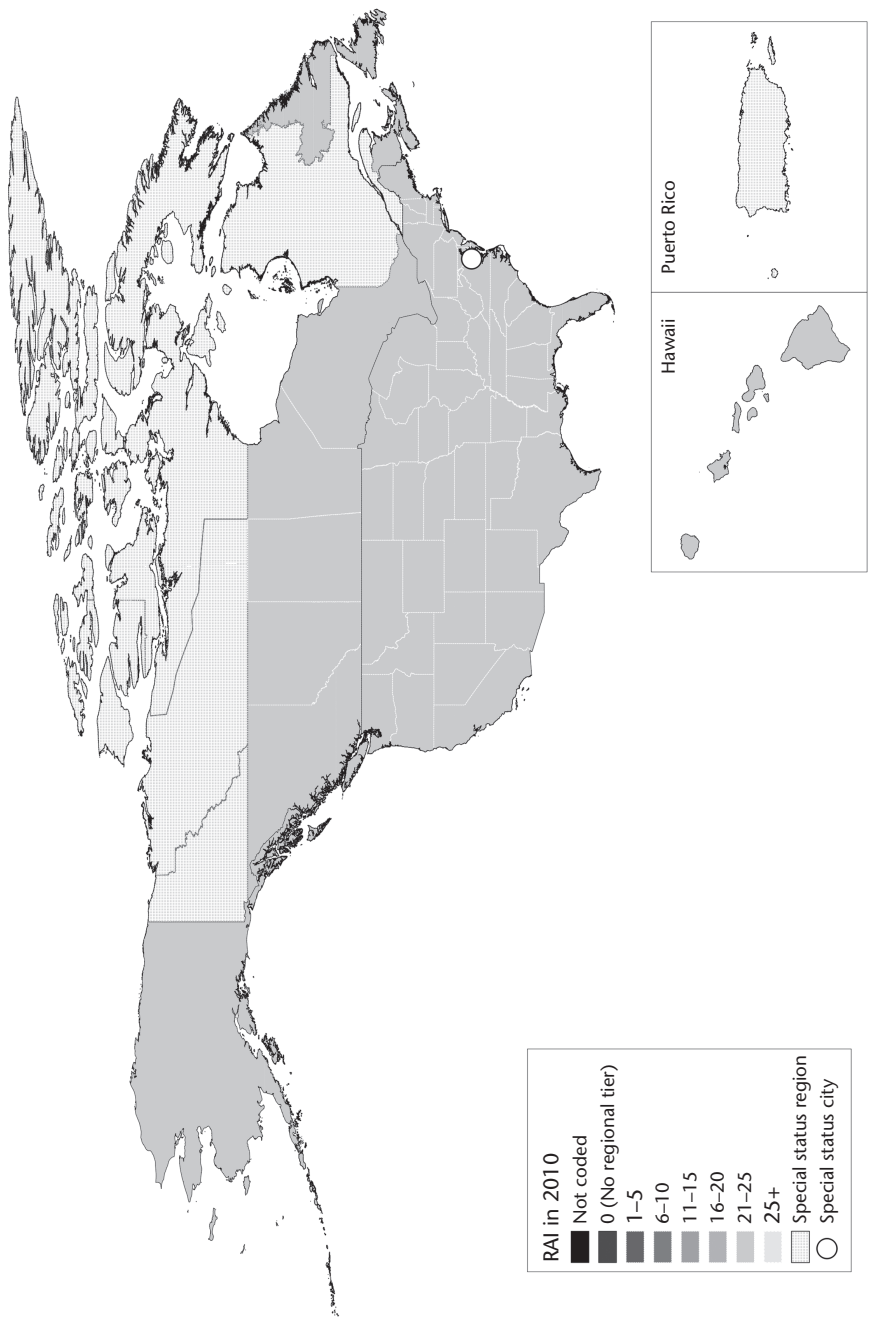


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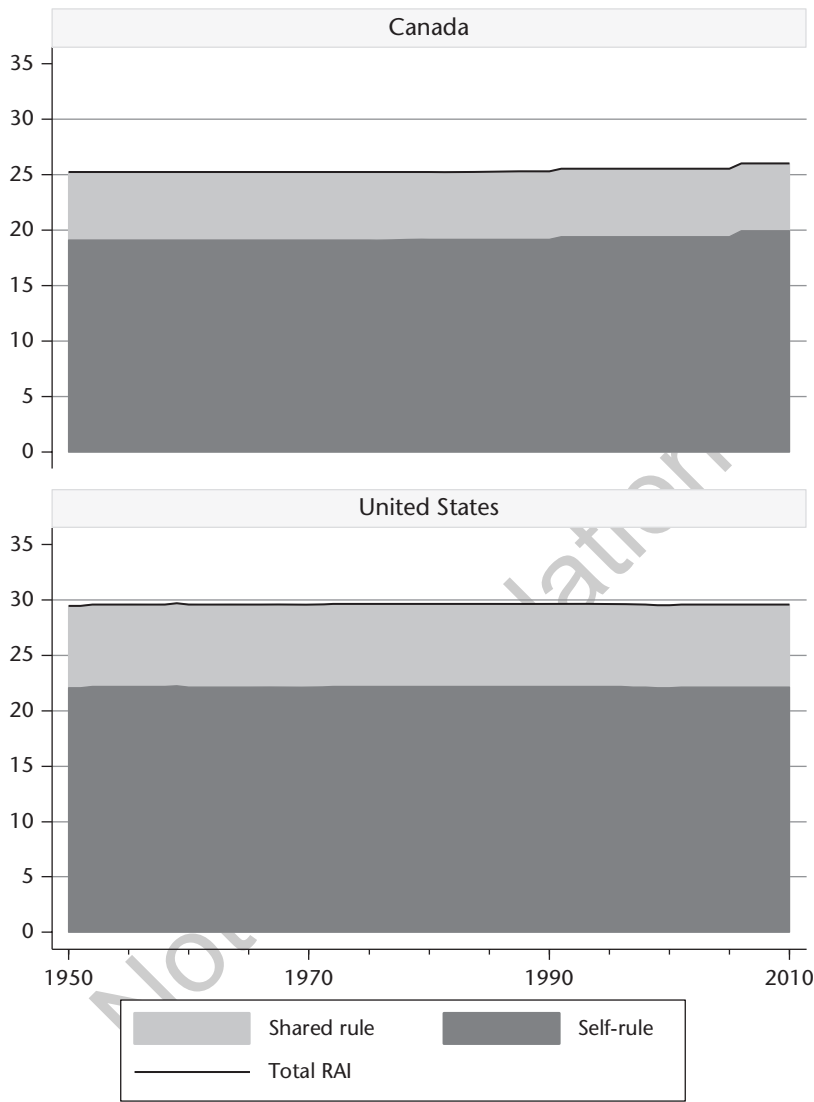
7      Canada (1950–2010)      42      United States (1950–2010)

Not for circulation



Standard and differentiated regions in North America (2010)

Country Profiles



Trends in regional authority in North America

Canada

*Self-rule*

INSTITUTIONAL DEPTH AND POLICY SCOPE

Canada has ten provinces, including Quebec, which is coded as an asymmetrical region. It also has three autonomous territories: the Northwest Territories, Yukon, and Nunavut. Aboriginal peoples (which includes Indian, Inuit,

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and Métis peoples) can conclude self-government agreements with provincial, territorial, and federal governments and we code these as autonomous regions (C 1982, Art. 35.2; Law No. 11; Papillon 2012a, b).<sup>1</sup> In addition, we code counties in Ontario and, from 2006, *conférences régionales des élus* in Quebec.

Provinces and territories differ greatly in population, ranging from about 32,000 in the territories of Yukon and Nunavut to almost thirteen million in the province of Ontario. The major difference between a Canadian province and a territory is that provincial powers are constitutionally protected, while a territory's powers are granted by federal law. Hence, the constitution, which was repatriated from the UK in 1982, enumerates federal and provincial competences but not those of the territories (C 1867, Arts. 91–92). Another difference is that the formal head of the territories, the commissioner, is a representative of the federal government, in contrast to her counterpart in the provinces, the lieutenant-governor, who is a representative of the Queen. The acts of the Northwest Territories and Nunavut (but not Yukon) also stipulate that the legislatures exercise their powers “subject to any other Act of Parliament” (Law No. 27/1985, Art. 16 and 28/1993, Art. 23). However, in recent decades the commissioner has been under federal instruction to act like a provincial lieutenant-governor—that is to say, to interpret the role as ceremonial rather than substantive. Therefore, like provinces, the territories score 3 on institutional depth after this legislation was passed: 1986 in the Northwest Territories, 2002 in Yukon, and 1999 in Nunavut.

The 1867 constitution enumerated federal powers, which includes the regulation of trade and commerce, defense, navigation and shipping, and banking and currency. The federal government was also given exclusive authority over Aboriginal peoples and criminal law. Provinces were given responsibilities for public lands, natural resources (including energy), education, hospitals, justice, and local government (C 1867, Art. 92; Cameron 2002; Watts 1999a, 2008; Simeon and Papillon 2006). Originally agriculture and immigration (but not citizenship or naturalization) were concurrent, and in 1951 pensions was added. A revision of the constitution in 1982 reinforced provincial control

<sup>1</sup> Self-government agreements can be negotiated as part of comprehensive land claims. In 1975 the first comprehensive land claim was signed with the James Bay Cree and Inuit of Northern Quebec and subsequently an additional nineteen self-government agreements have been signed (until 2010). Government of Canada. *Aboriginal Affairs and Northern Development Canada*. “Final Agreements and Related Implementation Matters.” <<http://www.aadnc-aandc.gc.ca>>. In 2006, there were approximately 380,000 people living on 2267 Indian reserves, out of approximately 1.4 million self-identified Aboriginal people. Statistics Canada. “Aboriginal Peoples in Canada: First Nations People, Métis and Inuit.” <<http://www12.statcan.gc.ca>>; Government of Canada. *Aboriginal Affairs and Northern Development Canada*. “The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.” <<http://www.aandc.gc.ca>>.

