



January 2015

## “Wolves Have A Constitution:” Continuities in Indigenous Self-Government

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### Recommended Citation

Cornell, S. (2015). “Wolves Have A Constitution:” Continuities in Indigenous Self-Government. *The International Indigenous Policy Journal*, 6(1) . Retrieved from: <https://ir.lib.uwo.ca/iipj/vol6/iss1/8>

**DOI:** 10.18584/iipj.2015.6.1.8

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# “Wolves Have A Constitution:” Continuities in Indigenous Self-Government

## Abstract

This article is about constitutionalism as an Indigenous tradition. The political idea of constitutionalism is the idea that the process of governing is itself *governed* by a set of foundational laws or rules. There is ample evidence that Indigenous nations in North America—and in Australia and New Zealand as well—were in this sense constitutionalists. Customary law, cultural norms, and shared protocols provided well understood guidelines for key aspects of governance by shaping both personal and collective action, the behavior of leaders, decision-making, dispute resolution, and relationships with the human, material, and spirit worlds. Today, many of these nations have governing systems imposed by outsiders. As they move to change these systems, they also are reclaiming their own constitutional traditions.

## Keywords

self-government, governance, constitutionalism, Indigenous nations, tradition, customary law

## Acknowledgments

This article is part of a research project on Indigenous self-determination, governance, and development in the United States, Canada, Australia, and Aotearoa/New Zealand, being carried out by the University of Arizona’s Native Nations Institute in conjunction with international partners. My thanks to Steve Hemming, Miriam Jorgensen, Joe Kalt, Mark McMillan, Regis Pecos, Ian Record, Daryle Rigney, Grant Rigney, Diane Smith, Ron Trospen, Alison Vivian, and Rob Williams for relevant conversations and helpful comments, to Cosima Hay Mcrae for her assistance, and to the Ngarrindjeri Nation for its partnership in this research. Work with the Ngarrindjeri Nation was supported by an Australian Research Council (ARC) grant to the Jumbunna Indigenous House of Learning at the University of Technology, Sydney (UTS). I am indebted to the ARC and UTS for their support of that work.

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## “Wolves Have A Constitution:” Continuities In Indigenous Self-Government

*We were in Australia, four of us, sitting in an Indigenous nation’s rural cultural center, talking with one of the nation’s leaders—an elder—about self-government. The day before, in a meeting with other leaders of the nation, the Elder had noted that their most active decision-making body had a written constitution. He pointed out, however, that this constitution reflected Australian government requirements. If an Indigenous community wants to build an organization that can receive and use government funds, then it must meet the Australian government’s organizational criteria having to do with officers and boards, frequency of meetings, reports, and so forth. In other words, the constitution was an Australian government product. “It’s not our constitution,” the Elder said. “It’s theirs. I want our own constitution. I want a constitution that reflects our values.” Others in the room agreed.*

*Now, the next day, he wanted to talk more about constitutions. He told us that constitutions are important for the successful functioning of human communities. He thought for a moment or two and then said, “You know, wolves have a constitution.” We must have looked mystified. “The wolf pack has rules,” he explained. “Each wolf knows its role and respects the rules. That makes the pack effective. When they follow the rules, the system works.”<sup>1</sup>*

This article is about constitutionalism as an Indigenous tradition. It is occasioned both by the conversation related above and by the recent experience of a colleague. He was talking with managers and elected leaders from some American Indian nations in the Midwestern United States. The topic was governance: how Indigenous nations could reclaim self-government as an Indigenous tradition, right, and contemporary practice. At one point the subject of constitutions came up. Should these nations revise their existing, written constitutions, many of which were products of U.S. government impositions? There was some skepticism in the room about the worth of constitutions. Eventually, one of the skeptics said, “We need to decide whether to be traditional or constitutional.”<sup>2</sup>

The point of this article is that this choice—between being traditional and being constitutional—is unnecessary. The two are not in conflict. I argue—as have others such as Borrows (2002, 2010) and Fletcher (2011), albeit in different terms—that most Indigenous nations, by their own traditions, are constitutionalists. As the comment by the Indigenous Australian Elder suggests, constitutionalism is deeply embedded in long-standing Indigenous understandings of how the world works and should work. My focus is North America, but as suggested at several points in what follows, I believe the argument has wider relevance.

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<sup>1</sup> The late Matt Rigney, Ngarrindjeri elder, in conversation, June 2011; I have used his words and name here with the permission of his sons. On social order and roles in wolf packs, see Mech (1981) and Halfpenny (2003), and on Native American relationships with wolves, Lopez (1978) and Marshall (1995). Richard Nelson (1983) wrote that for the Koyukon people of interior Alaska, “The wolf . . . is the master predator among animals of the north, possessing intelligence and strength, keen senses, and above all the ability to hunt cooperatively” (p. 159).

<sup>2</sup> Related to me by Ian Record, in conversation.

