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The Deployment of the Terms *Indigenous*, *Aboriginal*, and *Indian(s)* in the Texts of International Constitutions

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Abstract

Indigenous societies around the world are stepping forward to assert their place as an equal partner in their nation's future. In many cases, these efforts have been undertaken in response to the development and the 2007 publication of the Declaration of the Rights of Indigenous Peoples, as endorsed by the United Nations Working Group on Indigenous Populations. Governments also have begun to reconsider their stance on the associated issues. The digital texts of 189 international constitutions – as offered by the *Constitute* Web site – were examined for occurrences of the four tokens *indigenous*, *aboriginal*, and *Indian* or *Indians* to yield country indices. Documents from forty countries were found to contain the term *indigenous* and seven possessed *aboriginal* (N uses = 320 and 19, respectively). The more familiar token *Indian*, or its plural, occurred 88 times in ten of these political affirmations.

> "We are not myths of the past, ruins in the jungle, or zoos. We are people and we want to be respected, not to be victims of intolerance and racism." – Rigoberta Menchú Tum

Article 161A of the *Constitution of Malaysia* directly concerns the legal status of the inhabitants of the States of Sabah and Sarawak, those residents of the two bordering areas in northern Borneo where the latter surrounds the Nation of Brunei. Within this Article, the definition in Clause 6 of the term *native* is applied in different manners to the occupants of these two regions:

- a) "in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as *indigenous* to the State or is of mixed blood deriving exclusively from those races; and
- b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race *indigenous* to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth."

Clause 7 declared that "[t]he races to be treated for the purposes of the definition of 'native' in Clause (6) as *indigenous* to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabit, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits" (see Zakaria, 1995, pp. 99-100; emphasis added).[1]

Western observers would most likely be hard pressed to recognize beyond the *Malays* any of these named entities, yet the very creation in September 1963 of this national statement pinpoints the exact opportunity and – more so, the inherent responsibility – to declare a portion of Malaysia's composition. The identification of those ethnic groups is a far cry from the almost lackadaisical approach that the United States took when it declared administrative control over its own indigenous peoples by specifying that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states, and *with the Indian tribes*" (*The Constitution of the United States of America: Analysis and Interpretation*, 2004, p. 168; emphasis added). Half a decade after that Malaysian stance was added to its constitution, President Lyndon Johnson's *The Forgotten American* speech in 1968 only began to advocate for diverting the United States away from a policy of tribal termination of, and towards one of self-determination for, these unique original nations. He claimed that the federal government had observed "a new concept of community development – a concept based on self-help – work successfully among Indians" (Johnson, 1968, p. 440), even though the President also admitted that the American Indian "has been an alien in his own land" (p. 438). In the meantime, and within the Malaysian identity, those nearly thirty enumerated subpopulations were understood as important fundamental contributors to the social fabric of the Borneo State of Sarawak, in a way that the Inuit of Canada would similarly announce, in their own language, that they are *the people* of the Arctic (Damas, 1984, p. 7). Yet in many other locales in the twenty-first century's universe of political affairs, the world's indigenous peoples are still at risk. The 1992 Guatemalan Nobel Peace Prize winner of Mayan descent, Rigoberta Menchú Tum , is just one native citizen driven to acquire basic human rights for, and to overcome governmental abuse of, indigenous peoples.

In part, the international scope of this difficulty has been hindered by the absence of an exact definition of the term *indigenous*. The United Nations Working Group on Indigenous Populations , after many years of contemplation, formulated the Declaration of the Rights of Indigenous Peoples upon the assertion that "[i]ndigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems" (Study of the problem of discrimination against indigenous populations, 1987, paragraph 379, p. 29).[2] The absence of a consistent definition for what an *indigenous* group may comprise is confounded by the United Nations' own declaration in August 2013 that "[w]ith more than 5,000 distinct indigenous groups in some 90 countries, indigenous people make up more than 5 per cent of the world's population, representing 370 million people."[3] The organization also "urged governments to honour the treaties and agreements established with their indigenous groups, stressing that respecting official policies is the only way to maintain peace and advance development" (UN stresses importance of honouring treaties between states and indigenous groups, 2013).

It is precisely the *pre-invasion* and *pre-colonial* attributes that frequently separate a nation's older native societies from its present and much broader foreign infiltration. The massive multi-national emigration to the United States during the nineteenth and twentieth centuries, for example, swamped any semblance of sustained federal recognition of the sovereignty of virtually every American Indian tribe. The waffling among the four policies of tribal extermination, assimilation, termination, and self-determination in the century preceding Johnson's *Forgotten American* proposal reflected the utter absence of a *coherent* Indian Affairs program in the United States.

The terms *indigenous*, *aboriginal*, and *Indian(s)*

The Declaration of the Rights of Indigenous Peoples employed the term *indigenous* to identify this selected component of a population in the most comprehensive and inclusive sense: "indigenous communities, peoples and nations." It is pertinent that *The Oxford English Dictionary* (1989b, p. 867; emphasis added) indicates that the term may be used to denote "born or produced naturally in a land or region; native or belonging naturally to (the soil, region, etc.). (Used primarily of *aboriginal* inhabitants or natural products)." As one demonstration of an earlier evocation of the word, Article 2 of the 1917 *Political Constitution of the United Mexican States* professed that "[t]he Nation has a multicultural composition *which has its roots in its indigenous peoples*, comprising those who have descended from the people who inhabited the present territory of the country at the beginning of the colonization and who have preserved at least partially their own social, economic, cultural, and political institutions" (see Wolfrum and Grote, 2008, p. 1; emphasis added). This statement – including the collective noun *indigenous peoples* and the phrase *comprising those who have descended from the people who inhabited the present territory of the country at the beginning of the colonization* – was a precursor to the subsequent, yet parallel, proposed parameters of the Declaration of the Rights of Indigenous Peoples.