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over natural resources (C 1982, Art. 92A; see Chandler 1986). Residual powers lie with the federal government (C 1867, Art. 91; Cameron 2002; Watts 1999a, 2008).

The constitutional provision of concurrent provincial power in immigration remained largely a dead letter until 1978, when the Canada Immigration Act authorized the federal government to conclude federal–provincial agreements (Law No. 52/1976, Art. 108.2 (in force since April 1, 1978) and 27/2001, Art. 7). The first province to conclude an agreement was Quebec. The 1978 Cullen–Couture agreement gave Quebec a role in selecting its immigrants through its own points system (DeVoretz and Pivnenko 2007). In subsequent decades agreements were signed between the federal government and individual provinces (and two territories) for shared funding and responsibility for settlement services as well as for a greater say in selecting immigrants, but these do not challenge the preeminence of the federal government on immigration. The exception is Quebec.<sup>7</sup> The Canada–Quebec Accord of 1991 allows Quebec to select its economic immigrants and control settlement (Simeon and Papillon 2006). Only Quebec “has sole responsibility for the selection of immigrants destined to that province” and only with respect to Quebec is Canada legally bound to “admit any immigrant destined to Quebec who meets Quebec’s selection criteria” (Canada–Quebec Accord 1991, Art. 12).<sup>2</sup> Hence, since 1991 Quebec receives the highest score on policy scope, while other provinces score 3.

There has been intense debate concerning whether Quebec should be constitutionally recognized as a “distinct society” (Simeon 2004). On October 30, 2003 the national assembly of Quebec voted unanimously to affirm “that the Quebecers form a nation,” and on November 27, 2006 the federal House of Commons passed a symbolic motion declaring that “this House recognize[s] that the Québécois form a nation within a united Canada.” What this means is contested. One tangible element of Quebec’s special status is that it has on occasion acquired opt-outs or special arrangements on matters that are deemed central to its identity, such as pensions, and to a more limited extent, health and education. Legally, opt-outs can be extended to all provinces, though Quebec has made most use of them.<sup>3</sup>

<sup>2</sup> The gap between Quebec and other provinces has narrowed as provinces have become proactive in attracting (and selecting) economic immigrants (Paquet 2014). Under the Provincial Nominee Program (PNP), created in 1996 and gradually diffused through federal–provincial agreements, provinces can “nominate” immigrants within quotas set annually by the federal government. Although provinces merely recommend applicants, an overwhelming majority of recommendations gain federal approval (Canada 2011: 20). Canada continues to select the vast majority of its immigrants through federal programs—between 2005 and 2009 just 17 percent were PNP immigrants—but the proportion varies widely by province (Canada 2011: 20).

<sup>3</sup> Quebec has its own pension plan and has refused to sign intergovernmental agreements on health and education. Quebec also has its own revenue agency and statistical office (Telford 2003).

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The territories were treated initially as quasi-colonies governed from Ottawa, but over the years their competences have grown (Cameron and White 1995; Hicks and White 2000). The Northwest Territories obtained some devolved authority in education, housing, and social services in 1966 and extensive self-rule with a law adopted in 1985 (Law No. 27/1985; enacted in 1986). It now has authority over essentially the same policies as provinces, except for mineral resources, immigration, and citizenship. Yukon became self-governing in 1978 when it gained control over its budget and its executive became responsible to its elected legislative assembly (Sabin 2014). It was given formal provincial-type powers (including immigration, but not criminal prosecution) in 2002 (Law No. 6/1898 and 7/2002, Art. 18). Nunavut, formerly a part of the Northwest Territories, was carved out as a separate territory in a comprehensive land claim agreement with the Inuit in 1993 (Dahl, Hicks, and Jull 2000). It received extensive policy competences (excluding immigration and citizenship) when it was granted territory status in 1999 (Law No. 28/1993; enacted in 1999). We score Nunavut as a self-governing arrangement between 1993 and 1999 and as an autonomous territory from 1999 onwards.

We distinguish two channels of differentiated territorial governance for Aboriginal peoples.<sup>4</sup> The first has its legal base in the Indian Act of 1876, which institutionalized First Nation reserves (Law No. 18/1876). The lands of First Nations were placed under the authority of the federal government under the provisions of the constitution (C 1867, Art. 91.24). We code the governing institutions of Indian Act bands—that is, a First Nation under the authority of the Indian Act (Law No. 18/1876, Art. 3.1)—which serve as the statute for these reserves (Papillon 2012a).<sup>5</sup> According to the Indian Act, the Minister of Aboriginal Affairs (before the Minister of Interior) exercises broad authority over reserves whereas locally elected chiefs have limited regulatory powers—subject to confirmation by the minister<sup>6</sup>—over policies such as public health care, prevention of trespass by cattle, maintenance of roads, bridges, ditches, and fences, construction, and repair of school houses and council houses (Law No. 18/1876, Arts. 2 and 63; Peters 1987). The department of Aboriginal Affairs and Northern Development Canada oversees the implementation and administration of governance processes under the Indian Act (Papillon

<sup>4</sup> For reviews of literature on Aboriginal self-government in Canada, see Cassidy (1990) and White (2011); for a comparison between aboriginal self-government in the US and Canada, see Papillon (2012a).

<sup>5</sup> First Nations are Aboriginal peoples who are neither Métis nor Inuit. The Indian Act applies only to First Nations (Law No. 18/1876, Art. 4).

<sup>6</sup> The Indian Act Amendment and Replacement Act adopted on December 14, 2014 abolishes ministerial oversight over bylaws except for money and tax by laws. Government of Canada. Aboriginal Affairs and Northern Development Canada. “Changes to By-laws.” <<https://www.aadnc-aandc.gc.ca>>.

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2012b).<sup>7</sup> The institutional relationship with the federal government has remained fundamentally hierarchical, to the degree that as late as 2010 a report of the Standing Senate Committee on Aboriginal peoples observed that “leadership under the Indian Act is limited largely to administering ‘Indian Affairs money’” and that locally elected leaders “are primarily responsible to the Department of Indian Affairs and Northern Development” (Senate Standing Committee 2010: 25). Indian Act bands score 1 on institutional depth throughout the period.

There has been more change on policy scope. Over time federal and provincial governments have begun to decentralize programs and services to the Indian Act bands, including in schooling, social services, housing, and economic development (Papillon 2012b). While this decentralization is mostly administrative, it has given Indian Act bands greater control over their internal affairs. It is difficult to pinpoint a particular act or executive decree that introduced greater policy autonomy, but observers agree that “only in the 1980s it became a systematic element of federal policy” (Papillon 2012b).<sup>8</sup> We opt to increase the score for policy scope from 0 to 1 in 1985 because that date coincides with a major revision of fiscal arrangements (see Fiscal autonomy).

The second channel is through “comprehensive land claims agreements,” also called modern treaties, which provide self-government (Alcantara 2008: 343). This venue opened up in 1973 when the Supreme Court ruled that Aboriginal peoples may hold title to their historic lands (SCR 313/1973). The 1982 constitution introduced a section on “Aboriginal and treaty rights” (C 1982, Art. 35/Law No. 11), and in 1983 a House of Commons committee on Indian self-government recommended that the federal government recognize First Nations as a distinct order of government (House of Commons 1983; Cowie 1987; Hurley 2009; Wherrett 1999). In 1995 the federal government adopted its “Inherent Right of Self-Government Policy,” which finally brought the self-government agreements under constitutional protection (Law No. 11/C 1982, Art. 35) and allowed Aboriginal peoples to negotiate self-government arrangements as part of comprehensive land claim agreements, as treaty rights in new treaties, or as additions to existing treaties.<sup>8</sup> Provincial and territorial governments must be parties to the self-government agreements for subject matters falling within their jurisdiction.<sup>9</sup> The scope of jurisdictional authority (which can be significant) is defined in the agreement but is given legal status through federal enabling legislation. The first three

<sup>7</sup> Government of Canada. Aboriginal Affairs and Northern Development Canada. “Governance,” “Tribal Council Funding,” and “Band Support Funding.” <<https://www.aadnc-aandc.gc.ca>>.

<sup>8</sup> Agreements, treaties, and negotiated settlements project (ATNS). “Inherent Right of Self-Government Policy 1995.” <<http://www.atns.net.au>>.

<sup>9</sup> The Parliament of Canada. “Aboriginal Self-Government.” <<http://www.parl.gc.ca/content/lop/researchpublications/prb0923-e.htm>>.

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agreements were signed in 1976, and to date the federal government has signed twenty-two self-government agreements involving thirty-six Aboriginal communities. Of those, eighteen are part of comprehensive land claim agreements.

Federal policy determines what can be negotiated in the comprehensive land claims and self-government agreements, and this constrains institutional depth (Papillon 2012a: 300).<sup>β</sup> Aboriginal peoples can obtain competences in policies such as own institutional set up, band membership, taxation, language, education, social services, health, land tenure, local transportation, and public works. Power sharing, but not full transfer, can be negotiated in the areas of labor, justice, divorce, prisons, environment, fisheries, gaming, and emergency preparedness (Peters 1987).<sup>10</sup> The federal government retains full authority over immigration, defense, international trade, national economy, and foreign relations. We score from the year a self-government agreement is enacted.

Ontario and Quebec have intermediate governance within their jurisdictions,<sup>11</sup> whereas the other provinces and the territories have local government only (Higgins 1991; Humes and Martin 1969; Sutcliffe 2007).<sup>12</sup> Ontario has thirty upper-tier municipalities, nineteen counties, three united counties, and eight regional municipalities which cover about 60 percent of the population in Ontario and have an average population of about 230,000. These governments have extensive responsibilities in economic development, urban planning, and social services (Law No. 8/1990 and 24/2001).

