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Title:	Tribal Constitutions Project
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Issue:	1
Year:	2023
DOI:	10.21825/dlh.89669
Keywords:	Database, Unpublished Archival Records, Tribal Constitutions, Slavery, Habeas Corpus
Abstract:	Tribal Constitutions, Citing Slavery, and Petitioning for Freedom are digital legal history projects focused on expressions of sovereignty within tribal constitutions, the remnants of slavery in modern law, and the underexamined role of habeas petitioners in challenging coercion and confinement in the long-nineteenth-century United States. Each project deploys legal databases differently, but with the shared goal of contributing key insights to legal historical scholarship and offering interfaces that appeal to a broad, public audience.

Tribal Constitutions Project

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The development of tribal constitutions—in particular how these documents create and sustain claims to sovereignty—remains relatively unexplored in the academic literature.¹ Yet, the importance of tribal constitutions to Native self-governance is hard to overstate, and many tribal governments regard their constitutions as the cornerstone of self-determination and sovereignty. Beyond the legal ramifications, constitutions impact tribal culture, member well-being, and even tribal survival. Constitutions instantiate power, both its exercise and constraint. A constitution can serve as the statement of a people, who they are, what they value, and what they want.

But constitutions do not develop in a vacuum; historical trajectories and power processes shape modern states. In the tribal context, constitutions are also directly influenced by settler-colonial processes aimed at the destruction of tribal self-determination. The Tribal Constitutions Project (TCP) examines the evolution of tribal sovereignty through constitutionalization by analyzing the most extensive database of tribal constitutions assembled. Collected through archival research and cooperation of Native rights groups and individual tribal governments, the TCP is, to our knowledge, the most comprehensive collection of original tribal constitutions, constitutional amendments, and replacement constitutions, covering 304 of the 345 federally recognized tribes within the continental United States.² Figure 1 details the number

¹ Scholars have addressed components of this question. On membership, using a dataset of 331 constitutions from 247 tribes, see Kirsty Gover “Descent and Genealogy: The Changing Landscape of Tribal Membership Governance in the United States,” in *Tribal Constitutionalism: States, Tribes, and the Governance of Membership*, ed. Kirsty Gover (Oxford: Oxford University Press, 2010). On economic welfare, using a dataset of 450 documents from 70 tribes, see Randall Akee, Miriam Jorgensen, and Uwe Sunde, “Constitutions and Economic Development: Evidence from the American Indian Nations,” *IZA Discussion Papers 6754*, (Institute of Labor Economics (IZA), Bonn, Germany, 2012). Significant scholarship also examines constitutional development within specific tribes. See, for example, Richmond L. Clow, “The Indian Reorganization Act and the Loss of Tribal Sovereignty: Constitutions on the Rosebud and Pine Ridge Reservations,” *Great Plains Quarterly* 317 (1987): 125-134; Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation* (Chapel Hill: University of North Carolina Press, 2012); Eric Lemont, “Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention,” *American Indian Law Review* 28, no. 1 (2003): 1-34; Anthony M. Massad, Robert A. Layden and Daniel G. Gibbens, “The Massad Commission Report to the Tribal Council of the Cherokee Nation,” *American Indian Law Review* 23, no. 2 (1999): 375-408; Gerald Vizenor and Jill Doerfler, *The White Earth Nation: Ratification of a Native Democratic Constitution* (Lincoln: University of Nebraska Press, 2012). Other scholarship focuses on recommendations for general reform, such as Robert L. Bee, “Structure, Ideology, and Tribal Governments,” *Human Organization* 58, no. 3 (1999): 285-294; Harvard Law Review, “Tribal Executive Branches: A Path to Tribal Constitutional Reform,” *Harvard Law Review* 129, no. 6 (2016): 1662-1682; Miriam Jorgensen, *Rebuilding Native Nations* (Tucson: University of Arizona Press, 2007); Eric D. Lemont, ed. *American Indian Constitutional Reform and the Rebuilding of Native Nations* (Austin: University of Texas Press, 2006); Eric D. Lemont, “Developing Effective Processes of American Indian Constitutional and Governmental Reform,” *American Indian Law Review* 26, no. 2 (2002): 147-176; Melissa Tatum, Miriam Jorgensen, Mary E. Guss, and Sarah Deer, *Structuring Sovereignty: Constitutions of Native Nations* (Los Angeles: American Indian Studies Center, 2014); Mark C. Tilden, Tilden McCoy + Dilweg, LLC, and Native American Rights Fund, *Tribal Constitution Handbook: A Practical Guide to Writing or Revising a Tribal Constitution* (Native American Rights Fund, 2007).

