Can Native Nations Sovereignty or Self Governance Fit Within a Modern International Paradigm? Lessons To Be Learned

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This paper examines how indigenous people's sovereignty and legal system, may not mesh adequately with the United States legal system. The issues and injustices indigenous peoples feel are not unique to the United States. Canada has experienced similar cultural and legal issues and has come up with a unique solution to the problems created. I intend to examine the problems from both a historical and legal societal perspective. And then suggest some potential solutions. The value of this paper is that it helps us to recognize the valuable resources we have in our diverse population and how to effectively utilize and, most importantly recognize their unique and varying skill sets. By including these peoples into our collective fabric, we will yield a better society. The fabric of our society can seem much like conventional clothing fabric, which is strengthened by the introduction of another element into the mix.

Keywords: Indigenous Peoples, Native Nations, oral traditions, Indians, legal systems, ethics

INTRODUCTION

Most of today's products and innovations are made up of an amalgam of varying pieces, each with unique properties. Each piece of the whole adds something of value to the final product. Wool garments are strengthened by adding nylon in varying proportions to increase its strength and durability. The same can be said for how we as a nation treat differing elements of our society. Our goal should not be to alienate or segregate but rather celebrate what we can bring to our society's collective growth.

What Are Native Nations or First Nations Peoples?

The terms Native Nations, First Nations, and Indigenous Peoples are all modern phrases which refer to the original inhabitants of North America.[1] We must examine and compare how the United States of America and Canada have dealt with their respective discovery of the land's native inhabitants.

A Land Discovered

Perspective plays a great part in the conversations about the discovery of America. Most grade school historical texts will recite that Christopher Columbus discovered America. Some more sophisticated tomes may even mention that a Viking named Leif Erickson, son or Eric the Red, landed in North America 500 years ahead of Columbus.[2]

Nonetheless, Columbus is the one commonly recognized for discovering America. Columbus originally misled the inhabitants as *Indians,* due to his belief that he had arrived in the Indies, his original destination.[3]

The belief that he *discovered* America, belies the fact that the current evidence suggests that the native inhabitants of America had occupied the land for over 12,000, years.[4]

The original occupants of America were diverse in numbers and in culture.[5] At the time of Columbus, the area presently occupied by the 48 contiguous states was home to over 10 million inhabitants.[6] Their area of occupation was a large geographic area, resulting in much cultural diversity amongst these inhabitants. So much so, that most anthropologists break down the original inhabitants by geographic region or cultural areas,[7] These separate cultural areas are: "the Arctic, the Subarctic, the Northeast, the Southeast, the Plains, the Southwest, the Great Basin, California, the Northwest Coast, and the Plateau."[8]

Examples of the people's cultural diversity can be seen by their adaptation of their living quarters to the climate and area in which they lived.

Like the Lakota, those living in the Plains states of the Midwest lived in tepees and hunted buffalo. The Navajo of the Southwest lived in hogans, (domed shaped dwellings covered in mud). The Algonquian of the great lakes lived in bark wigwams. The Iroquois of the Northeast lived in wood, long houses. Each group utilized the resources available to them in a way that benefited their society the best.[9]

The idea that these Indians, so-called, could be labelled by one man as a single group, displays his lack of knowledge and great hubris.

Indigenous Peoples' Significance Recognized

During the next century, England, France, and Spain attempted to gain footholds in North America. In 1760 at the end of the French and Indian War, British forces surrounded Montreal, forcing France to capitulate.[10] The Treaty of Paris signed in 1763 relinquished all of Frances's claims in North America to England.[11]

To calm the fears of the indigenous population over the transfer of power from France to England, King George III issued a Royal Proclamation of 1763.[12] King George understood the value of having allies in the new world, which could be called upon to protect English holdings and its' Citizens.[13]

King George III's proclamation gave" the several nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested of disturbed in possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them or any of them, as their hunting grounds."[14]

The Proclamation also clarified that the Indians' lands were to be protected and that their use of the land should not be interfered with.[15] King George III stated in great detail that "on Pain of Our Displeasure", people should not settle, use or encroach either inadvertently or inadvertently on the land designated by the Crown as for use of the Indians.[16]

Most Indigenous Peoples regard this Proclamation as equivalent to the Magna Carta of England. It established the Crown's recognition of Native Nations Peoples as a group whose significance could not be overlooked.