The cross-linkage between *indigenous* and *aboriginal* is similarly echoed in the definition of the latter in the *Dictionary*: "First or earliest so far as history or science gives record; primitive; strictly native, *indigenous*. Used both of the races and natural features of various lands" (1989a, p. 35; emphasis added). In the literature, the capitalized form *Aboriginal* has been used to identify the original inhabitants of Australia. Withnell (1901, p. iii) forewarned over a century ago of the demise of these natives of northwestern Australia by remarking that "[s]ince the discovery of gold and the consequential influx of population… it is only a matter of time when they will become extinct." Further, *aboriginal* has been used to pinpoint a select contingent of citizens within Canada. Section 35 of the *Constitution Act of 1982* acknowledged that "In this Act, '*aboriginal* peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada" (see Inter-University Associates, 1999, p. 69; McCabe, 2010, pp. 120-142 for more on §35; and *Aboriginal Law Handbook*, 2012, pp. 6-8; emphasis added).[4] Thus, there is evidence that the two tokens *indigenous* and *aboriginal* have been used over time by governments to recognize specific constituents of their population for consideration within their constitutions. In this simple example of the fundamental documents of Mexico and Canada, contrasts may be conducted between the usages of the terms to learn more about the perspectives of these nations upon their own compositions. Expanding the search for these two terms to a more complete international examination would offer a truly comprehensive viewpoint of the ways that these collectives have been considered.[5]

During the early years of the United States, the use of *indigenous* and *aboriginal* in official government documents was almost nonexistent. A search of the *Readex* digital *American State Papers*, covering the interval of the first to the twenty-fifth Congress over the years 1789 through 1839, yielded just 25 and 31 occurrences of these two terms, respectively. The initial employment of *indigenous* took place in the 1794 material entitled France (1832b, p. 352), while the first usage of *aboriginal* may be found in the 1797 Inaugural speech of President John Adams (1832, p. 38). As an overpowering comparison, the more North American token *Indian* or its plural appeared in over 1,400 documents within the *American State Papers* during the same period, even if a few uses of the word surfaced in phrases such as *West Indian* or *Corn, Indian*.[6]

Contemporary reflections on indigenous and aboriginal issues

To be fair, the consideration of indigenous peoples has come a long way since the United States communicated its constitution in 1789. However, the legacy of treaty negotiations between the United States federal government and the tribes has served as a model of what can go adrift

when more thought is not placed upon the needs of aboriginal populations.[7] Today, many nations have more carefully addressed their relationship with *all* their resident peoples, even if only through giving voice to more appropriate constitutional strictures. The process of that analysis, however, has revealed an almost bottomless crevasse, since the uncovering of past difficulties with one group or tribe – often inherited from colonial times – frequently leads to the unveiling of another problem, either within a single country or across an entire continent. Canessa (2007, p. 198) acknowledged one such forceful burst when he noted that two-thirds of the entire census population of Bolivia now claim to be *indigenous* and that this statistic includes as a claimant the country's President, Evo Morales (see Kohl, 2010). As will be seen below, Bolivia's recent constitutional revisions (see Flanz and Ward, 2004a) included a full reconsideration of the place of indigenous peoples in the Bolivian future; many other Latin American nations have adapted their viewpoints as well. Still, Negretto (2012, p. 749; emphasis added) remarked that "[s]ince 1978, all the countries of Latin America have either replaced or amended their constitutions. Replacement and amendment are, however, substantively different means of constitutional transformation. While the replacement of the existing constitution involves a political decision to re-create the basic legal structure of the state, amendments, like judicial interpretation, are mechanisms of legal adaptation that preserve the continuity of the constitution in a changing environment. *The frequent replacement of constitutions thus puts into question the legal and political foundations of democratic regimes*."[8] Thus, it would appear that a country's willingness to make changes to its national underpinnings carries with it a potential difficulty, regardless of the premise – benevolent or otherwise – for those proposed modifications. Mending today the abuse bestowed over centuries upon Bolivia's indigenous groups may consequently instill fresh difficulties.

