain 1956, 232). With this encouragement, in 1880 the Rhode Island state legislature declared the Narragansett tribe extinct. This action also allowed the state to take over the remaining land that had been reserved for the tribal reservation. While some Narragansett left, those with the resources to purchase land in the area did stay and managed to continue the tribal government and some cultural practices. The tribe never stopped asserting their rights to land— as early as 1894 a New York Times article reports that the Narragansett Indians were claiming $4 million in compensation from the Rhode Island General Assembly for their taken lands (“Want Millions from Rhode Island” 1894).

The de-tribalization of the Narragansett by Rhode Island and ongoing assimilation into the dominant culture could have been the death of any future efforts based on the existence of a community. Yet even the state itself, despite its action, continued to refer to the Narragansett as a tribe in documents and reports (Knight 1978). The broader community also appears to have recognized the persistence of the tribe and a collective identity and ascribed them a romantic status. For example, this description is from an article describing the “grand celebration” to dedicate a military fort on former tribal land after the state had dissolved the tribe:

It is of interest that the nearest approach to prevalence of Narragansett blood in any of the members of the recently dissolved tribe was one-eighth, the people being mostly African, and some white. Yet the strain of Narragansett blood appears to have made an enduring impression on the character and lives of the tribesmen, who are noted for a strong individualism, and a pertinacity and fixedness of ideas and pursuits not characteristic of the more volatile, happy-go-lucky negro … (“A Narragansett Celebration” 1883).

Another report, ten years later, detailing the 1894 claim to recompense for the land, describes the “survivors of the once-powerful tribe of red men…”

Most of the braves, though they are property farmers, preserve the ancient characteristics of their race. They have strong, massive features, aquiline nose, rugged chin, broad cheekbones, and bold, fierce eyes. They conduct themselves with great dignity, and on all occasions are taciturn (“Want Millions from Rhode Island” 1894).

The image of the Narragansett as a tribe of “noble savages” has persisted.

While images of Narragansett identity certainly note the presence of intermarriage and miscegenation from an early time, the tribe did retain cultural practices that marked them as
“Indians,” such as an annual pow-wow (Boissevain 1956). This was facilitated by the strong presence of the Narragansett who had remained in the local area. A focal point for Narragansett life was their church, which nearly all of the tribal members in the area continued to attend. In many ways—education, Christianity, the acceptance of English and English names, and racial dissemination—the Narragansett had the appearance of assimilation (Boissevain 1956). At the same time, they worked to preserve governance and at least minimal traditions (Boissevain 1956, 239).

The Narragansett had made a strong effort to maintain their traditional form of government and leadership throughout this time. Along with the small size of their population, the ongoing governmental structure gave them a great deal of solidity as a group as well as contributing to their appearance as a persistent entity. Unlike many other tribes on the eastern seaboard where tribal leadership and organization had to be entirely restructured and rebuilt, the Narragansett had the advantage of a continuous and experienced leading body (Boissevain 1956, 1959). Their presence in the former reservation land was a key factor in this— with a central location and resident members they were able to retain government and social practices in a way that would have been impossible with a fully scattered population. The mayor of Charleston, Rhode Island attested to this in his testimony before Congress:

… the Narragansett Indians have a strong local identity because there has been a consistent presence in the community, and in more recent years Indian organizations have been dedicated to providing social services to, and expanding economic opportunities for, their clientele.” (US Congress House 1978)

7.3.2 The Pursuit of Land Rights

In 1975, encouraged by the early success of the Penobscot and Passamaquoddy in court and the 1974 ruling on the rights of the Oneida in New York, the leaders of the 800 remaining members of the Narragansett tribe filed suit in US district court. They claimed about 3500 acres near Charleston, Rhode Island ("Narragansett's, Land Suit Settled, See Small Victory." 1979). A trial was set for 1978, but out of court negotiations between the state and the tribe began before the suit could be heard. It is highly likely that the state was encouraged to act because of the surrounding legal
environment. Claims in Connecticut and Maine also based on the Trade and Intercourse Act were progressing and appeared to be going in favor of tribal rights. The Mashpee in Massachusetts had just lost their suit based on a complex and narrow legal interpretation of continuous identity, but it appeared very likely that the Narragansett tribe could prove identity- and therefore legitimacy in their claim- even by those strict standards (Campisi 1985, 351).4 Government officials were therefore convinced that a decision in favor of the tribe was imminent, so chose to be proactive in considering a settlement.

Another factor that facilitated settlement was that the relatively small Narragansett claim was far less expensive than the claims brought by the Oneida or the Penobscot and Passamaquoddy. In Congressional testimony, the state’s Lieutenant Governor, Thomas L. Diluglio, said of the reasons that the state supported settlement:

First, the Rhode Island Indian land claim is small in relative terms. The claim area encompasses some 3,200 acres in the single town of Charleston. In Mashpee, Massachusetts the claim is for some 16,000 acres, and in Maine the claim is for over 10 million acres. About half of the 3,200 acres claimed is State-owned land... (US Congress House 1978).

The land claimed was comprised largely of swamplands and wetlands. Unsuitable for development, it was also environmentally fragile. The very limited development potential reduced the value of the land. As one tribal leader stated, “It’s mostly swamp land,” said Matthew Thomas, sachem chief of the tribe. “You don’t think they’d give us good land, do you?” (Zremski 1998).

Negotiations reduced the proposed settlement amount to about 1,800 acres. While half of the proposed settlement land was state owned, private landowners were involved with federal funds to be used to compensate private landowners at market value for the 900 acres of property to be purchased. The few numbers of private owners involved did not lend itself to widespread or

4 The dismissal of the Mashpee’s case in court was based on the jury decision that the tribe had not maintained a continual identity, government practice, or culture. While members of the Mashpee tribe argued that they had maintained their community and presence in the area, the jury decision found that there was not enough evidence that they had kept a distinct social or political existence (apart from the rest of the population of the town of Mashpee) throughout history. Because the Narragansett had continued to function as a tribal entity and maintained associations with a specific church, it was expected that a court decision based on similar merits would find that they had preserved an ongoing identity as a tribe (Clifford 1988).
organized opposition and all were willing sellers to the tribe (US Congress House 1978). As part of the claim, the Narragansett promised to keep the large part of their settlement land “forever wild” (US Congress House 1978; Campisi 1985, 351). This served to position the claim as an environmental effort, and tie the persistence and health of their tribe to the ability to help care for and preserve the land.

In February of 1978, the town of Charleston, the Narragansett, and the State of Rhode Island reached an out of court settlement, supported by the federal government, to buy 900 acres of private land with $3.5 million of federal funds and have another 900 acres donated by the state. The land was primarily wetlands, unsuitable for building or development. According to the agreement, 200 acres were available for development, but the remainder- and all of the land donated by the state- had to be kept in its natural condition (“Narragansetts Land Suit Settled, See Small Victory” 1979). State officials were likely supportive of this settlement because of the relatively low cost and because they sought to avoid lengthy public conflicts which might have economic repercussions (such as title issues and a stagnation in real estate, as had been threatened in the Mashpee case).

The Narragansett case had an unusual twist in that they were not federally recognized prior to or in conjunction with the settlement act. Before Congressional approval had been reached on the settlement agreement, however, the tribe began to pursue the administrative path to recognition via the newly created Office of Federal Acknowledgement process. The state passed a law making the tribe a corporation during the interim. The temporary tribal corporation would hold the land in trust for the benefit of the tribal members. The law also extended state jurisdiction over criminal and civil matters. In July of 1982, the Department of the Interior recommended that they be recognized by the federal government, and the Narragansett took over the property as a recognized tribe in 1983 (Campisi 1985, 352-353).
7.3.3 Potential Causal Factors

Legal Support:

The Narragansett’s suit never reached any legal conclusion. The suit was filed at a time when numerous other claims were being filed in court, a handful of decisions had suddenly granted new support for those with similar claims, and the state and federal governments had strong expectations that the court would find in favor of the rights of the Narragansett. They acted quickly to resolve the relatively small claim with the anticipation that a legal decision would require them to settle the claim anyway, and the litigation process itself would also carry costs. This situation resulted in a much faster settlement than if the tribe and federal government had waited for a court decision.

Costs of Settlement:

The potential costs of the claim were low. Much of the land in question was swampland with no development potential. Half was state held, and the few homeowners involved appeared relatively unopposed to the transfer (US Congress House 1978). Further, this was the time of uncertainty when homeowners and businesses were concerned about how claims might affect their title rights. These concerns also encouraged rapid settlement.

Identity:

The tribe’s small population had become relatively assimilated but still retained some cultural practices and governance. The dominant population did hold some perceptions of the Narragansett as “false” Indians (because of intermarriage with outsiders, particularly blacks), but this association was not as strong as it has been for other New England groups such as the Pequot or Golden Hill Paugussett. The tribe had long been characterized as the “remnant” of a proud, noble, and very non-threatening tribe. Another positive perception of the Narragansett was of their connection to the land in question. Their ongoing presence on traditional territory and in the community was also positive and contributed to the dominant populations’ comfort with the claim.
Justification for Claim:

The Narragansett claim had surprisingly little controversy or antagonism surrounding it. As in the other cases, a large part of the justification for their claim relied on the illegal role of the state in the dissolution and dissemination of their reservation lands in violation of the Trade and Intercourse Acts. Their claim also relied on providing environmental protection, which fit nicely into stereotypical positive conceptions of American Indians as stewards of the land. This framework also allowed them to present part of the claim as collaboration between the tribe and local populations in seeking to avoid pollution and environmental degradation. The claim also referred to the use of a land base to help promote cultural survival and to encourage the economic development and self-sufficiency of the tribe.

Group Cohesion:

With a well established community and small, concentrated population, the tribe had very strong group cohesion. The strength of and support for the tribal government meant that goals were clearly established and the collective members were willing to follow their leaders. There was no doubt among political elites that the tribe would be able to follow through with a well-organized claim for some time, which was a likely factor in entering into the out of court settlement.

7.3.4 Current Status of Settlement:

After the Narragansett settlement and subsequent recognition by Congress, there have been ongoing concerns over their sovereign powers and their relationship with the state. The establishment of the interim corporate status has continued to blur the boundaries of tribal and state authority. While the tribe argues that after recognition it assumed full powers as a recognized tribe—including criminal and civil jurisdiction, the state law made no specific mention of which aspects of the tribal corporation expired with recognition and the state argues it maintains these powers. This erupted into conflict with a 2003 raid by state troopers on a reservation convenience store which had not been charging state taxes on tobacco products. Another major element of contention is whether
or not the tribe can purchase additional lands to be taken into trust, and whether or not it has the power to develop casinos on this property (Nowlin 2005). Subject to a complex web of legal arguments (and numerous attempts in courts, state and federal congress, and state wide referendums), the rights of the tribe in terms of trust acquisitions and sovereignty are awaiting decision by the Supreme Court in 2009 (Toensing 2009). The ongoing conflict between the Narragansett and Rhode Island revolve around issues of sovereign authority and how much was truly conveyed with the transfer of land.

7.4 Mashantucket Pequot:

The Mashantucket Pequot land claim settlement is now widely known because of their astronomical post-settlement success with Foxwoods Casino (built on the reclaimed land). Prior to the passage of the IGRA in 1988 and development of the casino, however, the land claims in Ledyard were of little interest other than to local residents. The settlement was consistently supported by federal representatives as a quick and easy measure to resolve the claim, although it was initially vetoed by the President out of concerns for its precedent setting possibility in terms of other claims.

7.4.1 History of Acquisition:

The Mashantucket Pequot tribe, part of the larger Pequot Nation confederacy, occupied land near the Thames River in eastern Connecticut prior to European contact. Conflict with the British resulted in the near massacre of the population in 1637, and the survivors were divided by colonial officials. Some were placed with the eastern Pequot; others put under the control of the Narragansett or the western Pequot, and later turned over to the Mohegan (Campisi 1985, 353; D’Hauteserre 1998, 113). In late 1686 a parcel of 2,000 acres near Ledyard was assigned to the reorganized Mashantucket Pequot survivors. Ongoing disputes between the colonists and later Americans continued to erode this land base over the next 200 years (Campisi 1985, 353). In 1855 an act of the Connecticut state legislature provided for the sale of all but about 212 acres. The Pequot reportedly
protested the sale and legislative action but without success (D’Hauteserre 1998, 113). The 1855 sale, never approved by the federal government, was the basis of the later land claim.

From this point the Pequot dwindled and many left the area. Both those in Connecticut and elsewhere intermarried with other Indian groups as well as those of European descent and African Americans (Pasquaretta 2003). They were often characterized as a tribe with the “mixed blood and European names of assimilation and intermarriage” (Freedman 1983). By the middle of the 20th century only one tribal member, Elizabeth George, remained on the reservation.5 After her death in the late 1960s one of her grandchildren, Richard (Skip) Hayworth, returned the reservation in Ledyard and began work to revitalize the tribe. Hayworth was elected by the few poorly organized tribal members in the area as tribal leader in 1975 and, spurred by the legal environment of the Maine and New York decisions, began to seek ways to restore the tribe and develop an economic base.

Part of the reorganization of the tribe involved the creation of a constitution, bylaws, and membership requirements. Under Hayworth, the small tribe began to seek out relatives (and potential tribal members) who might be interested in returning to the area. A 1981 article quotes the number of residents on the reservation at 19, while a later article in 1983 (the year of the settlement) puts total tribal membership at 184 and notes that many of those live off of the reservation (Freedman 1983). Hayworth and other tribal members sought to create economic opportunities and development on their reservation. These plans were picked up by the local media. Hayworth was described as a leader able to get federal subsidies, with a vision for the future. The residents and workers of the reservation were shown as energetic and enterprising (Rozhon 1981).

Mr. Hayward and the tribe plan to leave much of the new land in its natural state. Part of the land will be devoted to housing, a tribal administration building, a restaurant, a museum, a trading post and expansion of the maple-sugar operation. The Pequots would also like to use the money to start up light industry (Chira 1983).

5 Nearly every work on the modern Pequot refers to George, who as the sole resident was responsible for maintaining the connection to the land and resisting state and local efforts to acquire the land. George’s half sister, Martha, is also included in some accounts (D’Hauteserre 1998; Benedict 2000; Freedman 1983).
7.4.2 The Pursuit of Land Rights

In 1976, with the aid of Thomas Tureen, the tribe filed a lawsuit against local landowners to recover 800 acres of land. The Pequot suit followed the same legal argument introduced in the Maine land claims. The 1855 sale of land to the state was in violation of the Trade and Intercourse Act and was therefore illegal, entitling the tribe to restoration of the land in question. The lawyers for the Ledyard landowners argued that the Trade and Intercourse Act did not apply to the Pequot. A preliminary March 1977 decision found that the Trade and Intercourse Act did apply, bolstering the position of the Pequot tribe. The land-owners (and their counsel) feared that the ongoing cost of litigation would far outweigh the potential benefits even if they were to win. At stake was land- to which they already argued they had ownership- worth approximately $200,000 at the time. But winning the case would actually gain nothing for land-owners other than legal fees, as it would just support ownership of land they already claimed (Benedict 2000, 103). The tribe, local landowners, state and federal officials agreed to work on an out of court settlement arrangement.

While economic development was a key part in publicizing the claim, the main justification was that the transfer of land back to the tribe would serve to right past wrongs and attain justice. The illegal sale of the land by Connecticut was unfair and needed to be amended (Rozhon 1981). Media reports also made it clear that the very existence of the Mashantucket Pequot tribe was in jeopardy. The message often conveyed the idea that the settlement award would provide hope and opportunity for the future, which matched the image of sustainability and productivity that the tribe was developing (“Connecticut Journal” 1983).

Opponents of the claim argue that the tribe was not seeking to become self-sufficient, but solely to gain federal benefits. Jeff Benedict’s Without Reservation is noted as being particularly stinging. He writes that Richard (Skip) Hayworth and many members of the extended family once considered themselves white, declaring this as their race on all documents prior to the initiation of land claims. According to Benedict, it was only when they recognized the benefits of establishing
Indian identity for federal funds, services, and land that they did so. Detractors argued that the tribe had no spoken language, no continued traditions, and other than Elizabeth George no ongoing connection to the land (Benedict 2000). Despite this situation, the state of Connecticut had continued to recognize their existence and identity as a tribe and its legal existence remained.

For elected officials, the potential costs of negotiations as well as the final award were small. The 800 acres claimed were largely unoccupied and were primarily woodlands. In addition, the acreage did not carry very high property values. Reports referred to it as “undeveloped acres of the Pequot’s ancestral territory” and stressed that “no homeowners would be displaced.” (“Connecticut Journal” 1983; Freedman 1983). Only a dozen landowners would be affected. While controversial at the local political level, state and federal officials (and the broader public) viewed the claimant group as a nearly extinct, impoverished tribe asking for a small parcel of land. Since the property owners would be compensated by the deal, it was widely considered fair to them as well (although the property owners themselves did not agree with this perception). At minimal expense, state and national officials could herald their support for minority rights.

House Representative Sam Gejdenson (along with the majority of other state and federal elected officials) supported the deal, saying:

… the agreement is fair because it causes little social disruption. "No one is losing their home," he said. "All the parties involved in the settlement worked together to reach an equitable agreement, one that recognizes the rights of the Indians, yet took into account the predicament of the property owners”(Connecticut Journal 1983).

In the early 1980s it appears that elected officials did not consider the potential costs for future claims to be high. With overwhelming support from the state government, the Pequot’s claim went before Congress. A bill sponsored by Representative Gejdenson and Connecticut Senators Dodd and Weicker was passed unanimously in both the House and Senate. The law allocated $900,000 of federal funds to pay local landowners for the 800 acres claimed (“Connecticut Journal” 1983).

Despite this widespread public and congressional support, the legislation was initially vetoed by President Reagan. Reagan cited several reasons, including the most prominent concerns of the
burden of federal responsibility for the settlement and the fact that the Pequot had not been through
the administrative path for acknowledgement (Biddle and Slade 1983; US Congress Senate 1983). In
1979, aware that this step might hinder their claims, the Pequot had begun the petition for
recognition, but the process had not progressed. Reagan and his administration expressed concern
over the lack of authentication of identity because of this (US Congress Senate 1982). Reagan wanted
the tribe recognized through this newly established administrative path before a settlement was
reached (US Congress Senate 1983).

With intensive lobbying and support from Senator Weicker, the Indian Rights Association,
and the Native American Rights fund the administration reached an agreement that included an
additional contribution from the state and the submission of a recognition application to the Office
of Federal Acknowledgement (Campisi 1985, 353-4). The final settlement Act was signed in 1983,
with the President happier with the new financial agreement. Compared to later (and ongoing) land
claims in the Northeast and Connecticut, the progress of the Mashantucket Pequot’s claim was
relatively rapid. Some of the political conflict surrounding the veto of the initial agreement was likely
due to partisanship differences and policy preferences, as Reagan and many Republicans at the time
were seeking ways to decrease, not extend, services to American Indians. Ultimately, Congress as a
legislative body did follow the lead of the delegation (which was both Democrat and Republican)
from Connecticut, as is often the case in American Indian decisions.

7.4.3 Potential Causal Factors

Legal Support:

The Pequot foray into court was supportive, with the initial decision favoring their right to
bring a suit based on the violation of the Trade and Intercourse Acts. The case clearly followed the
legal arguments offered in the successful Maine settlements, even being supported by the same
lawyers. Elected officials had a strong expectation that the Pequot would win their case, and may
have been more willing to negotiate because of the very small and low value acreage claimed. The
case was settled out of court before a final legal ruling could be made. Similar to the Narragansett case, the parties involved felt that legal support was imminent and negotiating as quickly as possible could help avoid a drawn out and costly court case.

*Costs of Settlement:*

This claim was to relatively low value land and affected only a handful of property owners. The claim to 800 acres was settled with the full amount. While the claim certainly affected those property owners and caused conflict at the local level, outside of the town of Ledyard it was seen as very easy to settle and a low cost way for legislators to end the group’s claim. This was stressed by Representative Gejdenson in the development of the settlement arrangement.

*Identity:*

At the current time, dominant populations’ negative stereotypes of American Indians, particularly in areas where casinos have become an issue, often include portrayals of schemers and greedy Indians, simply out to make a profit (Cramer 2005, 140). In the late 70s and early 80s, however, American Indians in New England were more likely to be characterized as an “invisible minority,” a group without any public perceptions of their ongoing identity, whether positive or negative. The main concern that surrounded the Mashantucket Pequot’s identity was over its authenticity. The tribe was sometimes accused by detractors among the dominant population of being “false” Indians because of no clear ongoing connection to the land, the loss of continual cultural practices, and intermarriage with other populations. This would become far more pronounced after settlement and after the introduction of gaming.

*Justification for Claim:*

The claim was grounded on calls for justice and the need for reparations after past treatment. The claim argued that the tribe needed land in order to survive as a cultural group. Hayworth and other political supporters of settlement also stressed the desire of the group to develop economic self-sufficiency and enterprises (again, casinos were not yet on the table). In fact, the aspirations of the Pequot and the plans of Hayworth to develop industries such as a hydroponic
greenhouse (most of which never materialized) were often seen as examples for other eastern tribes to follow.

Group Cohesion:

Unlike other, more established tribes with an existing hierarchy of leadership and/or pre-existing factions, Hayworth and other Pequot were creating a new government. The very small population made this cohesion as a group and in terms of goals much easier. While rifts would later develop, during the early years before the casino, the recognized and only public leader was Skip Hayworth. The small size and newness of the organization facilitated negotiations and settlement.

7.4.4 Current Status of Settlement

There have been few concerns raised about the security of the rights granted in the settlement agreement. The Pequot initially tried several different small scale economic ventures on their expanded reservation before opening a bingo parlor in 1986. After the passage of the IGRA they entered into a gaming compact with the state and the first phase of the Foxwoods casino opened in 1992. It has since become one of the most successful gaming enterprises in the country. The compact reduced some of the sovereign independence of the tribe over the land by allowing some state jurisdiction, but this was not related to the settlement of the land claim itself.

7.5 Mohegan

The second land restoration in Connecticut came over a decade after the settlement and recognition of the Mashantucket Pequot. The Mohegan claims were put on hold during their pursuit of federal recognition; the land claims settlement came shortly after. The tribe’s compliance and success with the administrative procedure avoided many of the issues raised over identity that came up following the Pequot’s settlement as well as those that now cloud the Golden Hill Paugussett and Schaghticoke claims.
7.5.1 History of Acquisition

The Mohegan were once part of the Pequot Nation, the confederacy of tribes that inhabited New England from the 1400s. Their first prolonged contact with Europeans was with Dutch traders in the early part of the 1600s. During the 1600s the Mohegan broke from the rest of the confederacy. The split came out of a power struggle over tribal leadership. The tribe became allies of the British, and aided the British in the famed massacre of the Pequot in 1637 (Benedict 2000). The alliance between the British and the Mohegan continued throughout the colonial period (Judson 1994a). In 1743 the King’s Commission and Governor Dudley set aside a tract of land between 4,000 and 5,000 acres for the Mohegan (US Congress Senate 1994). The alliance could not spare the Mohegan the effects of small pox and other diseases, however, and the population was decimated. During and after the time of the Revolutionary War, the Mohegan’s land base was rapidly eroded by the dominant population. By the beginning of the 1800s the survivors were pressed onto a reservation of about 2,500 acres in Montville, Connecticut (Judson 1994a).

In 1861, supposedly at the request of the tribe, the Connecticut General Assembly voted to dismantle the reservation and distribute it to the Mohegan members as fee simple land. The tribe had supposedly made this request because it was “fed up with state overseers who had sold Mohegan land to white farmers and railroad companies, and had used the reservation largely for their personal gain.” (Lightman and Jones 1994). This action was not approved by Congress as required by the Trade and Intercourse Acts. Some of the land was sold to non-Mohegans, but some remained in Mohegan hands (US Congress Senate 1994; Judson 1994a). The loss of reservation land and status as private landowners encouraged the Mohegan to assimilate into the dominant society and participate as American citizens. Over the next 100 years the Mohegan in the area strove to maintain a continual identity and culture. At the same time, they were also exposed to mainstream education,
community groups, churches, and integrated into the local economy throughout the 19th and 20th centuries (US Congress Senate 1994).6

7.5.2 The Pursuit of Land Rights

During the 1970s the first land claim on behalf of the Mohegan tribe was developed by John Hamilton, the Grand Sachem of the tribe. Hamilton also submitted a petition for federal recognition when the administrative process opened in 1978. These actions exacerbated disagreements within the tribal community, and in 1970 part of the tribal council sought to elect a new leader. Hamilton and his supporters disagreed, and tribal leadership split with the new faction supporting Courtland Fowler as an elected chief. The Fowler group named themselves the Mohegan Tribe of Indians of Connecticut (MTIC) and developed their own constitution during the 1980s (Native American Mohegans et al v United States et al 2002). While this division was certainly socially and politically disruptive for the tribe, it did not escalate to the severe conflict seen in many other tribes. Members participated in cultural and social events with one another, regardless of the leader they supported. At times the two groups also did reluctantly work together to pursue their recognition bid.

The Mohegan Tribe (under Hamilton) filed a suit against Connecticut in district court. The claim was to the 2500 acres lost in the 1861 dissolution of tribal holdings. The tribe’s case argued that the transaction was invalid because it had never been approved by Congress. The land in question constituted a state park, private farms, businesses, and residential communities in Montville, a town of about 17,000 individuals (“Mohegans Win A Round in Connecticut Land Claim.” 1980; Rozhon 1981).

The initial decision, by Judge M Joseph Blumenfield, went against the state’s argument. The decision found that the Trade and Intercourse Acts did apply to the transfer of land, and the sale to

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6 This integration went against them during part of their review process for federal recognition- the Bureau of Indian Affairs found a gap in political activity during the 1940s. The tribe showed that this was due to the Bureau’s oversight of the involvement of females in the tribal leadership and the fact that all able bodied Mohegan males were absent at the time because they were serving in World War II (Judson 1994c).
the state of Connecticut was declared invalid. The state appealed to the 2nd Circuit Court of Appeals, which affirmed the lower court’s decision and supported the rights of the tribe to some form of compensation (“Mohegans Win A Round in Connecticut Land Claim,” 1980). In 1981 the Supreme Court agreed in Connecticut v Mohegan Tribe that the Mohegans were protected by the 1790 Trade and Intercourse Act, and there were legal grounds for compensation. This Supreme Court decision was the final push for the state, Bureau of Indian Affairs, and the federal Congress to begin considering the negotiation of a potential settlement (Rozhon 1981).