Despite the purported protective nature of the document, not all Native Nations peoples were happy with the English arrival.[17] Pontiac, an Ottawa Chief, encouraged the taking up of arms against the British at the time of the proclamation.[18] In response and by way of solidifying the proclamations' purpose, "Sir William Johnson held an assembly at Fort Niagara in 1764 which was attended by twenty-four Native Nations, representing [from] as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay."[19]

"At this meeting, a "nation-to-nation relationship" between the tribes and the British settler society was affirmed by way of the Treaty of Niagara, which established that "no member gave up their sovereignty." 10 After the two-day conference, which involved speeches, declarations of peace, and exchanges of presents and wampum, the tribes dispersed back to their respective homelands on either side of the then non-existent 5,525-mile east-west boundary line."[20]

The Treaty of Niagara, purportedly established the Sovereignty of England and that of the Native Nations Peoples. And yet, the limitations placed upon colonial settler's expansion would rear its head shortly. King George III may have even hinted at this future encroachment possibility in the Proclamation

of 1763, where King George II prohibited encroachment on the lands given to the Indians, unless, "Our especial leave and License for that Purpose first obtained."[21]

Based on the Treaty of Niagara and the Proclamation of 1763, one might interpret that the Crown considered the Native Nations People as a sovereign nation. Still, language in the Proclamation itself I believe, makes it clear that the Crown wanted all of its options left open. Thus, Native Nations were self-governing and autonomous at least for now.

Divergence Between Canada, the United States, and England

In the years that followed the American colonies experienced much friction with England.[22] The Boston Massacre of 1770, the Boston Tea Party of 1773, the marching of British troops on Boston in 1775, all leading to the beginning of the Revolutionary War in April of 1775.[23]

A Critical Legal Split Occurs

With the Declaration of Independence ultimately came the formation of the United States of America in 1787.[24] The US Constitution was ratified in March of 1789 when the ninth State of New Hampshire ratified the Constitution.[25] Unlike the earlier confederation, the Constitution did not require unanimous consent but rather 75% of the colonies to ratify its provisions.

This creation of a separate country, now not under the rule of King George III, meant that the treaties of 1763 and the Treaty of Niagara no longer applied to the indigenous population of the United States of America. This freedom of sorts allowed the American government to fashion their own model of appropriate conduct as it applied to its indigenous inhabitants. "The United States did not want the Indian tribes as a part of their country, and its policies were, from the start, designed to separate rather than include."[26] This separation has been deemed a benefit by some observers in that it allowed the indigenous people to retain their societal independence. Still, it yet may have also been detrimental as their being treated as a poor stepchild.[27]

The war of American independence forced the indigenous populations to choose sides. Most chose to side with Britain, hoping they would be granted a separate state in the Ohio valley.[28] Unfortunately for the indigenous population, Britain lost the war of American independence and the indigenous population residing in America were left to the devises of their new *benefactors.*

The Early years of the United States made mention of the indigenous tribes as 'our native neighbors' and 'our Indian neighbors'.[29] The tone resembles one of civility and separation.

The American view of the indigenous people was far from uniform. "President George Washington, believed that the best way to solve this "Indian problem" was simply to "civilize" the Native Americans."[30] His goal was to make Native Americans "as much like white Americans as possible by encouraging them convert to Christianity, learn to speak and read English and adopt European-style economic practices such as the individual ownership of land and other property"[31] Yet others such as those settling the interior of the country feared the indigenous people and considered them both unfamiliar and a threat to the settlers use on the occupation of much-needed land.[32]

For Native Nations who resided in Canada, they were still considered subjects of the Crown, by virtue of the Treaty of Niagara and the Proclamation of 1763. In the early 1800s the Canadian Courts saw the indigenous population as a distinct but feudatory group.[33] In 1829 the Court referred to indigenous people in a most demeaning way, stating, "however barbarous these Indians may be considered, the treaty under which they migrated to and reside in this country is binding."[34]

The Greener Grass of the United States Is a Matter of Perspective

Regarding Native Nations rights 3 US decisions come to the forefront known as the Marshall trilogy. These three cases are Johnson v M'Intosh, (21 U.S. 543 (1823)), Cherokee Nation V Georgia, (30 U.S. 1 (1831)) and Worcester v Georgia, (31 U.S. 515 (1932)). From a positive perspective these cases illustrate that the Native Nations were to be considered an independent nation though one which was a domestic dependent component.[35] This notion is somewhat contrary to the Canadian philosophy of Indigenous peoples being non-citizens of Canada but subjects of the Crown.[36]

This subtle difference between being independent in identity but dependent as to citizenry is seemingly one more of semantics than of legality. The wording, and its connotative definition vs denotative definitions, is played one against another frequently as we will see.