## Constitutionalism

What is a constitution? I'm not talking here about a paper document—what one might call a Constitution with a big “C.” I'm talking instead about the generic meaning of a constitution—think of it as constitution with a small c<sup>3</sup>—as a set of basic principles and rules by which members of a community cooperate, make decisions, engage with each other and the world around them, distribute and exercise authority, and set about trying to get things done. A constitution is a blueprint for collective action.

I assume here that all human societies—at least those that last for very long and that are not completely dominated by an external power—govern. In one way or another, they make binding decisions on their own behalf across the range of matters that have significance to them. In some cases, those decisions may be made in an ad hoc fashion by community members following no consistent guidelines other than their own inclinations or the pressures of the moment. In others, those decisions may be made by dictators or ruling cliques whose authority comes solely from their willingness to use violence to enforce their will. But in many cases, decision-making is guided by broadly understood, fundamental, and more or less stable and predictable rules that specify who is part of the nation or community, what the nation or community values, what its purposes are, who has authority over what, and how various kinds of decisions will be made. This is a constitution. It is a set of guidelines for community decision-making and action, providing what Joseph Kalt (2007) calls an “overall architecture” for governance (p. 79).

These rules or guidelines may be written or unwritten; they may be taught in school or taught by elders, parents, and medicine people; they may be recorded in honored books and documents or deeply embedded in the often unspoken but shared understandings that make up a people's culture; they may be drawn from hard-won experience, given to the people by spirit beings, or invented in response to new needs or conditions that compel new ideas or forms of action. And they may change over time. Regardless of origin, they form a body of norms or laws that fundamentally shape the processes of government.

This is the heart of constitutionalism: The idea that the process of governing is itself *governed* by a set of known, foundational laws or rules. It is the idea that government—the persons and positions that hold decision-making power in various aspects of group life—is limited by those rules; it cannot simply do whatever it wishes. In the constitutional world, government is held to a higher law than itself. That higher law is a constitution, and its existence distinguishes such forms of government from a number of other forms including, for example, absolute monarchies in which royalty need answer only to itself and can do whatever it wants, or dictatorships of force where rulers' willingness and capacity for violence give power to their decisions, allowing them to behave as they please. Constitutionalism refers to the generic idea “that government can /should be limited in its powers and that its authority depends on its observing these limitations” (Waluchow, 2014, Constitutionalism: A minimal and a rich sense section, para. 2). This conception embraces a broad range of phenomena: from “ancient” constitutions based on custom and tradition to contemporary constitutional governments (Tully, 1995). It resonates with Lord Bolingbroke of England's idea, in 1733, that “by constitution we mean . . . that assemblage of laws, institutions and customs . . . according to which the community hath agreed to be governed” (cited in

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<sup>3</sup> My thanks to Duane Champagne and Joseph Kalt, in conversation, for suggesting this distinction.

McIlwain, 1947, p. 1), and it departs from a separate tradition in political thought that limits constitutionalism to those forms of government that include differentiated branches.

Many commentators on constitutionalism assume that this higher law will be written, but there is no reason to think it must be. An unwritten constitution can be as powerful as a written one, and a written one can be ignored as much as an unwritten one. The *Stanford Encyclopedia of Philosophy* entry on constitutionalism states that “long standing social rules and conventions are often clear and precise, as well as more rigid and entrenched than written ones, if only because their elimination, alteration or re-interpretation typically requires widespread changes in traditional attitudes, beliefs and behaviour” (Waluchow, 2014, Writtness section, para. 2). In short, the idea of constitutionalism makes no assumption about form.

The signers of the American Declaration of Independence claimed that what is now the United States of America had a constitution—with a small c—before it produced its written Constitution. Douglas Ginsburg, Chief Judge of the United States Court of Appeals for the District of Columbia circuit, pointed out that the Declaration of Independence, which preceded the US Constitution by more than a decade, complained that the King of England and others had “combined to subject us to a jurisdiction foreign to our constitution . . .” (cited in Ginsburg, 2002-2003, p. 7). There was no written US constitution at the time, nor even a United States. This statement, said Ginsburg (2002-2003), used the word constitution “in its underlying sense, as referring to the natural structure of a thing” (p. 7). The Declaration asserted the existence of such a structure—a shared understanding of what was appropriate and just—that England had violated.

Even a written Constitution may not fully capture that shared understanding; it may be only a partial constitution. Akhil Amar (2012) has argued recently that behind the US Constitution lies an unwritten constitution, composed of principles and norms, that has compelling force in judicial and other decisions, indicating “how various rights are embodied in citizens’ daily rhythms and embedded in powerful customs” (p. 97). In effect, he argues that there is a constitution as well as a Constitution, and both have to be taken into account in understanding the foundations of US government and law.

The fact that a constitution represents a higher law is not to award it any particular moral value. By higher, all I mean is that it has a higher standing than either decision-makers or their decisions. But constitutions, written or unwritten, may be good or bad, effective or ineffective at achieving the goals of the society they govern.