Nevertheless, several important international court cases over the last few decades have fueled endeavors to reach a more meaningful consensus on basic aspects of this issue:

- the case of *Calder et al. v. Attorney-General of British Columbia* (1973) before the Supreme Court of Canada in 1972 confirmed for the first time in that country the existence of an aboriginal right to land;

- the 1992 *Mabo and Others v. Queensland* proceedings at the High Court of Australia rejected the concept of *terra nullius* and instead recognized native title. The opinion noted that in previous times "[i]nternational law recognized conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty" (*Mabo and Others v. Queensland*, 1992, paragraph 33; see Ewing, 1993);

- *Delgamuukw v. British Columbia* (1997) concluded that indigenous peoples have a constitutional right to own and control their aboriginal lands (see Dacks, 2002);

- the Inter-American Court of Human Rights in 2002 decided that the Sumu Indians of Nicaragua had the right to determine whether their timber lands could be cut (*The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001; see Anaya and Crider, 1996);

- indigenous mineral rights in South Africa were assessed by the Constitutional Court when the Nama asserted their entitlement to ancestral lands (*Richtersveld Community and Others v. Alexkor Ltd and Another*, 2003; see Ülgen, 2002); and

- the Malaysian Court of Appeal (*Kerajaan Negeri Selangor & Ors v. Sagong Bin Tasi & Ors*, 2005, p. 292; see Nah, 2008) substantiated the Temuan tribe's contention that they owned their land, and concluded that its use by the government required "[a]dequate compensation."

These actions form only a small subdivision of recent litigation, yet each illuminated the transition from long-standing views of the limited rights of indigenous peoples to new perspectives that had virtually been forced upon all litigants by some intersection of modernity and traditional ways linked to immemorial land holdings. Therefore, countries have been compelled in part to revisit the attendant historical patterns of use, occupancy, and land tenure by their aboriginal groups that recent court decisions have begun to recognize as critical data for opinion formation.[9] The discovery of the existence of previous supporting documentation for such claims furnishes the evidence now required by many jurisdictions. Nevertheless, these inquiries through their sheer existence undoubtedly influenced the path of the United Nations Working Group on Indigenous Populations.

To add to the melee, the 2007 vote for the adoption of the Group's Declaration of the Rights of Indigenous Peoples was supported by 143 nations. Australia, Canada, New Zealand, and the United States were dissenting countries. These nations have struggled with their past aboriginal controversies. Initially, they "could not support [the Declaration] because of concerns over provisions on self-determination, land and resources rights and, among others, language giving indigenous peoples a right of veto over national legislation and State management of resources" (see the United Nations news release for this vote), but by the end of 2010, this quartet had relented and endorsed the decree (Pulitano, 2012, p. 2).[10]

A constitution search tool

Constitute is the result of a partnership between the Comparative Constitutions Project (CCP) and Google. The CCP began as a program to collect world constitutions for comparison by legal and political science professionals. It serves as an information source for constitutional reform by governments and consultants through the process of collecting and providing access to a wide array of such instruments. With funding provided by Google Ideas, the CCP content is now available to Internet users, researchers, and scholars. *Constitute* is presented as a timely and relevant Web-based resource, without a fee, of world constitutions that permits users to evaluate these documents during study or review and/or for the creation of new variants.[11] In a statement regarding its perceived mandate, the CCP declared that its intent "is to investigate the sources and consequences of constitutional choices. Towards this end, the investigators are collecting data on the formal characteristics of written constitutions, both current and historical, for most independent states since 1789." Previously, the three principal study members published *The Endurance of National Constitutions* (Elkins, Ginsburg, and Melton, 2009, p. 51) in which they described "a universe of 935 new constitutional systems, of which 746 have been replaced or suspended, and 189 are still in force." The Appendix to that volume furnished a catalogue of these statements (see pp. 215-221), and in October 2013, the CCP released its *Constitute* site to supply searchable digital texts of these materials.

Document population

An initial appraisal determined that the United Nations consists of 193 member states, while the *Constitute* database contained 189 national entries, a suite almost completely composed of those nations identified in the Appendix of *The Endurance of National Constitutions*.[12] The latter assembly included the documents of two non-members of the United Nations – Kosovo and Taiwan – and the United Nations list tallied several representatives that did not appear as entries in the digital collection, i.e., the six countries of Egypt, Fiji, New Zealand, San Marino, Tunisia, and the United Kingdom were absent from *Constitute*.[13] However, Fiji released a new constitution in 2013 that exhibits two uses of *indigenous* in its Preamble; the Appendix denotes a previous version from 1997 (p. 217). The expectation is that these last few official statements will find their way into a more complete version of the *Constitute* database, but activities such as the suspension of Egypt's 1971 constitution in July 2013 (Hauslohner, Booth, and al-Hourani, 2013) or the introduction in the following month of this new announcement by Fiji are events

that temporarily hinder the completion of an ensemble such as this. Since those Fijian data were derived from outside the *Constitute* universe, they were not counted in the results of this investigation.[14] Nevertheless, the scope of this digital endeavor now permits interrogation of the fundamental political declarations of almost all current United Nations members.[15]

User interface

Users may browse and download all available constitutions in PDF or HTML formats. One can consider the countries as an entire list, or filter one or more constitutions by continent and country, with the ability to search within the parameters selected. The filter-by-date option allows the user to scan a specific date range, with the ability to comb through these results. A handy guide is the indicator at the top of the page – the "Search results" – that records the number of returned constitutions containing the inquiry term.

The search bar is easy to navigate and is positioned across the top of each *Constitute* webpage. If a selected keyword is included in the Topics list, then autocomplete suggestions of relevant options appear to assist the user. The Topic search feature provides eleven pre-determined subjects such as Election or Legislature by tree search. This allows the user to review relevant material in detailed order or explore more deeply into the corresponding constitutions. In the present study, this suite was perused for the occurrences of the individual terms *indigenous*, *aboriginal*, and *Indian or Indians*. The resulting outcomes for each relevant country were examined and the text locations of the retrieved items were collected together under categories of documents that exhibited each of these tokens, with the restriction that the results for the *Indian* and *Indians* probes were gathered to form a single *Indians(s)* class.