While the precise details remain debated by the two different Mohegan groups, at some point the attorney that had been hired by Hamilton to pursue the land claim began to report to Fowler and the MTIC. The leadership of Fowler changed the dynamics of the claim. The local residents and various levels of government officials saw the MTIC as a more amicable and less antagonistic group, and negotiations began to proceed (US Congress Senate 1994). The Mohegan tribe (regardless of leadership) held a similar position to that of the Narragansett, where they were seen as a small, unthreatening group. They had assimilated into the local population a great deal but still retained some markers of identity such as tribal cultural practices, religious observances, and tribal government. Despite the break-up of the reservation, a significant number of tribal members had stayed in the area, establishing an ongoing connection to the land in question. Further, their history of alliances with the European based population- even against other Indians- meant that the dominant population had an ongoing association of the group as particularly amicable. In testimony before the House, Chief Ralph Sturgess (Fowler’s elected successor) states that the “Mohegan Indian has always been a friend of the white man…” He stressed the tribe’s efforts to keep peace and retain a position as part of the community (US Congress Senate 1994).

As negotiations unfolded, two key properties became central to the settlement of the claim. The first was a 244 acre industrial site on the Thames River that had been home to the United Nuclear Corporation (Judson 1994b). The tribe saw it as a potential site for gaming development after clean up. There were serious environmental concerns about the site, which had been used to
prepare nuclear reactor cores for nuclear submarines. The land had been contaminated by solvents used in the process. In fact, the town government was relieved by the transfer of financial and environmental responsibility to the tribe for the site (US Congress Senate 1994). The other significant transfer was park land from Fort Shantok Park, which included burial grounds considered sacred by the Mohegan tribe. The burial sites had been maintained by the tribe since the 19th century, even as the rest of the park fell into disrepair. The Mayor’s testimony again pointed to the fact that there would be benefits from the transfer. He noted that the park had not been very well maintained and “… at night the undesirable kind of takes over the area. And the town believes that with the park under the control of the tribe, that the situation of the park will be a lot better.” (US Congress House 1994).

The inclusion of these two sites in the claim was important for how it was justified and understood by the dominant population. While its core argument was about justice and the illegal taking of lands in the past, it also incorporated concerns about the environment and religion. The poor condition of both the UNC site and the parkland contributed to the tribes’ insistence that their ownership would help environmental cleanup. The claim also invoked ideas of Indian environmental stewardship. There was also an appeal to the need for the burial grounds as part of the basis of their culture and for religious reasons. Fowler had declared this site as “the most important thing” in the entire claim (Rozhon 1981).

While not an initial part of the land claim in the 1970s, by the late 1980s gaming rights entered the arrangement. This possibility factored into the way that the claim was both justified and perceived. The Mohegan leaders argued that the claim was part of ensuring cultural survival, and that without an economic base, their tribe could not survive. The poor economic situation of the surrounding community also played into this- the proposed gaming enterprise had the chance of bringing money to Montville in general, not just the Mohegan. Certainly there was some opposition from anti-gaming forces. However, casinos were not yet the issue they would become shortly, and
the local government and the state were both supportive and willing to negotiate the terms of gaming as part of the land claim.

Because the tribe was undergoing the administrative process of recognition during this time (from the petition initially started in 1978), there were not the underlying concerns about the authenticity of identity that surrounded the Pequot claim (Judson 1994a). In 1994 the Department of the Interior announced that the Mohegan qualified for federal recognition as a tribe, opening up the way for federal aid and increasing the prospects for the final settlement of the land claim (Judson 1994a).

The settlement terms included a class III gaming compact with the state and the transfer of 700 acres of land. The land to be transferred incorporated 244 acres of the heavily contaminated submarine factory site and Fort Shantok State Park (US Congress Senate 1994; US Congress House 1994). It also involved an agreement on future gaming related payments from the tribe to the state and to the town of Montville. An initial payment of $3 million to Montville and annual payments of $500,000 to follow were intended to compensate for the loss of tax dollars (from the transfer of land) as well as the services that the town would need to provide to cope with the casino (such as traffic, crime, social problems, environmental outcomes, etc.). The state was to get a minimum of $80 million per year from the casino enterprise (US Congress Senate 1994; US Congress House 1994; Judson 1994b). The final agreement was approved in 1994 by the state’s Congressional delegation, the state government, and both the Montville and tribal councils and leadership.

7.5.3 Potential Causal Factors

Legal Support:

The chain of decisions that ultimately ended with the Supreme Court’s support for the Mohegan rights to land provided strong legal support for their land claim. The rulings left no doubt that the federal government had failed in its responsibility to protect their interests against Connecticut and prompted the serious evaluation of the claims. Legal standing in this case followd
the chain of decisions in New England based on the argument that tribes’ interests should have been (but were not) protected by the federal government. The timing of negotiations in this case took so long because of the federal recognition process. The Mohegan purposefully held off until the issue of recognition was resolved which cleared several hurdles for the land claims settlement process as well.

Costs of Settlement:

While the inclusion of casino rights created some controversy and opposition from anti-gaming forces, the actual land transfer was not contested, in part because of its small size and mainly public ownership. In this case there were actually strong incentives for the local and state governments to encourage the transfer of land. The main properties involved, the polluted nuclear site and the derelict park, were extremely costly to clean up and maintain. By transferring the sites, the local, state, and federal government not only passed on responsibility, but maintained the appearance of helping the community by providing a means for the cleanup.

Identity:

The simultaneous land claim and recognition bid served to compartmentalize public evaluations of Mohegan identity outside of the land claim process. The extensive history of the Mohegan in the area as “friends of the white man” contributed to a positive and deserving public image among the dominant population. The primary identifications of Mohegan involved their ongoing connection to the land and the romantic image of a tribe of “noble savages.”

Justification for Claim:

The Mohegan tribe involved a wide range of reasons behind their claim. A major argument, as in all of the claims discussed, involved an appeal to justice and fair treatment for the past taking of their rightful property. The tribe also based aspects of their claim on their need for economic self-sufficiency. A prevalent and commonly mentioned argument was the religious significance of the land claimed. This also tied into the need for the land transfer as part of the Mohegan’s cultural survival. It is interesting to note that despite the environmental aspects of the land transferred in the
settlement, the language of the claim and ongoing public statements about it made little mention of environmental concerns as a justification for the claim itself.

*Group Cohesion:*

The split between the Fowler and Hamilton led factions of the tribe was ongoing throughout much of the land claims process. This seems to have been a largely internal dispute, with little attention being paid by the court, state or federal government. The final settlement award privileged the group that supported the elected Chief, and appeared to take little consideration of any potential challengers. A 2002 suit in Connecticut State court by the Native American Mohegans (one of the groups that grew out of Hamilton’s followers) challenged the MITC as the recipients of the land claim, but it was dismissed.

**7.5.4 Current Status of Settlement**

The Mohegan claim and settlement were characterized by a remarkably amicable relationship with the local population. The gaming compact that was companion to the settlement of the land claims did cede some rights to provide state oversight. Like the Pequot, the Mohegan (also located in a highly populated region in southeastern Connecticut) have had astronomical success in their gaming enterprise, the Mohegan Sun. After the Mohegan agreement the political environment in Connecticut has shifted greatly, as will be seen in the studies on the Schaghticoke and Golden Hill Paugussett in the next chapter.

**7.6 Seneca:**

The Seneca are most well known for the monetary settlement over leasing arrangements in the city of Salamanca in central New York. The tribe has also filed two claims for the return of traditional lands, one to Grand Island and other islands, and the second to land around Cuba Lake. A 2005 agreement granted them 51 acres surrounding Cuba Lake, which remains the only completed land claims transfer in the state of New York. The Grand Island claim has been denied.
7.6.1 History of Acquisition

The Seneca are part of the Haudenosaunee (often known as the Iroquois Confederacy), a group of tribes that joined as a confederation in the 14th or 15th century (Crawford 1994, 353). While each tribe remained autonomous, they joined together with specific rules to govern their interactions with one another and with outsiders (Crawford 1994; George 2006). The Haudenosaunee engaged in treaties with the British and later United States as a united front. The Treaty of Fort Stanwix in 1768 ceded traditional lands south of the Susquehanna and Ohio Rivers, but guaranteed traditional homelands in western New York. It was shortly followed by the second Treaty of Fort Stanwix in 1784 with the new United States, which reduced land holdings and specifically distinguished between supporters of the Continental forces (Oneida and Tuscarora) and allies of the British (Seneca, Cayuga, Onondaga and Mohawks). The Treaty of Canandaigua in 1794 again redrew the boundaries of the Seneca territory. During this time New York State also sold large sections of Haudenosaunee territory as pay for officers and soldiers who had fought in the Revolutionary War (George 2006).

A Seneca agreement with the state in 1797 established three reservations: Allegany, Cattaraugus, and Oil Springs. The land was further encroached on with a treaty in 1815 that ceded Grand Island and other islands. The remaining reservation territory was supposedly transferred to the United States in a treaty in 1838, but the tribe refused to leave and their legal right to remain was restored in 1842. In 1858 the state used the power of eminent domain to take land around Cuba Lake for a canal development project that was never realized. Leasing also became common, and by 1875, approximately one third of the Alleghany Reservation was leased to non-Indians. Congress confirmed the leases in February 1875, and an 1890 Act amended all lease terms to 99 years (US Congress House 1990).

The Seneca were in the public eye during the first half of the century because of the leasing arrangements as well as the publicity over the Kinzua Dam project. The dam was designed by the Army Corps of Engineers to prevent flooding in Pittsburgh from the Alleghany River. Completed in
1965, the dam instead flooded a large portion of the Allegany reservation, including a large portion of the farming land and 90% of reservation homes (“Senecas Renew Protest on Dam” 1956). The federal government did not respond to the Seneca protests to stop the dam. The tribe was ultimately granted compensation for the homes and resources lost, but continued to express concerns about their ability to develop an economic self-sufficiency without a suitable land base (“$15 Million Fund Set for Senecas” 1964).

7.6.2 The Pursuit of Land Rights

In 1952 the Seneca filed a claim with the Indian Claims Commission charging inadequate compensation for leases in the town of Salamanca. The Claims Commission ruling awarded the tribe $600,000 in 1977 as back pay for payments below the lease value of properties. The lease arrangement continued to cause tension, however, and in 1990 the negotiations over the renewal of leases, due to expire in February 1991, brought tribal representatives before the US Congress. The Seneca Land Claims Settlement Act of 1990 awarded the tribe $60 million and authorized the renewal of leases with the residents. The settlement funds included money that could be used for the acquisition of future land.7 Congressional testimony over the settlement pointed to the settlement and agreements between the tribe and town as a way to secure a better future for all residents in the economically depressed area. The settlement was also linked to supporting tribal specific concerns related to providing for the elderly, helping the environment, and developing tribal self-sufficiency (US Congress House 1990).

In the wake of the lease settlement, in August 1993 the Seneca nation filed suits in court for 51 acres around Cuba Lake and 18,000 acres on Grand Island and surrounding areas of the Niagara River outside of Buffalo. They argued that the state’s acquisition of Cuba Lake in 1858 and Grand Island in 1815 were illegal and invalid without the oversight of the federal government. The Grand

7 There has been ongoing conflict between the Seneca and opponents as they have purchased land outside of the reservation with the intention of casino development.
Island suit listed the defendants as New York State, the New York State Thruway, and Erie County, as well as the six largest owners of private property on Grand Island. These six property owners were seen as the representatives of the more than 6,000 individual property owners on the island (“Seneca Nation Files Suit to Reclaim Grand Island” 1993).

Ongoing conflicts with the local population and the state government tinged public perceptions of the tribe negatively. Tribal protests erupted in 1992 over New York State’s assertion that it had the right to collect taxes on reservation sales to outsiders. Indian leaders barred state troopers from entering reservation land without permission. Protesters burned tires and debris on a bridge overlooking the Thruway, temporarily causing the police to close it when the flaming debris was thrown onto passing cars. Protestors also cut off a section of a state road with “roadblocks of cars, burning tires, and park benches.” The spectacle ended quickly, but local residents remained concerned about their safety (Gruson 1992). The Seneca shut down the New York State Thruway again in 1997 during violent confrontations between Seneca protesters and state troopers in a series of clashes over the collection of taxes (Precious 2007).

The dominant populations’ stereotype of the Seneca as dangerous and very threatening was heightened by the internal conflicts over leadership and violence within the tribe. The rival factions were the Seneca Party, lead by Karen Bucktooth, and Coalition ’94, lead by Dennis Bowen (Palazetti 1995b). The violence began when the narrowly elected President Bowen attempted to remove a council member, Ross John Sr, from office and fired department heads from the tribal government in 1994 (Palazetti 1994). The conflict escalated and brought tribal government to a standstill as council members walked out of meetings and refused to participate. Bowen’s rival, Karen Bucktooth, said to the press that the dispute had fostered “unsafe and terrorist-like conditions.” Bowen controlled the tribal police force, which her opponents likened to “thugs” and “bullies” (Buckham 1995).

The culmination of the conflict came in the end of March 1995 when three men, Myron Kettle, Patrick Thompson, and Samuel Powless, supporters of Bucktooth, were shot to death when
they stormed the William Seneca Building. The Seneca Building had been occupied by Bowen’s supporters since November 1994 (Kwiatkowski 1995). On April 4, 1995 the Bureau of Indian Affairs ruled that Bowen was the rightful and sole president of the tribe (Palazetti 1995a). He eventually stepped out of office and peaceful- and more decisive- elections have followed. The internal rifts in the tribe were not directly related to the land claim, but certainly hindered their ability to appear as a united and formidable front to the government. Beyond the problem of violence in public image, the more subtle forms of racism that have dogged American Indians also confronted the Seneca. Their claims were presented as “ancient” in the local media and their leadership as inept and out of step with the modern American nation. Their ability to act as a sovereign nation was continually discredited by this image as well as internal problems (Niman 2006).

In 1998 US District Court Judge John Curtin ruled that the Seneca legally owned 51.3 acres of land around Cuba Lake, finding that the state had illegally taken the land as part of its attempt at developing a canal project. The negotiation and settlement of the Cuban Lake claim has gotten remarkably little public attention, especially given that it was the first land transfer to reach settlement in New York State. The state and federal government were to split the expense of buying the 19 lakeside cottages for $3.4 million (Herbeck and Michel 2005). Part of the reason for the quietness surrounding the Cuba Lake claim and its negotiated settlement was the early decision that the transaction was authorized without Congressional approval. The Department of the Interior and the Department of Justice sat in on the mediated negotiations and supported this arrangement.

Technically, the land claim affected no private or federally owned property, as all of the land in question had been seized and retained by the state and only leased by homeowners. After the state lost interest in the canal project for which the land had been taken, squatters moved in during the end of the 19th century. Eventually the state authorized their presence with leases, but the title never passed from the state to private owners (Palazetti 1998). The agreement also guaranteed that the occupants of the other lands surrounding Cuba Lake, the Lake District, the counties, and municipalities would not be affected by the claims (Coffey 2006).
The Grand Island claim had different legal outcome. The district court ruled that the Seneca did not have a valid claim to Grand Island or the other islands in the Niagara River as the tribe could not prove that it had exclusive or recognized territorial rights to the area (Buckham and Cardinale 2006; Precious 2007). New York State had paid them $1000 in 1815, which may not have been a reasonable price, but the Seneca had never inhabited or owned the island so the question was moot. In 2004 a three judge panel for the Second Circuit court unanimously affirmed the lower court decision. The Supreme Court refused to reinstate the Seneca’s claim in 2006 and ended the quest for Grand Island definitively (Buckham and Cardinale 2006).

The costs involved in settling the two land claims were markedly different. The Grand Island claim affected about 18,000 people, with more than 6,000 individual properties (“Seneca Nation Files Suit to Reclaim Grand Island” 1993). In 2001 The Department of Justice barred private landowners from Indian land claims in New York, but this move came late to salvage any potential settlement (Odato 2001). The estimated cost of a financial settlement when the suit was denied was $176 million (Buckham and Cardinale 2006). In contrast, the “little noticed claim” for the 51 acre parcel surrounding Cuba Lake affected only about 110 people and 19 cottages. Furthermore, the cottage owners had never held title to land. The final cost of settlement was $3.4 million, primarily funded by the federal government. Since Congressional approval was deemed unnecessary and there was little publicity, the political costs of negotiation were very low (Coffey 2006).

7.6.3 Potential Causal Factors

Legal Support:

The legal decision in the Grand Island claim appears to have definitively ended the Seneca’s pursuit of that territory. The decision against the tribe was based on their inability to prove exclusive historical use and occupancy of the area in question. The support for the Cuba Island claim in district court was the clear prompt for negotiations to begin. The peculiar property and legal parameters of the Cuba Lake land made this distinct in terms of the negotiation and settlement
arrangements, as federal approval was not required. Despite this, the function of legal support as necessary to generate attention and action on the part of the government (in this case, the state government) remains the same.

Costs of Settlement:

The Cuba Lake settlement was low cost on every possible measure. The claim was to a small, remote parcel. There were no private property owners involved, and the settlement was ruled to not need Congressional approval. This makes the claim different than any of the others covered here, and also is key factor in understanding the ease of its settlement and lawmakers were able to make a quiet settlement without the attention of their constituents. The Grand Island claim was markedly different- many people and property owners affected, very public, and a far more valuable and sizable territory.

Identity:

The Seneca (and, in fact, the other members of the Haudenosaunee) have some associations with proud noble savages because of their connection to the famed confederacy. Their ongoing presence on the reservations and in the areas claimed also supports the public perception of the cultural connection to the land itself. While these are relatively non-threatening images, they are also the least prevalent. The dominant population in the area has a strong public association of the Seneca as dangerous and violent, and image reinforced by public protests and internal disputes. In recent years the pursuit of gaming rights and ongoing disputes over taxation have also contributed to the idea that the Seneca are greedy and are seeking rights and sources of money that the rest of the population cannot get. Because of this predominantly negative, undeserving and threatening image of the Seneca, the quiet nature of the Cuba Lake agreement may be the only reason it progressed.

Justification for Claim:

The main reason given for the Seneca’s claims has consistently been one of seeking justice and fairness (Precious 2004). As was noted in Chapter 5, this justification can be both positive and negative for the tribe. In the Seneca’s case, just as they have morally grounded their claims on ideas
of fair treatment, so have their opponents. For example, this statement comes from a 1993 editorial on the land claim in the Buffalo News:

If the Indians are successful in their bid, then few in this country will be secure on their property, acquired fairly and legitimately through years of long, hard work. One must wonder what right does any person or group have to take such an action that may immobilize entire communities for years. (El-Bahari 1993)

In other areas, such as their casino bids with the state, the Seneca have stressed economic development and cultural survival, but neither came into play with the Cuba Lake claim. The small size and removed location of the property make it unsuitable for economic enterprise other than the two gas stations that the tribe currently has on the territory.

Group Cohesion:

The conflict between rival factions was not directly related to the pursuit of land, but it severely affected the ability of the tribe to present a united front and the perception of the tribe by the surrounding community. Leaders were able to come together in agreement over the small and clearly delineated Cuba Lake parcel. Combined with the quick and relatively quiet negotiations process, negotiations were able to proceed.

7.6.4 Current Status of Settlement

The Cuba Lake land returned to the tribe is home to two gas stations operated by the tribe and is unlikely to see any future development. Outside of this, however, conflict over land and sovereignty continue. After a legal suit for compensation over an easement for the New York State Thruway failed, in April 2007 the Seneca tribe voted to rescind the easement of approximately 300 acres on the Cattaraugus Reservation (Thompson 2007). The Seneca currently operate three gaming facilities in the state of New York.

7.7 Conclusions

The real outcomes of “successes” in land transfers have varied. The Mohegan and Mashantucket Pequot used the land transferred to develop hugely lucrative casino enterprises and
provide a wide range of services and supports for their tribal members. They were in a unique situation because of the agreement of tribal members to pursue gaming as well as their location near large metropolitan areas. In order to exercise gaming rights under the federal structure of the Indian Gaming Regulatory Act, however, both tribes ceded some sovereign control and legal jurisdiction to the state and federal governments.

In contrast, the Seneca have done relatively little with the tiny Cuba Lake parcel, which has no development potential. The Penobscot and Passamaquoddy have struggled in their pursuit of economic development due mainly to their remote location. The Narragansett continue to seek ways to expand their territory, exercise sovereign rights over the new land as trust property, and develop a casino. They have hit hurdles in each of these goals. Most recently, in February 2009, the Supreme Court ruled that the Narragansett are not eligible to take additional lands into trust because they were not federally recognized during the 1934 Indian Reorganization Act. The complexity of the Alaskan Natives settlement arrangement has also resulted in many complications and concerns over the management and operation of the corporate entities, with many concerns remaining over 35 years after the initial settlement. The Supreme Court has ruled that Native villages cannot set laws for non-natives in their jurisdiction, further reducing the control that Native authorities have over the lands granted.

The ongoing concerns of tribes over the state of the lands transferred in settlements are similar to those expressed by tribes which have had preexisting control over their territory. In other words, these problems are problems of all American Indian tribes and territories, not just of those who have recently reclaimed land. The tension between American Indian tribal sovereignty and the authority of the federal and state governments is ongoing.

Given their weak status, the victories of these groups in regaining control over territory are remarkable. The Alaskan Natives, with their large population and institutional support, had a degree of strength that no other claimant group covered has had. Still, the settlement terms of 44 million acres of title and almost $1 billion set a precedent that inspired other groups to pursue the return of
their land. The case studies presented here make it clear that without the normative support of the judiciary to bring their claims to the legislature, elected officials will not consider American Indian land claims. The transfer of land (whether from public use or private hands) into tribal trust property is simply too disruptive to happen without some formal prompt to do so. Even in cases where the negotiation of settlement was rapid, the negotiation did not begin until there was strong legal support for the responsibility of the government to consider claims.

The successful claimant groups discussed in this chapter generally operated in a social context where the dominant population saw them as deserving of transfers. Because of the electoral dynamics of settling the claims of the very weak with public transfers, elected officials will not do so if the group is considered threatening or nondeserving. In the case of the Alaskan Natives, the Narragansett, and the Mohegan, the claimant groups were all seen as very non-threatening. The Mashantucket Pequot were not well known, and while there were some perceptions of the group as “false” Indians, the group was also seen as very non-threatening because it was so small, resource poor, and the claims were relatively tiny. The Penobscot and Passamaquoddy were publicly connected with a wide variety of stereotypes, and the groups do not appear to have a dominant positive or negative image. Finally, in the last case discussed, the Seneca, it appears that the Cuba Lake transfer may have only been able to happen because it was so small and done so quietly.

There were a range of justifications for the claims given. It does appear (both in the chart offered in Chapter 6 and in the discussion above) that those justifications that align with dominant ideals and values (such as environmental concerns, the pursuit of economic self-sufficiency, and justice) are favorable for settlement. With the exception of the Seneca claim to Cuba Lake, all of the settled claims included justifications for the use of transferred land as a means of attaining economic self-sufficiency, ensuring cultural survival, and offering justice for past wrongs.

Given the extensive effort involved in the pursuit of land claims, it is surprising to see that group cohesion does not appear to be necessary. The Seneca and the Mohegan tribes both suffered from factionalism during their settlement negotiations. The Seneca, however, were able to come to
an agreement over the Cuba Lake settlement and were not opposed by the Seneca-Cayuga of Oklahoma over that particular claim. The Mohegan case is more surprising. There was no violent or public confrontation between the two Mohegan groups, which was a problem for many of the other groups with internal factions, as will be seen in the next chapter.

Other than the need for some formal measure of normative institutional support (as expected, this was legal), the cases range across the hypothesized causal factors. Each claim was settled because of the interaction of factors that made settlement appear less costly than ongoing claims might be. The social context of the claimant groups and the justifications for their claims were viewed as non-threatening by the dominant population; elected officials were not likely to be punished by their electorate for the decision.

The transfers of land represent not only tangible rewards for the claimants, but also a very moral acknowledgement of their position and sovereign right. Many of the ongoing concerns of these winning groups are about the fact that their sovereign powers are in some way restricted by the settlement agreements. While these are valid concerns, they also reflect the common and ongoing experience of American Indians in the United States.
8. When the Weak Don’t Win

This chapter turns to those cases where the claimant group has not seen success in gaining the restoration of their land. They are “losers” only in the sense that they have not seen the restoration of their desired land. Several tribes have won substantial legal victories or even been offered financial compensation, but they have not reached land transfers. In each case, tribes have struggled against overwhelming odds to pursue these claims for the return of territory. In several of the cases, the government has declared the claims process ended while the tribe continues to fight it. Those cases that appear to have been legally and politically ended are labeled closed. It is worth noting, however, that the persistence of tribes cannot be underestimated. A case this work has treated as denied, the Cayuga claim (ended in 2005 when the Supreme Court declined to review the Appeals Court’s dismissal of the claim), may be reopening again. In February of 2008, the Cayuga filed a new court suit to reopen the possibility of a land claim. No decisions have been reached. Even while the odds may appear to be long, the claimants in this chapter may someday join the ranks of the victors.

8.1 Sioux

The Sioux’s persistent claim for the return of the Black Hills is one of the most well known land claims cases in the country. Despite being offered the largest financial settlement ever awarded by the Court of Claims or Indian Claims Commission, members of the Teton Sioux have refused the settlement money. They argue that they are not interested in selling their claims, and will only accept the return of land itself. The Sioux continue to pursue their claim for the restoration of land to this day while the government offered settlement funds sit in trust, unaccepted.

8.1.1 History of Acquisition:

Before the eighteenth century, the Sioux lived in the woodland regions of Minnesota. The increase of the white population on the east coast caused settlers to move westward. At the same time, American Indians tribes were leaving the east coast and seeking new territory to the west.
These pressures encouraged the Sioux themselves to begin migration westward. By 1776, there is evidence that the Oglala were in the Black Hills, but they (and all of the tribes and bands of Sioux) maintained a wide range of hunting territory that often overlapped with other tribes (Hyde 1937; Lazarus 1991; Sutton 1985, 124). Official contact with the American government came in the mid-19th century. The first Treaty of Fort Laramie (1851) recognized the land belonging to the Sioux. The second Fort Laramie Treaty (1868) set aside the Great Sioux Reservation (essentially all of South Dakota west of the Missouri River) and ceded the remainder of Sioux lands. The treaty also stated that there would be no more land cessions without the consent of three quarters of the adult male population (Lazarus 1991; Office of Senator Inouye 1988; Sutton 1985).