Since 2006, Quebec has twenty-one *conférences régionales des élus*.<sup>13</sup> Each *conférence* consists of local government and civil society representatives (Law No. 22.1/2014). *Conférences régionales des élus* draft five-yearly development plans to be submitted to the Quebec government (Law No. 22.1/2014, Art. IV.3).<sup>14</sup>

<sup>10</sup> Government of Canada. Aboriginal Affairs and Northern Development Canada. "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government." <<http://www.aandc.gc.ca>>.

<sup>11</sup> British Columbia has regional districts which provide municipal services, such as water systems and reservoirs, sewers, cultural and recreational facilities, libraries, regional planning, fire protection, transportation and waste disposal, and outside areas incorporated by municipalities (Law No. 323/1996). Municipalities can opt in. The regional districts can also levy a property tax. The average population size does not meet our criterion for intermediate governance. <<http://www.cscd.gov.bc.ca/lgd/pathfinder-rd.htm>>.

<sup>12</sup> Law No. 22/1973, 225/1996, 323/1996, 8/1988, 18/1998, 24/1999, 26/2000, 24/2001, 154/2002, 22/2003, 36.1/2006, 13/2013, and 27.1/2014.

<sup>13</sup> The *conférences régionales des élus* were abolished in April 2015.

<sup>14</sup> Gouvernement du Québec. Ministère des Affaires municipales, des Régions et de l'Occupation du territoire. Développement régional et rural. *Conférences régionales des élus*. "Composition et répartition," "Ententes entre le gouvernement et les CRE" and "Mandats." <<http://www.mamrot.gouv.qc.ca>>.



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## FISCAL AUTONOMY

Provinces have extensive tax autonomy (Banting, Brown, and Courchene 1994; Lazar 2005; Leslie, Norrie, and Ip 1993). The constitution gives both the federal government and the provinces the right to tax. The federal government can impose both indirect and direct taxes whereas provinces can levy direct taxes only (C 1867, Arts. 91.3 and 92.2). Provinces have control over the rate and base of the sales tax, and there are province-specific exemptions for certain goods, services, or types of purchases. In practice, the provinces use a common definition of the tax base and the federal government collects the taxes but remits them to the provinces—except Quebec, which collects its own taxes (Chernick and Tennant 2010). The provincial goods and services tax (“retail sales tax”) is the second most important revenue source for provinces after the income tax.

Before 1962 both base and rate of the income tax were set by the federal government, and provinces received in the form of cash transfers or tax “rentals” a portion of income (and corporate tax) revenues levied in their territories, along with a supplementary equalization payment. In 1962 this system was replaced by one in which each province received a standard rate, and could, in addition, set its own rate above the standard rate. Quebec sets the base and rate of its personal income tax. Provinces also set the rate of corporate income tax, but the base is set by the federal government, except in Ontario, Quebec, and Alberta, which set both base and rate (Krelove, Stotsky, and Vehorn 1997). In addition, provinces may tax natural resource extraction (C 1982, Art. 92A), which accounts for around one-quarter of Alberta’s revenue and one-tenth of Saskatchewan’s.

Until the advent of self-governance the territories’ fiscal situation was controlled by the central government, either directly from Ottawa or indirectly through the government-appointed executive in the territories.<sup>a</sup> When the territories became self-governing, they acquired the same tax authority as the provinces (Law No. 27/1985, Art. 16.a; 28/1993, Art. 23.1.j; 7/2002, Art. 18.1.f). The exception is resource extraction: since public land (“crown land”) remains federal, royalties on non-renewable resources are levied by the federal government (C 1982, Art. 92A.4; see Malone (1986) for early decades). Only Yukon has, since 2002, tax authority over non-renewable resources (Law No. 7/2002, Art. 19).<sup>15</sup>

<sup>15</sup> On April 1, 2014, the Northwest Territories became the second territory to obtain tax authority over non-renewable resources. As of 2015, Nunavut is negotiating devolution of non-renewable resource taxes with the federal government. Government of Canada. Aboriginal Affairs and Northern Development Canada. “Northwest Territories Devolution,” and “Nunavut Devolution.” <<https://www.aadnc-aandc.gc.ca>>.

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Over the past twenty-five years Aboriginal communities have acquired some capacity to levy taxes. The greatest authority for Indian Act bands and self-governing Aboriginal peoples is the property tax which can be introduced in two ways. Since 1985, a revision of the Indian Act allows First Nations or self-governing Aboriginal communities to adopt property tax bylaws subject to approval by the Minister of Aboriginal Affairs and Northern Development (Law No. 18/1876, Art. 83). Since 2005, the First Nations Fiscal Management Act enables First Nations and self-governing Aboriginal peoples to set the base and rate of a property tax. These property tax laws still require prior approval by a federally appointed First Nations Tax Commission, but this control is now one step removed from the minister. The commission is composed of “men and women from across Canada, including members of First nations, who are committed to the development of a system of First nations real property taxation” (Law No. 9/2005, Arts. 5.3 and 19–20). While control over the rate and (since 2005) base remains conditional on federal consent, there is a track record of Aboriginal autonomy in crafting laws and we recognize this by coding tax autonomy as 1 for 1985–2004, and 2 since 2005.<sup>16</sup>

Indian Act bands and self-governing Aboriginal peoples may also levy some major taxes, but authority over the rate and base remains firmly federal or provincial. The decision to introduce these taxes rests with the Indian Act band or self-governing Aboriginal peoples, but their implementation depends on tax agreements with the Department of Finance and the taxes are administered by Canada Revenue.<sup>17</sup> Federal and provincial governments may also abate or abolish their taxes to minimize double taxation, and they usually do so, but this requires negotiation on a case by case basis. In 1998 a First Nations sales tax on alcohol, fuel, and tobacco was enabled. In 2003 the First Nations goods and services tax broadened the tax base to all taxable supplies. Both taxes are available to non-self-governing First Nations and self-governing Aboriginal peoples.<sup>18</sup> Finally, in 1999, a First Nations personal income tax—payable by Aboriginal and non-Aboriginal residents—was introduced; it is only available for self-governing Aboriginal peoples.<sup>19</sup>

<sup>16</sup> Sixty-six First Nations established a property tax pursuant to the Indian Act whereas seventy-seven did so pursuant to the First Nations Fiscal Management Act <<http://fntc.ca/property-tax-fns>>.

<sup>17</sup> Government of Canada. Department of Finance Canada. “First Nations Sales Tax Administration Agreements,” “First Nations Goods and Services Tax Administration Agreements,” and “First Nations Personal Income Tax Administration Agreements.” <<https://www.fin.gc.ca>>.

<sup>18</sup> Since the introduction of the First Nations goods and services tax no new first nations sales tax has been established. Government of Canada. Canada Revenue Agency. “First Nations that have implemented the FNT.” <<http://www.cra-arc.gc.ca>>.

<sup>19</sup> As of February 2014, eight First Nations levy a First Nations sales tax, twenty-six self-governing Aboriginal peoples have implemented the First Nations goods and services tax, and fourteen self-governing Aboriginal peoples have enacted a first nations personal income tax. <<https://www.aadnc-aandc.gc.ca/>>.

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Comprehensive lands claims or self-government agreements may specify additional tax powers, which are often exercised concurrently with federal or provincial government.

Counties and regions in Ontario may set rates on the services they provide to municipalities or they may ask municipalities to levy a separate tax rate on property (Law No. 8/1990 and 24/2001, Art. 311; McMillan 2006). The *conférences régionales des élus* in Quebec obtain funding from the Quebec regional development fund (Law No. 22.1/2014, Art. 21.18).

## BORROWING AUTONOMY

Provinces have unrestricted access to domestic and foreign borrowing (C 1867, Art. 92.3; Council of Europe 1997; Joumard and Kongsrud 2003). “Provinces may borrow money for any purpose, wherever, whenever and however they wish” (Rodden 2003a: 92). When provincial debt rose in the 1980s and 1990s, rating agencies downgraded a number of Canadian provinces (Rodden 2003a; Krellove et al. 1997). Provinces responded by introducing debt targets that helped them regain the trust of capital markets (Joumard and Kongsrud 2003; Liu and Webb 2011).

Territories could not borrow until self-governance, at which point the territory’s legislature could pass a law with the prior approval of the federal-appointed governor (Law No. 27/1985, Art. 20; Law No. 28/1993, Art. 27; Law No. 7/2002, Art. 23).

First Nations were not granted borrowing rights by the Indian Act of 1876 (Law No. 18/1876). However, those that entered into negotiations with the federal government for comprehensive land claims or self-government agreements could borrow from the central government to finance the treaty process (Alcantara 2008). Since 2005, Indian Act bands and self-governing Aboriginal peoples can borrow from the First Nations Finance Authority which is constituted by the borrowing members (the First Nations) and financed by property tax income (Law No. 9/2005, Arts. 5.1.d and 59–60). To become a borrowing member, an Aboriginal community must introduce a property tax, with prior approval from the federally appointed First Nations Finance Management Board, to secure its contribution (Law No. 9/2005, Arts. 5.6, 9.2, and 39–40). Indian Act bands therefore receive a score of 1 from 2005. Aboriginal peoples with self-government agreements may borrow without prior authorization.

Counties and regions in Ontario can borrow but they are required to balance their budget and short term debt obligations may not exceed 50 percent of total revenue (Law No. 8/1990, Art. 110 and No. 24/2001, Art. 401). Long term borrowing and debt obligations exceeding 50 percent of total revenue need prior approval from the Ontario municipal board (Law No. 8/1990, Art. 110 and No. 24/2001, Art. 401.4). The *conférences régionales des élus* in Quebec do not have the authority to borrow (Law No. 22.1/2014, Art. 21.18).

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### REPRESENTATION

Provinces have a unicameral parliament which is directly elected every four years. The federal government appoints a lieutenant-governor in each province.<sup>20</sup> Provincial executives are elected by the provincial parliaments (C 1867, Arts. 82–90).