Critically, however, constitutionalism includes the idea that this higher law embodied in a constitution—written or unwritten—has real power. It shapes how government behaves and what government does. Not all constitutions—neither the little “c” nor big “C” kind—necessarily have such power. A constitution compels compliance not through force but through the perhaps unspoken agreement—the cultural understandings—of those who live and act under its provisions. We might create a constitution—an agreed upon set of rules by which we will operate—that those in positions of power then choose to ignore and make meaningless: a rejection not only of the constitution but of constitutionalism, a claim that the decision-makers are above the rules. Referring to work by Brown and Amit (1995), who describe Egypt’s modern history of numerous Constitutions, each successively abandoned, modified, or suppressed by sitting or insurgent governments, Franklin and Baun (1995)

argued that some countries are “rich in constitutions yet poor in constitutionalism” (p. 221). Another scholar points out that some Constitutions are “nominal, sham, fictive, or façade constitutions” (Hemberger, 1993, p. 190). Their effects on those who govern are negligible. In such cases there may be a Constitution, but there is little commitment behind it.

By constitutionalism, then, I mean not only the idea but also the fact: not only the idea that there is a higher law that governs government but the practical realization of that idea in how a nation, people, or community actually governs itself. Constitutionalism refers not to the existence of a particular kind of constitution but to its effect: the subjection of government to some set of laws or principles that limit its freedom to do as it pleases.

### **An Indigenous Constitutional Tradition**

Were the Indigenous peoples of North America constitutionalists? Ample evidence indicates that they were, but we should begin with a prior question: did they *govern*? This may seem an unnecessary inquiry. Prior to European invasion, Indigenous peoples had survived as coherent, sustained, identifiable collectives over multiple generations. That in itself is evidence of organized and sustained cooperation among persons—that is, of effective governance. Most also exhibited more or less formally organized authority structures—governments—that distributed decision-making responsibilities and processes across activities and persons (Cornell, Curtis, & Jorgensen, 2004). The primary exception is perhaps some Arctic peoples who engaged in sustained collaborative activity and depended on each other for survival in a harsh environment but had little in the way of institutionalized authority structures, being characterized by what Brody (1987) described as egalitarian individualism. But even they had shared rules and obligations, described by Borrows (2010) in the Inuit case as “legal traditions.”

Nonetheless, many early European invaders of North America had their doubts. Despite repeated encounters with the outcomes of Indigenous governance—in trade relations, diplomacy, warfare, treaty-making, and other activities that were manifestations of various forms of collective decision-making—early Europeans often concluded that the continent’s Indigenous peoples had no governments, or at least no governments that they could recognize as such. The forms and processes of Indigenous governance were unfamiliar—often invisible—to newcomers from the continent of kings and queens.

So Indigenous nations governed, but the more interesting question is: Did they have constitutions? In the sense of written documents, no, but in the sense of a body of principles or values or law that gives stable shape to a polity, consistently organizes or shapes the processes of governing, recognizes a distribution of rights and duties, and to which all persons are subject, including those holding governmental authority, the answer in most cases is almost certainly yes. As far as we can tell, the organization and exercise of authority typically rested on a body of law, unwritten but known, shared, and transmitted orally from generation to generation, that ordered processes of decision-making and both individual and collective action. That law might have had diverse roots, from group deliberations to

spirit teachings to the accretions of long experience. But whether we call it law or lore, political culture or a constitution, it had the power to shape the behavior of leaders and other citizens.<sup>4</sup>

There are numerous examples of such law. Thomas Tso (2005), first chief justice of the Navajo Nation Supreme Court, has written:

When people live in groups or communities, they develop rules or guidelines by which the affairs of the group may proceed in an orderly fashion and the peace and harmony of the group may be maintained. This is true for the Navajos. (p. 30)

Another Navajo jurist, Raymond Austin (2009), who served for more than 15 years as a justice of the same court, provides a relevant account of the origin of some of these guidelines in his partial summary of Navajo creation narratives. After creating the Diné (the Navajo),

The Holy Beings then established several foundational laws for the Diné, including those on language, natural environment, spirituality, kinship, and knowledge, to ensure their perpetual growth and prosperity in all their humanity and guide them on maintaining right relations with all their relatives (all “beings”) in creation. (p. xvii)

He goes on to quote from the 1990 decision of the Navajo Nation Supreme Court in *Bennett v. Navajo Board of Election Supervisors*, in which the Court wrote:

The Navajo word for “law” is *beehaz’aanii* [which] actually refers to higher law. It means something which is “way at the top;” something written in stone so to speak; something which is absolutely there; and something like the Anglo concept of natural law. In other words, Navajos believe in a higher law, and as it is expressed in Navajo, there is a concept similar to the idea of unwritten constitutional law. (cited in Austin, 2009, p. 40; for original source see *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. Rptr. 319, 324 (Nav. Sup. Ct. 1990))

“Traditional Navajos,” wrote Austin (2009), have an understanding of these foundational principles or law “as values, norms, customs, and traditions that are transmitted orally across generations and which produce and maintain right relations, right relationships, and desirable outcomes in Navajo society” (p. 40).