² As of 2022, not all tribes have constitutionalized. Our analysis is confined to the continental United States, as constitutions for Native Alaskan and Hawaiian groups operate under a different federal legal framework. A 2020 article by Cordell *et al.* describes a collection of tribal documents including over 2700 American Indian and Alaska Native “constitutions, amendments, codes, treaties, and further legal documents,” which were subjected to machine-learning content analysis to identify key words for the enumeration of institutions. In the article, the authors use the 97 active constitutions in their set (from tribes within the continental United States) to compare machine vs. hand-coded results. Rebecca Cordell, Kristian Skrede Gleditsch, Florian G Kern, and Laura Saavedra-Lux, “Measuring institutional variation across American Indian constitutions using automated content

of constitutions, both new constitutions and amendments, collected by year of enactment since 1934. Together, these 1,009 documents represent an estimated 90% of enacted tribal constitutions, spanning more than 200 years of tribal constitutional history.³

Despite its importance, the study of tribal constitutions has developed in a patchwork manner, due to challenges identifying and acquiring the documents thought lost to history. This loss is not just unfortunate for researchers, it represents an erasure that tribes, subject to assimilation, have struggled against for years. The process of cultural genocide often silences Indigenous voices.⁴ It is time for tribal constitutions to be read, and for their lessons to be in dialogue with U.S. policy and research on constitutionalization worldwide.

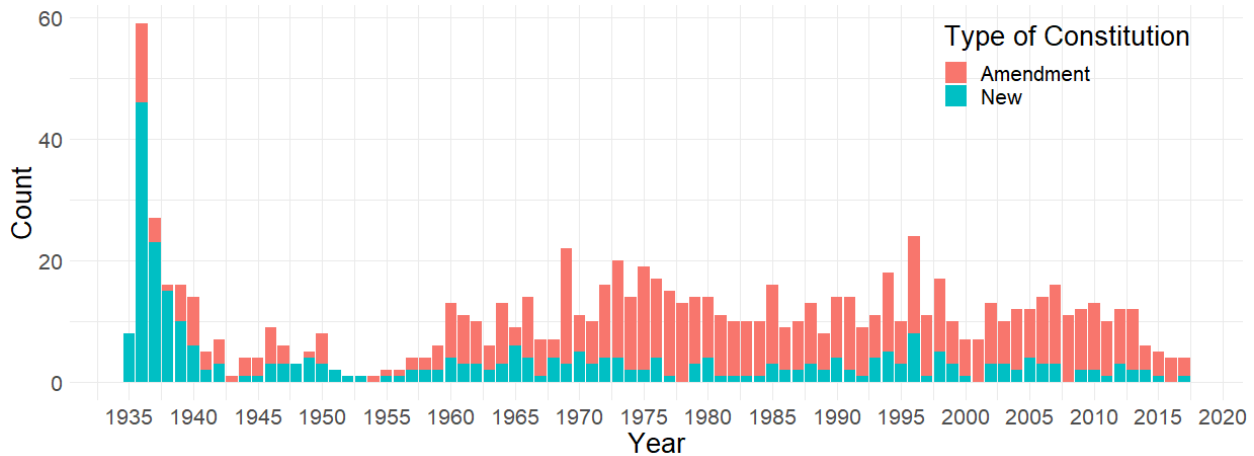


Figure 1. Constitutions and amendments from 304 tribes, by enactment year, 1935 - 2019 (N =1,009).

1. Significance of Studying Tribal Constitutions

Tribal governance is necessarily embedded in the broader American political, legal, and colonial structure.⁵ Indeed, a written constitution delineating tribal powers can itself be understood as a construct of empire.⁶ How tribal constitutional governance is best conceptualized, whether as an act of self-determination or externally imposed, involves a multi-dimensional understanding of constitutional enactment and development, tribal institutions, and member well-being.⁷ Yet the links between Native American tribal

analysis," *Journal of Peace Research* 57(6) (2020): 777-788. Rather than focusing on the presence or absence of an institution, and the amount of physical text describing or surrounding the institution, a qualitative legal coding scheme focuses not only on the form, but on the function and centrality of created institutions and how those institutions interact with other within-document institutions.

³ The full corpus also includes 35 pre-1934 constitutions.

⁴ We note that all of our post-1934 constitutions are in English, as they required approval from the Department of Interior. Pre-1934 written constitutions (of which we have roughly 35) are also in English, some translated by tribal members, perhaps because they were designed for interaction with U.S. officials. For a discussion of the embrace of a written constitution by the Cherokee, see Linda Colley, *The Gun, the Ship, and the Pen* (London: Liveright, 2021) at 150-152.