In the first of the Marshall trilogy, Johnson v M'Intosh, Chief Justice Marshall codified the concept of *the doctrine of discovery,* which states that if land is discovered by a country and subjugated, title to that land becomes the property of the subjugator.[37] In this case, the United States. Therefore, the Indigenous people could not sell their use of their land to anyone other than the United States Government, and their occupation of said lands was at the pleasure of the United States Government[38]; a situation somewhat in line with King George III's idea in the Proclamation of 1763, where no one should encroach on the lands of the Native Nation's peoples *without the consent of the Crown*.

In the second case, Cherokee Nation vs Georgia, the State of Georgia attempted to pass State legislation that would directly impact indigenous peoples. The Supreme court held against the State of Georgia but came to again some interesting conclusions.

Justice Marshall again gave the opinion of the court, holding that the Cherokee Nation was equivalent to an independent State capable of suing another State in the Union but they were not a State of the United States but rather a foreign state.[39] He analogized the indigenous peoples position to being "in a state of pupilage".[40] "Their relation to the United States resembles that of a ward to his guardian."

Justice Marshall also denied the Cherokee's Nation's assertion that they were independent and therefore could not be regulated or effected by State statutes created by the State of Georgia.[41]

"The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government. It may well be doubted whether those tribes residing within the acknowledged boundaries of the United States can be denominated by foreign nations with strict accuracy. **They may more correctly perhaps be denominated domestic dependent nations.** (emphasis added)"[42]

Here Justice Marshall struck an odd juxta position between national sovereignty and self-governance. Until this point in history, the United States was composed of a Federal Government and many State governments. The State governments, being subservient to the Federal Government in certain situations. Marshall created a third category called a *denominated domestic dependent nation*.[43] What is unclear is what exactly these phrase means.

Marshall acknowledges that the First Nations peoples may occupy the land, though he does not seem to state that they own the land.[44] The distinction is significant because under English common law, simple absolute ownership is "[l]and owned … completely, without any limitations or conditions".[45] To occupy or possess land is simply one of the many rights owned by the fee simple absolute owner. The possessory rights are less than complete ownership and are more akin to a leasehold i.e., a situation where a person leases the property. Thus, they can occupy the property, use it, and eject trespassers on the property but do not own the property per se.

The phrase *denominated domestic dependent nation,* seemingly to mean a domestic dependent nation, in name.

Yet what was the meaning of the phrase domestic nation? We do not consider States to be domestic Nations. From the perspective of maintaining a law suit we will allow Native Nations to maintain a suit against other States. But that is also true generally of U.S. citizens.

Does the reference to the word Nation, change their status? According to Black's Law Dictionary, citing Worcester V. Georgia, a nation is A people, or aggregation of men, existing in the form of an organized jural society, usually inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally but not necessarily living under the same government and sovereignty.[46]

The definition seems to show that Native Nations Peoples are a Nation in the traditional sense, like France or England, until the last part of the sentence where they state that "generally but not necessarily living under the same government and sovereignty".[47]

This modifier seems to place Native Nations People in their own unique category of judicial creation.

The reference to Native Nations being in the same relationship of a ward to a guardian reiterates the viewpoint of the early 1800s that Native Nations were not as developed or sophisticated as their Federal guardians, either intellectually and or socially, and were therefore in need of supervision. This guardianship of Native Nations is not something that the Supreme Court has burdened the States with, however. States are free to manage and govern themselves. States are autonomous at least as to the affairs within their States.