These kinds of understandings, regardless of the group involved, may vary and may change over time, and consequently may be the subject of internal discussion and debate, even as they are put to use. Richland (2008) provides an excellent example of this in his exploration of how Hopi custom and tradition are interpreted, argued over, and invoked in legal proceedings of the contemporary Hopi tribal court.

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<sup>4</sup>For an extended discussion, see Borrows (2010), especially chapters 2 and 3. A cogent early discussion of this idea in regard to property is Hallowell (1943). Ronald Trosper has reminded me of Pierre Clastres’s argument that power in these societies was commonly non-coercive; it rested on the consent, in effect, of the governed. Clastres (1977) wrote, “it is society as such—the real locus of power—that exercises its authority over the chief” (p. 175).

Such rules or prescriptions for a good life typically included expressions of both value and process, indicating what matters to the people and how such things are to be protected or sustained: in short, the outlines of a system of governance. Thus, long before Europeans appeared in their lands, the Iroquois Confederacy, the Haudenosaunee, an alliance of five nations and then later six nations living around the eastern Great Lakes and portions of today's Pennsylvania, New York, Ontario, and Quebec, had an elaborate, multi-level political system that operated according to guidelines given in the Great Law of Peace, itself recorded in wampum belts. These guidelines had real power, specifying distributions of authority among the member nations and citizens, how leaders would be selected and dismissed, and procedures for decision-making, all organized in the service of security and peace among the member nations.<sup>5</sup>

Later, when the Iroquois and other nations of the Woodlands region entered into agreements with Europeans, their actions, according to Rob Williams (1997), were fundamentally constitutional. Drawing on Jennings's (1984) description of a constitution as "a whole body of traditions, customs, and practices basic to the polity" (p. 368), Williams (1997) pointed out that "a treaty required treaty partners to acknowledge their shared humanity and to act upon a set of constitutional values reflecting the unity of interests generated by their agreement" (p. 99). A typical treaty both reflected an understanding of how nations might lawfully interact with each other and put in place rules intended to govern certain subsequent actions of the participating governments.

Prior to warfare with Euro-Americans and eventual confinement on reserved lands, the Lakota people had a governing system that combined fluidity—individuals and families who were dissatisfied with how things were done could leave one group or camp and either start their own or join another—with clear lines of authority, for example, vesting certain decision-making powers in chiefs and councils and enforcement powers in warriors or marshals. There were clear expectations of how chiefs, marshals, and ordinary citizens should behave; those who could not or would not subscribe to the accepted rules could "vote with their feet" (Biolsi 1992, p. 36; see also Demallie, 1971; Wissler, 1912).

In a discussion of both historical and contemporary Wet'suet'en governance in what is now British Columbia, Antonia Mills (1994) wrote,

The Witsuwit'en often talk about their law. They speak of it as the principles which govern not only human relations but the relations of humans to the land, to animals, and to the spirit world which sustains them all. The expression the Witsuwit'en use most commonly for law is *yinkadinii' ha ba aten* ("the ways of the people on the surface of the earth") . . . The principles of Witsuwit'en law define both how the people own and use the surface of the earth when they are dispersed on the territories and how they govern themselves and settle disputes when they are gathered together in the feast . . . (p. 141)

As the above examples suggest, such systems not only organized collective action and the processes of government; they also shaped personal behavior. Pilsk, Record, and Cassa (2007) argued that Western

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<sup>5</sup> For a translation of the Great Law of Peace, see "The Constitution of the Iroquois Nations" (n.d.). See also Wallace (1969, pp. 39-44) and Borrows (2010, pp. 72-77) for some summary discussions. Bradley (1987, chapter 5) explored some of the changes the Iroquois made in their political organization and practice as the world around them changed in the mid-17<sup>th</sup> century.



Apache governance was in part an “*ecocracy* . . . a society governed by the laws and powers of the natural world” (p. 2). They go on to say,

Western Apache ecocracy was, in every sense, a basic form of common law. It demanded of its adherents not only close personal engagement with and a comprehensive understanding of the natural world, but the ability and willingness to make decisions based on a stringent complex of environmentally sound rules. For example, rigid rules governing hunting, such as prohibitions on hunting deer during times that might jeopardize reproduction, ensured the sustainability of the game upon which the people relied. (p. 2)

Ronald Trosper (2002, 2003) makes a still more comprehensive argument that the multi-millennial cultural resilience of Indigenous nations in the Pacific Northwest of North America was dependent on sets of Indigenously generated “rules” governing such things as territoriality, exchange, and the behavior of leaders. These rules in turn supported accountability, organized collective action, and facilitated sustainability in the face of ecosystem change—in short, a governing system of understood and enforceable law (see also Trosper, 2009, pp. 163-168).