In 1874, Lieutenant Colonel George Custer (against the promises laid out in the Fort Laramie Treaty) led an expedition into the Black Hills and discovered gold. The vast wealth of gold and minerals in the Black Hills make it an incredibly valuable region. In 1875 the federal administration removed the troops that had been stationed to protect the boundaries of the Great Sioux Reservation and keep miners and settlers out. With this barrier removed, white squatters and prospectors pushed into the Black Hills. In a further violation of the existing agreement, the Department of the Interior notified the tribe that any Sioux not in their assigned area of the reservation by January 31, 1876 would be considered “hostile” and could be shot. Custer was out searching for “hostile” Sioux in 1876 when his forces were defeated at the Battle of Little Big Horn by Sioux and Cheyenne warriors (Lazarus 1991, 88; Office of Senator Inouye 1988). The Battle of Little Big Horn instilled an early image of the Sioux as a dangerous, violent tribe.

The news of the defeat and deaths came quickly to the east coast just after the centennial Fourth of July, raising fear and anger against the Sioux (Lazarus 1991, 89). Quick legislative action brought the Indian Appropriations Act of August 15, 1876. The Sioux could either “sell or starve”- they were to get no more rations or support from the federal government until they ceded the Black Hills. Even with this provision, a commission sent to gain consent from the Sioux was only able to get signatures from ten percent of the adult males. Disregarding the treaty requirement for the
approval of seventy five percent of males, Congress approved the new treaty in February of 1877 (Office of Senator Inouye 1988; Lazarus 1991). The Sioux lost the vast majority of their land, a total of 7.3 million acres. After ongoing unrest and conflict between the military and Sioux on their reservation, on December 29, 1890 soldiers massacred a group of 300 Sioux men, women, and children camped at Wounded Knee Creek. Wounded Knee has become synonymous with the end of the armed resistance of American Indians as well as a low point in history for the Sioux.

8.1.2 The Pursuit of Land Rights

Despite vast legal, social, economic, and political hurdles, the Sioux fought a long battle to assert their right to the land. They were initially barred from bringing any claim against the government (Indian tribes were banned from filing suit in the Court of Claims unless specifically authorized to do so by an Act of Congress). As early as the 1890s, chiefs met to discuss the treaties and determine what was owed them (Lazarus 1991, 119). The Sioux repeatedly petitioned Congress, and in 1920 Congress passed an Act allowing them access to file a suit for the land. The Sioux brought their case to the Court of Claims in 1923 (Taylor 1981). Nearly twenty years later, in 1942, the Court of Claims finally offered its rejection of the Sioux case, arguing that their claim was not eligible for compensation but was instead a moral claim. The Supreme Court declined review of the case (Deloria 1988; Office of Senator Inouye 1988; United States v Sioux Nation, 1980).

The Sioux were not stalled for long. After the passage of the Indian Claims Commission Act, the Sioux filed a claim in 1950. In 1954 the ICC ruled that the Sioux had failed to prove their case. The case was reopened in 1958 after an order from the Court of Claims found that the Sioux had been inadequately represented. With new legal representation, the case progressed, and in 1974, a preliminary opinion stated that Congress had acted inappropriately, using its power of eminent domain rather than acting as a trustee. The case was not settled before the ICC’s end and it was transferred to the Court of Claims. In 1979 the Court of Claims affirmed the ICC decision, and found that the Sioux should be compensated with $17.5 million as well as 5% annual interest. This
brought the total to an unprecedented $105 million judgment, the largest award made by the ICC or
Court of Claims. The federal government continued to protest the ruling, but a 1980 Supreme Court
decision upheld the decision and the monetary award (“$105 Million to Sioux Upheld” 1980; Lazarus

Unlike the vast majority of cases settled in favor of American Indian tribes by the ICC, many
Sioux tribes refused to accept the settlement money and persist in their claim for the return of the
Black Hills. Their position has been repeated time and time again: “The Black Hills are not for sale.”
The complexity of the Sioux Nation and their locations complicate understandings of the settlement
and ongoing claims. The ICC decision held that the original 1851 treaty referred to certain lands; the
Teton held 93% and the Yankton 7%. According to this judgment, the Yanktonai had no interest in
the claim being pursued as they resided primarily east of the Missouri River. In addition the Court of
Claims had argued that the Santee did not sign the treaty and also lived primarily east of the Missouri,
so were not a part of the claim or settlement. The Yankton have accepted their 7% portion of the
settlement funds and extinguished future claims (“Oglala Sioux Tribal Attorney Mario Gonzalez
discusses Docket 74” 1986). The remainder of the settlement money is held in trust (Giago 1995). The
Teton Sioux continue to press their claim for the return of land.

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1 The lawyers involved (Arthur Lazarus, Marvin J Sonosky, and William H Payne), were awarded $10,595,943 in legal
fees, also a record breaking amount representing 10% of the settlement total funds recovered for the Sioux (Taylor
Table 7.22: Members and Locations of the Great Sioux Nation

<table>
<thead>
<tr>
<th>Sioux tribe</th>
<th>Band</th>
<th>Reservation</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Teton</td>
<td>Oglala</td>
<td>Pine Ridge</td>
<td>North and South</td>
</tr>
<tr>
<td></td>
<td>Minneconjou</td>
<td>Cheyenne River</td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td>Blackfeet</td>
<td></td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td>Two Kettle</td>
<td></td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td>No Bows (Sans Arc)</td>
<td></td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td>Brûlé</td>
<td>Rosebud</td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Lower Brule</td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td>Hunkpapa</td>
<td>Standing Rock</td>
<td>Dakota</td>
</tr>
<tr>
<td>Yanktonai</td>
<td>Upper Yanktonai</td>
<td>Crow Creek</td>
<td>Dakota</td>
</tr>
<tr>
<td></td>
<td>Lower Yanktonai</td>
<td>Standing Rock</td>
<td>Dakota</td>
</tr>
<tr>
<td>Yankton</td>
<td>Yankton</td>
<td>Yankton</td>
<td>Dakota</td>
</tr>
<tr>
<td>Santee</td>
<td>Sisseton</td>
<td>Santee</td>
<td>Nebraska</td>
</tr>
<tr>
<td></td>
<td>Wahpeton</td>
<td></td>
<td>Nebraska</td>
</tr>
<tr>
<td></td>
<td>Wahpekute</td>
<td></td>
<td>Nebraska</td>
</tr>
<tr>
<td></td>
<td>Mdewanton</td>
<td></td>
<td>Nebraska</td>
</tr>
<tr>
<td>(Mixed)</td>
<td>Yanktonai and Teton</td>
<td>Fort Peck</td>
<td>Montana</td>
</tr>
<tr>
<td></td>
<td>descendents</td>
<td></td>
<td>Montana</td>
</tr>
</tbody>
</table>

Prior to the 1980 Supreme Court decision, in 1977, the Pine Ridge Oglala Sioux had split off from the other tribes involved and refused to renew their contract with the Washington based attorneys representing the Sioux Nation claim. With the legal support of Mario Gonzalez, the first Pine Ridge Sioux licensed to practice law, they rejected the monetary settlement offered and instead filed a new legal claim within a few weeks of the Supreme Court decision. The suit claimed the restoration of the land itself (7.3 million acres) and a staggering $11 billion in damages (Lazarus 1991). This amount was based on the estimated value of nonrenewable resources removed from the Black Hills (Greenhouse 1982; Office of Senator Inouye 1988). In addition, the suit named not only the federal and state governments as defendants but also seven counties, nine cities, and dozens of landowners and businesses (“Tribe files suit for $11 Billion over Black Hills” 1980). They also sought an injunction to keep the ICC settlement money from being disbursed. Eventually all of the

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2 This table is based on the summary offered by Oglala Sioux Tribal Attorney Mario Gonzalez in a 1986 Indian Country Today article (“Oglala Sioux Tribal Attorney Mario Gonzalez discusses Docket 74” 1986) and the breakdown in Black Hills White Justice (Lazarus 1991, 4).
Teton Sioux tribal governments would agree with Pine Ridge and refuse the monetary award (Lazarus 1991, 404). The first suit for land return was dismissed in court for lack of jurisdiction, a second suit requesting an injunction against a gold mine’s removal of minerals met the same fate (“Around the Nation” 1983; Goldstein 1984; Greenhouse 1982). The legal decisions in this case did not make any rulings on the merits of the case, simply arguing that the courts were not authorized to make decisions. This can be seen as a means of evasion; while the exact motivations of the judges in question are unknown, it is possible that they were seeking to not get involved in such an enormous and valuable claim.

Opponents to the claim view the position and reason for the Sioux’s claim quite differently. There has been concern that the Sioux are just as interested in the mining and logging as whites, and want to reclaim the land to exploit it for their own profit (Kanamine 1992). The value of the Black Hills and the riches they contain contrasted sharply with the deep poverty that characterized the Sioux population. The reservation system had stifled a lifestyle and economy based on hunting; poverty and dependency were endemic on the Sioux reservations. In the early 1980s, for example, two thirds of the residents lived below the poverty line, one third were homeless, and over three quarters unemployed (Goldstein 1984). These problems were accompanied by dismal education statistics, problems with drug and alcohol abuse, and mental and physical health problems (“In Indian Country” 1999). A 1984 series of articles that ran in both Indian Country Today and the Washington Post characterized the Rosebud Reservation as “Villages of despair.”

The roads are dusty, and the air is dry. Many houses are vacant, their insides charred and outsides worn by the harsh winds that whip the prairie. Others, occupied by as many as 25 people, lack electricity and running water. Stoves do not work. Woolen blankets hang where walls once stood. Children are bathed in large metal buckets. Dogs sniff the litter that is strewn in the streets. Some people live in shacks and old cars…seven of every 10 Sioux are jobless (Weiser 1984).

These problems were exacerbated by institutional breakdown on the reservation, mismanagement, corruption, and ineffectiveness of available social and health services (Weiser 1984).
Despite accusations of greediness, the central arguments for the Black Hills claim appeal to the unjust and illegal taking of land. As Vine Deloria wrote, the treaties with the federal government were intended to be “…documents of diplomacy in which two nations pledge their honor to regulate their future relations according to a set of mutually agreed-upon principles.” The quest to regain the Black Hills is an attempt to rebuild this relationship of sovereignty and honor. As the claim has dragged on, many of the Sioux statements and protests have become more antagonistic and frustrated, alleging that the taking of the territory was done through the trickery and deceit of the government.

The claim is also justified on the basis of the sacred status of the Black Hills. The Sioux argue that the state and federal governments are not protecting the religious rights of the Sioux (and Cheyenne, who also hold the Black Hills sacred) (Gonzalez 1996). The Black Hills are described as central not only to the religion of the Sioux, but to their very culture. “…The whole place, to us, is like a church, an altar… We protect the Black Hills, the sacred altar, so that our people will always know and remember that it is the center, the place where our relatives came from” (Little Eagle 1996). As Gonzalez, the attorney, states:

… No one would ever expect Christians, Jews and Muslims to accept monetary compensation for their sacred sites and shrines in the Middle East. Yet, these same Christians, Jews, and Muslims residing in the United States have no objection to forcing a monetary settlement on the Lakota tribes for their Sacred Black Hills… (Gonzalez 1996).

Opponents argue that to award the claim based on sacred status would provide federal support for the tribal religion. Local and national opponents also refer to the symbolic meaning of the Black Hills to the American population- the parkland, Mount Rushmore, and the tourism that provides a great deal of economic support for the region (Pommersheim 1988).

The Sioux have a long history of protest. While their activism has displayed the agency and strength of American Indians and exposed their problems to the light of national and international media attention, it has also served to reinforce the public perception of the tribe as vigilante and dangerous. For example, the American Indian Movement’s occupations of Wounded Knee in 1973
and the Yellow Thunder Camp in 1981 both resulted in violence and served to solidify white fear and opposition to Sioux claims. At the same time they displayed the resilience and tenacity of AIM and its members (Lazarus 1991; Little Eagle 1998). Both events were characterized by violence, and contributed to the ongoing tension between whites and American Indians in South Dakota (“Tension Rises in Wake of Death at Sioux Camp” 1982).

In 1985 a Congressional initiative lead by Senator Bill Bradley of New Jersey presented a proposed settlement known as the Bradley Bill. The bill included a transfer of 1.3 million acres of federally held lands as well as water and mineral rights and the preservation of certain forest and park lands. The justification for the bill was both moral, in terms of offering recompense and just compensation for past dishonorable dealings, and practical, in recognition of the fact that the Sioux had “been persistent and unrelenting in their efforts to regain the Black Hills” (Office of Senator Inouye 1988). The Bradley Bill died in Congress, primarily due to strong opposition from the South Dakota delegation.

An open letter from Governor Mikelson to Senator Bradley pointed to many of the arguments offered by local white opposition to the claim. Opponents reasoned that the Sioux could not establish a connection to the land from ancient times. Their relatively recent arrival in the area, barely predating the arrival of whites, did not fulfill the requirement of occupying territory “since time immemorial.” Other concerns include the fact that allowing a claim based on religious grounds could be akin to the government supporting the tribal religion and violating the separation of church and state.

State officials were well aware that the majority of South Dakotans were opposed to the settlement (Mikelson 1988). While the Bradley Bill was very specific in excluding private landowners, misinformation was rampant and fear of losing their homes was shared by many white residents (Pommersheim 1988). Even while many private property owners did not themselves benefit from mineral exploitation, as a whole South Dakota constituents were “virtually apoplectic at the prospect
of giving the Sioux substantial civil jurisdiction over Black Hills lands that produced $600 million in annual revenue from tourism, mining, and timber harvesting” (Lazarus 1991, 419).

Unlike many other claims, public opposition was and has been well organized. Groups such as the Open Hills Association, supported by Senator Tom Daschle, opposed the claim and help to disseminate information against it (Lazarus 1991; Little Eagle 1998). The widespread and well known concerns about the claim influenced the state’s federal officials to renounce any settlement:

Non-Indian protesters to the bill were quick to shout out -- wrongly -- that the "Indians were trying to take back all of the Black Hills." South Dakota's congressional delegation united against the Bradley Bill. So frightened did Rep. Tim Johnson, D-S.D., become that when he ran for re-election he voted against the return of 200,000 acres of land to the Quinault Nation located in the state of Washington, even though it had been clearly proven that the land was taken illegally because of a surveyor's error. Congressman Johnson was afraid his Republican opponent would accuse him of returning land to the Indians (Giago 1995).

Bradley’s settlement plan was reintroduced in 1987 with the support of Senator Daniel Inouye, but almost immediate derailed because of splits within the Sioux nation. Ultimately, Bradley would not pursue the bill without the unity and agreement of the tribes, and the bill was dropped (Frommer 2001). The intervention of Phillip J Stevens, a controversial figure from California who was made a “special chief” of the Oglala, introduced a rift within the claimant groups. Stevens’ new plan broke the Sioux’s unified support for the Bradley bill. Stevens proposed a far more radical settlement and raised the amount demanded. He argued that the Sioux deserved $3.1 billion in addition to the land transfer. Some Sioux groups, including the Black Hills Sioux Nation Council and the Grey Eagles Society, dropped support for Bradley’s bill to support Stevens’ plan (Lazarus 1991; Little Eagle 1998). Ongoing disagreements over the precise terms of the preferred arrangement have hindered settlement plans (Little Eagle 1998).

Conflicts between different segments and factions of each tribal band have also created internal and external confusion. For example, the conflict over the authority and tactics of tribal Chairman Richard Wilson resulted in an armed conflict between his supporters and more traditional,

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3 There was (and remains) disagreement as to the pragmatism behind Stevens’ ambitious plan as well as his claim to Sioux heritage (Gregg 1988; Hozid 1988).
treaty oriented tribal members and the standoff at Wounded Knee (Lazarus 1991; Little Eagle 1998). In the years that followed, the divisions on Pine Ridge persisted and violence continued (Lazarus 1991).

In addition, separate treaty councils committed to the return of the Black Hills have very different strategies and leadership. For example, the Teton Sioux Nation Treaty Council has focused on land claims in the international arena and places the Sioux struggle in the context of worldwide indigenous struggles. In contrast, the Black Hills Sioux Nation Treaty Council continues to focus its efforts domestically (Little Eagle 1998). As with many tribes, a major cause of divisions with the Sioux (as a Nation and within each tribe) comes out of political reorganization after the Indian Reorganization Act. Some Sioux moved to support the new elective style of government and others staunchly advocated only traditional forms of government (Lazarus 1991, 164).

Further efforts— all equally unsuccessful— have been made for settlements involving the transfer of the Black Hills. In 1990, for example, Representative Matthew Martinez of California presented a bill, the Sioux National Black Hills Restoration Act, for the restoration of federal lands to the Sioux. It died when opposed by the South Dakota delegation (Little Eagle 1993, 1998). Opposition to settlement from elected officials in South Dakota has meant little progress for settlement. Still, the majority of Sioux support pursuit of the land claim (Little Eagle 1998).

Resistance to a land transfer persists among non-natives. A 1993 survey of 807 South Dakotans found 26% in favor of returning federal land to the Sioux, 58% in opposition and 16% undecided. The support was greatest among Democrats and women (Little Eagle 1993).

The pursuit for the return of land has now gone on for over a century. The most recent round, beginning with the Oglala’s legal suit in 1980, is nearly 30 years old. The positions of both the Sioux and the state’s elected officials appear entrenched. The courts no longer seem interested in the case,

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4 For a better understanding of the conflict and violence surrounding Dick Wilson, AIM, and Wounded Knee on Pine Ridge, see Lazarus 1991 301-311 or also the excellent documentary In the Spirit of Crazy Horse or the book of the same name by Peter Matthiesen.
although the conflicting range of decisions over the years certainly point to a moral if not practical
interest in bringing the claims to resolution. The Sioux themselves won’t back away from the
insistence that they seek the return of the Black Hills, although precise terms of the goal are unclear.
Public opinion polls of the Sioux taken during the late 1990s show that the vast majority of the tribal
population will only be satisfied with the return of land.5

8.1.3 Potential Causal Factors

Legal Support:

The 1980 Supreme Court decision in favor of the ICCs ruling and settlement for the Sioux
was a strong assertion of the injustice that had been perpetuated by the government. In this sense, it
supported the claims of the Sioux. The court rulings, even when openly apologetic, do not advocate
the return of the land or any additional consideration or responsibility by the government. Because
of this, the research considers the Sioux to have no legal support for the transfer of the Black Hills.
The dismissal of the Oglala lawsuits for lack of jurisdiction shows the legal unwillingness to recognize
rights to transfer in this case. While the Sioux have long had a strong moral claim on the land, there
has never been legal support for the return of land.

Costs of Settlement:

The potential costs involved in negotiating and awarding a settlement to the Sioux are
astronomical. The claim encompasses 7.3 million acres of land and billions of dollars in damages.
The chance to settle with for less with the Bradley bill was lost with its defeat in Congress and later
disagreement among the Sioux; the tribe’s demands have not diminished. The Black Hills land has
value to both the Sioux and the dominant population far beyond its physical value as well, as the

5 The publication Indian Country Today conducted several public opinion polls of the Sioux during the late 1990s
regarding the future of the land claim. Unfortunately, the offices were subsequently moved and the records and data
lost, leaving only anecdotal evidence and the summary provided by the Little Eagle’s articles (personal correspondence
with David Melmer of Indian Country Today, 2007).
territory is central to Sioux religious beliefs and also has come to stand as a symbol of American heritage for those opposed to a transfer

Identity:

The public perception of the Sioux has been problematic throughout much of their history with the United States. Historical events such as the Battle of Little Big Horn and the Wounded Knee massacre generated national attention at the close of the 1800s, and unlike many tribes that are virtually unknown outside of their local regions the Sioux are relatively well know. The dominant national population developed a widespread understanding of the Sioux as dangerous and warlike Indians. The dangerous stereotype was revived with the media attention to the standoff at Wounded Knee in 1973. The dominant population also associates the Sioux with stereotypes of laziness and a desire for public handouts. While these stereotypes have negative social connotations, the Sioux do have the “advantage” of being associated with two less threatening images. The public generally views them as connected and established on the land. The dominant media also often invokes images of the Sioux as proud (and doomed) noble savages.

Justification for Claim:

As the Sioux claim has gone on and on, the underlying message of their claims making has become more frustrated. The quest for justice is at the core of the argument, and at this point the validity of their case of government injustice has been supported in multiple forums, even if there is no support for the transfer of land itself. The religious significance of the Black Hills remains central to arguments for the transfer, as does the need for the territory to ensure the cultural survival of the tribe and its practices. As the claim has progressed, more of the public language put forth about the claim refers to the trickery and deceit of the dominant population and the government as the basis for the claim. In this context, the claim for the Black Hills is extremely contentious.

Group Cohesion:

The various bands and tribes constituting the Great Sioux Nation add complexity to the case. The split in the 1980s ended any chance of the success of the Bradley bill, as its supporters
refused to pursue it without the cohesion of the group. The many operating tribes who comprise the Teton Sioux as well as the internal divisions within these groups have made reaching agreement on goals, tactics, and even leadership very difficult. These rifts undermine the chance of reaching a settlement.

8.2 Schaghticoke:

The Schaghticoke tribe’s quest for land highlights the role of federal recognition and its complications in the land claims process. Formally recognized and therefore authorized to pursue their land claims in 2004, the status was revoked after a period of intense political pressure and outcry in 2005. This reversal has likely ended any possibility of land transfers.

8.2.1 History of Acquisition

The Schaghticoke, who reside in western Connecticut along the present New York border, had contact with the white settlers as early as the 1690s (Salzman 2004). A reservation was established by the colony in 1737 and its boundaries confirmed in a 1752 treaty (Stowe 2004). In 1756, concerned about the encroachment on their land, the tribe asked the Colony of Connecticut to appoint a white overseer to help protect their interests. The position was created, but offered little protection for the tribe as the overseers themselves often sold tribal territory for their own benefit. One overseer, Abraham Fuller, rented or sold 4,000 acres of Schaghticoke land to pay for his medical bills (Freedman 1982). During the revolution the Schaghticoke fought on the side of the Continental army (Salzman 2004; Yardley 2004). This alliance did not offer any security to the tribe, and throughout the 19th century their land base was sold off and the population declined precipitously (Salzman 2004).

There is very little recorded history of the Schaghticoke during the 1800s and early 1900s (Yardley 2004). A handful of tribal members remained on the reservation, but the remote mountainous setting and discrimination against the tribe contributed to poverty and abysmal living conditions. The state of Connecticut worked to detr ibalize the few remaining Schaghticoke

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throughout the 19th century, refusing to allow any businesses other than farming on the reservation and denying permits for new buildings. As late as the 1950s “the state sought to discourage settlement on the reservation here by bulldozing or burning the homes of elders after they died.” (Freedman 1982). Their isolation and dwindling population in a rural area kept the Schaghticoke out of the public eye and consciousness. At the time of their initial recognition bid and first land claim, they were a largely unknown minority group in Connecticut. “‘Nobody even knows there are still Indians in Connecticut,’ said Maurice Lydem, tribal chairman of the Kent Schaghticokes and the executive director of the Connecticut Indian Affairs Council” (Rozhon 1981). The Schaghticoke were faced with a problem of a perceived absence of authentic Indian identity.

In 1973 an administrative shift in the state government allowed the tribe (along with the other tribes in Connecticut) to incorporate as part of the new Indian Affairs Council. Indian affairs had been previously administered under the State Park and Forest Commissioner and the Commissioner of Welfare (“Blumenthal to fight Schaghticoke recognition.” 2003). This change encouraged some reassertion of tribal practices and culture, and helped the few remaining members reorganize the tribal government.

8.2.2 The Pursuit of Land Rights

State recognition of the Schaghticoke and the experiences of other Connecticut tribes encouraged leaders to submit a bid for federal recognition, in 1981, and a land claim in 1985. While the tribe had historical treaties with the state and had received state services, it had never had a relationship with the federal government. Formal federal recognition would open up a new stream of financial support for the tribe and other services for its members. Recognition would also allow the federal transfer of land to the tribe to be held in trust. Without recognition, the tribe could not have their land claims settled with returned land.

There were three Schaghticoke land claims. The first, beginning in 1985, sought to reacquire 43 acres of land that the National Parks service had taken from the reservation for the Appalachian
Trail (AT) in 1937. The court action was stayed pending the determination of tribal status. Instead of appealing to norms of environmental conservation, their claim to the AT land was portrayed in the media as opposing conservation, and environmental organizations argued that the claim threatened the trail's continuity.

During both the recognition and land claims processes the Schaghticoke tribe was beset by factional rifts. In the early 1980s a disagreement over rewriting the constitution caused the tribe to split. Two leaders, Trudie Ray Lamb and Irving Harris, both claimed to be the elected tribal chairman, and each was supported by a different nine member tribal council. The issue in this case was compounded by sexism, which Harris did little to deny: “I might be called a male chauvinist pig, O.K. I do believe in certain things, and no woman's going to change me. My mold's set.” (Freedman 1982). The division died down for a while, but was revived in 1996 (Yardley 2004).

Lamb’s supporters would ultimately form the Schaghticoke Tribal Nation (STN), the group that maintained the petition for recognition and would (briefly) be recognized. The STN has approximately 300 members and has been led since 1987 by Richard Velky. The Schaghticoke Indian Tribe (SIT) was loosely aligned with Harris and was lead by Alan Russell (Gray Fox). The SIT had about 90 members in the early 1990s with about 10 of those on the reservation in Kent (Urban 2002a; Yardley 2004). The dispute over tribal control, while never as violent as the conflicts for other tribes such as the Mohawk, has had some tense and very public moments. In 2000, Chief Velky was arrested on disorderly conduct charges when he broke the camera of Karen Russell, wife of the SIT leader Alan Russell during the removal of padlocks that had been placed on a reservation pavilion (Collins 2000). In 2001, three members of the SIT challenged Velky to prove that he was actually of Indian descent with a DNA test (“Tribal members challenge chief’s heritage.” 2001).