Territories have, by stages, gained directly elected parliaments with accountable executives. From 1897–1905 the Northwest Territories had an elected government resembling that of a province. However, when Saskatchewan and Alberta were formed, the rump of the Northwest Territories slipped back into quasi-colonial status, and for the next half century it was run by an Ottawa-appointed commissioner and council. This began to change in the 1950s, when directly elected council members were introduced. By 1966 the majority of council members were popularly elected, while the executive remained appointed by Ottawa. From 1975 two representatives elected by the council sat on the commissioner's executive committee (White 1991). In 1979, the federally appointed commissioner was replaced by a premier elected within the legislature. We score the Northwest Territories 1 for 1975–78 (dual executives) and 2 from 1979.

Yukon has had a popularly elected council since 1909, alongside a federally appointed executive. From 1970 the federally appointed executive was assisted by two elected representatives making the regional executive dual and from 1978 the executive was elected by the council (Smyth 1999). When Nunavut (carved out of the Northwest Territories) was set up in 1999, its directly elected council elected the executive (Hicks and White 2000).

Councils and chiefs of Indian Act bands are directly elected by band members (Law No. 18/1876, Art. 74). However, executive power is shared with a Governor-in-Council, through whom the Department of Aboriginal Affairs and Northern Development retains substantial veto power.<sup>21</sup> The Governor-in-Council also has the power to annul an election if she suspects corruption or a violation of the Indian Act. Hence we score the executive as dual.<sup>7</sup>

The default is that bands follow custom in organizing the election, subject to approval by the Department for Aboriginal Affairs and Northern Development. If the Department sees fit, it can impose an election procedure set out in

<sup>20</sup> Lieutenant Governors with ceremonial functions are appointed by the Governor-General on the recommendation of the prime minister.

<sup>21</sup> A recent senate report quotes Professor Frances Abele: "Ultimate power and responsibility is lodged in the Minister, not in the members of the Band or the officials they elect. Nowhere in the Act is room created for different lines of responsibility (from Chief and Council to the Band members, for example) even though there are several references to majority rule. Indeed, even the sections of the Act that establish the decision-making framework for Band Councils also, at the same time, maintain overriding Ministerial authority. The insertion of Ministerial power and authority into both elections and decision-making of the elected seems likely to undermine a sense of political responsibility and autonomy among Band electors" (Senate Standing Committee 2010: 24).

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the Indian Act (Senate Standing Committee 2010). Since 1988, the federal government requires that bands wishing to revert to custom set out written rules which are consistent with the Canadian Charter of Rights and Freedoms (Senate Standing Committee 2010).

In contrast, Aboriginal peoples under self-government agreements have directly elected councils and executives.<sup>22</sup> The Department or the Governor-in-Council is minimally involved in the selection process (Senate Standing Committee 2010).

Counties and regions in Ontario have councils composed of mayors and/or councilors elected by constituent municipal councils (Law No. 8/1990, Art. 7 and No. 24/2001, Art. 218). The head of the county or regional council is elected by the council or is directly elected, and serves as the chief executive officer of the county or region (Law No. 8/1990, Art. 12 and No. 24/2001, Art. 218). Councils of the *conférences régionales des élus* in Quebec are composed of the prefects of the *municipalités régionales de comté*,<sup>23</sup> mayors of participating municipalities, and civil society representatives coopted by the elected members (Law No. 22.1/2014, Art. 21.8 and 21.9). Each council is chaired by a government representative (Law No. 22.1/2014, Art. 21.4.10 and 21.5).

### Shared rule

There is no shared rule for counties and regions in Ontario, *conférences régionales des élus* in Quebec, or Indian Act bands (Law No. 18/1876).

### LAW MAKING

The upper house is a federal rather than provincial product. Provinces and territories do not select representatives for the senate—the federal government does: Quebec (twenty-four senators), Ontario (twenty-four senators), the Maritime Provinces and Prince Edward Island (twenty-four), the Western Provinces (twenty-four), Newfoundland (six), Yukon Territory (one), the Northwest Territories (one), and Nunavut (one) (C 1867, Art. 22). Senators must be residents of the relevant province/territory and are appointed by the governor-general upon the recommendation of the prime minister without prior provincial consultation (C 1867, Arts. 23–24).

<sup>22</sup> Government of Canada. Aboriginal Affairs and Northern Development Canada. “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.” <<https://www.aadnc-aandc.gc.ca>>.

<sup>23</sup> Since 1979, Quebec has eighty-seven *municipalités régionales de comté* which replaced the historic counties, and have an average population of 40,000. In addition, there are also two *communautés métropolitaines*, one comprising eighty-two municipalities around Montreal and one comprising twenty-eight municipalities around Quebec City. Their main tasks are economic development, culture, tourism, infrastructure, and transport (Law No. 37.01/2014 and 37.02/2014). The *communautés métropolitaines* are effectively associations of local governments.

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The constitution contains special provisions for Quebec.<sup>24</sup> In contrast to other provinces or territories, each of the twenty-four jurisdictions in Quebec is represented by a senator (C 1867, Arts. 22 and 23.6 and Schedule A). These provisions make Quebec the unit of representation in the senate (L1).<sup>7</sup>

Self-government agreements create mechanisms for consultation between the federal government and Aboriginal peoples and/or provincial governments and Aboriginal peoples when federal or provincial law impacts Aboriginal law (L5) (Papillon 2012a: 303).<sup>a</sup>

### EXECUTIVE CONTROL

Weak shared rule in law making has encouraged extensive intergovernmental relations, but without legally binding authority (Hooghe 1991*b*; Simeon 1982). Intergovernmental meetings have been labeled para-diplomacy, executive federalism, and interstate federalism, implying that the participants are (quasi)-sovereign. Federal and provincial governments have specialized ministries responsible for intergovernmental relations (Pollard 1986; Woolstencroft 1982).

Intergovernmental relations have long been a feature of Canadian politics, but from the 1970s the number and range of meetings mushroomed (Hueglin and Fenna 2006: 219–25). A standing secretariat provided administrative support for eight First Ministers' Conferences in 1973–74. Since the mid-1980s the number of meetings has increased to around 100 per year (Canadian Intergovernmental Conference Secretariat 2008). The extent to which provinces can use these meetings to co-govern the country is limited because the majority of meetings do not involve federal ministers but only provincial governments and, starting in the 1980s, territorial governments (Law No. 11/1982, Art. 37; Alcantara 2013). Territories became full players in intergovernmental relations with the Charlottetown Accord of 1992 (Canadian Intergovernmental Conference Secretariat 2002).

There are several channels for co-governance. The First Ministers' Conference is the highest-profile setting for federal–provincial executive federalism. The first meeting between the prime minister and provincial premiers took place in 1906, and meetings were mostly annual from the 1960s (Cameron and Simeon 2002). Territorial government premiers attended from 1992. However, the federal government stopped attending in 2009, and the future of the institution is uncertain.<sup>25</sup> The agenda was dominated by constitutional

<sup>24</sup> MacKay (1963: 38) writes that the only feasible scheme for the union of the British North American colonies in 1867 “was a federal state in which Lower Canada (Quebec) should be protected in all its rights.... And it could only be a willing partner by the grant of absolute guaranties for the protection of its institutions, its language, its religion, and its laws—guarantees that must be clearly evident to all.”

<sup>25</sup> Between 2006 and 2015, just three First Ministers' Conferences have been held. <<http://www.scics.gc.ca>>.

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issues, fiscal relations, and policies with major budgetary consequences such as public investment, social security, economic development, agriculture, employment, and health (Canadian Intergovernmental Conference Secretariat 2004). Aboriginal peoples were not regular participants. They were included in the meetings during 1983–85, 1987, and 1992, when the constitutional amendments regarding Aboriginal self-government were discussed, and in 2004 for the signing of the Kelowna Accord setting out an intergovernmental Aboriginal development plan (Boisvert 1985; Canadian Intergovernmental Conference Secretariat 2004; Hawkes 1985).

Ad hoc intergovernmental meetings between federal, provincial, and territorial governments are regularly held at the request of a federal minister. These have dealt with agriculture, education, environment, health, housing, justice, local government, natural resources, Aboriginal affairs, sports and recreation, trade, transport, and citizenship and immigration. These meetings rarely reach binding decisions, and when they do, they are taken by unanimity or allow individual provinces to opt out (Bolleyer 2006*b*). Despite all this activity, executive control remains shallow.

Alongside these federal–provincial meetings, premiers' conferences provide a forum for provinces, and latterly territories and Aboriginal peoples, to coordinate their policies. The first conference of provincial premiers was held in 1887. It became an annual event from 1960. Since 1982, the territories have attended the meetings as observers and in 1992 they became full participants (Canadian Intergovernmental Conference Secretariat 2002). In 2003 Premiers' Conferences were institutionalized as the Council of the Federation with a standing secretariat (Watts 2003).<sup>26</sup> Decision making is consensual with the aim to “exchange viewpoints, information, knowledge and experiences;” to “analyze actions or measures of the federal government that in the opinion of the members have a major impact on provinces;” and to “develop a common vision of how intergovernmental relations should be conducted in keeping with the fundamental values and principles of federalism.”<sup>27</sup> The meetings do not include Aboriginal peoples except when Aboriginal issues are discussed. In such cases, the Assembly of First Nations, the Congress of Aboriginal Peoples, Inuit Tapirisat of Canada, and the Métis National Council are invited to join the meetings (Canadian Intergovernmental Conference Secretariat 2002).

<sup>26</sup> The Council of the Federation. “About the Council.” <<http://www.councilofthefederation.ca/>>.

<sup>27</sup> The Council of the Federation. “Founding Agreement—December 2003.” <<http://www.councilofthefederation.ca/>>.

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Provincial and territorial first ministers also meet in regional premiers' conferences: the Western Premiers' Conference established in 1973; the Council of Atlantic Premiers (established in 1972 and until 2000 known as the Council of Maritime Premiers); and since 1973, the Eastern Canadian Premiers' and New England Governors' Conference. They meet once or twice a year, the chair rotates, decision making is on a consensual basis, and the federal government is not involved.<sup>28</sup>

### FISCAL CONTROL

The distribution of tax revenues is subject to intergovernmental federal–provincial bargaining, and fiscal policy features regularly on the agenda of First Ministers' conferences. However, decisions taken at these intergovernmental meetings are rarely binding (Watts 2005). Ultimate authority remains with the federal government. Territories have become regular invitees since 1992.