Search outcomes

Table I (Download Excel File) conveys the results of those *Constitute* assessments for the individual terms *indigenous*, *aboriginal*, and *Indian(s)*. The instances revealed forty nations with *indigenous* exemplars in their documents, seven more with the *aboriginal* token, and ten countries that wrote *Indian(s)* into their declarations. The first column of the Table (Download Excel File) arranges the identified countries and their version data, as taken from the *Constitute* site. Column 2 enumerates the *total* number of token occurrences within each instrument, and columns 3 through 6 itemize the locations of those incidences. The actual number of text citations in these last few columns may be less than the total number of recorded tokens, since some sentences or sections engaged more than a single usage of a term. For example, Colombia's constitution invoked the term *indigenous* two times within the same sentence when it stated in Article 171 that "[t]he representatives of the *indigenous* communities who aspire to become members of the Senate of the Republic must have exercised a position of traditional authority in their respective community or have been leaders of an *indigenous* organization, which qualification will be verified by a certificate from the respective organization, endorsed by the Minister of the Government" (see Wolfrum and Grote, 2005, p. 49; emphasis added). Titles of chapters, or of sections, on occasion included these terms: in Canada's document, Part II is named "Rights of the *aboriginal* peoples of Canada," and the title of Article 25 is "*Aboriginal* rights and freedoms not affected by Charter" (emphasis added).

Three nations – Malaysia, Panama, and Peru – were found to employ both of the *indigenous* and *aboriginal* terms in their constitutions and so their names are bolded in the Table (Download Excel File) to signify that distinction. Brazil, Colombia, Panama, and Singapore are underlined for the presence of *indigenous* and *Indian(s)* in their charters. Canada and Panama have their names in italics since they make use of *aboriginal* and *Indian(s)*, while Panama is capitalized because its document exhibits all three words: *indigenous*, *aboriginal*, and *Indian*.

Observations

The disparity between forty national documents employing the term *indigenous* and just seven using *aboriginal* is interesting. The smaller grouping of *aboriginal* users is highlighted by the total term counts shown in Table I (Download Excel File): Canada's twelve uses far overshadow the limited application of the term by the remaining countries (N uses = 5).[16] The Canadian applications arise almost exclusively in Article 35 that addresses the "Rights of the *aboriginal* peoples of Canada," and in particular in §2 that describes these very people: "In this Act, '*aboriginal* peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada" (emphasis added). Overall, there appears to be three general categories of the *indigenous* token: those countries' statements with less than 10 presentations, like Argentina and Cameroon; those with more than ten and up to just less than 30 such tokens, as issued by Colombia and Mexico; and the 127 instances conveyed by Bolivia's document.

It is clear from these findings that a research tool like *Constitute* can offer a true international perspective. As Table I (Download Excel File) illustrates, the outcomes represent nations from North and South America, from Africa, from Asia, and from the Pacific. Only Finland and Switzerland are part of the continent that in the past instituted much of the worldwide distress for indigenous peoples. Here, Finland declares that "[t]he Sami, as an *indigenous* people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act" (see Wolfrum and Grote, 2006, p. 5; emphasis added). These *Sami* are better known internationally as the reindeer-herding Lapps, very much an indigenous group residing in the far north (Errico and Hocking, 2008), but not necessarily a society that might come to mind during a discussion of *indigenous* peoples.[17]

Within a nation-by-nation comparison, the presence of 127 *indigenous* terms in Bolivia's constitution is in marked contrast to many other countries that have made a similar inclusive effort with regard to their native peoples. By employing a style similar to that used to enumerate the groups in Article 161A of the *Constitution of Malaysia*, Article 5 §1 of the Bolivian instrument broadcasts that the "official languages of the State are Spanish *and all the languages of the rural native indigenous nations and peoples*," and Article 10 states that "[t]he languages and dialects of ethnic groups are also official in their territories. The education provided in communities with their own linguistic traditions will be bilingual" (see Wolfrum and Grote, 2005, p. 2; emphasis added). This declaration is accompanied by the names of three dozen such ethnic entities, all of which may be quite unfamiliar beyond Bolivia: "Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chácobo, Chimán, Ese Ejja, Guaraní, Guarasu'we, Guarayu, Itonama, Leco, Machajuyai-kallawaya, Machineri, Maropa, Mojeñotrinitario, Mojeño-ignaciano, Moré, Mosetén, Movima, Pacawara, Puquina, Quechua, Sirionó, Tacana, Tapiete, Toromona, Uruchipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco."[18]

Chola cook. Photograph by Frank G. Carpenter, circa 1900-1923,
as part of his *Carpenter's World Travels* series.
(Courtesy of the Library of Congress, Prints & Photographs Division; image LC-USZ62-136385)

Mexico (N = 28 citations) and Colombia (N =19) have charters with the next most frequent employment of *indigenous*, but in both cases and unlike the Bolivian manuscript, no specific group names were provided. This unspecific use may be seen in Mexico's Article 2 that remarks that "[t]he Nation has a multicultural composition which has its roots in its *indigenous* peoples, comprising those who have descended from the people who inhabited the present territory of the country at the beginning of the colonization and who have preserved at least partially their own social, economic, cultural, and political institutions" (see Wolfrum and Grote, 2008, p. 1; emphasis added), and in Colombia's general statement that "[t]he exploitation of the natural resources in the *indigenous* territories will be done without impairing the cultural, social, and economic integrity of the *indigenous* communities. In the decisions adopted with respect to said exploitation, the Government will encourage the participation of the representatives of the respective communities" (Paragraph portion of Article 330; see Wolfrum and Grote, 2005, p. 108; emphasis added).