Such systems of law were not only a North American phenomenon. In what is now South Australia, the Ngarrindjeri people were divided into a number of subgroups known as lakalinyeri, each with a distinct territory around the lower lakes of the Murray River region. Each lakalinyeri had its own chosen council, called a Tendi, which served as a governing body when needed, addressing issues affecting the group and providing justice in disputes. The Tendi in turn selected a leader, called a Rupelli. The Tendi could establish laws governing the actions of the people. When needed, a grand Tendi representing all the lakalinyeri met to consider issues affecting the nation as a whole. Many of the core values and principles of Ngarrindjeri life were given to the Ngarrindjeri by Ngurunderi, “our Spiritual Ancestor,” who long ago roamed through the region, giving each lakalinyeri its identity and teaching the people how to live in their lands and waters and with each other, giving them the “Traditional Laws” they must follow, laws that supersede the rights and authorities of those who sit in positions of power (Ngarrindjeri Nation, 2006, p. 8; see also Bell, 2014).<sup>6</sup>

Anthropologist Fred Myers (1991) writing about the Pintupi people of the western desert of Australia, says that

As the Pintupi see it . . . consensus is maintained by common adherence to a shared, external, and autonomous code: the Dreaming. What they call “the Law” is not something made by humans. Not the creation of any person or group, the Law is outside human control and cannot be a vehicle of any private interests or selfish pursuits . . . All submit . . . to the same transcendental moral imperative . . . (p. 125)

Prior to the European colonization of Aotearoa (New Zealand), much of Māori life was organized by collectively recognized values and practices that Hirini Moko Mead (2003), using the term *tikanga* Māori, described as, among other things, a system of social control. “‘Tika’ means ‘to be right’ and thus *tikanga* Māori focuses on the correct way of doing something. This involves moral judgements about

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<sup>6</sup> Thanks also to Daryle Rigney, Grant Rigney, the late Matt Rigney, Steve Hemming, the late Tom Trevor, and Clyde Rigney for illuminating conversations about the Ngarrindjeri system.

appropriate ways of behaving and acting in everyday life” (p. 6). Tikanga Māori, Mead (2003) wrote, “controls interpersonal relationships, provides ways for groups to meet and interact, and even determines how individuals identify themselves” (p. 5).

Mead described tikanga Māori as fundamentally a normative system that can be viewed as a system of customary law. According to Eddie Durie (1994), Chair of the Waitangi Tribunal, “Maori norms were sufficiently regular to constitute law, in this context a social norm being defined as legal if its application or neglect provoked a predictable response” (p. 4). Writing about Māori social organization and the descent-based social units called hapū, Angela Ballara (1998) added that “the course of action of their chiefs, which usually bound the members of the hapū, were chosen according to a code of customary behavior or understood rules for any set of circumstances” (p. 192). Durie (1994) emphasized that such codes were not rigid, had some flexibility, varied to some degree across Māori groups, and doubtless changed across time and circumstance.<sup>7</sup> Nonetheless, they can be seen as having constitutional standing in the sense that they carried a recognized authority that was typically greater than that of any person or office.

Stories have often been the vehicles by which the law, rules, or moral order of the society are communicated across space and time, from community to community and generation to generation. For example, according to Richard Nelson (1983), stories told by the Koyukon people of the interior of Alaska “provide an extensive code of proper behavior toward the environment and its resources. They contain many episodes showing that certain kinds of actions toward nature can have bad consequences, and these are taken as guidelines to follow today. Stories therefore serve as a medium for instructing young people in the traditional code as an infallible standard of conduct for everyone” (p. 18). He goes on to say that “the environment is like a second society in which people live, governed by elaborate rules of behavior and etiquette, capable of rewarding those who follow these rules and punishing those who do not” (pp. 225-226; see also Borrows, 2010).

In the Indigenous world, by such accounts, both people and animals have freedom of choice—they may do as they please—but there is a higher law to which, by virtue of their citizenship in a particular community, they are obligated. Choosing to ignore that law can be risky. In his narrative of the 1997 hunt for an Amur tiger that had killed two men in the forest of remote southeastern Russia, John Vaillant (2010) refers to an ancient view held by the Indigenous peoples of the region—the Nanai and Udeghe peoples—who had long lived with tigers: “It was believed . . . that if you killed a tiger without just cause, you in turn would be killed. Likewise, if a tiger were to kill and eat a human, it would be hunted by its own kind. Both acts were considered taboo and, once these invisible boundaries had been crossed, it was all but impossible to cross back. There was an understanding in the forest then—an order” (p. 31).

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<sup>7</sup> Wrote Durie (1994/2013), “. . . while custom was posited as finite law that had always existed, Maori customary policy was in fact pragmatic and able to adapt, but change was effected with adherence to fundamental principles and beliefs” (p. 10). Durie argued that custom was not “rule-like” insofar as rules are rigid while custom, as he describes it, could be interpreted “according to circumstances” and changed “without institutional intervention” (p. 4). My own use of the term “rule” is not intended to suggest rigidity but instead to acknowledge prescription: collectively acknowledged, prescribed ways of doing things. Departure from such prescription, while certainly possible, is not done lightly and typically requires justification.

Russian colonization disrupted that order, upsetting the constitutional basis of Nanai and Udeghe relations with the natural world. This has been one of the heavy costs of colonialism: the disruption or suppression of the constitutional foundations of Indigenous societies and their relationships with the world around them.