The second land claim suit was filed in 1998 by the STN. It alleged that more than 1,900 acres of land had been taken in violation of the Trade and Intercourse Acts. This claim involved land owned by the Preston Mountain Club (a private fishing club) the Kent School, and other town and private land (Stowe 2004). Finally, a third suit, in May of 2000, claimed more than 148 acres
(also alleging violations of the Trade and Intercourse Acts) that had been taken from the tribe by the state and then transferred to the New Milford Power Company for the construction and operation of a dam and power plant. The tribe attempted to have the suits consolidated but were denied by a federal judge (“Federal judge denies tribe's request for speedy federal recognition” 1999). The land claimed in the two suits was mostly rocky, unimproved land that was unsuitable for development. Some of the land was underwater as a result of the dam on the Housatonic River (Mayko 2004).

The language justifying the claims has changed over time. Early on in the recognition (and land claim) process, Velky lauded recognition as the path to tribal cultural and economic success: federal grants, money for cultural and language preservation, and access to health care, housing, and education (Herbst 2002; Urban 2002). When residents expressed concern that the tribe would build a casino on an expanded reservation in Kent, Chief Velky initially (and carefully) announced that the tribe has "no visions of a casino in Kent," but was instead trying to expand its 400-acre reservation so that all of its members could live there (“Federal judge denies tribe's request for speedy federal recognition” 1999). He reiterated in a 2000 town meeting that the tribe was not interested in building a casino in Kent (“Kent forum on tribe recognition draws a crowd” 2000). Later in 2000, the role of the casino in the Schaghticoke’s pursuit of their land claim became clearer, and they announced hopes to build a casino near Bridgeport (on the other side of the state) (“Former Foxwoods president advising Schaghticokes on gambling issues” 2000).6

The political environment in Connecticut during the late 1990s was increasingly hostile to Indian land claims and the attached issue of casino rights. Lawmakers lined up in opposition to the Schaghticoke land claims- Senators Lieberman and Dodd, Representatives Shays, DeLaura, Maloney, Johnson, and Simmons, as well as the Governor of Connecticut all publicly opposed settlement (Urban 2002b, 2004, 2005; US Congress Senate 2005). The state Attorney General, Blumenthal,  

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6 A distinction between the Schaghticoke and the Golden Hill Paugussets (who were also undergoing recognition and land claims at the same time) should be clear. Where the Paugussets were willing to use their land claims as leverage for casino rights, offering to drop the claims for a casino site, the Schaghticoke have never made that offer, and have never proposed to build or develop a casino on their claims in Kent.
became one of the most notable and staunch opponents of tribal recognition and land claims during the 1990s and 2000s. The citizens’ group, Town Action to Save Kent (TASK) also became an outspoken opponent. They cited concerns not only with the potential disruption to the town and concerns over title, but also focused on casino issues including unwanted development, traffic, crime, and other problems accompanying casinos (Baldor 2004b; US Congress Senate 2005).

The land claim suits were put on hold by the legal system until the outcome of the recognition process was decided. Concerned over the length of time the recognition process could take, the tribe requested either an expedited hearing or to have the courts determine their status in 1998 (“Federal judge denies tribe’s request for speedy federal recognition” 1999). In reaction to their suit (and in agreement with the final ruling by US District Court Peter C Dorsey), the state Attorney General Blumenthal argued that the Bureau of Indian Affairs, not the courts, needed to determine recognition status (“Blumenthal seeks permission to get involved in Schaghticoke claims” 1998). The legacy of the Mashantucket Pequot’s legislative recognition and building concerns about the authenticity of the tribal heritage likely influenced this insistence on administrative process (Cramer 2005). The tribe attempted to have their recognition application considered at the same time as the Golden Hill Paugussett over concerns that the two tribes had identified the same ancestors (Benjamin 2000). This request was denied on the grounds that the bloodlines were not closely enough linked to warrant joint consideration (“BIA denies Schaghticoke request for joint petition.” 2000).

The Schaghticoke also tried a more disruptive tactic. The STN leaders threatened to close the Appalachian Trial with a protest on July 4, 2000, which would force hundreds of campers and hikers to reroute. They cancelled the protest when Blumenthal agreed to meet with them and discuss the recognition bid (Christoffersen 2000; “Indian Tribe Cancels Protest” 2000). Concern with the slowness of the BIA process was not limited to the Indians. The town of Kent had a referendum and the residents voted 489-147 to spend up to $200,000 for an independent investigation of the recognition bid (“Town approves spending in tribal recognition case.” 2000). In 2001 US District
Court Judge Peter Dorsey ruled that the BIA would have to issue a final ruling by June 2003 after the tribe sued again over the slowness of the process (“Judge sets timeline for Schaghticoke recognition process.” 2001). To further complicate matters, in 2001 the SIT rejected the actions of the STN and filed its own separate petition for recognition, claiming to have been the originators of the 1981 filing. In December 2002 the BIA issued a preliminary rejection, stating that the tribe had failed to demonstrate a continuous community and political authority through last two centuries (Urban 2002c). The 2002 preliminary rejection of the STN’s bid was welcomed by the members of the SIT, who thought that it might help their own bid (Urban 2002c).

In response to the preliminary finding, the tribe was allowed to submit additional material, and in a “dramatic turnaround,” the Schaghticoke Tribal nation was granted federal recognition in 2004. The change came from the BIA lending more weight to the fact that the tribe retained state recognition when other evidence of continuity was lacking (Baldor 2004b). The recognition in 2004 was celebrated by the Schaghticoke, but the Connecticut state government, its congressional delegation, and the local population were stunned (Stowe 2004). The state immediately entered an appeal, again stalling the three land claim suits again until the decision was finalized (Mayko 2004). A federal brief revealed in the investigation during the appeals process argued that the method used for determining marriage rates within the tribe during the 19th century had been flawed—rather than counting marriages, the record counted the individuals within the unions and inflated the numbers reported (Yardley 2004b). Another factor was that the STN “failed to meet the criteria from 1997 to the present because numerous Schaghticoke Indians refused to be members of the Schaghticoke Tribal Nation” (Chistroffersen 2005).

The BIA and Department of the Interior were also under heavy pressure from Congress to reconsider the recognition. The Connecticut delegation was very public in its call for a reversal, continuing to argue that the Schaghticoke did not meet the criteria of a legitimate tribe. There are also allegations that Virginia Representative Frank Wolf, a noted opponent to Indian special rights, went to President Bush with threats to oust the Secretary of the Interior Gale Norton unless the
recognition was revoked. There was also the involvement of a lobbying firm hired by tribal opponents (Mayko 2007).

The BIA revoked the recognition of the Schaghticoke in May 2005, the first time that such a reversal had taken place. The Department of the Interior upheld the decision in October (Urban 2005b; Christophersen 2005). Velky and the STN immediately began to make plans for a further appeal (Gordon 2005). The tribe has sued both the lobbying firm and the Town Action to Save Kent (Mayko 2007). The land claims are indefinitely on hold, as the courts will not rule on them until the tribe has federal recognition, and legislators are incredibly unlikely to voluntarily reconsider the claims given the opposition of the Connecticut population and elected officials.

The political opposition to the land claims and recognition of the Schaghticoke contrasts with the support that had been seen for the Mashantucket Pequot settlement (1983) and the Mohegan settlement (1994). It appears that the success of the casinos by the two tribes and the increase in land claims activity contributed to an increase in public opposition to additional awards to American Indian tribes. American Indians were beginning to be seen as potentially powerful, making them unworthy (and no longer in need of) special rights. The involvement of gaming also drew those that opposed gaming into opposing Indian rights and land claims. The fact that the Schaghticoke and Golden Hill Paugussett (to be discussed below) also struggled in establishing the authenticity of their identity in the federal process also contributed to opposition. All of these factors were involved in pushing elected officials to oppose land claims.

The involvement of the casino issue was complex regarding the Schaghticoke land claims, particularly as none of the land in question would be suitable for development. Because of this, the tribe has continued to leave open the possibility of staking claims elsewhere in the state, including Bridgeport, Danbury, New Haven and Stratford (“Schaghticokes leave open the possibility of future

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7 The process of the reversal took place at the same time as immense political pressure was being put on the BIA to change its recognition process. The Congressional testimony preceding the reversal reveals concerns over the length of time and inefficiency of the process, the lack of oversight, the lack of consistency, and the possibility for corruption or political favoritism as opposed to objectivity in decisions. (US Congress Senate 2005).
land claims” 2002). All claims are off of the table with recognition denied. It should also be noted that over the course of the recognition bid and land claim process investors, including Frederick DeLuca (the founder of the Subway chain), the Eastlander Group (a Middletown based venture capital firm) and the Native American Gaming Fund (based out of New London) have spent more than $12 million to fund the process. The tribe itself has spent more than $500,000 to lobby Congress and other federal officials (Green 2002; Yardley 2004; Urban 2005b; “Blumenthal wants Schaghticoke federal recognition overturned” 2004).

8.2.3 Potential Causal Factors

Legal Support:

The Schaghticoke claims were never granted a legal decision. The court argued that the claim could not be evaluated until a decision was made in the federal recognition process. With legal support to delay, the government certainly had no incentive to begin consideration of land claims. The research labels the legal status of the case as “pending.”

Costs of Settlement:

The potential costs of a settlement award are relatively low. Much of the land that the tribe was claiming was mountainous with little development potential. The claim to the Appalachian Trail parcel was complicated by the symbolism of the property and its potential effect on the broader system. This may have added an element of difficulty. The other aspect of the suit that raised the costs was the inclusion of businesses and public facilities in Kent. Even with these elements, the three claims are low cost. There were also few expenses or pressures on government officials related to ongoing claims other than the strain on local social relations between the Schaghticoke and the other residents of Kent.

Identity:

The Schaghticoke’s pursuit of federal recognition at the same time as their claims meant that there were ongoing concerns about the authenticity of their identity. Despite the established
connection to the land with their reservation, the few residents and persistent attempts of the state to
discourage any population growth challenged this. They were often associated as imposters, seeking
only to get federal recognition and territory out of laziness and greed. These associations intensified
with the announcement of plans for potential gaming rights. There are also consistent associations
of the group as lawless, and dangerous, and their presence seen as unsafe for the dominant
population. Overall, the group was perceived and portrayed by the dominant population to be
threatening and clearly undeserving of the transfer of land.

Justification for Claim:

The claims were based on a call for justice, based on ongoing mistreatment and the failure of
the federal government as “trustee” to protect the tribe against the encroachment of the state. The
claims also involved an appeal to the need for a land base and recognition in order for the tribe to
develop economic self-sufficiency. The poor relationship between the tribe, the local community,
the state, and the federal government created a great deal of hostility, and the claim for land return
was also referred to as arising out of the past trickery and deceit of the government.

Group Cohesion:

Group cohesion is and has been poor. The split between leadership and allegiance to the
Schaghticoke Tribal Nation and the Schaghticoke Indian Nation remains hostile. This rift may have
helped to doom their recognition process as well as the evaluation of their land claims.

8.3 Golden Hill Paugussett:

The Golden Hill Paugussett’s land claims are also best understood in the context of the
accompanying recognition bid. Gaming has also been a factor in perceptions of the group and of
their claims. While the quest for federal recognition began in 1982, long before the IGRA was

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8 The spelling of Paugussett is found as both “Paugussett” and “Paugussett.” I have chosen the variation with the
double “s” that is used by the tribe, which officially calls itself “The Golden Hill Tribe of the Paugussett Nation.”
Another spelling traditionally used by members of the tribe (but not used here) is Paugeesukqs. Some of the direct
quotes and references used may retain their original spelling.
enacted in 1988; the first land claim wasn’t officially filed until 1992 and was quickly overshadowed by arguments about gaming rights (Cramer 2005). Recognition was established as a precursor to both continued pursuit of land claims and to casino rights; the formal negative recognition decision by the BIA in 2004 also ended their chances of a land claims settlement.

8.3.1 History of Acquisition

The Paugussett inhabited what is now eastern Connecticut prior to European arrival. The English first reached the area around the 1630s. The early timing of contact is evidenced by the fact that the Golden Hill reservation in Bridgeport is the oldest reservation in the nation, tracing its origins to a dispute over property in 1658. The tribe agreed to accept an 80-acre reservation in Bridgeport to reduce conflict between the tribe and settlers. The name of the reservation, known as Golden Hill, was taken as part of the name of the tribe (Smith 1985; Hays 1992). The reservation land slowly eroded as more and more settlers entered the area. By 1760 only about six acres and a handful of residents remained (Smith 1985, 24).

After a series of petitions by the Paugussett over the encroachment, the colonial assembly commissioned a review of reservation boundaries. While the ultimate finding was in “favor” of the Indians, settlers were allowed to keep 68 acres of the initial 80 acre reservation. The state officially sold the land to the white occupiers in 1802 and used the funds to set up a dedicated account that could only be used by the tribal members (Libby 1999). A suit brought by Tom Sherman, the head of the last remaining family on the reservation, resulted in the establishment of another reservation near Trumbull at the beginning of the nineteenth century (Smith 1985, 27). This left the Golden Hill Paugussett two lots of approximately 20 acres total (Hays 1992; Libby 1999). Much of the Trumbull reservation land was later taken by local officials, leaving only a quarter acre lot (Hays 1992; Smith 1985).

The tribe managed to maintain a tenuous ongoing presence on both reservations during the 19th and 20th centuries, with only a single house on the tiny Trumbull property. Some tribal traditions
were preserved, including a small governing group. There was a revival of political organization with
the creation of the Indian Affairs Council by the State of Connecticut in 1973. The administrative
support helped the tribe file for a Housing and Urban Development grant. In 1979 the tribe was
awarded $69,000 from HUD, allowing them to purchase 69 acres of wetland and forest land in
Colchester. This was later added to for a total of about 107 acres (Hays 1992; Smith 1985). While
the addition of the Colchester land was important for the Paugussett, it did not substantially improve
their situation. The conditions on the Colchester reservation were poor, with all but one home
lacking electricity and running water (Walsh 2002).

During this time of resurgence, the tribe also engaged in visible conflict and protest against
the surrounding community. In 1976 a conflict erupted on the Trumbull reservation when a
neighbor claimed that the boundaries were incorrect and argued part of the reservation land was
actually his. The disagreement escalated into an armed standoff. While initially just involving tribal
members, the group later received support and publicity from the involvement of AIM. The
standoff came to an end (without violence) when the court upheld tribal ownership of the land
(Smith 1985; Libby 1997, 1999). The media attention generated brought public awareness to the
issues (and existence) of the Paugussett, but also connected the tribe with images of other armed
confrontations and violence, and lawless, dangerous Indians (Libby 1997; Walsh 2002).

Bolstered by their acquisition of land, the limited legal support in the Trumbull dispute, and
the success of other groups in New England, the tribe’s quest for federal recognition began in 1982
(Hays 1992). The purpose of the filing was to qualify for health care, housing, and other federal aid
only available to federally recognized Indian tribes. The federal administrative process was painfully
slow, and the tribe’s petition made little progress. Throughout the 1970s and 1980s the tribe was
also petitioning the state government and federal government for the return of land from their initial
reservations. With the success of other tribes against Connecticut and Maine, the Paugussett argued
that they had the same legal standing, and the government the same responsibility, for the settlement
of their claims. The tribal leadership ultimately decided to file a lawsuit in court, citing the state’s refusal to recognize their demands or enter into negotiations (Pazniokas 1993).

8.3.2 The Pursuit of Land Rights

The Golden Hill Paugussett, led by Chief Aurelius Piper Jr (also known as Quiet Hawk), filed a suit in federal court in 1992 for nearly half of the land in the city of Bridgeport, including the properties of City Hall, the Post Office, and nearly two hundred other properties. The claim was originally for 20 acres, but later extended to nearly 91 acres to include land in Trumbull and nearby Orange. The urban territory claimed was valued at over $1 billion. The claim was based on the argument that 68 acres of land guaranteed to the Paugussett were taken in 1765 in violation of the 1763 proclamation by King George III that forbade the sale of any Indian land to anyone except for the King. The remaining 23 acres were argued to have been taken in violation of the Trade and Intercourse Act of 1790 (“Indian Tribe Plans Suit for Land for a Casino.” 1992; Dixon 2007).

Immediately, arguments from the opposition asserted that the tribe was only interested in opening a casino. Chief Piper maintained that the land had been a priority for generations, but the tribe had not had the money or resources to go after it given the many hurdles within the legal and political system (Hays 1992).

The justification and rhetoric surrounding the land claim changed over time. Early on, the tribe’s emphasis was on the need for territory and resources for their self-preservation as a group (Hays 1992). In the earlier acquisition of the Colchester land, for example, Chief Piper asserted that the new reservation area would help maintain a central location, traditions, and culture, and would be kept “in its natural state -no condos, no two-stories, no bulldozers to tear it up, no paved roads” (Paznoikas 1993). Later, during the formal land claim suit in court, he argued that they were forced into filing the claim because the city had been unwilling to speak to them without legal pressure. Piper also stated that the tribe’s primary goals were to obtain support for federal recognition and to secure undeveloped land (or cash to purchase land) for a casino project as a means of economic
support ("Indian Tribe Plans Suit for Land for a Casino." 1992). The idea that the land claim was being used as leverage in the hopes of federal service and a potential casino was met with a great deal of public hostility. The local political arena labeled the claims everything from "judicial terrorism" to "extortion" (Pazniokas 1993).

In 1993 Federal Judge Peter C Dorsey issued his opinion. The decision stated that the court did not have jurisdiction over the 68 acre claim because of its basis in the actions of the British government. More favorably for the tribe, the decision also ruled that the 1802 sale of land by the State of Connecticut (involving most of present day Bridgeport) was in violation of the 1790 Trade and Intercourse Act. Despite this supporting opinion, Dorsey also said that the merits of the land claim case could not be tried at that time because of the controversy over whether or not the Golden Hill Paugussett constituted a recognized tribe. He argued that the Bureau of Indian Affairs would need to determine the tribe’s recognition status before the land claim could be settled (Judson 1993a; Libby 1999).

The tribe continued to escalate the scale of their claims. In 1993 a new land claim was filed by a group of members of the tribe to 17,000 acres over four Bridgeport suburbs that constituted a total of $10 billion in Fairfield County real estate (Judson 1993b; "Supreme Court refuses to hear tribe’s appeal” 1998; Lavoie 2000). The tribe also threatened to include another 700,000 acres in their suit.

The manner and justification of the tribe’s claim intensified opposition. While the Mohegan settlement was being negotiated at the same time- and involved casino rights- it met very little opposition. The Mohegan were advantaged by their relatively easy progress through the federal acknowledgement process, the positive conception of the tribe, the relatively strong relationship between the leaders of the MITC and the local government, and the fact that the land they claimed was seen as very undesirable. The Paugussett, on the other hand, were viewed with suspicion by the dominant population and had laid claim to incredibly valuable and contested land. A 1993 survey Hartford Courant/ University of Connecticut Institute for Social Inquiry survey asking questions
about the Paugussett claim found that 70% of respondents believed land claims were an unfair burden-regardless of whether or not they thought their own property would be affected.

While the claim did not actually tie up real estate sales- title companies continued to issue titles, banks continued to lend and refinance mortgages- homeowners were incensed by the claims and feared for their homes and investments (Hernandez 2004). Groups such as Homeowners Held Hostage developed out of concerns over the suits effect on property titles in and around Bridgeport. The media disseminated stories in a similar vein, such as one about a single mother held “hostage” by the claim in a house she said she could not sell but could not afford (Indian Tribe's Lawsuit Freezes Property Owners' Land Titles” 1993).

The opposition also relied on arguments against gaming rights. The connection between these two issues raised the stakes- and potential political cost of negotiations- of settlement enormously.

Whatever sympathy the Paugussett might have had for the loss of their lands, their tactics and their goals have provoked fierce opposition. The tribe wants not just a reservation in Bridgeport, but a gambling casino. The object of the claims is not to recover ancestral lands, but to pressure officials to grant the Federal recognition the tribe needs to operate a casino. State and local officials call the suits extortion and say they will not negotiate. (Judson 1993b).

The Paugussett claim was hindered by a public division within the tribe. Chief Piper had banished his half brother, Kenneth Piper (also known as Moonface Bear) from the tribe’s main reservation. Moonface Bear then started a cigarette business on the Colchester Reservation (without the consent tribal leadership) and persisted in selling the cigarettes tax-free after repeated requests to stop from the Chief and state officials. He became wanted for felony-tax evasion because of the operation (without federal recognition the tribe was not allowed to avoid taxation). The dispute escalated when Moonface Bear, concerned that he would be arrested, armed the reservation with camouflaged sentries, which drew heavy police surveillance (Johnson 1993; “2 Chiefs Order Cigarette Vender Off Reservation.” 1993). Eventually, Moonface Bear surrendered to state police in
November 1993 (Faison 1993). He died of cancer before standing trial related to the sale of untaxed cigarettes and for interfering with police business (Johnson 1996).

The factionalism within the tribe also involved disagreements over recognition and land claims. The claim to 17,000 addition acres were dismissed in court by Milford Superior Court Judge Hugh Curran, with the Judge arguing that there was not sufficient evidence of a tribe following Chief Piper and his claim. The judge argued that the many members of the tribe (mainly followers of Moonface Bear on the Colchester Reservation) opposed the claim and was therefore not a legitimate tribal claim (“Judge Dismisses Suit By Indian for Land.” 1993; Silverman 1993; Supreme Court refuses to hear tribe’s appeal.” 1998). However, on appeal the federal court ruled that the claims should remain open until after the BIA decision on recognition status (Lavoie 2000).

Meanwhile the BIA finally began to offer findings in the recognition bid. Preliminary rulings in 1993 and 1995 went against the tribe. The decisions argued that the common ancestor (William Sherman) the tribe claimed was not conclusively proven to have Indian identity and, moreover, the tribe would have to prove their ancestry to be related to tribal existence, not just a single individual of Indian descent (Judson 1995; Libby 1999). The final ruling in September 1996 fully rejected the bid for federal recognition (Baldor 2004).

The recognition process had snagged on the Paugussett’s ability to prove a historical and continual relationship as a single tribe with Indian- and specifically Golden Hill Paugussett- identity. Tribal leaders also argued that racism played a part in the state and federal governments’ reluctance to support them (Hays 1992). The Golden Hill Paugussett, like many coastal New England tribes, have the double “racial disadvantage” of both African American and Indian ancestry. Both Quiet Hawk and Moonface Bear expressed ongoing concerns about the role of racism against their tribes in the dominant society as well as government proceedings. This not only results in prejudice against the tribe by the dominant population, but has also resulted in institutional problems. For example, for much of the history of Connecticut racial data was collected using only “black” or “white” categories, so there are no historical records of individuals of Indian identity (Cramer 2005; Johnson
1996; “Paugussett chief renews threat for property claims, citing bias” 2001). The Paugussett tribe’s small size and experience of being scattered and urbanized as the land base diminished contributed to very high rates of intermarriage with outsiders (Johnson 1996). Chief Quiet Hawk denounced the decision of Superior Court Judge Francis McDonald (who found that the chief had no legal standing to bring the suits) and argued that the courts were inherently racist and had no intention of offering a fair trial to the Indians (Silverman 1993).

In May 1999 the Bureau of Indian Affairs announced that it would revisit the tribe’s application and reconsider the rejection (Lavoie 1999). The process the second time around was just as tumultuous as the first. Even the leaders of the BIA came under attack from Indian rights opponents during the process. For example, the BIA director, Kevin Gover, was once an attorney for the Golden Hill Paugussett, and towns in Connecticut (lead by state Attorney General Richard Blumenthal) argued that this connection was the basis for favorable findings on behalf of the tribes. The detractors called for Gover to resign. Gover did leave the position prior to the final decisions, although he had long announced his plans to depart with the end of the Clinton administration (“Department of Interior Rejects Town Leader’s Allegations” 2000).

Frustrated by the tedious pace of the now 19 year old recognition process, the Golden Hill Paugussett filed a new lawsuit in 2001 to speed up their application for federal recognition. They argued that the Bureau of Indian Affairs had failed to meet given deadlines and was taking an unacceptable amount of time in processing the application. The BIA, unsurprisingly, opposed the motion (“Agency files to block tribe’s speedup bid” 2001). An out of court agreement was reached and the BIA promised to issue a proposed finding by early 2003 (“Bridgeport Indian tribe announces settlement with BIA.” 2001). The preliminary finding issued by the BIA in 2003 went against the Paugussett (Herszenhorn 2003). The final decision from the BIA came in summer 2004, and formally rejected the Golden Hill Paugussett’s bid for federal recognition. This decision actually found that the tribe met fewer criteria for recognition than the preliminary finding had stated. Most
prominent was the argument that they had failed to prove a historical link to the original tribe (Baldor 2004a; Hernandez 2004).

In response to continued opposition from the state government, the tribe renewed its threat to claim more than 700,000 acres (about one third of Connecticut) in Branford, Bridgeport, Derby, East Haven, Orange, Redding, Seymour, Shelton, Southbury, Southport, Trumbull, Westport and Woodbridge. The potential claim would involve about one million property owners (Lavoie 2000; “Paugussett chief renews threat for property claims, citing bias” 2001). While there was no actual suit or formal claim, the threat was enough to spread fears and build opposition on an even wider scale. Tribal representatives also continued to state that they would “drop all land claims in exchange for the right to build and operate a casino in Bridgeport.” (“Evidence of influence, intimidation in push for tribal recognition.” 2000; “Golden Hill Paugussetts may pursue claims on state land.” 2002). The involvement of investor Tom Wilmot in supporting the tribe’s recognition process by funding them with nearly $10 million for the necessary research and documentation also drew attention to the reality of their casino interests (Green 2002; Hernandez 2004). The insistence on gaming rights has also involved anti-gaming organizations such as the Connecticut Alliance Against Casino Expansion, CAASE, or CasiNO and those opposed to development in general along the already congested Interstate 95 corridor (Hernandez 2004; “Bridgeport Indian tribe announces settlement with BIA.” 2001) as opponents of the Paugussett’s claims.

The Golden Hill Paugussett tribe has continued to assert its claims even in an unfavorable political environment. In 2006 they attempted to amend their previous claim in order to charge landowners back rent for the property claimed (“Tribe wants to charge landowners back rent.” 2006). Federal District Court Judge Janet Bond Atherton ruled that the tribe could not pursue land claims without federal recognition (Collins 2006). The tribe has appealed the dismissal of their land claims to the 2nd Circuit Court of Appeals, although the odds of success are slim (Dixon 2007).
8.3.3 Potential Causal Factors

Legal Support:

The Golden Hill Paugussett claim had a degree of legal backing; the district court ruling found that the 1802 sale of land by Connecticut was illegal. The ruling also deferred any action on the land claim until the process of recognition was finalized. Later rulings also ordered the case to remain open pending the recognition decision. This deferral allowed - in fact, recommended - the government to wait to offer any consideration of claims. Despite the favorable legal opinion in 1993, therefore, this is treated as a deferred decision.