Alternatively, the constitution of Nepal (N = 13 occurrences) assured the fundamental right of equality by stating that "[t]he State shall not discriminate against citizens among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalits, *indigenous* peoples (Adibasi, Janajati), Madhesi or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated" (Article 13 §3; see Wolfrum and Grote, 2007, p. 8; emphasis added). Article 21 additionally promised to these groups the right to social justice: "The economically, socially or educationally backward women, Dalits, *indigenous* peoples, Madhesi communities, oppressed classes, poor farmers and labors shall have the right to take part in the structures of the State on the basis of the principle of 'proportional inclusion'" (p. 10; emphasis added).

In contrast with these contemporary *indigenous* or *aboriginal* revisions, the older yet more familiar American token *Indian* or its plural is written eighty-eight times into only ten international documents: for that of Brazil (N = 6 instances), Canada (N = 3), Colombia (N = 5), Cuba (N = 1), India (N = 59), Mozambique (N = 1), Panama (N = 1), Singapore (N = 8), Somalia (N = 1); and the United States (N = 3). Absent the clear necessity of the term in virtually any official national document from India, Mozambique and Somalia couple the term once with *ocean* – as *Indian* Ocean – to provide a geographic reference within their texts; Singapore referred to a resident minority derived from its geographic neighbor; and Brazil, Canada, Colombia, Cuba, Panama, and the United States devoted the term to label their nations' original inhabitants. The existence of this proper noun in the lexicon of the last six New World countries undoubtedly was influenced by the arrival of Christopher Columbus in 1492, who believed that his voyage had in fact terminated in India and so identified the observed residents as *Indians*.[19] Only Colombia and Panama used the singular form, while the latter remains distinctive among all these nations by the inclusion of all three particular tokens – *indigenous*, *aboriginal*, and *Indian* – within its constitution. Cuba made use of the word in perhaps the most forceful nationalistic manner, when it declared "We, Cuban citizens, heirs and continuators of the creative work and the traditions of combativity, firmness, heroism and sacrifice fostered by our ancestors; *by the Indians who preferred extermination to submission*; by the slaves who rebelled against their masters; by those who awoke the national consciousness and the ardent Cuban desire for an independent homeland and liberty;…" at the onset of its document's preamble (see Flanz and Ward, 2004b, p. 3, emphasis added).[20]

The occurrence of paired constitutional exemplars of *indigenous* and *aboriginal* (Malaysia, Panama, and Peru), of *indigenous* and *Indian(s)* (Brazil, Columbia, Panama, and Singapore), and of *aboriginal* and *Indian(s)* (Canada and Panama) in this digital resource imparts a special social perspective to the documents. Nations such as Colombia or Canada, but especially Panama with all three terms, thereby pledged to consider more segments of their people: it has been noted that an *indigenous* President leads Colombia, and Canada has declared that the Indian, Inuit, and Métis form its *aboriginal* peoples (McCabe, 2010, pp. 120-142; emphasis added). For the latter nation, the collective *Métis* denotes a community consisting of Indian and French descendants – primarily through intermarriage during the 18th and 19th centuries – that developed a composite language based upon Plains Cree and Canadian French, coupled to Saulteaux or Ojibwa (see Payment, 2001, p. 661). Slobodin (1981, p. 361) remarked that "[t]he Métis form a regional example of a social and demographic phenomenon that has marked the frontiers of European colonial expansion in the post-Renaissance era: the 'mixed' population," a description that may be applied to the makeup of many New World countries and one that is echoed today in the use of the constitutional applications of the tokens *indigenous*, *aboriginal*, and *Indian(s)*.

Furthermore, this very assertion by nations like Canada stimulates concern for the issue of indigenous restitution. Morse (2008, p. 271) used Canada's own constitutional definition to illuminate this very problem: "Simply put, the history of First Nations, Inuit, and Métis peoples

(who are now described as 'aboriginal people' in s 32(2) of a portion of the Canadian Constitution added in 1982), since extensive contact with Europeans began over four centuries ago, has been horrendous. It is replete with instances of virtually unimaginable suffering through, for example, territorial dispossession, theft of traditional lands, exploitation, violence frequently amounting to instances of genocide, oppression of cultural practices and religious beliefs, denial of legitimate sovereignty held by their governments, wholesale removal of generations of children to be brutalized in church-run residential schools, as well as gross over-representation in prisons and child welfare systems." There is no doubt that considerable legal work remains – and not exclusively in Canada – even if nations are committed to fashioning or to adjusting their instruments with relevant parameters that more directly target the needs of their original peoples. On a more general scale, however, Christie (2009, p. 231) warns that "[i]t is indisputable that much of the 'heavy work' of colonialism has been carried out by the law, and indeed by the construction of the dominant system on a foundation of racist and colonial theoretical presumptions and positions." In the United States, and as cultural norms continue to evolve there, the ability of native populations to speak up and be heard has improved. The December 2012 purchase of Pe' Sla, the sacred land in South Dakota used for ceremonies by the Oceti Sakowin, or the Great Sioux Nation, is a recent example of American Indian tribes working together to reclaim historic lands (South Dakota: Tribes raise money for sacred lands, 2012).