These foundations may be general or specific: as general as the instruction to treat various classes of persons, places, or spirits with exceptional respect or as specific as the elaboration of complex rules for how certain decisions should be made. In other words, they may range from core values and interpretive schemes to details of governmental, economic, or ceremonial practice. To be a member or a leader of the group was to accept responsibility for observing such rules and enacting them in daily life.

Constitutions, in this fundamental sense, are not “Western” or colonial creations. They are the work of human communities of many kinds attempting to create stable polities and find effective ways of organizing themselves to achieve the things they value. Indigenous peoples, like others, engaged in just such work. They were accustomed to the idea of a basic set of rules indicating values, responsibilities, obligations, and protocols that, if followed, were keys to a good life.

### **The Contemporary Relevance of Indigenous Constitutionalism**

I have called this Indigenous constitutionalism: the self-imposed subjection of Indigenous government, leadership, and citizens to an overarching set of laws, rules, or principles—a constitution—to which they are accountable and that limits and shapes what they do. But what relevance does this constitutional tradition have today?

Across North America Native nations are engaged in a sustained effort to regain self-governing power over their lands, communities, and affairs. In the process, they face the organizational legacies of colonialism, in particular the institutional mechanisms or tools set up by central governments—the tribal governing systems established under the Indian Reorganization Act of 1934 in the United States and, in Canada, the governing structures imposed on First Nations by the Indian Act of 1876 and its subsequent amendments. For the most part, the governments set up under these legislative provisions were not (and are not) Indigenous creations but Western impositions that reflect Western expectations, needs, and convenience. Many depart not only from the values and organizational principles that underlay their Indigenous predecessors but from contemporary ideas within Indigenous communities about how authority should be organized and exercised. In a series of papers on Indigenous governance and development, Cornell and Kalt (1995, 1997, 2000) have pointed out that these governments are often characterized by organizational weaknesses and, in addition, a potentially crippling legitimacy problem: Their provenance means that Indigenous populations often do not see such governments as truly theirs. Therefore, those populations fail to support those governments.<sup>8</sup>

In his critique of tribal governments in the US, Duane Champagne (2006, 2007) explored these and related issues. He noted that while many Indigenous governments historically involved high levels of local or subgroup autonomy, the creation of these new governments usually involved centralization. Such power as they had usually was vested in a central set of structures such as a council or other quasi-

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<sup>8</sup> Janet Hunt and Diane Smith found a similar problem with externally designed or imposed governing systems—such as they are—among Indigenous communities in Australia (Hunt & Smith, 2006; Smith, 2008).

legislative body, itself often unprecedented in that particular people's history. Individual members of that new body might have accountability to citizens via elections, but the body as a whole is seldom accountable to the social or political units that traditionally had exercised authority in local matters, or to the principles or values that governed earlier, Indigenous forms of government.

At the same time, older organizational structures may have to change in the face of contemporary circumstances. Champagne (2006) pointed out that

Native communities in the United States, like all contemporary governments, are confronted with globalized markets, politics, and culture . . . If Native peoples are going to assert their nationalities and maintain their cultures they will need to have strong leadership and government organization capable of representing and defending their interests at local, state, and national government levels. Furthermore, Native peoples will need to develop a degree of economic development capable of supporting their assertions of sovereignty and self-government while loosening their dependence on federal funds and administration. (p. 11)

He goes on to say, "many tribal governments lack checks and balances, cultural and institutional support from their communities, active executive powers and leadership, and general administrative capability" (p. 21), hindering their capacity to adequately serve their peoples in contemporary times.

Governments established under the Indian Act in Canada suffer from similar shortcomings. They, too, represent outsiders' ideas of how Indigenous peoples should govern themselves. Furthermore, while the original 1876 legislation has been modified since its original passage, its ideas come from another time. Frances Abele (2007) described the Indian Act as "a legislative fossil" that:

. . . reflects administrative and organizational practices that were characteristic of public institutions in the early and mid-twentieth century, but that have been modified and superseded in other governments. The Act relies upon regulation, top-down authorities, fiscal control, and enforcement. Today most Canadian governments and other organizations rely upon collegial decision-making and policy development, policy research, human resource development, management accounting systems, and citizen engagement. The Indian Act does not mention these things, and the basic provisions do not leave much room for them. (p. 3)

John Borrows (2008) offered a more fundamental critique. The Federal Government of Canada, he wrote,

Benefits from legislating over Indians because it allows them to set the parameters of our lives. The Indian Act makes it easier to control us: where we live, how we choose leaders, how we live under those leaders, how we learn, how we trade, and what happens to our possessions and relations when we die. (p. 5)

One result of these issues is a radical discontinuity, in many Indigenous nations, between the written constitutions under which, supposedly, they govern and what Rob Williams (personal communication) calls "the 'real' constitution, unwritten but grounded in customs, norms, and traditions; that is, the 'way we've always done things around here,' that's still alive although significantly suppressed until certain types of 'troubles' or conflicts show that it's the constitution that everyone pays attention to."