Costs of Settlement:

The potential cost of the award as well as the costs of negotiations over settlement are extremely high. The first claim was small in size, but the value of the land was high because the acreage was in urban Bridgeport. The ongoing threat of a much larger claim across the region (also to heavily populated land) has made the dominant population even more opposed to the claim. The dominant view is that any Paugussett settlement would be economically very expensive, and the opposition to the claim from the dominant population would also make negotiation a very costly endeavor for elected officials.

Identity:

The tribe’s ongoing residency on the quarter acre reservation and the new Colchester territory established an ongoing connection to the land. Their presence in the region was often noted, both by the tribe and by the dominant population. The most prevalent stereotype held by the dominant population, however, labeled the Paugussett as “false” Indians, who had lost any semblance of traditional lifestyle or deservingness for special rights. This was intensified because of local opposition to their recognition. It is also likely that this is related to the racial heritage of the tribe. Dominant perceptions also include the idea of the Paugussett as lazy and without a work ethic. They were argued to be seeking land claims out of a desire for casinos. Finally, the tribe was
associated with the image of lawlessness. This was solidified with the standoff between Moonface Bear and the police. These predominantly negative public images of the tribe portray them as very undeserving of transfers and as both a moral and physical threat to the dominant population.

Justification for Claim:

The claim for land was largely justified through appeals for justice. The early court decision that found the 1802 sale of land to be illegal bolstered these arguments, even if the ultimate decision was deferred. The tribe argued that transfer of land would promote economic development and cultural survival. The development of their interests in gaming complicated this, as it became clear that the tribe was willing to trade their land claims for the promise of gaming rights. The extended progress and the less than friendly interactions between the tribe and state and federal officials also has incorporated some degree of hostility and justifications that the Paugussett are owed compensation due to the poor treatment and deceit perpetuated by the government.

Group Cohesion:

The Paugussett claims have clearly suffered from the division into internal factions. The dispute between the supporters of Chief Piper and Moonface Bear brought a great deal of negative public attention to the group. It also had direct effects on the tribe’s pursuit of recognition and land claims. Political and legal understandings of the legitimacy of the claims were hindered by the split over leadership and allegiance.

8.4 Oneida:

The Oneida case is notable for its lack of settlement half a century after the assertion of claims and over a quarter of a century since the Supreme Court first supported the Oneida’s claims. Despite this favorable legal environment, the settlement of Oneida claims have been stuck in ongoing negotiations, generated substantial local opposition, and exacerbated conflicts between different factions of the original Oneida tribe. Recent legal decisions have reversed the legal trends against land claims, and it now appears even more unlikely that the Oneida will reach a settlement.
8.4.1 History of Acquisition

The Oneida were members of the original Haudenosaunee (Iroquois Confederacy) along with the Seneca, Cayuga, Mohawk, and Onondaga. The league dates to the 15th century, and was joined by the sixth nation of the Tuscarora in the 18th century. The Haudenosaunee signed a treaty with the British at Fort Stanwix in 1768 establishing the boundaries of their territory. After the revolutionary war, the group signed a second treaty at Fort Stanwix, this time with representatives of the United States. The treaty distinguished between those who supported the British and those who supported the revolutionaries, the Oneida and the Tuscarora. The treaty states that the “Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled” (Treaty with the Six Nations, 1784; Hill 1930). Despite this assurance, portions of Oneida territory were given to soldiers after the war in lieu of pay by the state (George 2006).

In 1788 the state of New York purchased over five million acres of land from the Oneida, ostensibly extending protection over the tribe “against the dealings of unscrupulous white land speculators.” According to some historians, the Oneida leaders had been lead to believe that they had already lost their title and the treaty offered a way for them to re-secure possession (Weiner 2005, 31; Shattuck 1991, xx). Despite numerous warnings from the Department of War (which oversaw Indian Affairs at the time) over its actions regarding Indian lands, the state government violated the 1790 Trade and Intercourse Act and purchased the Indian’s land without federal oversight. In 1795 the state finalized an agreement in which the Oneida released virtually all of its remaining land for annual cash payments of $2,952 (Weiner 2005, 32).

The fortunes of the tribe continued to decline as they lost more and more land to encroaching settlers. Without a land base to support them, the Oneida tribe fragmented, and during the 1800s, the majority of the population left the reservation. One group departed for Wisconsin and another group went to Ontario, Canada (George 2006, 90). A New York Times article from 1893 describes the remnants of the Oneida in New York, a group of about 200 on a reservation of
400 acres, as “helpless wards” of the state (“Wards of New York State” 1893). The reservation land was further lost to encroachment by the state. A limited victory for the tribe came in 1919 when the federal government filed in US District Court to take the last 32 acres. The court ruled in the tribe’s favor. The 2nd Court of Appeals upheld this ruling in 1920 and confirmed that the reservation could not be alienated without the consent of the tribe (George 2006).

After 1920 the Oneida’s land holdings were limited to that 32 acre tract. By the early 1960s only one family maintained a residence on the land, although other tribal members remained in the area. In the late 1960s, bolstered by the civil rights movement and Indian activism, a few others returned to the reservation and began to work to rebuild the tribal community. Conflicts over leadership and goals surfaced early as returning members clashed with those who had remained in the area (George 2006, 90). These problems were exacerbated by further problems of tribal unemployment, poverty, drug use, and discrimination from the dominant population.

8.4.2 The Pursuit of Land Rights

The land claim trajectory of the Oneida began in 1951 when a group of Oneida Indians filed a petition with the Indian Claims Commission. The claim sought judgment against the United States as trustee for the fair market value of the Oneida lands sold to the state of New York between 1785 and 1846. The tribe remained concerned that the ICC was empowered to offer monetary damages only and could not return ancestral lands. Eventually the Oneida chose to dismiss their case “for fear that obtaining monetary damages might prejudice their land claim.” (Weiner 2005, 33).

In 1965 Jacob Thompson, leader of the Oneida Indian Nation of New York, approached an attorney to revive the tribal land claims for the return of land (Shattuck 1991; Weiner 2005, 9). Prior to bringing a lawsuit, Thompson had pursued various administrative paths to attempt to bring attention to his tribe’s claim for the return of its territory. He approached or petitioned, among

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9 This decision did not fully support the rights of the Oneida, however. The ruling allowed state and corporate entities (such as Niagara Mohawk Power and the New York Telephone Company) to retain their rights of way through the reservation (Shattuck 1991, 11).
others, such offices and officials as the New York Attorney General, the New York state legislature, the Governor of New York, the Bureau of Indian Affairs, the Department of the Interior, the federal Congress, and Presidents Johnson and Nixon (Shattuck 1991, 19).

The tribe filed a formal suit in court in 1970. This first claim referred to the portions of land transferred by the 1795 “lease” with the State of New York and alleged that actions of the state violated the 1790 Trade and Non-intercourse act. It called only for compensation for the fair rental value of land occupied by Oneida and Madison counties from 1968 to 1969 (Wiener 2005, 30). Because of the limitation of this claim to compensation, this specific claim is not considered in this research. What is of major significance is the Supreme Court ruling that came out of the suit and how it supported the legal position of the Oneida claims that followed the first.

The 1974 Supreme Court decision in Oneida Indian Nation of NY v County of Oneida found that the Trade and Intercourse Acts were applicable to the Indian tribes in the original thirteen colonies and supported their right to sue the state under federal law (Oneida Indian Nation of NY v County of Oneida, 414 US 661 (1974); Shattuck 1991, xx). Essentially, the Oneida could sue for the chosen two years of rent on 900 acres illegally acquired in 1793 (Rapp 2006). This case was followed a decade later by the 1985 decision in County of Oneida v Oneida Indian Nation which again found that the Oneida Indians were entitled to sue Oneida and Madison county for damages and supported a federal responsibility to consider the claims. The ruling also made clear that because of the widespread economic and political implications of the case, Congress would be best suited to settle the claims in New York as it had done in Connecticut, Maine, and Rhode Island (Shattuck 1991; Wiener 2005; County of Oneida vs. Oneida Indian Nation 470 US 226 (1985)). These two court decisions are considered foundational for land claims suits, particularly in New York (Rapp 2006). They also supported the string of legal decisions that on other land claims in the northeast based on the application of the Trade and Intercourse Acts, including the Penobscot and Passamaquoddy, the Mashantucket Pequot, and the Mohegan cases discussed in the previous chapter.
A second Oneida land claim filed in 1974 challenged the purchases of the state made between 1795 and 1842. It built on the arguments of the first (which was considered a test case by the tribe and their legal counsel) and claimed the restoration of land and the fair market value for the entire period of dispossession for more than 250,000 acres in Oneida and Madison counties (a well populated area near the city of Syracuse). This strong claim has proven to be the most contentious and enduring. A third claim filed in 1978 argued that purchases made by the state in 1785 violated the Treaty of Fort Stanwix’s (1784) promise of territory and asked for the restoration of approximately 5 million acres. This suit has since been dismissed (Weiner 2005, 30). At one point, the combined suits of the Oneida Indians challenged possession of close to six million acres and the titles of 60,000 property owners in 12 New York counties (Faber 1981). The third and largest claim originally left small property owners out. According to Arlinda Locklear, the lead counsel, the Oneida would not evict anyone from their homes. This promise went unheard by most of the opposition and elected state and local officials, who expressed concern that the suit would affect title and land sales, slow new construction, keep banks from issuing mortgages, and hinder municipalities from issuing bonds ("Oneidas File A Suit for Upstate Tract" 1979; "Bill Would Protect landowners on Indians Claims" 1980).

Despite this pledge, in 1998 the Oneida asked the Justice Department to alter the suit to include 20,000 homeowners in Oneida and Madison counties. The tribe argued that it had been pushed to this action because of the stagnant settlement negotiations. Public statements claimed that it was to prompt negotiations only, and that the tribe was still not interested in taking people’s homes. The inclusion of private landowners, even as a simple pressure tactic, galvanized local residents to form organizations, such as Upstate Citizens for Equality (UCE), opposed to land transfers or any other group specific American Indian rights.10 These opposition groups not only

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10 UCE, with approximately 8,000 members, has expanded to branches concerned with the Cayuga land claim and the Seneca claim to Grand Island (http://www.upstate-citizens.org/).
served to organizing the opposition but disseminated information and put pressure on local, state, and federal officials (George 2006). The public was deeply concerned about the security of their property, and images of the Oneida as aggressive enemies increased. The mayor of the town of Oneida is quoted as saying that in response to the suit: “some people are talking about violence.” (“Landowners Get Backing of State in Indian Claims” 1998). This public attention made elected officials even less willing to negotiate.

At the time of the claims in the 1970s, there were approximately 500 Oneida Indians in the state of New York, although there were 10,000 at the reservation near Green Bay Wisconsin and about 2,500 on a reservation near London, Ontario (Shattuck 1991). The original Oneida tribe has been split in many ways. As noted above, two groups left New York in the nineteenth century. The Oneida Indian Nation of Wisconsin and the Canadian group (Thames Band Counsel of Canada) have both brought claims and petitions to the state of New York in attempts to reclaim land, and in recent years, to gain casino rights. The Oneida in New York State have also split into the Oneida Indian Nation of New York (OIN) and the Oneida Nation (ON), who currently reside with the Onondaga on their reservation (Feretti 1976). The division began in the 1960s and 1970s with the renewal of the reservation population. Two major divisive issues have been the style of leadership (the OIN follows an elected government while the ON follows the traditional government) and gaming rights. Each group has separate leadership, goals, and strategies. The OIN has been particularly dedicated to attempts to keep the Wisconsin and Canadian tribes out of settlements (Coin 2005). The inability of the Oneida to agree on leadership or present a united front hindered not only their ability to deal with reservation problems but has also exacerbated the dominant populations’ perception of their ineffective governance and lawlessness.

At best, this poor group cohesion has been characterized as “disorganized.” (Faber 1978). At worst, it has both provoked violence and stalled the ability of the tribe(s) to reach settlement on their claims. In testimony before the US House in 2005, a witness stated that “In the Oneida claim, for example, the plaintiff tribes appear to oppose each other as much as they do the defendant counties”
(US Congress House 2005). One reason cited by state as well as federal officials for their reluctance to agree on settlement terms has been their hesitation to recognize one tribal group over another (Ehman 1979; May 1986). Governor Pataki’s office also argued that negotiations stalled because of infighting among the Oneida, not because of the state government (Dao 1999). Internally, the opposing factions have continued to protest and petition the BIA, with one supporting Halbritter and the other asserting that Halbritter is not the rightful leader of the Oneida in New York. As an example of how external claimants have stalled settlement, a potential agreement brokered with the New York Oneida by Governor Pataki in January 2002 went by the wayside just five days later because the Wisconsin Oneida had been left out of provisions for casino rights (Dewan 2002; McKinley 2002).11

Tensions over casino issues, the land claims, and power struggles between factions have erupted into conflict within the tribe since the 1970s (George 2006, May 1986). This violence has been reflected in the perceptions of the dominant population. For example, in June 1976, two people were killed when the local fire department failed to respond to a fire in a trailer on the reservation. The mayor of Oneida, Herbert Brewer, had ordered the fire department not to enter the reservation without armed police escort out of concern for the safety of firefighters. Similar orders had been given to the police after they were met with armed Oneida during questioning related to charges and complaints pressed by the conflicting factions within the tribe (Feretti 1976). These orders were characterized as being necessary for “public safety” and highlighted the fact that the Oneida Indians were viewed as a very dangerous and lawless. Relations were further strained with the 1981 disappearance and murder of a young woman, Tammy Mahoney, who was last seen on the reservation. Local police were unable to get cooperation from residents of the reservation, and the case remains officially unsolved (George 2006, 89). In 1986 there was an arson attempt on the bingo

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11 At the same time, the New York Brothertown Indian Nation and the Stockbridge- Munsee have also laid claim to lands claimed by the Oneida (O’Brien 2006).
hall operated on the reservation by the OIN. It was judged to be the action of anti-gaming tribal members. In 1988 the bingo hall was dynamited, again by rival Oneida (George 2006).

The wording of claims and other public statements that highlight the frustration of the various Oneida groups has not helped. For example, the 1978 action lays claims to “land taken 'by coercion, fraud, deceit, and the utmost bad faith.'” (Faber 1980a). The 1998 extension to homeowners twenty years after the initial claim in Oneida and Madison counties also altered the context of the claim and has been seen by local populations as not only a direct accusation of guilt and duplicity, but an attack on their homes.

The Justice Department and the Oneidas adamantly maintain that they have no interest in evicting people from their homes or forcing them to pay rent. They say the suit is intended to pressure the state into reaching a settlement. But such assurances have not stopped people from believing that their homes and farms are in danger, that they will be unable to buy or sell property or that banks will stop making loans… (Dao 1999).

This third claim was eventually dropped, but the antagonism that the tactics and language of the Oneida raised have remained. Despite the extremely strong legal position of the Oneida Indians for a transfer of land under the second claim, their land claims have yet to be settled (Crittendon 1980; Faber 1977). A negotiated settlement with New York State has been in the works and occasionally on the brink of acceptance, but has never gone through.

Perceptions of the Oneida and their land claim have also been influenced by the issue of gaming rights. The OIN operated a bingo hall on the reservation for many years. In 1993 they reached a gaming compact agreement with the governor (Mario Cuomo), although it was never approved by the state legislature. The Turningstone casino development in central New York has been a focal point for gaming opponents, as they argue that it is an illegal enterprise. Critics have called the actions of the OIN Chief, Ray Halbritter, and the Oneida government “arrogant” (George 2006). Residents have expressed concerns that the Oneida “flaunt” their tax free status and refuse to give back to the local community. Local business owners complain that they have lost business because of their inability to compete with the prices the Oneida can offer. The tribe is dogged by
stereotypes of greedy, opportunistic Indians (Dao 1999). The OIN have also worked to maintain their position as the sole gaming operators in the region, even to the point of further damaging the relationship among the Oneida tribes. In December 2004, for example, Governor Pataki’s office negotiated a proposed settlement with the Oneida of Wisconsin for a casino deal in New York’s Catskill region. It was publicly attacked by the OIN and later aborted (McAndrew 2005, Rapp 2005b).

Questions of taxation and tribal trust property have been a major issue for the Oneida. Over time (and largely with the proceeds from the casino) the OIN have purchased almost 17,000 acres of land in Madison and Oneida counties. These properties are in the traditional territory of the Oneida and also contained in the land claims suit. The tribal government argued that it could therefore treat the properties as trust land and refused to pay taxes. The town of Sherrill filed suit against the tribe for back taxes, and the case was ultimately decided in the Supreme Court (City of Sherrill v Oneida Indian Nation of New York). The 2005 decision ruled that the land could not be converted into trust property by the tribe because the land had been outside of tribal control for so long. The argument relied heavily on the legal principal of “laches,” stating that the tribe had waited too long to assert its rights over the property in question (Adams 2006, George 2006). The decision did not necessarily invalidate the string of decisions supporting tribal land claims based on the Trade and Intercourse Acts. The argument was instead more similar to the idea of a statute of limitations; too much time had elapsed for the claims to turn the property into trust to be legally valid.

This ruling formed the precedent for the decision in the 2nd Court of Appeals decision to overturn the land claims settlement for the Cayuga tribe (to be discussed below). The Supreme Court’s refusal to review the Cayuga decision has placed all of the open land claims of the Haudenosaunee in serious doubt, as they have been generally understood to share the same legal background and merit. In response, the Oneida have sought to reposition their claims entirely. They now argue that they deserve monetary compensation for low prices paid for their land from 1795 to 1827, despite the earlier arguments that those sales were completely invalid (Coin 2007).
8.4.3 Potential Causal Factors

Legal Support:

For a lengthy period of time, the Oneida had perhaps the strongest legal standing of any tribe in support of their claims. In fact, many of the media reports from the late 1970s and early 1980s specifically mention that the Oneidas were the most likely to see success from their suit. After the 2005 Sherrill decision, the Oneida are now in a more unfavorable position. While the decision was not specifically directed at land claims transfers, the extension of the same argument in the Cayuga decision in circuit court to land claims has been widely interpreted to mean the same for the Oneida. At the time of writing, these cases are considered to no longer have legal support for land transfers.

Costs of Settlement:

The amount of land involved in the Oneida claims creates very high costs of settlement. The territory of the 5 million acre claim encompassed several cities, such as Syracuse and Binghamton. The claim to 250,000 acres encompassed a relatively populated area outside of Syracuse. The extension to small homeowners also raised the resource costs of potential settlement dramatically. While there were concerns about development and title security because of questions raised by the claims, no problems ever actually materialized. This means that there were few electoral concerns for legislators about not settling, and no external economic pressures encouraging them to settle.

Identity:

The Oneida have been characterized very negatively. They are perceived by the dominant population as dangerous and lawless, a stereotype clearly exacerbated by the ongoing internal tensions and conflicts with local law enforcement. There are historical connotations of the tribe as impoverished because of laziness, an image that is now complicated by one of greed made from connections to the casino development. The dominant population also holds stereotypes of the
Oneida as noble savages from their connections with the Haudenosaunee. The Oneida are perceived as the least “deserving” of the tribes with claims to central New York. This perception of the dominant population is encouraged even by the other tribes, who seek to distance themselves from the controversies surrounding the Oneida claims.

**Justification for Claim:**

The complexity, size, and drawn out process of the Oneida land claims have lead to far more public exposure than many of the other claims discussed. A major argument offered is that the Oneida need the land to develop economic self-sufficiency as a tribe. Tribal arguments often cite the success of Turningstone as bringing development not only to the tribe, but also to the local community. They argue that more property would only enhance this economic situation. The core argument of the claims is an appeal to justice and fairness, but in the Oneida case there have also been recent appeals to the obligation of the government to settle land claims because of its trickery and deceit in past dealing with the tribe. This argument has done little for already poor relations between the Oneida and the dominant population.

**Group Cohesion:**

The Oneida claims have clearly been influenced by factionalism. The sometimes violent and very public internal factions have been a part of the poor public perceptions of the tribe. The external challengers have also had direct effects on the inability of the tribe to settle their claims, even interfering in other areas such as gaming rights. From the history presented above, it appears likely that the problems of group cohesion have been significant in undermining the Oneida’s chance at a land transfer.

**8.5 Mohawk:**

After a lengthy history, the Mohawk finally reached a settlement agreement in 2005. In the wake of the 2005 Sherrill and Cayuga legal decisions, the state and federal consideration of their claim has stalled and the claim has returned to court for evaluation. Prior to a brief period of
agreement and cooperation between 2003 and 2005, the Mohawk land claims and potential settlements have clearly been affected- and at times derailed completely- by divisions within the tribe.

8.5.1 History of Acquisition

The Mohawk are also members of the Haudenosaunee, with their historical territory overlapping the northern border of New York State into Canada. As a result, the tribe is politically and administratively divided between the two countries, although there are cultural overlaps. The Mohawk’s original territory ran along the St. Lawrence River. In the sixteenth century the Mohawk tribe had to retreat from this area, known as Akwesasne, due to war with invading Algonkian Indians. They retreated to the Mohawk Valley in central New York, but by 1747 enough of the population had returned to the northern part of New York for Akwesasne to be considered an established community. By 1754 the French sent the first Catholic priest was sent to the region as part of colonial outreach attempts (George 2006, 13).

After the French surrendered in defeat in the French and Indian War, the Mohawk found themselves in a struggle to protect their land against the encroaching British colonists. Only a small portion of the population remained on the American side of the border, with most going north (Brown 2008). A tentative alliance ensued as the Mohawk tried to keep their land, and during the revolutionary war, the Mohawk sided (reluctantly) with the British. In 1779 Washington ordered the troops to invade the territory of the Iroquois Confederacy and “break the backs of the Iroquois,” an order that resulted in the eviction of thousands of natives from their homes (George 2006, 18). The treaty of Fort Stanwix in 1784 that established the relationship between the members of the Haudenosaunee and the new American government set aside a reservation for the Mohawk of about six square miles, although there were still encroachments by the state of New York. The tribe’s territorial concerns were complicated by the fact that they overlapped onto the British (now Canadian) side of the border as well, including several islands in the St Lawrence River that were disputed between the two powers.
The 1796 Seven Nations of Canada Treaty confined the Mohawk to a small reservation along the St. Lawrence, despite the fact that none of the four representatives who signed the document had the authority to cede the land. In 1797 British educated Mohawk leader Joseph Brandt signed a treaty with New York State that sold over nine million acres of Mohawk land to the state for $1,500. The tribe has long asserted that Brandt did this without the approval of the tribe or the Haudenosaunee leaders (Severo 1975). New York State continued to take the Mohawk’s land. The state government even chose three tribal members as “designated trustees” who were given the authority to cede territory from initial boundaries. This was an incredible violation of sovereignty, and has also been a large part of the Mohawk tribe’s claims. The “trustees” signed a series of state treaties from 1816 to 1845 and sold over 10,000 of the original 24,000 acres of reservation land (George 2006). In 1822 (after the end of the War of 1812) the United States and Canada agreed on a modified border in the St. Lawrence that transferred several islands guaranteed to the Mohawk in treaties from Canadian waters to American (US Congress House 2005). The New York legislature further went against tribal sovereignty rights by creating the St. Regis Tribal Council in 1892 (George 2006). This council was intended to replace the tradition government of the Mohawk, although in practice both continued to function. A similar government was also created in Canada during the 1890s (Brown 2008).

The 20th century brought a great deal of environmental disruption for the Mohawk on both sides of the border. The construction of the St. Lawrence Seaway project (a system of locks and canals along the river that connected the Great Lakes to the ocean) began in 1954. The shoreline and islands were lost to rising waters, and the ecology of the river was disrupted, causing declines in the fishing populations. In the same time period, due to the combination of inexpensive power generated by the projects hydroelectric dams and easy transportation, several industrial plants were set up along the river. The aluminum smelting was particularly damaging, causing air, soil, and water pollution in the area. As fishing and farming became less viable, many residents of the reservation left in search of jobs (Brown 2008). The pollution has also taken a toll on the health of the Mohawk
population, many of whom continue to rely on fishing and farming for their sustenance (Hoxie 1996, 12). The Mohawk have joined together in long term protests and lawsuits against polluters, although the tribe has not been able to generate support. Despite this ongoing concern with the environment, it has not appeared as a consistent part of the reasoning behind land claims.

8.5.2 The Pursuit of Land Rights

The Mohawk have long been concerned with the return of their territory. Their ongoing complaints and historic claims to the state government resulted in the reservation being set aside, but it was eventually overrun. In the modern era, land claim activities by different groups of Mohawk Indians have been the subject of public attention in central and northern New York. For example, in August 1957 a group of Mohawks from Canada occupied a stretch of farm land on Schoharie Creek in central New York. They had been forced off of the Caughnawaga Reservation in Quebec because of the construction of the St. Lawrence Seaway. The group declared the seized land the “Mohawk Six Nation Reservation.” The group was ordered to leave by the courts in February 1958 (James 1957; “Mohawk Ordered Out” 1958). Their longhouse was eventually burned by New York state troopers as a means of eviction (George 2006).

The Seaway project and the construction of bridges also resulted in native concerns over the exercise of their sovereignty. The Canadian government was requiring Mohawk Indians crossing the bridge between their territories on the US and Canadian side to pay duties and taxes for goods. Mohawk leaders argued that this was in violation of their sovereignty, and in 1968 organized a blockade and stopped all traffic on the Cornwall- Massena International Bridge. The blockade drew widespread attention and ultimately resulted in the Mohawk being able to pass the bridge duty free. It also helped spur the creation of the newspaper Akwesasne Notes, which has been a primary voice for activism among American Indians (George 2006, 33; Hoxie 1996, 12).