However, when the opportunity does arise, the creation of tribal constitutions has occasionally been found to be problematic, even when expedited by government encouragement or decree. Gover (2009) described tribal membership provisions contained in the constitutions of forty-eight New Zealand Treaty Settlement Entities and thirty-eight Australian Registered Native Title Bodies Corporate, where the former are a subset of recognized groups under the 1840 *Treaty of Waitangi* settlement process.[21] She concluded that "the constitutions and rules they contain can be expressions of evolving cultural production of customary norms" (p. 228), precisely the *societal* mechanism needed to overcome the colonial legal stagnation that confounds the status of indigenous peoples. In a later publication, she enumerated those recognized American Indian tribes and First Nations of Canada (2010, pp. 213-230)[22] that have initiated changes to their definitions of membership criteria,[23] but the American process is thwarted by a debilitating barrier wherein tribes must "submit all constitutional amendments to the Secretary of the Interior for approval" (p. 118), a parameter originally specified in §16 of the 1934 Indian Reorganization Act (48 *Stat.* 984, 987): "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws." In a complementary suite to the international items found in *Constitute*, the Library of Congress makes available over 400 of these digitized constitutions and corporate charters, partitioned by tribe or community within six areas of the United States: Arctic Alaska (N = 124), Northeast Atlantic (N = 1), North Central (N = 58), New Southwest (N = 84), Pacific Northwest (N = 40), and South (N = 120). Today, any international constitutional committee may access all this administrative history from Australia, Canada, New Zealand, and the United States in its quest to form a modern, more inclusive national instrument.

Conclusions

The entire concept of an Internet-based digital collection of international constitutions, that offers almost limitless examination of these critical instruments, reaches beyond just the few countries that have the relatively unique tokens *indigenous*, *aboriginal*, or *Indian(s)* in their

political lexicons. In this gathering, it is possible to observe how each country has pronounced its own national stance on issues such as *discrimination* (N constitutions = 145); *slavery* (N = 75); *election* (N = 187); *court* (N = 188); *genocide* (N = 22); *children* (N = 163); and *education* (N = 182).[24] Indeed, Albania provides that "[c]hildren, the young, pregnant women and new mothers have the right to special protection by the state" (Article 54 §1; see Imholz, 1999, p. 14). Yet, while none of the words *discrimination*, *genocide*, *children*, *young*, *pregnant*, *women*, *mothers*, or even *education* appears in the *United States Constitution*, their presence elsewhere signals the evolution of more modern – and thus, now more inclusive – national perspectives, even if the American document may have served as a useful, and almost universal, model over the last two centuries (see Arato, 2009). Thus, one substantial advantage of this particular database is that specific tokens may be scrutinized and the uncovered models embedded in the identified constitutions may then be paired with other pertinent data, such as those offered by other specific research endeavors,[25] to illuminate one or more aspects of a nation's particular political connection to an individual search token. The development of this digitized library opens the geopolitical world to deeper inquiry. Consequently, while the task of searching for tokens like *genocide* and *children* tends to pre-determine the point of reference in such activities, there are constitutional parameters entailing other ideas that make this utility particularly worthwhile. The resulting immediate feedback of the distribution of terms conveys a prompt index of the importance of those concepts in the eyes of all these nations. This supplemental reward of almost boundless inquiries means that *fisheries* (N = 16) and *agriculture* (N = 58) may take their place alongside *police* (N = 134) and *army* (N = 71) to further fathom the underlying psychology of a nation, or to unveil promptly that *ecology* is disappointingly included in just seven of the current international instruments.

Finally, it is crucial to recall that these vehicles are the means by which nations boldly express themselves to their neighbors, and that they are articulations of thought in which every term – *children*, *police*, *ecology*, or otherwise – demanded judicious selection. Now, through the Comparative Constitutions Project's efforts, the designated political vocabularies from almost every member of the United Nations may be found within *Constitute*. Further, when the United Nations marked the International Day of the World's Indigenous Peoples in August 2013 by announcing that there are "more than 5,000 distinct indigenous groups in some 90 countries," it publicized – as shown in conjunction with the forty-nine unique entries in Table I – that only about half those nations have to date addressed fundamental issues affecting their indigenous peoples. This new *Constitute* gathering has created an opportunity that calls for and facilitates careful reflection upon, and useful comparative analyses among, these various avowals.