Most Aboriginal self-government agreements are accompanied by tax agreements, but these do not include provisions for regular consultation or co-decision.

### BORROWING CONTROL

Borrowing is not subject to intergovernmental negotiation or coordination.

### CONSTITUTIONAL REFORM

Until 1982, constitutional change required approval in the British Parliament and unanimous provincial consent. The precedent for provincial consent was established in 1940, when Prime Minister MacKenzie King delayed the introduction of an amendment on the federalization of unemployment insurance until all provinces (including Quebec) agreed. When Prime Minister Trudeau challenged the norm after the defeat of the separatism referendum in Quebec in 1980 and sought to bring home the constitution without provincial consent, he suffered an effective veto by the Supreme Court. In a reference case brought by several provinces, the Supreme Court ruled that federal unilateralism was legal but violated an established constitutional convention (SCR 753/1981).<sup>29</sup>

Following acrimonious federal–provincial negotiations, the Canadian constitution was repatriated in 1982 and adopted by every province except Quebec. The Canada Act states that constitutional amendments require approval by the federal parliament and two-thirds of the provincial legislatures representing at least 50 percent of the Canadian population. Some amendments require approval by the federal parliament and unanimity among provincial

<sup>28</sup> <<http://www.gov.mb.ca/fpir/fedprov/western.html>> and <<http://www.cap-cpma.ca/images/CAP/capmou.pdf>>.

<sup>29</sup> The convention of unanimous provincial consent for constitutional change has been reinforced by several events. See for an overview Russell (2004) and Stein (1989).



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legislatures (Heard and Swartz 1997; Kilgour 1983; Levesque and Moore 1984). Constitutional amendments which affect only one province require federal approval (both houses) and the approval of the affected province (Law No. 11/1982, Arts. 38–49; Finbow 1994; Hueglin and Fenna 2006: 219–25; Simeon 2004). Hence provincial governments—collectively, and for important questions, individually—have a veto over constitutional reform.

A reluctance to embrace unilateralism is also apparent in case law regarding the right to secession. The Supreme Court of Canada ruled in 1998 that there is an implicit constitutional right for Quebec to secede but by negotiation of the terms, not one-sided action (SCR 217/1998). The decision must first find support with a clear majority of Quebecers in a referendum posing a clear question, and next the terms of exit must be implemented in negotiation and agreement with “the rest of Canada” (Aronovitch 2006). The Court was intentionally vague on what it meant by “the rest of Canada,” but Canadian commentators have generally understood it to refer not only to the federal government.

Except for Yukon, territories have no formal consultation or decision right with respect to their own statute.<sup>30</sup> The Yukon government acquired, in 2002, the right to be consulted on future amendments of the Act (Law No. 7/2002, Art. 56.1). In addition, the legislative assembly of Yukon may make recommendations with respect to amending the Yukon Act (Law No. 7/2002, Art. 56.2).<sup>31</sup> Incidentally, despite their weak formal powers, territories participated in the 1992 Charlottetown federal–provincial constitutional negotiations, which sought to resolve longstanding disputes on the division of federal, provincial, and territorial powers. The accord was defeated in Canada’s first nationwide referendum since 1942. Quebec held its own referendum, which was also negative. The status of the territories was not changed.

The self-government agreements of Aboriginal peoples can be amended on the proposal of the Aboriginal peoples concerned (by a majority of the voters and/or by a majority of elected council members), the federal government (by order of the Governor-in-Council and/or enactment of federal legislation) and/or by provincial government (by a resolution of the provincial assembly).

<sup>30</sup> Nunavut is governed by a land claims agreement and the Nunavut Act. Amendments to the land claims agreement require the approval of the Nunavut Tunngavik Incorporated, the organization that implements the land claims agreement. Amendments to the land claims agreement may not affect the jurisdiction of the Nunavut legislative assembly unless the assembly consents (Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, 1993, Art. 2.13.1). The Nunavut Act (Law No. 28/1993) does not specify a role for the Nunavut legislative assembly. (Nunavut Tunngavik Incorporated. “About NTI.” <<http://www.tunngavik.com/about/>>.)

<sup>31</sup> In 2014, the Northwest Territories was granted similar rights through the 2014 Northwest Territories Act (Law No. 15/2014, Art. 61).

## Self-rule in Canada

	Institutional depth	Policy scope	Fiscal autonomy	Borrowing autonomy	Representation		Self- rule
					Assembly	Executive	
Provinces	3	3	4	3	2	2	17
Quebec	3	3	4	3	2	2	17
	3	4	4	3	2	2	18
Northwest Territories	1	0	0	0	0	0	1
	2	2	0	0	2	0	6
	2	2	0	0	2	1	7
	2	2	0	0	2	2	8
	3	3	4	1	2	2	15
Yukon	1	0	0	0	2	0	3
	1	0	0	0	2	1	4
	2	3	4	1	2	2	14
	3	3	4	1	2	2	15
Nunavut	3	3	4	1	2	2	15
Indian Act bands	1	0	0	0	2	1	4
	1	1	1	0	2	1	6
	1	1	2	1	2	1	8
Self-governing Aboriginal peoples	2	3	0	3	2	2	12
	2	3	1	3	2	2	13
	2	3	2	3	2	2	14
In Ontario: Counties and regions	2	2	1	2	1	2	10
In Quebec: Confér. régionales des élus	1	0	0	0	1	0	2

## Shared rule in Canada

		Law making						Executive control		Fiscal control		Borrowing control		Constitutional reform		Shared rule				
		L1						L2		L3		L4		L5			L6		M	B
Provinces	1950–2010	0	0	0	0	0	0	0	1	0	1	0	0	0	0	4	0	6		
	1950–2010	0.5	0	0	0	0	0	0	1	0	1	0	0	0	4	0	6.5			
	1950–1991	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
	1992–2010	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	2			
Yukon	1950–1991	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
	1992–2001	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	2			
Nunavut	2002–2010	0	0	0	0	0	0	0	1	0	1	0	0	0	0	2	4			
	1999–2010	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	2			
Indian Act bands	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
	1977–2010	0	0	0	0	0.5	0	0	0	0	0	0	0	0	0	4	4.5			
In Ontario: Counties and regions	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
	2006–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
In Quebec: Confé. régionales des élus																				

National legislature has: L1=regional representation; L2=regional government representation; L3=majority regional representation; L4=extensive authority; L5=bilateral regional consultation; L6=veto for individual region. Total for shared rule is either multilateral (M) or bilateral (B).

## North America

Self-governing Aboriginal peoples can exercise a veto by referendum or by a vote in their elected government.<sup>32</sup> Our scoring reflects the second option.

## United States

### *Self-rule*

#### INSTITUTIONAL DEPTH AND POLICY SCOPE

The United States (US) has, for the most part, two regional tiers: states and, in the more populous and older states, counties. Counties fall under the jurisdiction of state governments. In addition, there are Indian tribes and until 1959 there were also two territories, Alaska and Hawaii. The District of Columbia has a special status as capital district. Puerto Rico is an Associated Free State with the US (*Estado Libre Asociado*, Elazar 1991: 325).<sup>33</sup>

The US constitution contains a list of expressed federal competences, encompassing taxation, the military, currency, commerce with Indian tribes, interstate and foreign commerce, and naturalization (C 1788, Art. 1.8). In addition, an elastic clause gives the federal government authority to pass any law “necessary and proper” for the execution of its express powers (C 1788, Art. 1.8). Competences not delegated to the federal government and not forbidden to the states are reserved to the states (C 1788, Amendment X) but federal law has supremacy over state law (C 1788, Art. 6). States have extensive competences, among them primary responsibility for education, social welfare, regional development, local government, civil and criminal law, and health and hospitals (Hueglin and Fenna 2006: 151–6; Schram 2002; Watts 1999a, 2008). The federal government has near exclusive authority over citizenship (including naturalization) and immigration. The power of congress to admit aliens into the country under conditions it lays down is exclusive of state regulation. Congress, with the help of the courts, has eroded state authority to regulate the conduct of aliens residing in the country.

The fifty states of the US include Alaska and Hawaii, former territories that were granted statehood in 1959 (Law Nos. 85-508/1958 and 86-3/1959). As territories, each had an elected legislature, a governor appointed by Washington, and self-governance over a broad range of policies (Law No. 339/1900, Arts. 12–15, 66 and No. 384/1912, Arts. 4–5, 9, and 14). Alaska could adopt legislation subject to national congressional veto (Law No. 384/1912, Art. 20)<sup>34</sup> but the

<sup>32</sup> Government of Canada. Aboriginal Affairs and Northern Development Canada. “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.” <<https://www.aadnc-aandc.gc.ca>>.

<sup>33</sup> The unincorporated organized territories of Guam, the United Mariana Islands, and the Virgin Islands are not included.

<sup>34</sup> The congressional veto was abolished by the Alaska Constitution of 1956 which came into effect with statehood in 1959.

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Hawaiian legislature could override a gubernatorial veto on territorial legislation with a two-thirds majority (Kinevan 1950; Law No. 339/1900, Arts. 49–51 and 66). We score Alaska 2 until 1959 and Hawaii 3 on institutional depth. The policy scope of the territories was similar to that of states, and Alaska and Hawaii score 3 on policy scope.