The activism continued. An armed band of approximately 200 Canadian Mohawks moved into an Adirondack camp in 1974 in an attempt to return to “ancestral ways” (Severo 1975). The
group sought land within the boundaries of traditional Mohawk land and had been specifically searching for publicly owned property (Landsman 1985). Their occupation of the 612 acre Moss Lake girl’s camp began in May 1974 and generated serious animosity from the local population. This was heightened by the fact that, in two separate incidents, gunfire from the encampment injured a nine year-old girl and a 22 year-old man who were driving past the site in October 1974 (Kaufman 1974; Landsman 1985; Williams 1977). In 1977, after negotiations with New York State authorities, the group agreed to move to a site in nearby Clinton County, a 5,000 acre portion of Macombs State Park near Altona (Landsman 1985). Unsurprisingly, the local residents there also expressed strong opposition (Williams 1977, George 2006). Eventually a lease deal was brokered with the state, Clinton County, and a third party (acting as lease holder). The group of Mohawk Indians remains today at what is known as Ganienkeh (although they still do not own the property). While the Schoharie Creek group and the residents of Ganienkeh originated from other Mohawk communities, their actions influence the perceptions of the Akwesasne Mohawk. All of the different tribes were often discussed and understood by the dominant population to be very similar, even though their physical territories, social organization, leadership, and goals were distinct.

After the success of the Oneida in the Supreme Court, the federal government and New York State considered the potential for other claims. The legal argument of the Mohawk was very similar in standing to the Oneida’s, and the state believed that the tribe would have a strong case. Seeking to avoid another legal battle, the state government began the negotiation process for settlement with the Mohawk and the Cayuga along with the Oneida. The Mohawk claimed 14,000 acres near the St. Lawrence River in 1978 (Faber 1978). An agreement was reached in 1980 between the St. Regis Tribal Council and representatives from both the state and federal governments. The Mohawk were to get 9,750 acres and $6 million in federal funds, contingent upon the approval of a tribal referendum and Congressional vote (Faber 1980b). This agreement was nearly accepted but was derailed by conflict within the tribe.
There were (and are) several divisions among the Mohawk at Akwesasne: the Canadian Mohawk Council of Akwesasne in Canada and the St Regis Tribal Council (SRTC or tribalists) and the Mohawk National Council (MNC or longhouse traditionalists), which are both on the New York side. The tribalists follow the elected government (SRTC) that is the successor of the Council created by the State of New York at the end of the 19th century. The SRTC is recognized by the state and federal governments and therefore controls approximately $5 million a year in grants. This group was involved in the negotiations over the 14,000 acres of land with the state in 1980 (“Armed Mohawk Factions Settle into Uneasy Peace” 1980). The traditionalist MNC supporters have repeatedly resisted the authority of the tribalist elected government, and have argued against negotiations with the state or federal government (Faber 1980b). They claim legitimacy based on ancient tradition and customs. Their leadership is made up of male chiefs who are selected by nine clan mothers (George 2006).12

The conflict between the two groups came to a head in May 1979 when the leader of the MNC, Loren Thompson, was arrested on charges of theft. Thompson had confiscated equipment from Federal workers clearing trees. The program had been approved by the elected chiefs, but the traditionalists again refused to recognize their authority. Thompson was jailed. His followers, protesting that they did not recognize the authority of the police, held a siege on the jail for nine hours (“Armed Mohawk Factions Settle into Uneasy Peace.” 1980; “Besieged Mohawk Faction Resists Tribal Majority” 1980). As a result, the state police later entered the reservation with 15 warrants and were met by 100 to 200 traditionalists, some armed, behind a barricade (Richman 1979). This was a catalyst for an armed standoff and blockades. The conflict also disintegrated the support of the state for the proposed land claim settlement at the time (George 2006).

12 To add to the confusion, in 1979 a third group within the New York Mohawks arose briefly and elected alternate leaders in opposition to the St. Regis council (“Besieged Mohawk Faction Resists Tribal Majority” 1980). This group appears to have broken apart.
The Mohawk Council of Akwesasne, the Canadian branch of the tribe, brought a new claim against New York State in 1982. The St. Regis Tribal Council and the Mohawk Nation Council of Chiefs also brought separate claims in 1987. These claims were based on the recovery of land defined in the 1796 treaty as well as transfers after the War of 1812. The island land in question, transferred during the War of 1812 from Canada to the United States, is challenged because it is argued that the territory was never ceded by the Mohawk. The land claimed in the state of New York is justified through arguments based on the Trade and Intercourse Acts (US Congress House 2005). The justifications for the claims have largely been appeals to justice and the rule of law. The three separate claims were later combined by judicial order. Any agreement between the three groups in their pursuit of the land claim was destroyed in conflicts over gaming during the late 1980s. This conflict would result in violence and keep the groups from agreement for 15 years (George 2006).

The first bingo hall had been opened on the Akwesasne reservation in 1981 by the SRTC. It was strongly opposed by the MNC. By the late 1980s, there were several more gaming establishments, some of which included high stakes gaming (without state or federal regulation). In the summer of 1989, gaming opponents protested by destroying several slot machines. The commotion brought the involvement of the state police and the FBI, and several casinos were shut down (Brown 2008). This tension between pro and anti-gambling forces lead to disastrous events in the spring of 1990. On March 23 1990, anti-gambling forces set up roadblocks to deny access to casino patrons. The barricades, manned by women, elders, and teenagers, stood for a month (George 2006, 104-105). The Mohawk Sovereignty Security Forces, a paramilitary group created by the Tribal Council and endorsed by gaming supporters, destroyed the barricades on April 24, 1990. Many of those opposing gambling left the reservation, either for Canada or other areas in New York. A few armed men remained, and a standoff between the two groups led to the shooting deaths of two men on April 30, 1990 (George 2006, 111-120).
This particular conflict quieted down in the wake of the violence, but the tension between the governing factions persisted well into the 1990s and 2000s. The Mohawk’s reputation in the community also suffered. While the population was relatively integrated into the local rural community, the resurgence of Indian identity and the growth of the Mohawk Warrior society and activities brought a greater attention to the differences between natives and non-natives and often focused the dominant populations’ attention on stereotypes if the Mohawk as dangerous (Landsman 1985). Problems with gambling, crime, drugs, and smuggling have all plagued the Mohawk (George 2006, 98). For example, in a hearing on proposed casino settlements, “Franklin County District Attorney Derek Champagne questioned whether the legislation would lead to more international drug smuggling through his county by expanding the Akwesasne Mohawk’s reservation on the Canadian border” (Rapp 2005a).

In 2003 there were elections that replaced the St. Regis Mohawk and Mohawk Council leadership. These new officials consulted with the Mohawk Nation Council of Chiefs and agreed to work together on the land claims (which had stagnated in the factionalism of the past twenty years). With the input of the entire community, the leadership of the three groups was able to agree on new settlement terms as their goal (US Congress House 2005). This has resulted in a newfound unity and the negotiated settlement that was reached with New York State in 2005. This potential settlement explicitly separated the issues of gaming and land. The final resolution for the land claim included an alternative of $100 million to be paid in annual increments over 40 years, reduced electrical rates, waiver of state college tuition, and the option of buying 13,000 acres of contiguous land (US Congress House 2005).

The Mohawk agreement was helped by the availability of state owned land and rural region. The residents were also well accustomed to the presence of the tribe. While tribal members generally do not participate in state, federal, or local elections (they are seen as outside of the governance system of the tribe, so irrelevant), the large number of Mohawks in the region and the
contributions of the tribal government to the local infrastructure have helped to build a relationship with the local community (US Congress House 2005).

Their long-term presence in the claim area helped establish a solid basis for the claim. In addition, the size and strength of existing Mohawk land holdings set it (and them) apart from the other claims. The very rural area and poor economic conditions have also influenced non-native reactions to the claim. There are no organized opposition groups as have been seen in central New York, likely because of the lack of resources and possibilities for organization. Further, the division of negotiations over land and casino rights allowed politicians to consider each issue separately and relieved some of the opposition’s pressure.

Unfortunately for the Mohawk, the unity of the tribe and strength of the new agreement has not been enough in the face of the new legal and political environment in the state. The settlement went before the state legislature in 2005. It passed the state assembly but was stalled in the Senate until the session ended. Before the legislature returned, the 2005 Sherrill and Cayuga decisions had gone into effect. The two counties involved, Franklin and St. Lawrence, have since withdrawn as signatories to the agreement. Without the agreement of all parties involved (the two counties, the three Mohawk parties, New York State, and the New York Power Authority) the settlement as it stands cannot progress.

The tribe has sought to distinguish itself from the Oneida and Cayuga claims. As Chief James Ransom stated in testimony before Congress:

The Akwesasne Mohawks have and continue to have a strong presence within their claim area. We have never moved from our ancestral lands. Both the size of the existing reservation at over 14,000 acres and the size of the Tribal membership with over 11,000 Tribal members set it apart from the Cayuga and Oneida claims….The Akwesasne Mohawks are an important part of the character of Northern New York State. It has allowed for a generally positive relationship to be built up over the years with neighboring communities and counties. This is in stark contrast to both the Oneida and Cayuga claim areas. Part of the claim area, the Hogansburg Triangle is 97% Indian occupied and is home to many Mohawk businesses. Within the Fort Covington tract, over 30% of the area is Indian occupied. (US Congress House 2005).
The timing of the potential settlement, combined with strategic actions of anti-Indian elements in the New York State legislature and the anti-Indian court decisions may be the deciding factors in removing the settlement from possibility. The potential for a casino deal has persisted, and in February 2007 Governor Spitzer and the St. Regis Mohawk announced a gaming compact agreement for a facility in Monticello in the Catskill Mountains (Wanamaker 2007).

8.5.3 Potential Causal Factors

Legal Support:

The Mohawk case was not subject to a legal decision. Their claim was considered similar in legal standing to the Oneida by the state and federal government, and all parties sought to develop an out of court agreement. This process has been derailed several times by problems with group cohesion. At present, the new legal environment after the 2005 Cayuga and Sherrill decisions places the Mohawk claim with no legal support. In the wake of the near agreement of 2005, the tribe is now embroiled in a new court case over their land claims with the affected counties.

Costs of Settlement:

In comparison to the other claims in New York State, the potential costs involved in awarding the Mohawk’s claim are relatively low. The acreage involved is in a very rural and impoverished area in northern New York, where land values (and demand for land) are very low. The Mohawk agreements have also been very flexible, allowing for landowners to choose whether or not to sell to the tribe or retain the property.

Identity:

The Mohawk are well established on their territory. Their ongoing connection to the land, continuation of tribal practices, and persistence of culture lend a great deal of credibility to their claims among the dominant population. They, as with the other members of the Haudenosaunee, also have had a consistent public image of “noble savages.” Their history of activism and the deep (and violent) conflicts between factions and the dominant population, however, have lead to public
perceptions of the Mohawk as a very dangerous and lawless group. They are viewed as clearly physically threatening by the dominant population and by political decision makers. As the time frame of the claim continues and gaming becomes more and more a part of the public consciousness, the Mohawk have also been subject to associations of being greedy.

**Justification for Claim:**

Justice has been the consistent basis of the Mohawk claim to land. Because the initial consideration of claims was prompted by the state, rather than through a lawsuit, there was little public justification at first. The Mohawk did not have the initial forum of a lawsuit of widespread public announcements over their claim, as was seen in the Seneca or Oneida cases. The development of the claim (and several potential settlements) in the three decades since the original consideration of a land transfer have stuck consistently to language pointing to the illegal and unjust taking of land as the basis for land transfers.

**Group Cohesion:**

The problem of group cohesion has derailed several potential settlement agreements. It appears that ongoing internal and external conflicts over control of Mohawk territory were the main reason no transfer has ever taken place. There was a brief window, between 2003 and 2005 when the different groups of leaders within the tribe were able to agree upon the same goals for their land claims. This alliance saw the development of a new land claim agreement, but before it could pass its first steps the 2005 legal decisions changed the incentives of the government to consider claims, and it appears that the joint effort came too late.

**8.6 Cayuga:**

The Cayuga case appeared to be on its way to settlement until the United States 2nd circuit Court dismissed it in 2005. The decision by Judge Cabranes dismissed the suit out of hand and relieved the state of obligations to settle, despite the series of affirmative rulings and negotiations that
came before it. The case was refused review by the Supreme Court, leaving the Cayuga little alternative for the future of their claim.

8.6.1 History of Acquisition

The Cayuga were also members of the Haudenosaunee, occupying a territory in central New York. Along with the Seneca and Mohawk, the end of the Revolutionary War left the Cayuga on the “wrong” side as allies of the British. The Treaty of Fort Stanwix in 1784 assured the Cayuga tribe peace and protection by the United States. In 1789 the Cayuga ceded three million acres of territory but reserved a 64,000 acre reservation in central New York. In the Treaty of Canandaigua in 1794, the United States affirmed the lands reserved to the Cayuga, and promised that “the United States will never claim the same nor disturb them or either of the Six Nations… until they choose to sell the same to the people of the United States, who have the right to purchase” (Treaty with the Six Nations, 1794).

In complete disregard of the promise of federal government in 1794 (as well as the stipulations of the Trade and Intercourse Acts); all but three square miles of the Cayuga property were taken by the state in 1795. The Cayuga made several protests, petitioning their Indian Agent and eventually even the Secretary of War, but no response was ever received. In 1807 the remainder of Cayuga’s land was taken by the state (Rapp 2006; US Congress House 1980). Landless, some of the tribal members went to Oklahoma (where there were lands reserved for them), some went to Canada, and a small group remained in New York State as the “guests” of the Seneca on the Seneca’s reservation (Lavin 1988). There is little history of the tribe in the state during this time, and their continued presence in New York was largely unknown.

8.6.2 The Pursuit of Land Rights

The Cayuga who remained in New York had repeatedly petitioned the federal and state government about the illegal loss of their land for 200 years with no response. Their legal standing changed, however, with the 1974 the Supreme Court decision that found that the Oneida Indian
Nation had federal standing to sue for lands taken by the state. The decision opened up the same legal possibility for the Cayuga (Lavin 1988). The state recognized the new strength of the Cayuga as well, and in 1978 the state offered to begin negotiations with the Cayuga as well as the St. Regis Mohawk. Upon initial consideration by state officials, the Cayuga negotiations were expected to be straightforward because the claim could be settled with public land (Faber 1978). Congressional approval was also widely expected by the media and government officials (“Land Claim by Cayugas Stirs Anger.” 1979).

The negotiated settlement was reached between Cayuga, state, and federal officials went to Congress in 1980. The agreement would transfer approximately 5,400 acres of land and $8 million to the Cayuga. The land was to be made up of 1,852 acres from Sampson State Park and 3,629 acres from the Hector Federal Land Use Area. No private residents would have been immediately affected (De Witt 1979). The bill had been introduced by Representative Gary Lee, a Republican from the affected district who had supported a negotiated settlement since approximately the option was introduced in 1977. It was initially expected that it would pass quickly, with the rest of the New York delegation (and the Congress as a whole) following the support of Lee.

Lee rescinded his support before the floor vote, however. He argued that his newfound opposition was based on the oversight of state rights (there was no requirement of approval by the state legislature) and no set limits on the amount of acreage that could be purchased to make a new contiguous reservation. He also argued (in a turnaround from his previous position) that the legal legitimacy of the claim could not be adequately demonstrated. The vote in the House was 201 to 184 against the bill (“Cayugas Threaten Suit for Land After House Rejects Agreement” 1980; “Cayugas Suing to Regain 100 Square Miles in State” 1980; Faber 1980b).

While Lee’s reasoning may have been truthful, it also speculated that his turnaround may have been due to local opposition to the settlement and concerns over his reelection. Local landowners were concerned about the negotiations as there was no public involvement in the negotiations over settlement. Misinformation was rampant, so it was also unclear to the public
whether private property owners would be affected (they would not have been). Complaints about the lack of public involvement in establishing settlement terms were frequently referenced in the Congressional hearings over the bill (US Congress House 1980). Lee was defeated in the next election.

After the failure of the settlement bill, the Cayuga followed through with their threat of a lawsuit and filed a legal land claim in 1980. The suit named over 6,000 landowners as well as Cayuga and Seneca county and New York State (Faber 1980b). The Cayuga called for the return of 100 square miles (approximately 64,000 acres) and $350 million in damages (“Cayugas Suing to Regain 100 Square Miles in State.” 1980; Lavin 1988). The suit affected a wide swath of land, including over ten percent of each of Cayuga and Seneca counties, the entire town of Springport, and the villages of Cayuga and Union Springs (US Congress House 1980). An agreement was proposed by state officials in 1984, but it was rapidly derailed by local opposition (Winerip 1984). Negotiations haltingly continued throughout the 1980 and 1990s, but no deal was reached and the suit continued to slowly progress in court (Lavin 1988).

The central arguments behind the Cayuga claim were appeals to fairness and justice. The Cayuga argued that their claim was the result of unfair dealings by the state of New York in clear violation of federal rules of oversight. Opponents of Cayuga settlements often also appealed to this moral ground, arguing that special rights were unfair. The inclusion of gaming rights as negotiations went on added to this. The fact that Cayuga businesses on tribal land could be operated tax free was seen as the epitome of unfairness and people not being treated equally (Rapp 2006). Cayuga County Legislator George Fearon is quoted as saying that: "I ask that the proposed legislation and treaties be rejected because two tax systems will never be equal and are inherently unfair…” (“In Their Own Words” 2005).

As the court case went on, local opposition and concerns over the effect of the suit grew. Landowners were particularly concerned about the threat of eviction (McAndrew 1987). The primary organization opposed to indigenous rights, specifically gaming rights and land claims
settlements, Upstate Citizens for Equality (UCE), established a branch dedicated to the opposition of the Cayuga claim in 1999. A UCE rally that same year drew about 1,200 people to protest claim and potential settlement (Greene 2000).

Judge Neal McCurn presided over the legal suit and issued multiple decisions over its extensive history. He rejected the state and counties’ argument that the tribe had abandoned the claimed land (and therefore lost their legitimacy to claim). The defendants then made an argument based heavily on the defense of “laches,” charging the Cayuga with an unreasonable delay in their claims (Shaw 1991). In 1999 the judge barred the eviction of landowners as part of the suit (Shaw 1999). He also issued a gag order, supposedly to prevent misinformation or terms of a potential deal being leaked. Instead, the order may have increased misinformation that was disseminated against the Cayuga, because tribal representatives were legally unable to reply.13

Judge McCurn sent the case to a jury to decide the damages. In 2000 a federal jury awarded the Cayuga $36.7 million in damages for the 64,000 acres taken illegally by New York State. This amount was characterized as an insult for its low value by the tribal council, and it was met with calls of “ridiculous” and “sickening” by the tribe. It offered an approximate value of $576 per acre (about $35 million total) and $1.9 million in back rent (Shaw and Seely 2000). After review in 2001, McCurn increased the award to $247.9 million, penalizing the state for an additional $211 million (Odato 2000). The state appealed the decision, and the Cayuga countered with an appeal for $1.7 billion in damages. McCurn granted the state a stay in payment while the case proceeded (Shaw 2002).

One factor in the delay of the court case as well as negotiations with government officials outside of court was confusion over the divisions among the Cayuga. Internal conflict brought some questions as to who the rightful leader of the New York Cayuga was. The elected leader, Clint Halftown, was opposed by some members of the tribal council. While Halftown was recognized by

13 Misinformation persists. In 2006 an opinion piece written by State Assemblyman Brian Kolb regarding Cayugas land into trust application warned that homeowners and businesses are in danger of losing their “hard-earned, privately owned property,” although there is no means for the Cayuga to acquire land that is not willingly offered for sale (Wanamaker 2006).
the Bureau of Indian Affairs as the leader, two members of the council, Timothy Twoguns and Gary Wheeler, spoke publicly about trying to remove him (Rapp 2005a). The challengers argued that Halftown’s refusal to accept any settlement terms that also included the Oklahoma based tribe did not reflect the sentiments of the tribe as a whole. The challengers petitioned the state government and governor’s office with the claim that Halftown did not legally have the authority to deal with New York State, that it was a power reserved for the council. The internal division caused state and county officials to question who the rightful leader of the New York Cayuga was, and which had the authority to negotiate settlement (Rapp 2005c).

Another cause of conflict in terms of group cohesion came from the claims from the Seneca-Cayuga of Oklahoma. This group left New York in the nineteenth century and is currently in possession of land in the state of Oklahoma. They have persisted in pressing their claims as part of any Cayuga settlement, and have also briefly intervened in the Seneca negotiations. The Seneca-Cayuga have also been involved in negotiating independent casino rights in the Catskills with Governor Pataki’s office. While some New York based Cayuga support the inclusion of the Seneca-Cayuga, others adamantly oppose it (including Halftown). The Seneca Cayuga are also actively opposed by some other native nations of New York, particularly the Oneida (US Congress House 1980; Rapp 2006). Government officials opposed to settlement agreements argued that they should not be dealing with a group that was so divided over goals (Kriss 2005).

Throughout the lengthy court case, out of court negotiations continued. By February of 2005, Governor Pataki’s office had proposed casino deals with five tribes in the works including Cayuga Indian Nation of New York and the Seneca-Cayuga of Oklahoma (Rapp 2005b). In exchange for a gambling compact to operate a casino in the Catskills, the Seneca Cayuga would agree to pay state taxes on all goods sold to non-natives and abandon their territorial claims (George 2006, 19-80). This agreement helped to encourage the New York based Cayuga tribe to reach an agreement. Their proposed settlement agreement restricted their land claim to the transfer of a 2,500 acre reservation near Cayuga Lake, $150 million in payment from the Seneca Cayuga (in lieu of state payments for
lost lands) and the right to operate a casino in southern New York. The New York tribe would also withdraw their claim for $1.7 billion dollars in damages any possibility of evictions for non-natives (George 2006).

Before the agreement could progress, however, the 2nd Circuit Court of Appeals made its decision on the appeal of the court case. The 2-1 decision, written by Justice Jose Cabranes, dismissed the Cayuga’s claim and ruled that they were not entitled to any settlement. It relied heavily on the Supreme Court’s recent Sherrill decision and based the reversal on the principal of laches (Kates 2005; O’Brien 2006). The decision argued that the tribe had waited too long to assert their historical claim to the land, and the progression of history had broken any legal entitlement that they may have had to it. In May 2006 the Supreme Court turned down review (Shaw 2006). The Cayuga land claim was effectively ended. The repercussions also extend to the other tribes’ ongoing land claims in New York and settlements, all of whom now seek to distinguish themselves from the Cayuga’s situation (Adams 2006; Coin 2007; Rapp 2006). The issue that remains is whether or not land purchased by Cayuga can be placed in federal trust and exempt from local taxation (Shaw 2006). The Sherrill decision potentially weighs heavily on this case as well.

Surprisingly, the authentic native identity of the Cayuga was not challenged during the land claims process, although this has often happened for other groups in the northeast that lost their reservation land. Rhetoric around criticisms of the claim frequently referred to the Cayuga’s claims as historical and invokes very outdated images of a primitive group unable to accept modern life. In essence, this language places the Cayuga in history, a dead tribe with no present claim. Also inherent in many arguments, particularly those against sovereignty in gaming regulation (offered by groups such as the Coalition Against Gaming), is the idea that gaming needs regulation and oversight by US government- or “the unquestioned notion that sovereign Indian nations are not competent to manage their own affairs” (Niman 2006).

An example comes out of the now infamous statement by New York State Senate Majority leader Joseph Bruno in 2005:
The chief and some of the others who sit around the campfire, or whatever they do, split,” Bruno said. “OK? So they are not unified. If they're not unified, we're not going to move for them. And I don't say that disparagingly. That's what we do in government now. We don't sit around the fire, we sit around a table with the lights and the daylight doing on-time budgets. (Kriss 2005).

Under pressure from groups such as the National Congress of American Indians, Bruno later apologized for what he claimed was simply misguided humor. Still, the statement illustrates the perpetuation of the dominant populations’ stereotype of a people left behind, clinging to outdated traditions. The inclusion of casino rights also brought in the idea that the claims were being used as leverage to gain access to special rights and privileges for the purpose of self-aggrandizement. Particularly in the last years of the claim, references to greediness have been common. As one opponent stated in a public forum, "This isn't about a tribe trying to reclaim its tradition and culture. This is about greed," said Cindy Schlegel of Seneca Falls (Kates 2005).

8.6.3 Potential Causal Factors

Legal Support:

The Cayuga claims spent 25 years with legal support. While the initial settlement agreement was made as a response to the legal support for the Oneida claims, the failure of the agreement in Congress led to a long court battle which generated substantial legal support for the rights of the Cayuga. This situation ultimately changed with the 2005 district court ruling that dismissed the case out of hand. The argument that the Cayuga’s claim has been invalidated by the passage of time has also cast doubt on the future of any claim that the Cayuga or other tribes may make based on historical takings.

Costs of Settlement:

The Cayuga claims are considered high value. While the region was not heavily populated, the large size of the lands claimed and their relative value as rich farmland and for tourism made it a valuable claim. While homeowners raised concerns about the security of their titles during the claims
process, there do not appear to have been any actual complications- and therefore little cost in the perpetuation of claims.

Identity:

The Cayuga were hindered the fact that they did not have an ongoing presence on the land. As they no longer had a distinct presence in the area without a reservation, they were considered outsiders by the local population. Residents of the proposed settlement area argued that the group was dangerous, and raised concerns about bringing the tribe into the area. The same stereotype often connected with the Haudenosaunee, that of noble savages, was also used to place the Cayuga as a tribe from history, with no real existence in the present. Finally, there were consistent associations of the Cayuga claimants as lazy and greedy, seeking rights to something that was not rightfully theirs.

Justification for Claim:

The core argument for the Cayuga claim was an appeal to justice and fairness. As in the Mohawk case, the state first initiated the negotiations over the claim. The Cayuga lawsuit focused on the illegal actions of the state as the basis for the claim. There were relatively few public statements about the basis and arguments behind the claim from tribal leaders because of the gag order imposed by Judge McCurn during the course of the lawsuit.

Group Cohesion:

The poor group cohesion among the Cayuga detracted from the ability of the tribe to negotiate an agreement. Officials were not clear on the legitimate leader of the tribe, making them reluctant to expend the effort and costs of negotiating. The external challenge of the Seneca-Cayuga of Oklahoma was also problematic (and has been for the Seneca as well). Without a cohesive front, the ability of the Cayuga to take advantage of their legal support and press for a negotiated settlement was hindered.
8.7 Conclusions

At the time of editing (February 2009), two recent developments may challenge the 2005 Sherrill and Cayuga legal decisions and their effects on land transfers. As noted in the introduction, the Cayuga have filed a new lawsuit that seeks to reopen their land claim to the original 64,000 acres. On December 30, 2008 the Oneida were informed that the Bureau of Indian Affairs approved an 18 acre parcel to be transferred into trust status as part of their land into trust claims (separate from the claims for land transfer, this refers to land that the tribe has purchased in fee simple ownership). Local and state leaders have immediately challenged this decision, and the outcome remains to be seen (McNichol 2009).