The final case of the Marshall trilogy is Worcester vs. Georgia. This was a case brought again by the Cherokee Nation against a law created by the State of Georgia, which attempted to strip away any legal governmental right of the Cherokee Nation.[48] The decision written by Chief Justice Marshall overturning the Georgia State Law again reiterated that the Indian Nations were distinct National entities.[49]

"The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States."[50]

Thus, from a United States perspective, Native Nations peoples were a *distinct community, occupying its own territory*, as a domestic dependent nation, whose existence and rights are managed ultimately by their guardian the United States Federal Government.[51]

It's Better in Canada, Depending on Who You Ask

The Canadian viewpoint of Native Nations peoples rests on a concept of aboriginality. "In Canadian society and Canadian courts, Aboriginal rights are theorized on the basis that they are sui generis rights that flow from the Aboriginal claimant's *Aboriginality*."[52] "In this sense, Aboriginal rights are not simply minority rights, but rather demand that Aboriginal peoples be treated with special deference as *first peoples* and as *Citizens Plus*."

The laws of Canada generally follow a different framework than that of the United States. There are three levels of government in Canada.[53] The Federal level, the Provincial level, and the municipal level.[54] The authority of each being spelled out in the Constitution Act of 1867.[55] There are 10 provinces in Canada, who have authority to act in areas such as education, health care, some natural resources, and road regulations, among other things, defined by Constitution Act of 1867.[56]

Defining aboriginals and therefore entitled to recognized rights began in earnest in the mid 1800s.[57] In 1850 An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada was created.[58] The act was the first legislation to attempt to define, what it meant to be "Indian" and has been said to be the first codification of the concept of aboriginality.[59] The Act for the Better Protection, was very broad in its granting of special rights to "Indians".[60] The Act was so broad in fact that its definitions were repealed a year later and restricted such that fewer persons were now entitled to hold the status as Indians.[61]

This reclassification had the effect of reducing the number of persons who could now claim to be Indigenous peoples or Indians under the law and also decreased the land area to which they held rights to occupy unmolested.[62]

The act was again redefined in 1876, making Indian status dependent on one's relationship to a male who hold Indian blood reputed to belong to a particular band, or the child or wife of such a person.[63] "Four categories of Aboriginal people were excluded from the 1876 definition: illegitimate children; Indians residing five or more years in a foreign country; enfranchised Indians, and Manitoba Métis who received entitlements under the Manitoba Act, 1870."[64] The effect of the statutory revision again caused disenfranchisement and loss of land rights by Indigenous peoples.

Six years prior to the 1876 statutory revisions the courts of Canada made it clear where the status of Indians was headed. "Justice Dalton held, in *R ex rel. Gibb v. White*, that *[t]here is a marked difference between the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen .... In [Upper Canada] ... Indians are subjects*."[65] "Indeed, Indians in Canada were conveniently considered by the Canadian government to be subjects but were still not afforded citizen status unless they voluntarily enfranchised themselves."[66]

Thus, though Canada continued to identify and codify the status of the indigenous population their efforts, while clarifying who was an Indian and therefore entitled to rights as an indigenous person, continued to marginalize and reduce the land use of those first inhabitants.

What's the Difference?

The 19th century treatment of indigenous populations in the United States and in Canada both had the effect of limiting land use by native cultures. In the United States, the States of Georgia and Alabama desperately wanted the land occupied by the Native Nations People. This was because those States exported large amounts of cotton to Britain.[67] In the Mid 1800s Britain relied on the United States for 50% of its raw cotton needed to produce textiles.[68]

"[Though] the Native Americans … [were] expert farmers, who grew staple crops like maize, beans, squash, tobacco, and sunflower they organized their lives around small ceremonial and market villages known as hamlets, they had no desire to sell cotton to England.[69] Maximizing land use for monetary gain was a foreign concept to Native Nations.

The President at the time Andrew Jackson was no friend of the Native Nations peoples.[70] President Jackson was a Southern slave owner and a strong supporter of expanding Federal territory westward for white settlers and for ever-enlarging cotton fields.[71] President Jackson used the Indian Relocation Act of 1830 and the Treaty of Enchota to coerce most of the Native Nations in the south east to trek across the United States to live in Oklahoma.[72]

In May of 1838, 16,000 Cherokee were 'escorted by Federal Army Troops to their new 'home' in Oklahoma.[73] Those who refused to leave or relocate were shot, with over 4,000 people dying as they walked to Oklahoma.[74] In the United States land and commerce were more important than domestic dependent nations, as were the Native Nations. The Guardian was more concerned with money and property development than human rights.