Puerto Rico is an Associated Free State not included in the fifty US states. Puerto Rico came under US control during the Spanish–US war, and was in 1898 officially ceded by Spain to the US. The 1917 Jones–Shafroth Act (Law No. 64-368/1917)—also known as the Jones Act of Puerto Rico—established limited self-rule. Puerto Ricans obtained full US citizenship, could elect both houses of its legislature, and elect a non-voting representative, the Resident Commissioner, to the US House of Representatives (Law No. 64-368/1917, Arts. 5, 24–25, and 29). However, the governor and the entire executive branch were centrally appointed; legislative acts of the regional legislature could be vetoed by the US president; and major policies including fiscal and economic matters, postal services, immigration, and defense, remained under control of Washington DC (Law No. 64-368/1917, Arts. 7–9, 12–13, and 34). Portions of the Jones Act were superseded in 1949 when the first directly elected governor took the reins, but central control over the administration remained strong. On several occasions, in response to a strong separatist movement, the US government and its local representatives severely curtailed local liberties. A law passed by the Puerto Rican legislature in 1948 made it illegal to display a Puerto Rican flag, sing a patriotic tune, talk of independence, or campaign for separatism (Law No. 53/1948). In 1950, the US government briefly imposed martial law to suppress rebellion. We reflect the strong central hand by scoring 1 on institutional depth and 0 on policy scope for 1950 and 1951 (Rezvani 2014: 174).<sup>β</sup>

In 1950, the US congress approved a law that granted the right to Puerto Ricans to draft their own constitution (Law No. 81-600/1950). The new Commonwealth constitution went into effect in 1952 after US congress approval (Elazar 1991: 324; Law No. 82-447/1952). The US congress and president retain ultimate responsibility for governing Puerto Rico (C 1788, Art. 4.3) so strictly speaking authority is merely delegated.<sup>β</sup> In addition, the constitution can only be changed with the approval of the US congress (Elazar 1991: 325). However, Puerto Ricans vote for their own governor and assembly (C 1952, Art. 3.1). The regional government has authority over the economy, education and welfare policies, public works, the Puerto Rico National Guard, the organization of the seventy-eight municipal governments, and the institutional set up of the regional government itself (C 1952, Arts. 3.16, 4, 6; Elazar 1991: 326). Immigration and citizenship is a federal responsibility. Given the central government veto and its wide policy competences, we code Puerto Rico 2 on institutional depth and 3 on policy scope for 1952–2010.

## North America

In 2010, 566 federally recognized Indian and Alaskan Tribes<sup>35</sup> exercised authority over almost two million citizens (US Department of the Interior 2014).<sup>36</sup> Relations with Indian tribes are an exclusive competence of congress (C 1788, Art. 1.8).<sup>37</sup> Congress ratified 370 treaties before the treaty making procedure ended in 1871.<sup>38</sup> Subsequently, Indian tribes have been federally recognized through acts of congress, presidential executive orders, federal court decisions and, since 1978, also through a federal acknowledgement process administered by the Bureau of Indian Affairs (BIA). Each tribe has its own constitution and authoritative competences, but there are some broad similarities.<sup>39</sup> Indian tribes possess all powers of self-government that states enjoy including the right “to form their own governments; to make and enforce laws, both civil and criminal; to tax; to establish and determine membership (i.e., tribal citizenship); to license and regulate activities within their jurisdiction; to zone; and to exclude persons from tribal lands.”<sup>40</sup>

However, the authority exercised by Indian tribes falls short of that exercised by states (Law Nos. 233/1924, 90-284/1968, 93-638/1975, and 103-413/1994). The doctrine of plenary power established in the Supreme Court ruling *Lonewolf v. Hitchcock* in 1903 allowed congress to intervene at will in Indian affairs (Babcock 2005; Papillon 2012a). Tribal authority over criminal and civil jurisdiction was limited in 1953 when congress gave six states full or partial jurisdiction and allowed others to elect to do the same (Law No. 83-280/1953).<sup>41</sup> Tribal courts have civil jurisdiction over Indians and non-Indians

<sup>35</sup> Indian tribes can also be recognized by states. See National Conference of State Legislatures. “Federal and State Recognized Tribes.” <<http://www.ncsl.org>>. Most federally recognized tribes are organized under the Indian Reorganization Act (Law No. 103-454/1994) except for regional and village corporations in Alaska and Indian tribes in Oklahoma which are incorporated by respectively the Alaska Native Claims Settlement Act (Law No. 92-203/1971) and the Oklahoma Indian Welfare Act (Law No. 816-74/1936).

<sup>36</sup> Federal Register. Volume 79, No. 19/Wednesday, January 29, 2014/Notices.

<sup>37</sup> The exclusive competence of congress can be derived from Art. 1.8 of the constitution which provides that congress has the exclusive power to “regulate Commerce... with the Indian tribes” (Papillon 2012a).

<sup>38</sup> An overview of treaties and legislation affecting Indian tribes is provided in seven volumes compiled by Charles J. Kappler entitled *Indian Affairs: Laws and Treaties*. <<http://digital.library.okstate.edu/Kappler/>>.

<sup>39</sup> US Department of the Interior. Bureau of Indian Affairs. “Sample Constitution of the Example Tribe.” <<http://www.bia.gov/cs>> and Tribal Court Clearinghouse. “Tribal Constitutions.” <<http://www.tribal-institute.org/lists/constitutions.htm>>.

<sup>40</sup> A federally recognized American Indian or Alaskan Native tribe possesses inherent rights of self-government (i.e. tribal sovereignty) and is entitled to receive certain federal benefits and services (Babcock 2005: 469–85; Law No. 73-383/1934). US Department of the Interior. Bureau of Indian Affairs. <<http://www.bia.gov/FAQs>>.

<sup>41</sup> The states required to assume civil and criminal jurisdiction over federal Indian lands were Alaska (except the Metlakatla Indian Community on the Annette Island Reserve, which maintains criminal jurisdiction), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. The states that elected to assume full or partial jurisdiction were Arizona (1967), Florida (1961), Idaho (1963, subject to tribal consent), Iowa (1967), Montana (1963), Nevada (1955), North Dakota (1963, subject to tribal consent),

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who reside or do business on Indian reservations but criminal jurisdiction over violations of tribal law extends only to tribal members. Indian self-government is also constrained by administrative and fiscal dependence on the Bureau of Indian Affairs (BIA).<sup>42</sup> Tribal police forces have to contract with the BIA, and the BIA administers and provides funding for education, social services, economic development, natural resources, housing, roads, and bridges (Law No. 93-638/1975).<sup>42</sup> In addition, about 326 Indian land areas covering approximately 56.2 million acres are held in trust by the US.<sup>43</sup> We score Indian tribes 2 on institutional depth and 2 on policy scope.

The constitution originally authorized Congress to govern the District of Columbia (C 1788, Art. 1.8). Congress delegated that power to a centrally appointed governor and an assembly with a majority of directly elected members (Law Nos. 15/1801 and 62/1871; McQuade 1968). In 1874, this arrangement was replaced by a three-member Board of Commissioners with two members appointed by the president (after senate approval) and a third member selected from the US army corps of engineers (French 1984; Law No. 18/1874; McQuade 1968). The Board of Commissioners governed the capital district for nearly a century until December 1973 when the District of Columbia Home Rule Act ceded authority to a directly elected district council and mayor (Law No. 93-198/1973, Arts. 302, 401, and 421; Newman and Depuy 1975). Congress has the right to review and overrule local laws and the district's budget (French 1984; Law No. 93-198/1973, Arts. 446 and 601; Schrag 1990). However, the policy scope of Washington DC is comparable to that of states (French 1984; Law No. 93-198/1973, Art. 302; Newman and Depuy 1975: 556–75).<sup>7</sup> Home rule was suspended between 1995 and 2000 when the president appointed an authority to administer the district's finances (Law No. 104-8/1995). In 2001, after a revision of the Home Rule Act, the federal government handed back regional authority to the elected government of the city (DC Inspector General 2001).

Counties are present in each state except in Alaska, Connecticut, and Louisiana which have boroughs, planning regions, and parishes, respectively. Rhode Island has counties but these serve as judicial and statistical subdivisions only. Twelve states have an intermediate tier of counties which are both general purpose and have an average population of at least 150,000: Arizona

South Dakota (1957–61), Utah (1971), and Washington (1957–63). US Department of the Interior. Indian Affairs. <<http://www.bia.gov/FAQs/>>.

<sup>42</sup> Tribal Court Clearinghouse. "Tribal Law Enforcement." <<http://www.tribal-institute.org/lists/enforcement.html>> and US Department of the Interior. Bureau of Indian Affairs. <<http://www.bia.gov/WhatWeDo/index.html>>.

<sup>43</sup> "The federal Indian trust responsibility is a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages." US Department of the Interior. <<http://www.bia.gov/FAQs/>>.

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(fifteen counties), California (fifty-eight), Connecticut (eight until 1960), Delaware (three), Florida (sixty-seven), Maryland (twenty-four), Massachusetts (fourteen, but six since 2000), Nevada (sixteen), New Jersey (twenty-one), New York (fifty-eight), Pennsylvania (sixty-seven), and Washington (thirty-nine).<sup>44</sup> Many states apply “Dillon’s Rule” which does not allow county governments to take actions beyond those specified in the state code (National Association of Counties 2010a: 6).<sup>45</sup> Counties play a role in providing education, justice, health, environmental planning, and regional development, with variation from state to state (National Association of Counties 2009, 2010a).

Connecticut replaced counties with regional planning agencies in 1960. They can design regional development plans for land use, housing, economic development, environment, recreation, public utilities, and transport. Massachusetts abolished eight of fourteen county governments between 1997 and 2000.<sup>46</sup> State legislation (Law No. 34B/1997) allowed abolished counties to reorganize as a “regional council of governments,” and two did so.<sup>47</sup> Regional councils have directly elected councils and executives, and their main responsibility lies in infrastructure, land use planning, and emergency planning (Law No. 34B/1997, Art. 20h).<sup>a</sup> The remaining six county governments administer jails and county court houses, recreational facilities, and solid waste management (National Association of Counties 2009: 45, 2010a: 86-87). Planning regions in Connecticut and counties and regional councils in Massachusetts score 2 on institutional depth and 1 on policy scope.