Driven by such discontinuities and the inadequacies of imposed governing structures, and building on long-standing Indigenous traditions of adaptation and innovation, a growing number of Indigenous nations in North America are experimenting with alternatives to those structures, with or without central government sanction. Over the last few decades a wave of creativity has been moving through Native North America, much of it in the form of constitution-making or reform or other kinds of institutional development. Native nations are variously turning to these still surviving—if often fragmented or suppressed—normative systems or “real” constitutions, resuscitating past practices, inventing new ones, borrowing ideas and models from each other, or even adopting non-Native structures in search of governing systems and strategies that can protect the things they care about while engaging productively with the world around them and addressing the contemporary challenges they face. Success in these efforts has come not from the adoption of any one-size-fits-all institutional structure or strategy but through the revitalization, discovery, and creation of diverse solutions.

For example, the Ktunaxa Nation in southeastern British Columbia is using the British Columbia treaty process to reorganize its governing system, linking four Ktunaxa bands that had been treated by Canada as separate First Nations and specifying the division of authority between the Nation as a whole and its constituent communities. In effect, the Ktunaxa are reconstituting themselves, replacing the fragmented administrative structure that Canada put in place with their own conception of who they are and how they should organize to pursue a Ktunaxa vision of the future. According to the Nation, its elders “often refer to the past hundred and fifty or so years as a time when the Nation ‘went to sleep’ . . . The process of building a modern Ktunaxa government is likened to ‘waking up’ . . .” (Ktunaxa History Timeline, n.d., pp. 25-26; see also Dolan, 2009). In 2007, the White Earth Nation in Minnesota launched a constitutional process; its stated goal: “the creation of a constitution for the White Earth Nation that would enact Anishinaabe values and envision a perpetual future as well as create an effective governance structure . . .” (Janis & Doerfler, 2013, para. 3). Over the next couple of years, the Nation held four constitutional conventions, all open to the public, with delegates from each White Earth community engaged in intensive discussions on major governance issues. Delegates eventually ratified a draft constitution that the Nation put to a vote in 2013; White Earth citizens overwhelmingly approved it (Janis & Doerfler, 2013; see also Vizenor & Doerfler, 2012). There are numerous other examples of North American nations replacing current governing structures with Indigenously generated alternatives that variously mix old and new (see, for example, Alcantara & Whitfield, 2010; Cornell, 2013; Cornell, Jorgensen, & Kalt, 2013; Dennison, 2012; Jorgensen, 2007; Kalt, 2007; Lemont, 2006; National Centre for First Nations Governance, 2009; and, for numerous examples of actual constitutional provisions, Tatum, Jorgensen, Guss, & Deer, 2014).

Similar efforts are happening elsewhere. In both Aotearoa (New Zealand) (Cant, 2005; Durie, 2012; Goodall, 2005; Hill, 2009; O’Regan, 2001; Wetere, 1999) and Australia (Barcham, 2008, 2011; Hemming & Rigney, 2008; Hunt, Garling, & Sanders, 2008; Hunt & Smith, 2006; Maddison & Brigg, 2011; Vivian, 2014), Indigenous peoples are attempting to organize governing structures capable of the effective pursuit of their own political, social, and economic goals. Among the challenges some of these efforts face is persuading central government to recognize Indigenous groups as collective political actors, to treat Indigenously generated or determined governing structures as legitimate, and to grant to those structures enough jurisdiction so that the communities they serve have real power.

Particularly in Australia, Indigenous efforts proceed under conditions that are significantly more hostile to substantive Indigenous self-government and jurisdiction (as opposed to Indigenous self-administration or self-management) than those in North America. But this has not stopped some nations from pursuing their own approaches to governmental tasks. In Australia, for example, the Ngarrindjeri Nation, whose pre-invasion governmental structure I referenced above, has developed “a Ngarrindjeri strategy for survival and positive transformation, with governance, caring for Country, and economic development at its centre” (Hemming, Rigney, & Berg, 2011, p. 99). That strategy includes a carefully worked out set of governmental initiatives designed—despite the constraints imposed by the dominant system—to expand Ngarrindjeri control over lands and other matters of essential value to them. In a sense, it seeks recognition as a result of the capable exercise of governmental power and practice, not governmental power as a result of recognition. In effect, the Ngarrindjeri are attempting a version of Paul Chartrand’s (2009) idea that Indigenous practices can crystallize into rights. In this case, capable Indigenous governmental action may lead eventually to outsiders’ at least implicit recognition of Ngarrindjeri governmental authority.<sup>9</sup>

What has all this to do with constitutionalism? As they search for new systems of governance and new governing tools, Indigenous nations are faced with fundamental, constitutional questions: What is the nation? What does it value? What is it trying to protect? What kind of future is it trying to create? What kinds of relationships does it wish to foster among its citizens, with its neighbors, with other governments, and with the natural and spirit worlds? And what kinds of governing tools—structures, systems, laws, processes—will such visions, priorities, and concerns require? Answering these sorts of questions requires constitutional thinking: What do we expect our governors to protect, sustain, and exemplify, and how do we make that happen? How do we constitute ourselves as an effective polity in contemporary times?