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Notes

1 Malaysia's instrument is modeled in part upon the *Constitution of India* (Maddex, 2008, p. 275). The Penans are cited in the "Peoples of the Land: Spiritual and Cultural Roots of Indigenous Societies" section of Coates (2004), along with more than twenty other groups from around the world. Coates described the Penans as "symbols of the continued destruction of indigenous territories and cultures" (p. 59). [back]

2 However, some native groups are concerned that "a precise, legal definition of the term 'indigenous' would impose standards or conditions for participation in human rights processes that would be prejudicial to their interests" (Niezen, 2003, p. 18). [back]

3 The profound beauty of some of these indigenous people, the diversity of their costume, and the grandeur of their environments may be seen in Nelson's pictorial work (2013). Indeed, there are images in that publication for groups from the nations of Argentina, Ecuador, India, Indonesia, Kenya, Nepal, Papua New Guinea, Russia, and Vanuatu that are among the forty-nine countries identified in this study. [back]

4 With regard to a predecessor Canadian document, the 1939 Supreme Court of Canada case *Re Eskimos* concluded that the constitutional status of the Eskimo within Canada (now known as the Inuit; see the "Synonymy" section in Damas, 1984, pp. 5-7) should be the same as the standing assigned to those groups identified as Indians. [back]

5 Udombana (2008, pp. 391-394) provided more insight into the use of – and the differences between – these two tokens, at least in terms of an African perspective. [back]

6 For the first germane text uses of the word *Indian*, see the occurrences on each of the eight pages of the initial document deposited in the Indian Affairs portion of the *American State Papers*: the 1789 report entitled The Six Nations, the Wyandots, and others (1815, pp. 5-12). The tokens *indigenous* and *aboriginal* do not appear in any of the 375 recognized American Indian treaties that are available in searchable databases of early acknowledged instruments or Charles J. Kappler's *Indian Affairs: Laws and Treaties* multi-volume compendium; see Bernholz, Pytlik Zillig, Weakly, and Bajaber (2006), and Bernholz and Holcombe (2005), respectively. Notice as well that the first appearance of the phrase *native American* in the *US Congressional Serial Set* had nothing to do with American Indians. Rather, the expression appeared in an 1818 memorial that requested certificates of registry for a pair of vessels – the *Stapleton* and the *Ann* – owned by two merchants and ship owners in Baltimore. The formal application to the Senate concluded with the remark that "[y]our memorialists, therefore, with confidence appeal to the justice and liberality of the government, that they will not be compelled to suffer their vessels to lie rotting at their wharves for want of employment, while British vessels are allowed to enter our ports, and to enjoy those rights and advantages, which are denied to the vessels of *native American* citizens, when neither reasons of policy nor justice demand the sacrifice" (Memorial of Thomas Tenant and George Stiles, of the City of Baltimore, merchants, and ship owners, praying that certificates of registry may be granted to their vessels, 1818, p. 4; emphasis added). The Committee of Commerce and Manufactures, to which the Senate referred the application, recommended to that chamber that the claim was without merit. The earliest use of *native American* in the *American State Papers* occurred in another shipping inquiry made during the 1790s that involved an owner described as "Mr. James Yard, a *native American* citizen, and merchant of Philadelphia" (France, 1832a, p. 637; emphasis added). Clearly, both of the *Serial Set* and the *State Papers* documents used the descriptor *native American* to identify individuals who were born in America, and not in Great Britain or elsewhere. [back]

7 In Appendix II of a study purposely made under the purview of the United Nations Declaration on the Rights of Indigenous Peoples, Anaya (2012, pp. 36-50) counted over 150 complaints voiced by American Indians, Alaska Natives, and Native Hawaiians. Many were based upon "breached treaty promises" or nothing less than utter disregard by the federal government. Groups – and many other governments – in all corners of the world are quite aware of such shortcomings in the United States and are now predisposed to avoiding these difficulties in their own futures. This is particularly so since, along with those in North America, indigenous entities frequently have "historical claims to the specific land on which a nation has been created" (Jabareen, 2011, p. 125), even if the Declaration itself has been criticized in terms of its overall design and effectiveness (pp. 159-161). [back]

8 Ninety years ago, Woods (1925, p. 50) warned that "[t]he more detailed the provisions the greater necessity for frequent amendment to meet changed conditions. One amendment calls for another, and familiarity with many amendments gives freedom to propose many for which there is no need. In the confusion of it citizens not only fail to respect and reverence the constitution, but fail to know it and to recognize the difference between their constitution and their statutes." [back]

9 See Gilbert (2007, pp. 586-590) for thoughts on the development of a doctrine of *indigenous title*, and Bulkan (2012) for words of caution regarding the evolution of today's "indigenous renaissance" and Gilbert's hypothesis. [back]

10 In the same Pulitano volume, Martin (2012) examined the foundation of this veto behavior by Australia, Canada, New Zealand, and the United States. [back]

11 It should be noted that a number of other information providers have collected and organized world constitutions, but many are available only by subscription. [back]

12 These member data were acquired from this United Nations site at the beginning of November 2013, as were the *indigenous*, *aboriginal*, and *Indian(s)* search results from *Constitute*. The organization's roster and all inquiry outcomes were re-examined in January 2014. Between those dates, some minor corrections were made by the CCP to their suite of constitutions to adjust typographical, spelling, formatting, and other textual difficulties (Jessie Baugher, personal communication, 8 January 2014). [back]

13 The Appendix of *The Endurance of National Constitutions* listed "new, interim, and reinstated constitutions in the CCP sample," through the year 2005. This sample also included earlier documents from Egypt, Fiji, New Zealand, and Tunisia, as well as from countries that no longer exist, such as Austria-Hungary and Bavaria. [back]