⁵ See Ann Laura Stoler, *Duress: Imperial Durabilities in Our Times* (Durham, N.C.: Duke University Press, 2016).

⁶ Cf. Colley, *The Gun, the Ship, and the Pen*.

⁷ As a normative matter, some scholars have elided these descriptive debates with the question of whether tribes can (or should) pursue tribal sovereignty through claims to autonomy or increased efforts at interdependence. See, for example, Koussla Kessler-Mata, *American Indians and the Trouble with Sovereignty: Structuring Self-Determination Through Federalism* (New York:

governance and scholarship on imposed and imperial constitutions have not yet been forged,⁸ in part because of a scholarly focus on the U.S. Constitution and the U.S. Supreme Court in assessing the scope and operation of tribal sovereignty.⁹

The TCP seeks to bridge the macro-micro gap, enabling study of tribal constitutions in the broader historical legal scholarship. Detailed below, we combine qualitative legal text analysis with quantitative feature extraction to enable the complex historical and relational analysis that has been missing from the study of tribal constitutionalization. By coupling an expansively tagged textual corpus with numeric coding, the TCP provides for a multi-dimensional approach to tribal sovereignty, allowing researchers to explore the causes and consequences of differential self-governance strategies, including geographic dispersion, institutional precursors, and colonial underpinnings, all without removing tribal constitutions from their unique cultural contexts.

1.1. Historical Analysis

Because U.S. federal jurisdiction unfolded across the continent in different ways at different times, tribes from different cultural regions often have different experiences with law, treaties, and federal interaction. Certain tribes constitutionalized early, seeking to protect their interests, but federal legislation, including the 1871 Dawes Act, intentionally sought to erode tribal sovereignty and governance. It was not until 1934, with the passage of the Indian Reorganization Act (IRA), repealing the Dawes Act, that tribes were actively encouraged by the federal government to adopt written constitutions.

The proliferation of tribal constitutions following the IRA has led to scholarship in various fields on numerous subjects relating to the role of constitutions in developing tribal interests—from questions of sovereignty to economic security. But, and in large part due to the challenge of identifying and acquiring tribal constitutions, compounded by contested history surrounding the implementation of the IRA, this literature is replete with contradictions and uncertainty.

The IRA impacted tribal sovereignty, but whether the Act created opportunities for tribal governance, or hindered its development, is contested.¹⁰ While the IRA in no way represents the beginnings of tribal constitutionalization, it is the first time Congress actively encouraged tribal governance—within specified bounds and definition. Some of the larger and more politically savvy tribes, most famously the Navajo, rejected the IRA, in part because of fear that “the establishment of an IRA tribal council would be detrimental to their interest.”¹¹ Nevertheless, for many tribes, the IRA era represents the first written and federally endorsed constitutional enactment.

Cambridge University Press, 2007). We take, as a given, that at least some tribes seek the expansion or preservation of tribal sovereignty.

⁸ On imposed and imperial constitutions, see Noah Feldman, “Imposed Constitutionalism,” *Connecticut Law Review* 37 (2005): 857-889; Michael Ignatieff, *Empire Lite: Nation-building in Bosnia, Kosovo and Afghanistan* (Penguin Canada, 2003).

⁹ See Dewi Ioan Ball, *The Erosion of Tribal Power* (Norman: University of Oklahoma Press, 2016); Bruce Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism* (Oxford: Oxford University Press, 2013); Francis G. Hutchins, *Tribes and the American Constitution* (West Franklin, NH: Amarta Press, 2000); Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2006).

¹⁰ See Clow, “The Indian Reorganization Act,” 125-134. We are mindful that many Native Nations voted not to organize under the IRA, and that even some of those tribes that initially voted to organize under the IRA did not adopt an IRA constitution. We do not suggest these are the “entire story of American Indian constitutions,” (Robert J. Miller, “American Indian Constitutions and Their Influence on the United States Constitution.” *Proceedings of the American Philosophical Society* 159, no. 1 (2015) at 45), but rather that this subset of constitutions may have created a different governance baseline for IRA tribes, allowing for important comparative analysis among and between tribes in future work.

¹¹ Floyd A. O’Neil, “The Indian New Deal: An Overview,” in *Indian Self Rule: First-Hand Accounts of Indian-White Relations from Roosevelt to Reagan*, ed. Kenneth R. Philip, 30-46 at 41 (Denver: University Press of Colorado, 1986).