It was not until 1924 that "Congress passed the *Indian Citizenship Act,* which conferred American citizenship on all Indians born in the United States who had not yet become citizens through treaties or statutes."[75] But despite the mantel of citizenship, the Supreme Court in the case of United States v. Nice held that Indians remained subject to Congress' plenary authority even after they became United States citizens.[76] Thus, they were citizens of the United States but subject to Federal Governmental oversite.

In Canada, indigenous populations were not citizens of Canada but rather subjects of England, "unless they voluntarily enfranchised themselves".[77] They could not cast election ballots or hold political office unless they relinquished their Indian rights or "if they had fought for Canada in a war".[78] "The unconditional franchise for Indians, with no strings attached, was not granted until 1960, when Prime Minister John Diefenbaker amended the *Canada Elections Act, thirty-six years after America made Indians citizens of the United States.*[79]

The significance of these events is how both countries seemed to effectuate the minimalization and marginalization of the indigenous populations through different means. In the United States, Native Nations people were citizens with the rights of U.S. citizens, but under the subservience of the Federal Government. Wearing the Supreme Court moniker of being a *dependent domestic nation*, seemingly a farce when it comes to being a sovereign nation, whose existence and borders are not theirs to control. The Trail of Tears and the use of the Indian Relocation Act made it clear who was in charge of the Indian Nation.

Canada was no different in its outcome, though their methodology was different. Canada's use of changing naming conventions in their numerous Indian Acts and amending who and who could not be classified as an Indian did nothing more that to fracture tribes and remove control of much tribal land.[80]

One could state, that Canada attempted to correctly identify who was an Indian and who was not as opposed to America's method of simply relocating an entire Native Nation. But is that statement really what happened in Canada? Did renaming and reclassifying indigenous populations in Canada help the indigenous populations or disenfranchise multitudes of First Nations peoples?

I would suggest that the effect or reclassification in Canada did nothing more than free up more land to Canadian Control and disenfranchise more of the indigenous population. That is not to say that we did it better in the United States. In fact, the trail of tears is proof positive that we forcibly moved an entire nation

from their ancestral homelands and in the *voluntary move* effectively killed people with little regard to their history or culture all in the name of monetary gain.

Where Are We Today and Why Does It Matter

The plight of Native Nations peoples has not changed much in recent times in the United States. Their relocation to areas unlike their native lands occurred almost 3 generations ago. Their ancestral homeland is gone and their way of life a distant memory. Tribal law in the United States is limited for the most part to tribal members within areas of tribal jurisdiction. Native Nations tribal law, for the most part, does not affect non-tribal members. The same is not true in Canada, where a significant step occurred in 1982 in Section 35(1) of part II of the Constitution Act, 1982, which recognized indigenous peoples and their laws[81].

Native Nations or Tribal law in the United States

Native Nations People in the United States, from a legal jurisdictional perspective, seem to hold a lesser position as a group than States within the United States. This position I believe, stems from two propositions. First, though they are citizens of the United States based of the Indian Citizenship Act of 1924 their position is one of a dependent domestic nation.[82] They are free to govern themselves but under the supervision of the Federal Authority.[83] This last constraint of being under the supervision of the Federal Government is different than the position held by States. This subservient position has been born out in the case of Strate v A-1 Contractors, which is my second point.

In the Strate case, "vehicles driven by petitioner Fredericks and respondent Stockert collided on a portion of a North Dakota state highway that runs through the Fort Berthold Indian Reservation.".[84] Fredericks (a non-Native Nation person who had married a woman who was a Native Nations person) sued Stockert (a non-native Nations person), in the Tribal Court, with the Tribal Court affirming jurisdiction.[85] Stockert moved to the Federal Court, with the 8th circuit ultimately stating that the Tribal Court lacked jurisdiction, which then caused an appeal to the US Supreme Court.[86]

The US Supreme court held: "When an accident occurs on a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance; absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases".[87]

The Court declined to decide who would have jurisdiction if the accident occurred on Tribal land. But significantly they did opine on where the Tribe would lack jurisdiction.

"Absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances."[88] The Court stated that they lack jurisdiction over non-member criminal actions.[89] They lacked jurisdiction and civil authority over non-members on non-member land *within* the reservation. They also stated that neither case Frederick presented "establishes that tribes presumptively retain adjudicatory authority over claims against nonmembers arising from occurrences anywhere within a reservation."[90]

The entire thrust of the case seemed to focus on why the Tribal courts should lack jurisdiction over non-tribal members and why the Federal Courts should be the proper venue when non-members are involved.[91]

This notion may be reasonable if we view Native Nations People as equivalent to a Nation and therefore, the suit involves a US Citizen from another Nation, but it is more likely that the court feels that non-members would be at a disadvantage in a Tribal court.[92] A conclusion that it also true when a citizen of New York is forced to sue in California.

I suggest that it is the Court's view that Tribal law is unsophisticated and relies on traditions different from English Common Law.

English and American common law revolves around formalities which are tangible.[93] "The essentials to an enforceable [real estate] contract were the use or parchment or paper, sealing by the obligor and delivery of the deed, normally witnessed or attested."[94] These formalities were purportedly to ensure that fraud might not be commitment by either party and that each person's rights would be protected.

Contrastingly Tribal law relies on relationships between parties where [oral] promises were held inviolate.[95] Oral traditions were a significant part of Native Nation tradition.[96] According to the Supreme Court the purported certainty of the American legal system with its formalities and proof requirements make the Tribal system of oral tradition unrecognizable to the non-member and, therefore, inappropriate for adjudicatory decision making.[97]

Tribal Law Achieves Equal Footing in Canada

Despite the renaming and contraction of what is to be an indigenous people in Canada, the country as a whole took an amazing step towards unity if 1982. "[In] 1982, the rights of Aboriginal peoples recognized and affirmed by the Canadian government have been inextricably linked to the same document that serves the general Canadian populace--the *Constitution Act, 1982*."[98] Section 35(1) of the Constitution Act, 1982, specifically recognizes: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[99]

Unique in the treatment of Aboriginal law in Canada is that rather than having the Canadian Government as a Guardian and the Tribes as Wards, Canada has placed the Aboriginal people on the same or at least somewhat equal footing with the Government in that if the Government wishes to infringe upon the rights of the Aboriginals, it must justify show that the limitation is proscribed by law and that it is justified in a free and democratic society.[100] Or to put it differently, the Government must have a justifiable purpose whose actions are proportional to the ends.[101] In Canada, "Section 35 has been successfully used by Aboriginal peoples to protect those rights that existed or were recognized by [the Constitutional Act], 1982, namely, logging and fishing rights, access to land, and the right to the enforcement of treaties".[102]

The Constitutional Act, 1982 also made it clear that the oral traditions of the aboriginal people were also a part of Canadian Law. This fact was reiterated in the case of R v Sparrow which stated that aboriginal rights which have legal significance are only those which existed at the time of the Constitutional Act 1982.[103] It was further clarified in in R v. Van der Peet, [which] provided a test, incorporating ten key components, to succinctly define an Aboriginal right as "an activity that must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,"[104]

Thus, the Canadian perspective acknowledged and codified Aboriginal traditions but left the discernment of said traditions to future decisions.

CONCLUSION AND INCLUSION

The significance culturally in this analysis is that both the United States and Canada, started out in similar positions. Both countries were populated by varying Tribes of Indigenous or Aboriginal people living in North America for centuries. Both Countries were ultimately occupied by English, European, and French cultures, who sought to colonize the countries and use the vast resources available to them. The major differences between Canada and the United States can be seen in how we viewed and deal with these cultures. I think it is fair to say that in the United States we have taken the approach of out of sight out of mind. We assumed the mantel of Guardian of the Indigenous peoples and chose to relocate them to a place that we were not interested in developing economically. The relocation of these burdens may, for some families, be like sending one's children to boarding school. You are still part of the family but just over there.

In the United States, indigenous peoples are Citizens of the United States, but our historical actions seem to suggest that we would prefer that all of their historical culture, oral traditions, and laws be left on the reservation, separate and apart from the rest of the American system.