In February of 2009 the Supreme Court found against the rights of the Narragansett in Rhode Island to take land outside of their reservation into trust. The argument hinged on the language of the 1934 Indian Reorganization Act, finding that because the Narragansett were not recognized as a federal tribe at that time, they were not eligible to take additional land into trust status. The Oneida argue that the legal precedent here does not alter the legal standing of their recently approved trust parcels, as they had an established federal relationship at that time of the IRA. These two conflicting developments show the vast complexity that surrounds American Indian claims and the legal environment in which they operate.

The cases in this chapter illustrate the incredible effort and long odds that American Indian tribes face in claims for the transfer of land. The evidence shows that these groups are weak in all of the ways discussed in the early part of the work. The evidence also shows quite clearly that normative support from within the government (whether legal or legislative) there are few incentives for those in power to even consider land claims. This has most often come from the legal system. At the same time, even strong legal support is not always enough force legislators to return contested land.

All of the groups here have been associated with negative and threatening images by the dominant population. Each of the six has been consistently characterized as dangerous and /or
lawless, placing them in a social context where they are considered by the dominant population to be undeserving of transfers. In some cases these perceptions have been somewhat balanced by conceptions of the tribe as noble savages and maintaining connections with the land. Still, none of the tribes with failed claims had overwhelmingly strong positive images. This supports the expectation that weak groups seen as deserving are more suitable targets for concessions and transfers of land.

I have argued that support or opposition of the dominant population drives the decisions of their elected officials. The Representatives and Senators of the affected area, in turn, drive the votes of the federal Congress as a whole. The Cayuga example, and the dramatic influence of Representative Gary Lee in derailing the proposed settlement, shows this relationship. When Lee withdrew his support because of concerns about his own electoral base, the rest of Congress followed.

Conclusions about the justifications of the claim are less clear. Several of the claims in the chapter relied mainly on appeals for justice, arguing that past transactions were illegal and the government had an obligation to offer compensation and returns based on these misdeeds. As has been discussed, appeals to justice and fairness tie into American norms and the idea that everyone in society is entitled to the protection of the law. This justification can also work against the pursuit of land claims, however, as tribes are seeking particular group rights over land that the rest of the population is not able to access. Further, private landowners argue that the claims against their own property are perpetuating a new form of injustice. The two claims that have used language to justify their claims based on the “trickery and deceit” of the government, the Sioux and Oneida, are extremely contentious and confrontation at the local level. This argument is found in cases where the conflict between the dominant population and the claimant tribe is severe, but it unclear from the evidence available whether these justifications have come from or led to this social conflict.

As a group these cases point to the role of group cohesion as being important for the negotiation of claims. All of the failed claims in the research were pressed by tribes without group
cohesion. The Mohawk case provides the best example of this, where internal divisions derailed the chances of several agreements with the government. In the brief window of both agreement and legal support, the tribe made significant steps towards reaching a settlement before the changing legal environment put their claim on hold.

The case studies also support the argument that the outcomes of American Indian land claims are not necessarily related to the size or economic cost of settlement with a land transfer. The range of the claims that have failed, from the Schaghticoke’s claims to small parcels with no development potential to the Sioux claims to millions of acres and the mineral rich Black Hills, is as extensive as the range of the settlements in the previous chapters. The size and value of potential settlements may make some settlements easier to make than others (as in the Seneca Cuba Lake settlement), but cannot be understood without factoring in the social contexts of claim and the cohesion of the group.

Gaming was not considered a fundamental part of the analysis in the initial development of the hypotheses. Nearly all of the land claims covered had their origins long before the possibility or proliferation of Indian gaming. For those that have not been settled and continue on in the post IGRA environment, however, gaming is becoming extremely important in understanding public and political reactions to tribal claims. For American Indian tribes seeking to become sovereign and economically independent, there are many draws to exercising their rights to develop gaming operations. The social repercussions, however, may damage their ability to reach land claims settlements. The social and political environment in Connecticut, for example, is now extremely hostile to American Indian claims although two early settlements, to the Mashantucket Pequot and the Mohegan, did not appear to be very confrontational at the time. This supports the idea that a threat to the security of the dominance of the strong- in this case economic- is significant for the ability of the weak to gain concessions.

The cases in New York State also show evidence of how gaming may have altered the perceptions of the group and their claims over time. There does seem to be a strong public
association of tribes as greedy as the claims have progressed since 1988. While other stereotypes held by the dominant population appear to be relatively fixed, the increase of perceptions of tribes as greedy and/or lazy seems strongly related to the context of tribal attempt to establish gaming rights. These cases also illustrate how gaming may have further hindered land transfers (and the resolution of any claims) by exacerbating the preexisting tensions within the tribes. The Mohawk and Oneida, for example, have both experienced violent internal conflicts related to disagreements over leadership and the exercise of gaming rights.

If the present research had been conducted a dozen years ago, the only example from the research that would be listed with a different outcome is the Seneca Cuba Lake Settlement. While the small numbers make it difficult to argue conclusively, it appears that settlement of land claims is becoming increasingly more unlikely. It may be that the “easy” cases reached early settlement. It may also be that as some cases were settled with land transfer, the dominant public became more aware of land claim and settlements, and perceptions of the weakness of American Indians may have changed. The general political and social context and perceptions of American Indian may also have changed after the 1990s because of gaming, putting American Indian claims to land at a new disadvantage.
9. Conclusion

Politically weak groups can, and do, win control over valuable rights and resources. The weak cannot win unless it is somehow in the interests of those in power to offer concessions. Even if the change is inspired by normative shifts, any pressure for change must take effect through the actions of those with political strength. If the weak can offer no practical incentives for the strong to act, those in power must be driven by some sort of normative compulsion to be generous (or appear to be generous) to the weak, and the weak themselves must be understood by the decision makers to be deserving recipients.

This dissertation focuses on the extension of rights to indigenous peoples to better understand why those in positions of power may offer to extend any power to the very weak. In the first section we identified trends in national level decisions that recognize the land rights of indigenous peoples, comparing the development of policies toward land rights in Australia, Canada, New Zealand, and the United States. These concessions have taken place in countries that have historically denied or ignored those rights, offering a good test for understanding the actions of the strong towards the weak. In the second section we turned to look more closely at the United States, and identified potential causes behind different outcomes in specific claims for the transfer of land.

The research reveals that while indigenous groups are gaining some degree of control, the true sovereignty that they have over the territory in question may be limited. The United States land claims settlements, while groundbreaking for returning territory to American Indians, have also led to ongoing concerns over the encroachment of state and federal government authority over the sovereign rights of the tribes over their land. The placement of settlement land as tribal trust in most cases may offer some rights, but also binds the property- and the tribe- to the authority of the federal government. The international comparisons also illustrate that the governments in question have severely limited the range of land available to be claimed. Those in power may be extending rights
and control to the weak, but they continue to protect their own power by putting very specific boundaries on how and where those rights can be used.

9.1 Victories of the Weak

In the first section of work I addressed the primary question of why, after a history of ignoring or denying indigenous peoples’ rights, governments would later reverse their policies and extend rights. Case studies of Australia, Canada, New Zealand, and the United States comparatively analyze the trajectory and causes of change. The focus on representative democracies with similar colonial and legal backgrounds allowed the research to control for these factors while using other similarities and differences to evaluate the expected causal and facilitating factors.

I conclude that in each country, by the first half of the 20th century, the indigenous populations had undergone dramatic population declines and loss of territory. International and domestic normative changes that took place after the World Wars encouraged the redefinition of indigenous peoples from outsiders to those with status as more “human,” eligible for the same rights and protections as the strong. These changes were facilitated by the fact that indigenous populations were at their weakest and the position of the strong appeared secure. Further, indigenous peoples themselves were becoming more cohesive (both nationally and internationally) and willing to assert their claims against the states. With the groups no longer posing a physical or economic threat to the position of the dominant population, it became “affordable” for the strong to consider offering concessions.

The four country cases support the idea that normative forces that pressure those in power to enact change are necessary for the recognition of the rights of weak indigenous groups. A primary way to identify this is the absence of any real practical incentives for those in power to concede anything to indigenous peoples. For the most part, indigenous populations were extremely small, scattered, and non cohesive. They showed few signs of increasing until well after the extension of rights had begun. There were no new allocations of resources until after the recognition of rights
extended control over some resources. Further, in Canada and Australia large portions of the indigenous population were disenfranchised well until the middle of the 20th century. In these countries, with extensive histories of dispossession and ongoing attempts to exterminate the indigenous population, normative change among elites as a motivating force for recognizing indigenous peoples as deserving of some rights was necessary where the group itself was unable to offer any practical incentives to do so.

The main exception to the designation of indigenous peoples as having no political leverage is the situation of the Maori in New Zealand, whose relatively large population (nearly 15% of the total), voting rights, and guaranteed representation in Parliament gave them some leverage that the other indigenous peoples in other countries did not have. The Mori were able to place more pressure on those in power for the extension of some rights, particularly equal and partnership rights. This practical pressure, however, has not translated to greater or even earlier recognition in terms of many more tangible or private goods, such as land rights.

In all four countries, indigenous populations were encouraged to mobilize for change because of the increasing attention and support of the dominant population being given to minority rights in general. Not only were indigenous peoples inspired by the success and tactics of other groups, particularly African Americans in the United States, they were also increasingly connected as part of an international network of indigenous peoples. This allowed Maori activists, for example, to learn from the tactics of American Indians in developing their agenda and staging public protests. There were both practical and normative benefits to this spillover; indigenous peoples were able to learn new methods but also were encouraged to believe that they had the possibility of success in attaining greater recognition of their rights.

We found little evidence of practical pressure for those in power to initiate change on behalf of indigenous peoples on a national scale. After all, those in power had been comfortable with denying the rights of indigenous peoples for centuries. In the United States, there is some evidence for the extension of rights to equality for American Indians as spillover, part of the broader shift
towards extending equal rights to all minority groups. This is due to the stronger pressure that was brought to bear by African Americans and Latinos during the Civil Rights Movement. However, this extension relates to rights to equality and inclusion, rather than indigenous specific rights to sovereignty and exclusion.

The expenses involved in administering or controlling the object of the claim of the weak may also generate practical incentives that encourage those in power to extend rights to indigenous peoples. While this may have been the case in very specific instances (such as the Mohegan in Connecticut in the US), it does not appear to be relevant as a widespread push for the extension of indigenous rights nationally. Even where the target of the claim, such as land, may be very low value (the Canadian tundra or Australian desert), there still must be some reason for those in power to consider transferring control and power to the weak.

In other words, there must be some reason for those in power to want to make concessions. The country studies pointed to the role of changing normative pressures related to the treatment of minority groups after World War II, the redefinition of indigenous peoples as non-threatening and deserving of “human” rights, and drive for western democracies to show their willingness to respond to indigenous peoples’ concerns as part of their public moral superiority. Another major component of elected officials’ willingness to recognize indigenous peoples’ rights comes from a government commitment to rule of law. As the common law legal world became more supportive of the sovereign rights of indigenous peoples, elected officials were pressured to respond to legal precedents and demands that pressed for policy change.

My work concludes that this normative change is necessary as an initial impetus for change towards the recognition of indigenous peoples’ sovereign rights, specifically their rights to land. Another necessary force is the normative belief of indigenous peoples in the possibility of their success; in no case are sovereign rights extended by elites when they have not been actively sought by indigenous peoples. These two components are far from sufficient, however. There are also a number of facilitating factors that contribute to the success of indigenous peoples in seeking the
recognition of their rights. For national level change, it appears necessary for the indigenous population to develop and mobilize under a national identity as “Aboriginal” or “American Indian” that connects the smaller band or tribal political entities. We have also seen that the dominant population needed to develop a sense of security in their own dominance, and that the extension of rights to indigenous peoples followed a period where indigenous populations had become clearly economically, socially, and politically non-threatening. This change also allowed for a social redefinition of indigenous peoples as dangerous or morally threatening to a more romanticized image of “disappearing noble savages” or “primitive innocents.”

The security of the strong in their position of power, the new normative concerns about the treatment of minority peoples, the extension of “humanness” and recognition of basic rights to legal and political equality and protections combined in ways that allowed elites to recalculate how affordable concessions to indigenous peoples were. In the absence of practical motivating forces, the strong need to have a normative compulsion to be generous to suitable targets of generosity and also to have redefined the weak as appropriate recipients of this generosity.

The “generosity of the strong” in terms of their willingness to recognize the existence of indigenous land rights does not necessarily equate to the willingness of the government to extend control over land, however. Prior to the 1970s, for example, the United States sought to recognize and extinguish indigenous claims to land through financial compensation. It is only after the 1970s, and a series of strong legal decisions, that the government has returned land (as opposed to other forms of compensation) to American Indians with any frequency. The other three countries have set up national bodies for evaluating and administering claims, but they have all created limitations on the land that can be claimed and enacted strict guidelines for its return. Indigenous peoples have been granted control over vast territories, and sometimes development rights to valuable resources such as oil or mineral deposits. It does deserve to be noted, however, that their rights are incomplete and often fall short of indigenous goals of sovereignty. Further, indigenous peoples have raised
ongoing concerns in all of the countries as to how government-appointed and influenced bodies can be “impartial” judges of the claims of indigenous peoples against the government itself.

9.1.2 Recognizing Indigenous Rights: Claims Comparisons

The second portion of the dissertation offers a comparative analysis of 17 American Indian land claims cases. The main conclusions from the first section are confirmed: normative shifts are essential in understanding change in favor of groups too weak to offer practical incentives to those in power. The conclusions in this section support those generated from the international comparisons. Even when there has been a general extension of rights and even a precedent of returning land to American Indians, transfers only take place when they appear to be “affordable.”

The cases prove that the hypothesized practical incentives for change rarely explain the extension of rights or control over resources to indigenous peoples. Only in one case, the Mohegan settlement, was there a practical pressure on elites to get rid of the territory in question. In this situation, the degraded state of the areas being claimed by the Mohegan tribe actually offered a practical economic incentive for local, state and federal decision makers to get rid of the property. This was the only expected situation where there might be practical reasons for the strong to offer concessions. Even in this example, the Mohegan first had to seek out the land in question through a long legal case as well as complete the formal process for federal tribal recognition. This offers support for the need for many facilitating conditions to be met as well as the requirement of normative change; the claimant group had to overcome several hurdles to be seen as “deserving” even when the strong may have actually had incentives to give control over the territory away regardless.

Instead, the key to understanding the extension of rights to American Indians appears to be the change in the dominant populations’ perceptions of American Indians and a redefinition of the group (through domestic and international forces) as deserving of basic human rights and treatment. A major part of this was the growth of the Civil Rights Movements and its success in bringing
political attention (and responses) to the demands of minority groups for equal rights and respect. For American Indians, the extension of equal rights was significant but did not cover their concerns about sovereign rights and independent political entities. In a legal, political, and social environment where minorities were now seen as deserving of rights, however, this attention helped American Indians get some recognition for their specific interests. The federal government’s concern with proving that there had not been genocidal treatment of American Indians also made this more viable, along with increasing judicial willingness to recognize the legal standing of treaties and government responsibility toward tribes. The new normative support for the rights of indigenous peoples—both as individual “humans” and, more significant for sovereign group rights, as tribal entities—was essential for any changes in support of indigenous peoples.

Many policies towards American Indians can be difficult to interpret, both in terms of their real motivations and objectives and in understanding the politics behind their enactment. It remains difficult to understand, for example, why the long term goal of exterminating American Indians was not continued even more energetically as the population, power, and land base declined. This is further complicated by policies that can be interpreted and understood in terms of multiple goals. The creation of the Indian Claims Commission, for example, operated in a way that simultaneously recognize and extinguish American Indian claims against the government over land. Because of this, it had support from tribal representatives and those who advocated the recognition of sovereign powers as well as other power holders who sought to end the claims of indigenous peoples and stop any potential responsibilities that the government might have toward them. So while some power holders may have been driven by normative beliefs in the humanity of indigenous peoples and the need to conform to legal recognition of their sovereign historical rights to land, others may have seen the ICC as an opportunity to appease international demands and yet continue down the path of eventually ending all tribal claims.

The restoration of land covered in the claims comparison is less ambiguous in its consequences for tribes. While those in power may again be driven by different specific agendas
(normative guilt, concern for the tribe, or the hope that the tribe will cease receiving public monies after the land transfer), the transfer of even limited control over territory is a recognition of the group specific sovereign rights of indigenous peoples. To get to this point of consideration, legal support appears to be a necessary condition.

In almost all of the cases discussed, the legal system provided the only means that tribes could use to get attention to their land claims. Without legal pressure (or the imminent threat of legal pressure) elected officials are not willing to engage in the potentially political costly act of negotiating the restoration of land rights to American Indians. Judicial decisions that support the rights of tribes to claim lands and lay the responsibility of resolving claims on the federal government appear to be essential in offering some prompt for elected officials to act. In the cases covered here, decisions supportive of land claims revolved around the application of the Trade and Intercourse Acts and the obligations of the federal government to resolve claims even if they were based on taking of land by the states (rather than the federal government or its agents).

Those decisions that went against tribal rights tended to fall on the inability of tribes to prove their exclusive use and occupancy of the land, or were deferred based on the question of identity and federal recognition. The two 2005 cases that found against American Indian rights over land both argued that the passage of time between the original occupation and the present was too long to now assert the territory was tribal land, and that the intervening years and events had invalidated the claims of the Oneida and Cayuga. Even in cases where there is (or was) strong legal support for the rights of the tribe, however, a settlement with transfer of land is far from guaranteed.

I proposed four main factors as the facilitating factors for the transfer of land. Generally, all of these worked in expected ways. It was surprising that while tribal group cohesion was an important element in understanding the claims of the weak, it was not necessary as a precondition for bringing a claim against the strong. While it was significant, it was also not necessary for reaching a transfer of land. The rough values of the land claimed, both in claims that are resolved with transfers and those that are not, are also wide ranging. Dominant perceptions related to the
deservingness of the claimant group and the moral compatibility of their claim to the legitimacy of 
the state were also important in understanding the willingness of those in power to offer concessions.
These findings confirm the role normative pressures on the strong in encouraging transfers of land.
Indigenous peoples can offer little practical incentive for those in power to respond to their claims;
the examples show here that it is more than possible for the government to continue to deny 
indigenous peoples claims for lengthy periods of time without any practical repercussion.

Recent developments indicate that American Indian gaming may become an increasingly 
important factor in understanding the context of other American Indian claims. This may be 
because gaming has brought economic success and independence to a few tribes, increasing their 
economic power dramatically. This success is limited to a very few tribes, to be sure, but it has 
brought the public conception that all Indians share in this new success. This changes the power 
dynamics expected to benefit the claims of the weak; if they are no longer considered economically 
subservient, calculations of affordability in making concession will shift. There is irony in this 
situation. The weak were able to gain concessions because of their extreme weakness, but their 
ability to use these concessions to gain ground increases their strength, making them appear 
potentially strong and threatening to those in power and damaging the chance of any future 
concessions.

9.1.3 Victories of the Weak

The main finding of the research is that the weak can win concessions from the strong even 
when they cannot offer practical incentives for those in power to do so. In situations where the 
strong have some motivation to offer concessions, they may offer generosity to the weak because 
they can afford to without jeopardizing their dominance. They are only willing to do so when it is 
considered affordable to grant concessions. This research points to the motivating force of 
normative change as a primary factor in initiating change.
We have seen few practical incentives related to the extension of rights to indigenous peoples. Rather, it appears that those in power were willing to extend equal rights, and eventually some sovereign rights, as normative pressures encouraged the redefinition of indigenous peoples as people deserving of rights. The combination of secured dominance and the inclusion of indigenous peoples under the umbrella of those deserving privileges such as citizenship and the protection of the rule of law encouraged those in power to recalculate the normative and practical costs and benefits of offering concessions. Changing norms at the international and domestic level and the increasing mobilization of indigenous peoples also gave indigenous claimants the ability to use public attention to shame governments into action.

Indigenous peoples’ claims for the return of land were chosen as a test for understanding how and when the weak can win concessions from the strong. In the universe of the “weak,” indigenous peoples are extremely weak. In the universe of demands that the weak can make, the pursuit of tangible private goods such as land is among the most challenging. The research presented here therefore offers important results for understanding how, why, and when the strong offer concessions to the weak. When the strong are secure their dominance, they may be willing to act for normative, rather than practical, gains.

9.2 Predicting the Outcomes of Claims

The expectations presented in Chapter 5 offered reasonably accurate predictions when used to test their power on the outcomes of the 17 land claims cases. Given the incredibly complex context of American Indian land claims, this is a significant accomplishment. If the outcomes of land claims can be understood and even predicted in a systematic manner, it may be possible for future claims to be positioned in ways that increase their chances of success. The comparison of claims is also important in the United States context, where the trajectory of most American Indian claims and their settlement outcomes are each considered to be unique. The establishment of comparability and similar predictive factors may then be useful in understanding the political
dynamics of the full universe of claims seeking rights or resources, including the remainder of those to land or those to other resources, such as treaty based rights to hunt or fish, or water rights.

A concern that is raised when looking at the case studies chronologically is whether or not the dominant population and those in power are becoming increasingly opposed to the further extension of rights to American Indians. This is something that must be closely and carefully watched in the future, and is discussed in the future directions section below. If this is the case, more recent claims will operate in an environment where they need the convergence of even stronger pressures for settlement than those before.

One way to further test the expectations developed here and confirm the findings is the extension of the research to new land claims. Two new claims for the transfer of property were brought before the courts in 2005 in the state of New York. New York is the state in which only one (very small) settlement has been reached, despite the strong legal position of many of the claims for a long period of time. If the social and political environments are becoming increasingly hostile towards American Indian claims, it is surprising to see these groups press their claims now. The tribes may be using the experiences of the other New York tribes as lessons, however. The two very different claims are introduced briefly below. They will be watched closely as they progress in the future and incorporated into future versions of the research.

9.2.1 Onondaga

The Onondaga Indians of central New York are members of the Haudenosaunee. The legal and historical basis of their claim is very similar to that of the Oneida, Mohawk, Seneca, and Cayuga tribes discussed in Chapters 7 and 8. The Onondaga Nation filed their land claim in 2005, on the heels of the Sherrill and Cayuga legal decisions which found that the New York tribes had delayed their claims to exercise sovereign rights too long; the claims were no longer valid. The Onondaga and their counsel have therefore sought to distinguish the claim from the other claims in New York,
arguing that they have continually sought to gain the return of their land and detailing the history and hurdles behind them.

The Onondaga reservation is located in close proximity to the Oneida reservation and the Turningstone casino development outside of Syracuse. The Onondaga have maintained a continual community presence on their reservation since its creation. They have also continued to follow a traditional system of government, and have not had the violent internal divisions that have characterized the Oneida, Mohawk, or Seneca (Adams 2005a). There are about 1,500 members of the Onondaga tribe and a 7,300 acre reservation south of the city of Syracuse. There is an Onondaga Nation in Canada, which resides in the Six Nations Reserve at Grant Rivers in Ontario. While the Canadian group has not officially stated whether or not they will be a plaintiff in the suit, they are not expected to contest (McAndrew 2005).

The lawsuit names New York State, Onondaga County, and the city of Syracuse as defendants along with five industrial companies that have been involved in the pollution of Onondaga Lake (Adams 2005a; Wanamaker 2005). The suit alleges that the Onondaga are the rightful owners to over 4,000 square miles in central New York State. The case is based on five treaties made between the Onondaga and New York State over the period of 1788 to 1822. The suit argues that the last four treaties, which ceded 100 square miles and the city of Syracuse, are invalid because of the failure of the state to gain federal approval, as required by the 1790 Trade and Intercourse Act (Rapp 2006). The first treaty, made in 1788, faces a different hurdle because it was signed prior to the Trade and Intercourse Acts and cannot rely on the same legal argument. The Onondaga instead claim that the 1788 treaty was not signed by valid representatives of the nation and furthermore was not ratified until after the Trade and Intercourse Act had gone into effect (Adams 2005a).

The Onondaga suit does not request repossession of the land claimed or eviction of homeowners. Rather, the Onondaga argue that they want a formal declaration that they are the rightful title holders of the land. The suit does not give up the right to acquire land- the tribe would
reserve the first right to buy land when it is being offered for sale in any settlement territory. The only resource to be transferred is Onondaga Lake. The Onondaga have a primary interest in becoming involved in the cleanup of the lake, which is part of their original territory and important to the tribe for both cultural and religious reasons. Experts agree that Onondaga Lake is one of the most polluted bodies of water in the country.

During the latter years of the 19th century, the lake became an industrial waste and raw sewage dump; water quality declined markedly. In 1901, harvesting ice from Onondaga Lake was banned. Swimming was prohibited in 1940 and by 1970 fishing was illegal. Mercury and at least two dozen other toxic chemicals have been identified in the lakebed. Additionally, sewage and runoff have created an oversupply of phosphorous, which leads to rapid algae growth, in turn depleting oxygen in the water, making it even more difficult for fish to survive. (Wanamaker 2005).

The repeated emphasis on environmental cleanup makes this suit very different than the other claims in New York (Wanamaker 2005). The horrific state of the pollution in Onondaga Lake has made it an embarrassment and source of concern for local, state, and federal officials, who have struggled to develop adequate plans to combat the pollution. The Onondaga petition for involvement and responsibility in the cleanup is, therefore, welcomed by some officials (O’Brien 2006).

The dominant population carries a mixed group of perceptions about the Onondaga (similar to the situation for the other members of the Haudenosaunee). Their connection to land is clear, and they have a strong association with romanticized images of noble savages. The tribe has been part of some violent protests and conflicts with the state police over taxation and sovereign rights. This, along with historical images of the Haudenosaunee as warriors, has contributed to some perceptions of the Onondaga as dangerous. Unlike the other tribes in New York, the Onondaga do not have the public image of being greedy or lazy, perhaps because they have not been involved in any gaming bids with the state. The main justifications for the claim, as mentioned above involve appeals for justice and concerns about the environmental. There are also associations of the claim with religion, as the claims of the Onondaga and their public statements frequently point to the sacredness of the site. A key distinction from the other claims in New York is that the Onondaga suit and leaders specifically state that they are not interested in gaming rights. This may help them in
their attempt to distance themselves from the other claims. As the example of the Schaghticoke shows, however, this commitment may change.