## FISCAL AUTONOMY

Taxes are concurrent between the federal government and states (C 1788, Art. 1.8 and Amendment XVI). Both levy personal and corporate income taxes along with general and selective sales taxes. States can set the base and rate for these taxes (Chernick and Tennant 2010; Posner 2007; Stotsky and Sunley 1997; Watts 1999b, 2008). The most important revenue source for states is usually the sales tax (Laubach 2005; Schroeder 2006). As a territory, Hawaii had the same fiscal authority as states (Law No. 339/1900, Art. 55), but Alaska was restricted to setting the rate of property tax up to 2 percent (Law No. 384/1912, Art. 9). Puerto

<sup>44</sup> In thirty-five states the average population of counties is below 150,000, and in two states (Alaska and Hawaii) the county is the lowest tier of government (National Association of Counties 2009; US Census Bureau 2013).

<sup>45</sup> Eleven states do not apply Dillon’s Rule: Alaska, Iowa, Massachusetts, Mississippi, Montana, New Jersey, New Mexico, Ohio, Oregon, South Carolina, and Utah (National Association of Counties 2010a: 204–5).

<sup>46</sup> Franklin and Middlesex were abolished in 1997; Hampden, Hampshire, and Worcester in 1998; Essex and Suffolk in 1999; Berkshire in 2000. Source: William Francis Galvin. Secretary of the Commonwealth of Massachusetts. “Historical Data Relating to the Incorporation of and Abolishment of Counties in the Commonwealth of Massachusetts.” <<http://www.sec.state.ma.us/cis/cisctlist/ctlistcounin.htm>>.

<sup>47</sup> Franklin (in 1997) and Hampshire (in 1998).



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Rico can levy corporate and personal income tax, as well as other minor taxes including excise taxes on imports, cigarettes, liquor, hotel rooms, cement, vehicles, and lotteries. Federal taxes do not apply in Puerto Rico unless by mutual consent, but Puerto Rico citizens participate in federal social security programs and pay taxes for social security and health care (Elazar 1991: 326).

Each Indian tribe is governed by its own constitution, but there are similarities in fiscal powers. An Indian tribe may set the base and rate of major taxes such as corporate and personal income tax and sales tax for members of the tribe who reside in its territory (Joint Committee on Taxation 2008).<sup>48</sup> Members of a tribe are subject to federal income tax and states may require Indian tribes to collect sales taxes on sales made to non-members of the tribe (Joint Committee on Taxation 2008: 5–6). In general, Indian tribes enjoy tax autonomy to the same extent as states but most tribes impose only a sales and excise tax.<sup>49</sup> Tribes are often unable to levy property taxes because of the trust status of their land, and generally do not levy income taxes.<sup>49</sup>

Before home rule, Washington DC depended on central government grants. Since home rule, it has similar taxation powers to states except that it cannot tax the personal income of non-residents (Law No. 93-198/1973, Arts. 302 and 602; Newman and Depuy 1975: 541–56). A federal control board took over the budget when home rule was suspended from 1995–2000.

The tax powers of counties vary by state. Most counties can set the rate of a property tax and many can impose an excise tax (Laubach 2005; Schroeder 2006).<sup>50</sup> The base of the property tax is set by the state, which collects the tax prior to transferring some portion to counties. Most counties can also introduce an excise tax on items such as alcohol, tobacco, motor fuel, occupancy, and motor vehicles. In Arizona, California, Maryland, Nevada, New York, and Washington, counties can set the rate of a sales and use tax, mostly in the form of surtax on the rate set by the state. In Connecticut (until 1960), Delaware, Florida, New Jersey, and Pennsylvania, counties cannot set the rate of the sales and use tax. In some states, they receive a share of sales and income taxes collected by the state (National Association of Counties 2008, 2010a).

Planning regions in Connecticut and regional councils in Massachusetts are dependent on dues, fees, and grants (Connecticut General Assembly 2007: 37; Law No. 34B/1997, Art. 20a (CT)). Counties in Massachusetts may levy taxes if

<sup>48</sup> A tribe or a tribal-owned corporation that is incorporated under section 17 of the Indian Reorganization Act (Law No. 73-383/1934) is not subject to federal income tax no matter where the business is located (Joint Committee on Taxation 2008: 3). State income taxes cannot be levied on Indian tribal members who live and work on the reservation (Zimmermann 2005 7–8).

<sup>49</sup> National Congress of American Indians. <<http://www.ncai.org/policy-issues/tribal-governance/taxation>>.

<sup>50</sup> C 1780 (MA); C 1864, Art. 10.1 (NV); C 1867, Art. 11.8 (MD); C 1874, Art. 13 (AR); C 1889, Art. 11.12 (WA); C 1897, Art. 7.1 (DE); C 1912, Art. 12.7 (AZ); C 1938, Art. 16 (NY); C 1947, Art. 8.1 (NJ); C 1968, Art. 7.9 (FL); C 1968, Art. 9 (PA).

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approved by a budget advisory board composed of local government officials (National Association of Counties 2008: 26, 2010a: 86–7).<sup>β</sup> Planning regions in Connecticut and counties and regional councils in Massachusetts score 0 on fiscal autonomy.

### BORROWING AUTONOMY

States do not face national restrictions on borrowing, nor does the federal government guarantee state bonds (C 1788, Art. 1.8; Joumard and Kongsrud 2003). Interest payments on state bonds are exempt from federal taxation.

Thirty-nine states have self-imposed constitutional and/or statutory provisions requiring a balanced operating budget and permitting borrowing for capital projects only (Advisory Commission on Intergovernmental Relations 1995: 6; Joumard and Kongsrud 2003; Plekhanov and Singh 2007). The stringency of these state provisions varies and their effectiveness, even when written into the state constitution, is often limited (Stotsky and Sunley 1997). The legislature in all but four states must pass a balanced budget at the beginning of the fiscal year, but only eight states are formally required to balance their operating budget at the end of the year or biennium (Hou and Smith 2006; Smith and Hou 2013). A further twenty-six states have within-year fiscal controls in place to avoid a deficit. Just seven states (Indiana, Maine, New York, Pennsylvania, Vermont, Virginia, and Wyoming) do not have legal limits.<sup>51</sup>

The territorial government of Alaska could borrow only with the prior authorization of the federal government (Law No. 384/1912, Art. 9), while Hawaii could borrow with prior presidential authorization up to 10 percent of the total value of property within the territory for capital investment (Law No. 339/1900, Art. 55). Central government oversight was abolished in 1959 when these territories were granted statehood. Puerto Rico can borrow up to 15 percent of annual revenue and does not need federal authorization (C 1952, Art. 6.2).

Indian tribes have the same formal borrowing autonomy as states. They can borrow freely and, as is the case with state bonds, interest payments on Indian tribe bonds are exempt from federal taxation (Joint Committee on Taxation 2008; Law No. 97-473/1982). However, review and approval from the Bureau of Indian Affairs (BIA) is usually necessary when a tribe uses Indian land or funds as collateral (Hyatt et al. 2005). This constraint amounts to prior authorization.<sup>β</sup> In order to facilitate borrowing, a 1974 law provides federal insurance for private loans to tribes (Law No. 93-262/1974).

Under direct congressional rule, Washington DC was not able to borrow.<sup>α</sup> Under home rule, borrowing is limited to capital projects up to 14 percent of

<sup>51</sup> These states do not have one of the following: a limit on the amount of debt that may be assumed for the purpose of deficit reduction; a balanced budget; controls on supplementary appropriations; within fiscal-year controls to avoid deficit; no deficit may be carried over the next fiscal year or biennium (Hou and Smith 2006).

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total revenue and prior federal authorization is not needed (Law No. 93-198/1973, Arts. 463 and 603b; Newman and Depuy 1975: 603–18).

Rules governing county borrowing are determined by the respective state government.<sup>52</sup> County debt is constrained in two ways. First, nearly all states place a limit on bond issues. This is often linked to the county's property tax base. Second, some states require that a majority or supermajority of voters approve long term debt (National Association of Counties 2010a, 2010b; Schroeder 2006).

Planning regions in Connecticut do not have borrowing autonomy (Connecticut General Assembly 2007: 37).<sup>a</sup> Counties in Massachusetts can borrow for infrastructural projects up to 10 percent of annual revenues (National Association of Counties 2010a: 86). Formally, regional councils in Massachusetts can incur debt up to half of annual revenues, but in practice, regional councils do not borrow (Law No. 34B/1997, Art. 20k).<sup>53</sup> Planning regions in Connecticut, and counties and regional councils in Massachusetts score 0.

## REPRESENTATION

State lower houses are elected every two years. Most state upper houses and governors are elected every four years.<sup>54</sup> As territories, Alaska and Hawaii had a government-appointed governor and directly elected senate (every four years) and house (every two years) (Law No. 339/1900, Arts. 30, 35, and 66; Law No. 384/1912, Arts. 4–5 and 14). Since 1959, they both have a directly elected governor and assembly. Since 1948, Puerto Rico has a directly elected governor and bicameral legislature (C 1952, Arts. 3.1 and 4.1). Until 1973 Washington DC had a three-member board whose members were appointed by the president (Law No. 18/1874, Art. 2). Since 1974 the capital district has a popularly elected council and mayor, and the council elects its own chair (Law No. 93-198/1973, Arts. 401 and 421; Schrag 1990). When home rule was suspended, the decisions of the mayor could be overridden by a presidentially appointed board, which amounts to a dual executive.<sup>β</sup>

Indian tribes are governed by directly elected councils, which appoint a president and vice-president.

Counties have directly elected councils. In some counties an executive is directly elected alongside the council; in others, the council combines

<sup>52</sup> C 1780 (MA); C 1864, Art. 8.10 (NV); C 1867, Art. 11.8 (MD); C 1874, Art.11.11 (AR); C 1889, Art. 8.6 (WA); C 1897, Art. 8.8 (DE); C 1912, Art. 9.7 (AZ); C 1938, Art. 8 (NY); C 1947, Art. 8.3 (NJ); C 1968, Art. 7.10 and 7.12 (FL); C 1968, Art. 8.9 (PA).