Canada, for the most part, followed our method of marginalizing its indigenous population. They did this through numerous naming conventions designed to remove valuable land from the indigenous populations' control. The indigenous population was accepted as a part of Canadian society but not as citizens. They were subjects of England. Whether this was considered a good thing or not is debatable. Again, like in America, the indigenous people were a part of society yet separate.

But in 1982, the Canadians and indigenous peoples did something amazing through the Constitutional Act 1982, they changed the indigenous people's position in society. The Constitutional change transformed these second-class people to a stated part of the society. They were not a group to be marginalized but a group whose historic traditions were to be recognized and codified into the Constitution of Canada. The significance of this should not go unnoticed. The historic oral traditions, the laws, the cultural norms of the indigenous peoples of Canada are now part of Canadian Law.

Canada made a complete 180-degree change in the way they treated their indigenous neighbors. They no longer treated them as separate people but as a part of the community. No different and no less important. The indigenous populations'' importance can be seen in the incorporation of their laws and traditions into the country's legal structure.

Lest it be lost on some of us the significance of this action applies to many areas of American life. We in the United States pride ourselves on being a melting pot where we are all equal, where our diversity brings global success to our culture a whole, yet I think we can all admit that we have done a disservice when it comes to those who cared for America long before we arrived. The time has come for us to no longer be their Guardians but their partners. They have long cared for America. It would seem we should acknowledge that and them. Their culture and legal systems should be acknowledged and incorporated into our fabric of society, not as a separate piece but as a valued part of the whole.

Marginalized people all have a part to play in American society. We must understand that working together to better America means using the best skills and values that each group, and person possesses, blending them together in a way which makes us stronger and better as a whole.

ENDNOTES

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10. Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context*, 58 McGill L.J. 607, 609
11. *Id.*
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14. *Royal Proclamation, 1763*, https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/
15. *Id.* And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.
    And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever or taking Possession of any of the Lands above reserved. without our especial leave and License for that Purpose first obtained.
    And We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a License for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

16. *Id.*
17. Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context*, 58 McGill L.J. 607, 610
18. *Id.*
19. *Id.*
20. *Id.*
21. *Royal Proclamation, 1763*, https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/
22. History.com Editors, *Revolutionary War, https://www.history.com/topics/american-revolution/american-revolution-history*
23. *Id.*
24. Constitutional FAQs, https://constitutioncenter.org/learn/educational-resources/constitution-faqs#:~:text=This%20was%20the%20same%20place,signed%20on%20September%2017%2C%201787.
25. *Id.*
26. Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context*, 58 McGill L.J. 607, 614
27. *Id.*
28. Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context*, 58 McGill L.J. 607, 615
29. *Id.* at Page 614
30. History.com Editors, *Trail of Tears, https://www.history.com/topics/native-american-history/native-american-cultures*
31. *Id.*
32. *Id.*
33. *The King v Phelps* (1823), 1 UCKB 47 at 52, 1 CNLC 411
34. *Foster v Neilson*, 27 US (2 Pet) 253 at 314, 7 L Ed 415 (1829
35. Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context*, 58 McGill L.J. 607, 624
36. *Id.*
37. Matthew L. Fletch, *The Iron Cold of the Marshall Trilogy*, North Dakota Law Review, Vol 82:627, 631
38. *Id at* 632, "The Federal government according to the Chief Justice held the preemption right, the right to extinguish Indian Title via purchase, conquest... [including] title to Indian lands."
39. Cherokee Nation V Georgia, 30 U.S. 1, at 60 (1831), "Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their