14 Further, New Zealand and the United Kingdom are two of a number of countries considered to use uncodified constitutions (see Norton, 1984, p. 60 for comparative United States and British constitutional characteristics, and Tomkins, 2003, pp. 7-14). The forthcoming referendum in September 2014 in which voters will be asked the question "Should Scotland be an independent Scotland?" has been preceded by the release of *Scotland's Future*, a Scottish government guide to independence. The document states that "[a] key responsibility of the first parliament of an independent Scotland will be to put in place *a written constitution to underpin the democratic gains of independence*. A written constitution will be a significant step forward for an independent Scotland. It will replace the central principle of the UK constitution – the absolute sovereignty of the Westminster Parliament – with the sovereignty of the people of Scotland, which has been the central principle in the Scottish constitutional tradition." It was further declared that "[t]he creation of a written constitution will be an important development for Scotland. A written constitution is more than a legal document. *It is a statement of intent for the nation.* The process of coming together to develop, draft and approve such a document is an

important part of defining the sort of nation we wish Scotland to be" (p. 14; emphasis added). [back]

15 At its release in October 2013, *Constitute* possessed a serious deficiency that still hinders full use of this tool: there are no bibliographic data accompanying these constitutional documents. This information is particularly important with regard to the materials from nations that do not use English as one of their official languages, yet also publish their constitutions in that form. Any such resulting instrument text has been created more as a convenience or courtesy than as a necessity, format notwithstanding. One nation's instrument will suffice to display the potential burden. The Swiss constitution is available from the official government Web site in a variety of official and unofficial versions. The English exemplar is presented with the disclaimer that "English is not an official language of the Swiss Confederation. *This translation is provided for information purposes only and has no legal force*" (emphasis added). Inspection of the provided parameters reveals that the opening line of the Preamble declares "In the name of Almighty God!" The *Constitute* Web variant begins with the pronouncement "In the name of God Almighty!" Further, the government's Preamble consists of ninety-nine words while the *Constitute* variant has an additional one, but several phrases may be seen to vary: e.g., "the strength of a people is measured by the well-being of its weakest members" versus "the strength of people is measured by the welfare of the weakest of its members," respectively. Provenance data would thus be a useful supplement to these digitized texts, since the title pages of the constitutions only have an announcement that "[t]his complete constitution has been generated from excerpts of texts from the repository of the Comparative Constitutions Project, and distributed on constituteproject.org." [back]

16 As an additional manifestation of Canada's attention to the term *aboriginal*, the name of the federal Indian Affairs and Northern Development department was changed in May 2011 to Aboriginal Affairs and Northern Development Canada (Aboriginal Affairs: A new name with an uncertain meaning, 2011). [back]

17 The case is the same for the Roma, for whom only Finland and Kosovo have a place in their constitutions to provide assurance that the Roma language will be a state-recognized one and, solely in the latter nation, that they will have representation. The convoluted history of this shunned group has entailed much of the same abuse, misunderstanding, and dispossession that have encased other indigenous groups in geographic areas far beyond the boundaries of Europe (see Keal, 2003, pp. 84-112, and Liégeois, 2007). [back]

18 Volume 3 of the Handbook of South American Indians (1945) provides ethnological descriptions of these tribes. The seventh volume in that series has a useful index (1957). [back]

19 Columbus stated in his first letter of 14 March 1493 that "[t]hirty-three days after my departure from Cadiz, I reached the Indian Sea." Higginson (1877, p. 19; emphasis added) recalls this error in his footnote to that statement: "Columbus always supposed that he had reached India, and therefore always called the natives *Indians*." Berkhofer (1988, pp. 522-523) also discussed this naming process, including the perseveration of the name for the peoples – as the Spanish token *Indios* changed into *Indien* in the French, into *Indianer* in the German, and into *Indian* in the English – even after Columbus' geographic mistake was established. [back]

20 See Cosculluela (1946) and Kimber (1991/1992) for more on the original inhabitants of Cuba. [back]

21 The official Government of New Zealand settlement site and the Australian Prescribed Bodies Corporate one have more on these programs. [back]

22 The Bureau of Indian Affairs at the Department of the Interior publishes periodically a list entitled Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs. In 2013, the inventory encompassed 566 entries and consisted of members from both the lower forty-eight states and Alaska; there are no acknowledged Native Hawaiian groups. Canada has a searchable First Nation Profiles page on the Internet. [back]

23 The federal government uses blood quantum as a means to determine *race*, not tribal affiliation. Adjustments to tribal rolls following Department of the Interior recognition, based upon reduced threshold blood quantum amounts for tribal enrollment to permit the inclusion of additional members, have led to several court cases including one with the Grand Traverse Band of Ottawa and Chippewa Indians, and another involving the Narragansett Tribe of Rhode Island (Gover, 2010, pp. 123-130; and for a more inclusive perspective, see Villizor, 2008). [back]

24 Other social issues like *prostitution* (N constitutions = 4); *pornography* (N = 2); *racism* (N = 19); *human trafficking* (N = 4); and the prohibition of *same sex* marriages (N = 5) are also considered by some nations within their documents. Indeed, the list of potential parameters is almost limitless: "[t]he Rhododendron Arboreum shall be the *national flower*, Crimson shall be the *national colour*, the Cow shall be the *national animal* and the Lophophorus shall be the *national bird* of Nepal" (Article 7 §2; see Wolfrum and Grote, 2007, p. 5; emphasis added). [back]

25 See, e.g., Andolina (2003) and Zamosc (2007) for observations on Ecuador. [back]