According to the expectations presented in the research, even if there is a legal decision in favor of the Onondaga’s right they are not guaranteed to win any rights to territory. The group is advantaged by their group cohesion, and the fact that the dominant population has a relatively favorable opinion of the group. The strong appeal to environmental concerns may advantage the claim as well. It is unclear how the dominant population or elected officials will consider the value of the claim. Unlike any other claims, in which the tribe expressed interest in the immediate transfer of any of the claimed land, the Onondaga are only seeking immediate rights to Onondaga Lake. The large amount of land included in the claim is not sought for transfer or exclusive rights to purchase. Instead, the claim seeks acknowledgement of prior ownership and the first option to purchase. This reduces the potential costs to the dominant population and elected officials dramatically. Because of the culmination of these factors—strong cohesion, positive social context, and (potentially) low cost of an award, if the Onondaga win legal support for their claim it is expected that they will reach a settlement with the state and federal governments over Onondaga Lake.

9.2.2 Shinnecock

The Shinnecock tribe began to formally press their land claim in 2005. The Shinnecock stand out from the other claims in New York because they are not part of the Haudenosaunee. The Shinnecock are part of the Algonquin group of Indians, which includes many of the former coastal tribes of New England. Their traditional territory, reservation, and claim are on Long Island. The tribe was one of the earliest to come into contact with the Europeans, and records of their interactions date to 1640 (US Congress House 2004).

The Shinnecock tribe has about 1,200 members with a reservation of around 800 acres in the Hampton area of Long Island. About 650 members live on the reservation (Adams 2005b; Algar 2005; US Congress House 2004). The poverty of their reservation and problems of unemployment
and underemployment as “housemaids and caddies” is in stark contrast to the opulent summer homes of the wealthy in the area (Adams 2005b). The Shinnecock’s claim is complicated by the fact that the tribe does not have federal recognition. The tribe was one of the first four tribes to file an application for the newly created administrative recognition process in 1978. Their case has still not been completely reviewed by the Bureau (US Congress House 2004; Toensing 2007). The tribe is recognized by the state, and in 2005 the tribe was recognized as a federal entity by the federal district court (Moreno Gonzales 2006; Reinholz 2005). The BIA responded to the suit, saying that the tribe would not be recognized until the administrative process was complete. It estimated that there were still a number of years left to complete the evaluation (Mead 2006).

The lawsuit for the return of 3,500 acres was filed in 2005. The tribe argues that the “sale” of the territory to a group of investors in 1859 was fraudulent, and no tribal authorities ever signed the petition for sale. The 3,500 acres sold are the subject of the current claim and are today valued at approximately $1.7 billion dollars. The suit names New York State, Suffolk County, the town of Southampton, Long Island University, Long Island Railroad and several developers and businesses on the claimed land, including two golf courses (Adams 2005b).

The claim is based on an appeal to justice, and the tribal members refer to the sale as the “Grand Dispossession.” A key element of the claim involves concern with environment coming from development in the area. Water pollution has become a large problem because of the fertilization of mansion lawns and golf courses; runoff has contaminated the reservation drinking water and killed off the oyster beds which were intended to promote tribal economic development (Adams 2005b). The tribe says that land returned to them will be managed in an environmentally sound way. While not publicly stated as an object of their land claim, the Shinnecock tribe is also involved in a bid to open and operate a casino. The quest for a casino operation began in 2003 with the involvement of Oklahoma businessman Ivy K. Ong (Adams 2005b). The tribe is also being funded in part wealthy investors who have been involved in several other Indian run casinos (Hamilton 2005). While the tribe may focus their justification for the claim on justice, the
environment, and the need for economic development, the local community has focused its attention on the casino bid and how the land claimed would be used.

The Shinnecock have been established on their reservation land since the early 18th century, giving them a clear and enduring connection to the land. Despite this history and the presence of an ongoing community, there are still detractors among the dominant population who challenge the groups’ identity as “false.” The Shinnecock have intermarried with African Americans, similar to the situation of other Algonquian tribes in New England (such as the Mashantucket Pequot or Golden Hill Paugusset). This racial composition has drawn challenges to their authenticity during their lengthy recognition bid and land claim (Reinholz 1999). Tribal members are even subject to a local racial slur, “monig,” which refers to their mixed Indian and black ancestry (Algar 2005). The tribe has also at times been associated with images of lawlessness. A 2007 police sting which resulted in the mass arrest of tribal members and resulted related to possession of sales of drugs and weapons further deteriorated public perceptions of the tribe (Eltman 2007).

The land claim and casino development plans have created some disagreements within the tribe, but the fallout has not yet been detrimental. The decision to pursue a land claim was voted on and approved by tribal members, although the numbers of votes and attendance has not been publicly disclosed (Hamilton 2005). If there are serious tribal divisions, they are not being publicly aired.

Legally, the Shinnecock have already established limited victories. In 1997 Judge John Jones of Suffolk County Court ruled on a conflict over a half-acre waterfront parcel. The Judge found that most, if not all, of the parcel did belong to the tribe and raised questions of title to other areas. This decision was upheld by the Appellate division of the State Supreme Court (Reinholz 1999). The 2005 decision in favor of the federal standing was a major reason for the timing of their land claim suit. This early legal support shows recognition for their title claims in the area.

The Shinnecock tribe may be disadvantaged by perceptions of the group as potentially false, greedy, and dangerous, even with their longstanding presence in the community. They have used a
similar route to justifying their claims as the Onondaga, relying heavily on both appeals for justice and for their role in repairing environmental damage. The tribe has also sought additional land for an economic base to attain self-sufficiency. The claim has been complicated by the parallel casino bid. The value of the 3,500 acres claimed is very high because of the location. While the Shinnecock suit names governments and businesses as defendants, rather than targeting individual homeowners, local residents (who include the most wealthy and connected people on the east coast) are also strongly opposed to the claim (Adams 2005b). The advantages of group cohesion and legal support are not expected to be enough to influence elected officials to return land to the Shinnecock. The costs—both practical and electoral—for legislators would likely be enormous.

9.3 Future Directions and Conclusions

The research offered here is in many ways a first step. It is an ambitious attempt to begin to answer questions both about paths for the politically weak and about the specific situations of indigenous peoples. The explanations supported by the work are expected to also be relevant to the claims of weak in general, such as public apologies, compensation, or group specific rights. Further, the explanations should also be viable for understanding the range of rights sought by indigenous peoples, such as access to resources, religious sites, specific treaty rights, or other support by the government for their sovereign status. One area for future development is to expand the universe of cases studied to generate more robust results. Throughout the work I have also alluded to several areas that are not adequately covered and that deserve more explanation. Two of these key areas for future development are introduced below.

In all of the countries and claims studied, legal decisions factor prominently in the explanations offered. The role of legal decisions and the motivations of legal actors, are important for understanding the extension of groups which have few other routes of access to political systems. The case of indigenous peoples illustrates not only the power of domestic law and precedents, but also the dissemination of legal norms between common law countries. In fact, the use of
international precedents appears prominently in many important decisions that supported indigenous rights. Further, what are the ongoing effects of this borrowing? If the precedents on indigenous rights spread between the four countries covered here, have they spread to other former commonwealth countries? More also needs to be known about the role of international law and its use in supporting domestic indigenous rights.

In the United States, another topic that begs for more explanation is the role of gaming. While the Indian Gaming Regulatory Act was passed in 1988, it was not until the mid 1990s that public attention and opposition to Indian gaming enterprises became relatively widespread. For many of the claims covered, the timing of claims long predated the IGRA. The lengthy period of most claims means that several continued on and the tribal claimants later become involved in gaming bids as well. Those claims most recently introduced have also been subject to concerns about whether or not the tribes are seeking to exercise gaming rights. Gaming appears to be altering the social and political dimensions of American Indian claims, whether to land or other resources or recognition. The trend appears to be fairly negative, with accusations of tribes as “greedy” and undeserving of additional resources or special rights. This phenomenon may be more apparent as the land claims progress over time and the research continues. I am beginning work on a new research project to explore the specific relationship between gaming and land claims, the way they are portrayed by the media, and public opinions on the two types of sovereign rights.

The work presented here offers an analysis of indigenous peoples land rights and victories as part of a broader attempt to understand how any weak group can win. The main route that the very weak have is seeking some access to the established government to gain even a minimal acknowledgement of their claims against the state. For indigenous peoples in elected democracies with the rule of law, this access has often been through the courts. For the very weak in countries without an open legal system, a commitment to the rule of law, or interest in their international reputation, there may be little hope for this sort of route. Further, for very weak groups in countries with less capacity, where those in power may struggle to be able to meet even the needs of the
dominant population, there will be less ability to meet the specific demands of weak groups. Truly weak groups can win when the strong feel the normative compulsion to offer concessions and when the concessions are considered affordable.
## Appendix A: International Timeline

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<tr>
<th>Dates</th>
<th>Australia</th>
<th>Canada</th>
<th>New Zealand</th>
<th>United States</th>
<th>International Events</th>
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<tbody>
<tr>
<td>Pre-1780</td>
<td>1776 Captain James Cook explores the east coast of Australia. 1788 The first British settlement is established in Botany Bay. The British do not acknowledge the political existence of natives, establishing <em>terra nullius.</em></td>
<td>1763 King George issues the Royal Proclamation and affirms indigenous rights to land title. Title can only be extinguished by consent, reinforcing the British treaty making policy.</td>
<td>1769 Captain Cook explores the coastline of New Zealand. This begins a period of trading between British and Maori.</td>
<td>1776 The Declaration of Independence is issued. 1787 Under the Articles of Confederation, the Northwest Ordinance affirms the relationship between the independent government and natives. 1789 The US Constitution is ratified. 1789 The new federal government establishes the administration of Indian Affairs under the War Department.</td>
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<tr>
<td>1781-1790</td>
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<td>1790 The Trade and Intercourse Act makes it illegal for states (or individuals) to buy or sell land to Indians without federal oversight.</td>
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<td>1791-1800</td>
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<td>1801-1810</td>
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<td>1811-1820</td>
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<td>1821-1830</td>
<td>1829 The British claim the Australian continent in entirety.</td>
<td>1820s-1830s The Maori fight among themselves and with the British over territory, known as the Musket Wars.</td>
<td>1823 The Supreme Court decision in Johnson v McIntosh establishes the legal concept of “domestic dependent nations.” 1824 The federal government creates the Bureau of Indian Affairs.</td>
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<td>1831-1840</td>
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<td>1839 The Crown Lands Protection Act declares that all indigenous lands are now Crown lands, subject to the administration (and ownership) of the British.</td>
<td>1840 The Treaty of Waitangi is drafted and signed as an agreement between the Maori and the British.</td>
<td>1830 Congress passes the Indian Removal Act to send eastern tribes west of the Mississippi.</td>
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<tr>
<td>1841-1850</td>
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<td>1850 The Colonial government creates a registry of indigenous peoples.</td>
<td>1847 The High Court affirms the responsibilities of the British to the Maori in R v Simmons.</td>
<td>1849 The Bureau of Indian Affairs moves from the War Department to the Department of the Interior</td>
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<td>1851-1860</td>
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<td>1857 The Gradual Civilisation Act excludes any registered Indians from the federal franchise.</td>
<td>1854 The Maori organize tribal assemblies to promote a national unification.</td>
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<tr>
<td>1861-1870</td>
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<td>1867 The Confederation of British North America unites modern Canada.</td>
<td>1860-1872 The Land Wars are fought between the Maori and the British. 1865 The Native Land Court break up communal land holdings and assigns individual titles to Maori. 1867 The Maori Representation Act creates four Maori seats in Parliament. 1870 Native Schools Act forces the education of Maori children in English.</td>
<td>1861-1865 The Civil War is fought.</td>
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<tr>
<td>1871-1880</td>
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<td>1876 The first Indian Act establishes national administration of natives. 1879 The Superintendent of Indian Affairs is empowered to lease reserve land.</td>
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<td>1871 Congress ends the period of treaty making.</td>
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<tr>
<td>1881-1890</td>
<td>1887 Australia is declared a Crown Colony.</td>
<td>1888 St Catherine’s Milling and Lumber Co v the Queen decision puts native title rights at the mercy of the “good will” of the government.</td>
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<td>1887 The Dawes (Allotment) Act authorizes the breaking up of reservations into individually owned plots and extends federal control over “surplus” lands.</td>
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<td>1891-1900</td>
<td>1900 Australia becomes an independent Commonwealth country. 1900-1960s Native welfare boards are established by progressive reformers, creating Aboriginal boarding schools in many places.</td>
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<td>1900 The Maori Land Administration Act creates Maori councils to lease land to whites. 1906-1908 Land Boards are established and now have the power to both lease and sell land.</td>
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<td>1901-1910</td>
<td>1902 The Commonwealth Franchise Act forbids indigenous peoples from the federal vote unless they are already on the rolls.</td>
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<td>1911-1920</td>
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<td>1917 The federal franchise is extended for indigenous people in the armed services. 1920 The franchise is further extended to all veterans and those off of reserves.</td>
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<td>1914-1918 World War I</td>
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<td>1921-1930</td>
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<td>1927 The Indian Act is amended, making it illegal for indigenous people to retain legal counsel for claims against the government.</td>
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<td>1924 The Indian Citizenship Act extends citizenship to all American Indians. 1928 The Meriam Report is published, criticizing the Bureau of Indian Affairs and Allotment policies.</td>
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<td>1931-1940</td>
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<td>1934 The Indian Reorganization Act ends allotment and allows tribes to administer some federal services if they agree to reorganize under specific conditions of the Act.</td>
<td>1939-1945 World War II</td>
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<td>Dates</td>
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<td>1941-1950</td>
<td>1946 The Pilbara strike brings local attention to poor working conditions for indigenous peoples. 1949 The Commonwealth Electoral Act extends the federal vote to indigenous military veterans and those with state voting rights.</td>
<td>1947 The government creates the Department of Maori Affairs.</td>
<td>1944 The National Congress of American Indians is established. 1946 The Indian Claims Commission Act creates a body to hear and settle native claims against the government with financial compensation. 1948- 1978 The Indian Claims Commission hears and decides on Indian claims.</td>
<td>1948 UN-Universal Declaration of Human Rights</td>
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<td>1951-1960</td>
<td>1951 The Darwin strike brings local attention to working conditions for indigenous peoples. 1954 The federal vote is extended to those with less than ¼ indigenous blood.</td>
<td>1951 The Indian Act is revised to allow indigenous peoples access to legal counsel and gives band government limited authority over reserves. 1951 The Department of Northern Affairs and Lands is created. 1953 It becomes the Department of Northern Affairs and National Resources. 1960 The federal franchise is extended to all natives.</td>
<td>1953 House Resolution 108 establishes a policy of termination of tribes. 1957 Public Law 280 extends state criminal jurisdiction over reservations.</td>
<td>1957 ILO-Convention 107 on Indigenous and Tribal Populations</td>
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1963 The Yirrkala bark petition gains the attention and support of Parliament for their rights against mining interests.  
1965 The last state, Queensland extends the vote to indigenous peoples.  
1965 The Freedom Rides protest de facto segregation.  
1967 A national referendum vote extends full citizenship rights to Aborigines. | 1966 The Department of Indian Affairs and Northern Development is created.  
1968 The American Indian Civil Rights Act is passed.  
1968 The American Indian Movement (AIM) is created by young, urban American Indians.  
1969 AIM occupies Alcatraz Island.  
1970 Blue Lake and 48,000 acres are returned to the Taos Pueblo. | 1966 UN-International Covenant on Economic Social and Cultural Rights  
1966-International Covenant on Civil and Political Rights |
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<tr>
<td>1971-1980</td>
<td>1971 Milirrpum v Nabalco Pty Ltd rejects the Yirrkala’s rights against development interests. 1972 The Aboriginal tent embassy protests the denial of indigenous rights. 1975 The Racial Discrimination Act is passed. 1976 The Aboriginal Land Rights (Northern Territories) Act allows the return of land under federal administration. 1977 The National Aboriginal Conference is founded.</td>
<td>1973 The decision in Calder v AG of British Columbia establishes the rights of native title as preexisting British recognition, opening the door to claims from groups without treaties. 1974 The Office of Native Claims is established to evaluate land claims. 1976 The James Bay Agreement returns 150,000 km² and $225 million to the Cree.</td>
<td>1975 The first Maori members of Parliament are elected from general rolls. 1975 The Treaty of Waitangi Act establishes the Waitangi Tribunal to evaluate and acknowledge Maori claims. 1976 The Maori Land March protests the taking of Maori land by the government. 1977-1978 The occupation of Bastion Point generates more public attention for Maori concerns.</td>
<td>1971 The Alaskan Native Claims Settlement Act transfers 44 million acres of land and almost $1 billion in compensation to Alaskan Natives. 1972 AIM members stage an occupation at Wounded Knee. 1974 The Supreme Court rules in Oneida Indian Nation that the tribe can sue the state and counties for the taking of land. 1975 The Indian Self-Determination and Education Act extends funds and administrative control over some services to tribal governments. 1978 1,800 acres and $31.5 million are transferred the Narragansett Indians.</td>
<td>1973-1982 UN decade to Combat Racism and Racial Discrimination 1977 UN-International NGO Conferences on Indigenous Populations in the Americas</td>
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<td>Dates</td>
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<td>1991-2000</td>
<td>1992 The High Court decision in Mabo v. Queensland recognizes native title in Australia. 1993 The National Native Title Tribunal is created to evaluate and administer title claims. 1994 The Torres Strait Regional Authority is created.</td>
<td>1991 Delgamuukw v the Queen 1992 Gwich'In Agreement 1999 creation of Territory of Nunavut</td>
<td>1991 The National Maori Congress is established 1996 The first year of the new federal electoral system of mixed member proportional districts.</td>
<td>1994 Approximately 250 acres are transferred to the Mohegan Indians.</td>
<td>1993 UN- Year of Indigenous People</td>
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<td>Dates</td>
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<td>2001-2008</td>
<td>2008 Prime Minister Rudd offers an apology to the “Stolen Generation.”</td>
<td>2003 The Specific Claims Resolution Act amends the settlement process.</td>
<td>2004 The Foreshore and Seabed Act gives New Zealand seabed and foreshore rights, not the Maori.</td>
<td>2005 51 acres surrounding Cuba Lake are transferred to the Seneca Indians. 2005 The City of Sherrill v. Oneida Indian Nation and Cayuga Nation v. New York decisions argue that the tribes have taken too long to assert their claims, placing historically based claims at legal risk.</td>
<td>2007 UN-Declaration on the Rights of Indigenous Peoples</td>
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# Appendix B: United States Land Claims Case Study Summary

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<tr>
<th>State</th>
<th>Claimant</th>
<th>Legal support</th>
<th>Date and Amount of Land Claimed</th>
<th>Cost of Settlement</th>
<th>Group Cohesion (claimant groups)</th>
<th>Stereotype of Identity</th>
<th>Claim justification</th>
<th>Prediction</th>
<th>Date and Terms of Settlement</th>
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</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Alaskan Natives</td>
<td>Limited legal support through Tee-Hit-Ton (1955) and Tlingit and Haida (1966)</td>
<td>1966-390 million acres</td>
<td>High-90% of entire state claimed,</td>
<td>Strong (1)</td>
<td>Primitive/Childlike</td>
<td>Cultural Survival</td>
<td>Possible</td>
<td>1971-44 million acres $962.5 million</td>
</tr>
<tr>
<td>Maine</td>
<td>Penobscot and Passamaquoddy</td>
<td>Strong support through Gignoux decisions (1972, 1975) and State of Maine v Dana (1979)</td>
<td>1972-12 million acres</td>
<td>High-2/3 of entire state claimed</td>
<td>Strong (1)</td>
<td>Primitive/Childlike Connected to land Noble Savage</td>
<td>Economic self-sufficiency Cultural Survival Justice</td>
<td>Unlikely</td>
<td>1980-300,000 acres $81.5 million</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Narragansett</td>
<td>Legal support likely in context of 1974 Oneida ruling, Gignoux decisions, and standards of Mashpee case</td>
<td>1975-3,500 acres</td>
<td>Low-Small area, little development potential</td>
<td>Strong (1)</td>
<td>Noble Savage Connected to land “False”</td>
<td>Concerns with Environment Economic self-sufficiency Cultural Survival Justice</td>
<td>Extremely Likely</td>
<td>1978-1,800 acres $35 million</td>
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<td>State</td>
<td>Claimant</td>
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<tr>
<td>South Dakota</td>
<td>Sioux</td>
<td>No support for transfer of land even with support for monetary settlement from ICC and 1980 Supreme Court decision</td>
<td>1980- Up to 7.3 million acres and $11 billion</td>
<td>High-Up to 7.3 million acres with valuable mineral deposits</td>
<td>Poor (multiple)</td>
<td>Noble Savage Connected to land Lazy/Greedy Lawless/Dangerous</td>
<td>Concerns with Environment Cultural Survival Justice Religion Deceit</td>
<td>Extremely Unlikely</td>
<td>NONE</td>
</tr>
<tr>
<td>New York</td>
<td>Oneida</td>
<td>Strong support from 1974 and 1985 Supreme Court decisions Post-2005 lack of support after Sherrill and Cayuga decisions</td>
<td>1974- 250,000</td>
<td>High Large area of state, several urban areas so many private owners affected</td>
<td>Poor (4) Oneida Indian Nation (NY) Oneida Nation (NY) Oneida Indian Nation (WI) Thames Band Council (Canada)</td>
<td>Primitive/Childlike Noble Savage Lawless/Dangerous Lazy/Greedy</td>
<td>Economic self-sufficiency Justice Deceit</td>
<td>Extremely Unlikely</td>
<td>NONE</td>
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<td>Mohawk</td>
<td>Anticipated support from Cayuga, Oneida decisions (until 2005) Post-2005 lack of support after Sherrill and Cayuga decisions</td>
<td>1978-14,000 acres</td>
<td>Low Very rural area</td>
<td>Poor (until 2003) (3) St. Regis Tribal Council (NY) Mohawk National Council (NY) Mohawk Council of Akwesasne (Canada) BUT Strong after 2003</td>
<td>Connected to land Noble Savage Lazy/Greedy Lawless/Dangerous</td>
<td>Justice</td>
<td>Unlikely</td>
<td>NONE</td>
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<tr>
<td>Cayuga</td>
<td>McCurn decisions supported monetary settlement until 2005 2nd Circuit Court threw claim out</td>
<td>1978-64,000 acres $350 million</td>
<td>High Large area of land with many private owners</td>
<td>Poor (2) Cayuga Indian Nation (NY) Political Factions within tribe: Halktown supporters Council supporters Seneca-Cayuga (OK)</td>
<td>Noble Savage Lazy/ Greedy Lawless/Dangerous</td>
<td>Justice</td>
<td>Extremely Unlikely</td>
<td>NONE</td>
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<td>Seneca</td>
<td>Cuba Lake claim supported by 1998 District Court decision</td>
<td>1993-51 acres</td>
<td>Very Low Small area, state owned</td>
<td>Poor (2) Political factions within tribe: Seneca Party Coalition ‘94</td>
<td>Connected to land Noble Savage Lawless/Dangerous Lazy/Greedy</td>
<td>Justice</td>
<td>Unlikely</td>
<td>2005-51 acres</td>
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<td></td>
<td>Grand Island claim had no legal support</td>
<td>1993-1,900 acres</td>
<td>High Valuable land, many private residents</td>
<td>Seneca Party Coalition '94</td>
<td>Connected to land Noble Savage Lawless/Dangerous Lazy/Greedy</td>
<td>Extremely Unlikely</td>
<td>NONE</td>
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<tr>
<td>Mashantucket Pequot</td>
<td>Legal support likely in context of Maine and Rhode Island decisions and settlements</td>
<td>1975-800 acres</td>
<td>Low Small area, few private owners involved</td>
<td>Strong (1)</td>
<td>“False” Indians</td>
<td>Economic self-sufficiency Justice Cultural survival</td>
<td>Extremely Likely</td>
<td>1983-800 acres $900,000</td>
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<td>Mohegan</td>
<td>Strong support for claim with 1981 Supreme Court Decision</td>
<td>1978-2,500 acres</td>
<td>Low Small area, city willing party to transfer</td>
<td>Poor (2) Mohegan Tribe of Indians of Connecticut Native American Mohegans/ Hamilton followers</td>
<td>Connected to Land Noble Savage</td>
<td>Economic self-sufficiency Cultural survival Justice Religion</td>
<td>Possible</td>
<td>1994-Approximately 250 acres</td>
<td></td>
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<td></td>
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<td>(denied)</td>
<td>1993-17,000 acres</td>
<td>urban land</td>
<td>supporters Quiet Hawk supporters</td>
<td>Lazy/Greedy “False” Indians</td>
<td>Survival Justice</td>
<td>NONE</td>
<td></td>
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<tr>
<td>Schaghticoke</td>
<td>Deferred decision pending recognition (granted then later denied)</td>
<td>1985-43 acres</td>
<td>Low Very rural land, little development potential, few private owners</td>
<td>Poor (2) Schaghticoke Tribal Nation Schaghticoke Indian Tribe</td>
<td>Connected to land Noble Savage “False” Indians Lazy/Greedy Connected to land</td>
<td>Economic self-sufficiency Justice</td>
<td>Unlikely</td>
<td>NONE</td>
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<td>1998-1,900 acres</td>
<td>2000-148 acres</td>
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<td>NONE</td>
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Biography

Anne Frances Boxberger was born in Watertown, New York on November 7, 1978. She received her Bachelor of Arts from the University of Richmond in Richmond, Virginia, and graduated magna cum laude with a double major in Political Science and International Studies in 2000. She earned a Master of Arts with merit in Peace and Conflict Studies from the University of Sydney in New South Wales, Australia in 2001. Anne returned to the United States, where she married her husband, Patrick Flaherty, in 2003. Anne earned a Master of Arts (2005) and a PhD (2009) in Political Science from Duke University in Durham, North Carolina. During her graduate studies she was awarded a National Science Foundation Graduate Research Fellowship (2004-2006) and an American Association of University Women Dissertation Fellowship (2008-2009).