<sup>53</sup> Franklin Regional Council of Governments. Annual Report 2013.<sup>β</sup> <<http://www.whately.org/images/FRCOG/Regional-13-j-post.pdf>>; Hampshire Council of Governments. <<http://www.hampshirecog.org/content/about-us>>.

<sup>54</sup> Upper houses in Arizona, Connecticut, Georgia, Hawaii, Idaho, Maine, Massachusetts, New Hampshire, New York, North Carolina, Rhode Island, South Dakota, and Vermont have two-year terms. The term of office for governors in New Hampshire and Vermont is also two years.

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legislative and executive tasks (National Association of Counties 2010a). Assessors, clerks, recorders, sheriffs, tax collectors, and treasurers are also often directly elected (National Association of Counties 2010a). Regional councils in Connecticut are composed of locally elected representatives (Connecticut General Assembly 2007: 7–18). Regional councils in Massachusetts consist of directly elected officials from cities and towns from within the region, and the council appoints an executive director.<sup>55</sup>

### *Shared rule*

There is no shared rule for Puerto Rico, counties, regional councils, planning regions, and Washington DC.

### LAW MAKING

Each state has two directly elected senators in the US senate. Elections are held every two years nationwide for one-third of the seats (C 1788, Art. 1.3 and Amendment XVII). The two Houses must pass all legislation in exactly the same form, which provides the senate with veto power over all legislation (C 1788, Art. 1.7).

As territories, Alaska and Hawaii had no senators, and since 1906 each territory has one directly elected, non-voting representative in the House of Representatives (Law No. 339/1900, Art. 85 and 384/1912, Art. 17). Puerto Rico has a non-voting Resident Commissioner in the House of Representatives. Washington DC has no representation in the senate, and since 1970 it has been represented by a delegate who can vote in committee but has no voting rights on the House floor (Schrag 1990).<sup>56</sup> Indian tribes have no formal channel for influencing federal law making affecting their interests.

### EXECUTIVE CONTROL

Exclusive policy competences are subject to extensive “marble-cake” federal–state collaboration. Executive control often involves federal financial incentives which states may accept or reject. From the 1960s, these incentives have taken the form of conditional grants (“grants-in-aid”) designed to induce states (and local governments) to implement federal priorities. Implementation of many national laws on concurrent competences hinges on these one-to-one agreements with funding and implementation conditions (Wright 1974, 1988). Once passed into law, grants-in-aid are submitted to the states which decide, one by one, whether to participate (Hueglin and Fenna 2006: 229–234). The agreements

<sup>55</sup> Franklin Regional Council of Governments. Annual Report 2013. <<http://www.whately.org>>; Hampshire Council of Governments. <<http://www.hampshirecog.org>>.

<sup>56</sup> Since 1961 residents of the District of Columbia can vote for three presidential electors (C 1788, Amendment XXIII).

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are bilateral, and once signed, they are legally binding (Bakvis and Brown 2010).<sup>57</sup> This mechanism provides a form of bilateral executive control to states.<sup>β</sup>

Lobby organizations provide a channel for informal intergovernmental bargaining. These include the National Governors Association (established in 1908), the National Conference of State Legislatures (1975), and the Council of State Governments (1933). Indian tribes are represented by the National Congress of American Indians (1944), counties by the National Association of Counties (1935), and towns and cities by the National League of Cities (1924), the National Association of Towns and Townships (1976), and the US Conference of Mayors (1932). These organizations do not have formal intergovernmental relations with the federal government, and do not receive a score in executive control (Bolleyer 2006*b*).

An Advisory Commission on Intergovernmental Relations (ACIR) was established in 1959 with representatives from federal, state, and local government (Law No. 86-380/1959).<sup>58</sup> Its remit was to consider common problems, encourage discussion, give advice, and provide technical assistance. It could also submit recommendations on drafts of federal regulations. The commission's recommendations were heavily directed towards improving the grant-in-aid system and shaping federal regulations (McDowell 1997). However, the federal government was not required to follow the commission's advice and often ignored its recommendations (Kincaid 2011: 185; McDowell 2011: 165). The ACIR was conceived as an "honest information broker," collecting, interpreting and disseminating data" (Stenberg 2011: 170). It did not serve as a venue to negotiate policies. The commission was abolished in 1996 (McDowell 1997). In sum, the ACIR did not provide states (and counties) with multilateral executive control.<sup>γ</sup>

Indian tribes are not routinely consulted on executive policy making, though the federal government has become more receptive. In the early 1980s the federal government adopted the principle that federal-tribe interactions should be treated as "government-to-government" relations (Papillon 2012*a*). One implication is that federal agencies should consult regularly with tribal governments on policy that affects them. The policy was strengthened through a presidential executive order in 2000 which instructs federal agencies "to respect Indian tribal self-government" and adopt "an accountable process to ensure meaningful and timely input by tribal officials in the

<sup>57</sup> In the 1970s, around one-quarter of state budgets came from conditional federal grants, declining to around 15 percent by the late 1990s, but increasing to about 30 percent in the 2000s. Currently there are more than 200 grant-in-aid programs. No particular law or executive order regulates these agreements. Their legal basis lies in the commerce clause, the Fifth and the Fourteenth Amendment, and in Supreme Court jurisprudence (Christensen and Wise 2009; Wright 1988).

<sup>58</sup> <<http://www.library.unt.edu/gpo/acir>>. The committee of twenty-six was a mix of federal representatives, senate and house members, governors, state legislators, county officers, mayors, and private citizens (Law No. 86-380/1959, Art. 2) (McDowell 1997).

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development of regulatory policies that have tribal implications” (Law No. 65-218/2000, Arts. 3 and 5). Each federal agency must set up its own process, and “the implementation of such principle is still inconsistent from one agency to another” (Papillon 2012a: note 9).

### FISCAL CONTROL

States or other subnational governments do not have shared rule on the distribution of tax revenues.

### BORROWING CONTROL

States or other subnational governments do not have shared rule on borrowing.

### CONSTITUTIONAL REFORM

The constitution gives states a veto over constitutional amendments. Two-thirds of both houses of Congress and three-quarters of state legislatures are required to ratify an amendment (C 1788, Art. 5; Schram 2002).

Territories did not have a role in reforming their statutes (Law Nos. 339/1900 and 387/1912). Since 1952, the Puerto Rico legislative assembly may propose amendments to its status as an Associated Free State by a two-thirds majority followed by a referendum, but the US congress takes the final decision (C 1952, Art. 6.3). Puerto Rico’s statute can also be changed unilaterally by congress.<sup>β</sup> The statute of Washington DC can be changed unilaterally by congress, and contrary to Puerto Rico, Washington DC cannot initiate a revision of its statute. Puerto Rico scores 1 on bilateral constitutional reform, while the territories of Alaska and Hawaii, the territory of Puerto Rico before 1952, and Washington DC score 0. None play a role in amending the US constitution.

The constitutional relation with Indian tribes is an exclusive competence of Congress (C 1788, Art. 1.8). Only congress can terminate a federally recognized Indian tribe (Law No. 103-454/1994, Art. 103). Indian tribes have two channels through which they can initiate constitutional reform. Since 1978, a tribe can instigate federal recognition through an acknowledgement process administered by the Bureau of Indian Affairs.<sup>59</sup> Moreover, an Indian tribe can change its constitution via a tribal referendum, which the Secretary of the Interior is required to hold on the request of the tribal council or upon a petition signed by at least 30 percent of tribal voters.

A tribal constitution needs approval by the Secretary of the Interior, and tribal constitutions are subject to federal law. Indian tribes have no role in amending the US constitution.

<sup>59</sup> US Department of the Interior <<http://www.bia.gov>>.

## Self-rule in the United States

		Institutional depth	Policy scope	Fiscal autonomy	Borrowing autonomy	Representation		Self-rule
						Assembly	Executive	
States	1950–2010	3	3	4	3	2	2	17
Alaska	1950–1958	2	3	1	1	2	0	9
	1959–2010	3	3	4	3	2	2	17
Hawaii	1950–1958	3	3	4	1	2	0	13
	1959–2010	3	3	4	3	2	2	17
Puerto Rico	1950–1951	1	0	0	0	2	2	5
	1952–2010	2	3	4	2	2	2	15
Indian tribes	1950–2010	2	2	4	1	2	2	13
Washington DC	1950–1973	1	0	0	0	0	0	1
	1974–1994	2	3	4	2	2	2	15
	1995–2000	1	0	0	0	2	1	4
	2001–2010	2	3	4	2	2	2	15
Counties*	1950–2010	2	2	2	2	2	2	12
Counties**	1950–2010	2	2	3	2	2	2	13
Counties MA***	1950–2010	2	1	0	0	2	2	7
Planning regions CT	1972–2010	2	1	0	0	1	2	6

\* Counties in Connecticut (CT) until 1960). Delaware, Florida, New Jersey, and Pennsylvania.

\*\* Counties in Arizona, California, Maryland, Nevada, New York, and Washington.

\*\*\* Including the regional councils of Franklin since 1997 and Hampshire since 1998 in Massachusetts (MA).

## Shared rule in the United States

		Law making						Executive control		Fiscal control		Borrowing control		Constitutional reform		Shared rule
		L1	L2	L3	L4	L5	L6	M	B	M	B	M	B	M	B	
States	1950–2010	0.5	0	0.5	0.5	0	0	0	2	0	0	0	0	4	0	7.5
Alaska	1950–1958	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Hawaii	1950–1958	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Puerto Rico	1950–1951	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	1952–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
Indian tribes	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2
Washington DC	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Counties*	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Counties**	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Counties MA***	1950–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Planning regions CT	1972–2010	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

National legislature has: L1=regional representation; L2=regional government representation; L3=majority regional representation; L4=extensive authority; L5=bilateral regional consultation; L6=veto for individual region. Total for shared rule is either multilateral (M) or bilateral (B).