right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

40. *Id*.
41. Cherokee Nation v. State of Ga., 30 U.S. 1, 2, 8 L. Ed. 25 (1831)
42. *Id*.
43. *Id*.
44. *Id*.
45. https://www.law.cornell.edu/wex/fee_simple
46. Worcester v. Georgia, 31 U.S. 515, (1832)
47. *Id*.
48. Matthew L. Fletch, *The Iron Cold of the Marshall Trilogy*, North Dakota Law Review, Vol 82:627, 645
49. *Id*. at Page 646
50. Worcester v. Georgia, 31 U.S. 515, 520 (1832)
51. *Id*.
52. Brian R. Pfefferle, *The Indefensibility of Post-Colonial Aboriginal Rights*, 70 Sask. L. Rev. 393, (2007)
53. Parliament of Canada, *Our Country Our Parliament, An Introduction on how or Parliament Works*, https://lop.parl.ca/About/Parliament/Education/ourcountryourparliament/html_booklet/three-levels-government-e.html.
54. *Id*.
55. *Id*.
56. *Id*.
57. Brian R. Pfefferle, s*upra*, note 54, page 2
58. *Id*.
59. *ld.* Under s. 5 of this Act, "Indians" were defined as having the following characteristics: • First.--All persons of Indian blood reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants: • Secondly.--All persons intermarried with such Indians and residing amongst them, and the descendent of all such persons: • Thirdly.--All persons, residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such: And • Fourthly.--All persons adopted in infancy by any such Indians, and residing in the village or upon the lands of such Tribe or Body of Indians, and their descendants.
60. *Id*.
61. *Id*. Section 2 of the Act read as follows: • Firstly. All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants: • Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons: And • Thirdly. All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.
62. *Id*.
63. *Id*.
64. *Id*.
65. Peter Scott Vicaire, *supra*, Note 37 page 626
66. *Id*.
67. *A Farming Society*, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/farming-society
68. *Id*.
69. History.com Editors, *Native American Cultures, https://www.history.com/topics/native-american-history/native-american-cultures*
70. *Id*.
71. *Id*.
72. Brian Hicks, Smithsonian Magazine, *The Cherokees vs Andrew Jackson*, https://www.smithsonianmag.com/history/the-cherokees-vs-andrew-jackson-277394/
73. *Id*. In May 1838, U.S. troops herded more than 16,000 Cherokees into holding camps to await removal to present-day Oklahoma. Indians who tried to flee were shot, while those who waited in the camps suffered from malnutrition, dysentery and even sexual assault by the troops guarding them. Within a month, the first

Cherokees were moved out in detachments of around a thousand, with the first groups leaving in the summer heat and a severe drought. So many died that the Army delayed further removal until the fall, which meant the Cherokees would be on the trail in winter. At least a quarter of them—4,000—would perish during the relocation.

74. *Id.*
75. Peter Scott Vicaire, *supra*, Note 37 page 626
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Brian R. Pfefferle, s*upra*, note 54, page 2
81. Peter Scott Vicaire, *supra*, Note 37 page 650
82. Peter Scott Vicaire, *supra*, Note 37 page 626
83. Peter Scott Vicaire, *supra*, Note 37 page 626
84. Strate v. A-1 Contractors, 520 U.S. 438 (1997)
85. *Id.*
86. *Id.*
87. *Id. at page 439*
88. *Id.*
89. *Id.*
90. *Id.*
91. Strate v. A-1 Contractors, 520 U.S. 438 (1997)
92. Matthew L.M. Fletcher, Toward a Theory of Intertribal and Intratribal Common Law, 43 Hous. Law. REV. 701, 705 (2006)
93. *Id*. at Page 403.
94. *Id.*
95. *Id*. at Page 404.
96. *Id.*
97. *Id.* at Page 450.
98. Peter Scott Vicaire, *supra*, Note 37 page 650
99. *Id.* Section 35(1) of part II of the *Constitution Act, 1982*--which is not included in the *Charter*--is the primary section of the Canadian constitution dealing with Aboriginal issues. That section reads simply: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Thus, section 35(1) provides for constitutional protection of *existing* Aboriginal and treaty rights of Aboriginals, even though the constitution neither defines these rights nor provides an enumerated list of them.
100. **Peter** W Hogg, *Constitutional Law of Canada*, looseleaf (consulted on 10 April 2013), (Toronto: Carswell, 2007) ch 28 at 46. Section 1 is known as the "reasonable limits" clause because it authorizes governments to limit individual *Charter* rights. When a government infringes on a protected right, the onus is placed on the Crown to show two things on a balance of probabilities: first, that the limitation was "prescribed by law", and second, that it is "justified in a free and democratic society." In other words, the government must have a justifiable purpose, and its actions must be proportional to the desired end. The primary test to determine whether the purpose is demonstrably justifiable in a free and democratic society is known as the *Oakes* test--taken from *R v. Oakes* ([1986] 1 SCR 103, 26 DLR (4th) 200).
101. *Id.*
102. Peter Scott Vicaire, *supra*, Note 37 page 652
103. *Id*. at Page 655.
104. *Id* at Page 656.