The results vary. Some contemporary American Indian nations have no written constitutions yet have built contemporary records of robust, innovative, and effective self-government. As a leader of one such nation argued, his nation has a constitution; it exists not on paper but in the heads and hearts of the people, learned from parents and elders and from living in a community that shares a common understanding of how things should be done.<sup>10</sup> Other nations have written constitutions, but they vary as well: Some express long-standing Indigenous governance traditions while others adopt what are generally viewed as Western ideas or structures. And, as one should expect, some constitutions work better than others, reflecting both inherent design issues as well as matters of provenance: rules that are freely chosen—even if borrowed—generally work better than rules that are imposed from outside. Constitutions gain strength through the free consent of the governed.

To think constitutionally is not the same thing as writing a constitution. It is a search for that set of core values, governing principles, and processes of government that are both an expression of the nation’s will and a means of achieving its vision. Whether the nation chooses to write its answers down is a separate question that has less to do with whether the nation has a constitution than with how it wants to communicate that constitution to its own people, to future generations of its citizens, and to outsiders. The Hereditary Chiefs of the Gitanyow Nation in British Columbia govern traditional Gitanyow lands

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<sup>9</sup> My thanks to Rob Williams, in conversation, for bringing Professor Chartrand’s concept to my attention.

<sup>10</sup> Personal communication.

according to long-standing practices embedded largely in kinship structures. As a result of Gitanyow involvement in the British Columbia treaty process and partly to help outsiders understand their governing system, the Hereditary Chiefs eventually decided to write down their constitution, which had been functioning effectively in unwritten form for generations (Peeling, 2004).

The writing may be important for other reasons as well. Especially where the nation's population is geographically and culturally diverse and where the ways of the people are no longer easy to transmit by traditional means, a written constitution can provide citizens with a critical reference point, a map of meanings and methods on the road to self-determination. But it is the thinking, not the writing, that counts.

### **Policy Implications**

There are implications for policy-makers at both central government and Native nation levels. One lesson for central governments is that many Indigenous nations have governance traditions of their own that are ancient, deeply rooted, and fundamentally constitutional. Many produced, in their original contexts, highly successful governments. Those traditions do not necessarily provide all the answers to today's Indigenous governance challenges, but policies that simply reject such traditions or insist on Western replacements invite rejection in turn, for those who wish to govern themselves typically want to choose the tools for the job. The choices made are important, but so are the freedom and ability to choose. As Diane Smith (2004) has written, the legitimacy of Indigenous governance solutions depends substantially on "a process of Indigenous choice" (p. 29). On the other hand, policies that not only recognize Indigenous aspirations for self-governing power but encourage Indigenous efforts to build capable governments that express Indigenous values and purposes are more likely, in turn, to win Indigenous support. In the effort to address long-standing grievances and difficult socioeconomic problems, such support will be crucial; the record of top-down policy-making designed to improve the welfare of Indigenous peoples is largely a record of failure.

Indigenous communities also have to pay attention to process. How constitutions are made or reformed is nearly as important as the constitution itself. The "how" will surely vary, reflecting both the contemporary circumstances and the distinctive cultures of the nations involved, but there are some critical considerations. Written or not, if it is to survive as an effective instrument of genuine self-government, a constitution has to have broad support. This argues for extensive community participation in constitutional processes, as time consuming as those may be. Clarity of purpose matters as well: A constitution is an instrument for realizing the collective will of a people. The task, therefore, is to figure out what forms of governance are likely not only to have legitimacy with the community but to be capable of effective pursuit of community goals in contemporary times. Miriam Jorgensen has argued that the relevant question for Indigenous constitution-makers is not "how did we govern ourselves 150 years ago?" but "how would we have changed our governing system over the last 150 years if we had been free to change it to meet the new circumstances we have experienced?"<sup>11</sup> Adequately answering such a question may take time; getting it right the first time around is by no means easy, particularly for nations or communities that have been denied decision-making power for generations. But this is part of

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<sup>11</sup> This is a paraphrase based on several conversations, but see Jorgensen (2014).

what self-determination means: Indigenous nations deciding for themselves how to govern, and learning as they go.

Both deciding and learning are happening now as more and more Indigenous peoples in North America and beyond not only assume self-governing power but address the task of forging capable governing systems in which core values, principles, and governing mechanisms guide leadership, decision-making, and collective action. In the process, many of them are continuing—in new forms for new times—their own constitutional traditions. For them, to be traditional is to be constitutional: to subject themselves to a set of rules designed to lead to a good life.

This, indeed, may be the tradition that matters most. The point is not so much the specific governmental arrangements that generations ago guided the nation in response to the circumstances of the time. What matters instead is the constitutional tradition itself, embedded in the histories of Indigenous peoples—the idea that effective self-government depends on a set of foundational, Indigenously generated principles and prescriptions that tell both governors and citizens how to make decisions and what to value and protect in the process. That is an Indigenous tradition with both relevance and power today.



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