The IRA ushered in a new era of mediated self-governance through constitutional provision, and the role of the federal government in the adoption of tribal constitutions remains opaque. To fully understand the import of tribal constitutionalization, we must unpack how different constitutional institutions affected the expansion (or diminution) of tribal sovereignty. Even if only in part colonial impositions, early constitutions can be understood to have set tribes on paths designed to benefit or accommodate the federal government. TCP methodology is designed to allow analysis of historical changes in constitutional provisions. Exploring historical change in colonial power dynamics gives historical and legal context to ongoing tensions between tribes and the federal government and builds understanding of the development of native sovereignty and tribal governance—where constitutions end up depends, in part, on where they begin.

1.2. Relational Analysis

Discussion of tribal constitutions often centers on federal influence, but the preferences of tribes and social choices available cannot be discounted.¹² Tribal constitutions are also the result of tribal contexts, imaginations, and inter-tribal relationships. After creation, legal institutions come to embody shared cultural frames and understandings,¹³ further embedding them in social structure and making their early trajectory only partially deterministic.¹⁴ Tribal institutions thus reflect both American colonial aims and tribal resistance.¹⁵

Constitutional institutions shed important light on how a tribe might conceive of its own sovereign power and how the articulation of that power—in what areas a tribe felt it could or should claim control—developed over time. Some institutions developed within a system of federal constraints, others were designed to stave off federal involvement, and still others reflect distinctly Indigenous/tribal priorities or history. While not all tribal constitutions are reflections of tribal values or create governance structures that contribute to tribal flourishing, some are aimed at the distinct preservation (or renewal) of tribal cultures, values, and lifeways. In-depth tribal case studies have illuminated the importance of traditional uniqueness, cultural priorities, and tribal interconnectedness.¹⁶ No narrative of tribal sovereignty should omit the importance of tribal agency or inter-tribal knowledge exchange.

The TCP is structured to allow research on the routes taken by tribes in developing (or not developing) tribal institutions and how such institutions are interconnected with other constitutional provisions. The TCP methodology enables relational analysis both in allowing constitutional provisions to be understood as part of a larger institutional whole, and in encouraging an understanding of constitutional adoption as influenced by learning and exchange within a larger community of interconnected tribes and organizations. One strength of an expansive corpus is the potential for complex and causal explanatory analyses. Constitutions are documents nested in place, time, culture, and circumstance. Constitutions, and subsequent revisions thereto, can be analyzed across these frames, allowing research into causation (e.g., what factors determine the institutional structures that are

¹² Kenneth A. Shepsle, “Institutional Equilibrium and Equilibrium Institutions,” *Political Science: The Science of Politics* 51 (1986): 51-81, at 51-52.

¹³ John W. Meyer and Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” *American Journal of Sociology* 83, no. 2 (1977): 340; W. Richard Scott, *Organizations and Institutions* (Thousand Oaks, CA: Sage, 1995).

¹⁴ James Mahoney, “Path Dependence in Historical Sociology,” *Theory and Society* 29, no. 4 (2000): 507-548.

¹⁵ Bethany Berger, “Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems,” *Arizona State Law Journal* 37, no. 4 (2005): 1047-1125.

¹⁶ Nell Jessup Newton, “Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts,” *American Indian Law Review* 22, no. 2 (1998): 285-353; Susan E. Grogan, “The Blackfeet Tribal Court,” *Legal Studies Forum* 21, no. 3 (1997): 485-504.

adopted), consequence (e.g., how institutions influence well-being) and tribes themselves, as interconnected, time-variant structures (e.g., with clustering and diffusion among institutional forms).

2. Database Design and Methodology

Each constitution documents an interconnected tapestry of evolving institutional forms. To aid in the complex analysis such documents warrant, we employ a mixed-methodological approach to database design. Constitutional documents are analyzed, annotated, and coded by law students with training in constitutional and Federal Indian law along multiple dimensions (discussed below). The resulting database provides an invaluable set of raw data for exploring the role of constitutions in tribal governance. Coding includes both qualitative and quantitative data, as we seek to maintain textual detail that allows for qualitative analysis of texture and nuance while also creating data expansive enough to allow for broad comparative and causal analyses.

Developing a valid coding structure for tribal constitutions is challenging because of the diverse influences on their creation. In part, these are cultural expressions of hundreds of nations that existed long before 1492. The majority were democratic, with universal suffrage and complex political, economic, and socio-cultural institutions. The diversity in traditional government would be expected to create substantial constitutional diversity. But these written documents are not entirely free expressions; the Department of Interior held non-transparent approval power until recently. The nature of strength of this influence, while likely changing over the last 90 years, has received little attention and is poorly understood.

Research also necessitated codes that would standardize as required for quantitative modeling, while capturing the potential differentiation needed for complex qualitative legal analysis. Starting with a structure similar to that of the Comparative Constitutions Project (CCP), which captures an expansive list of constitutional topics tracked over time, we found that the CCP's examined areas only partly fit Tribal Nations.¹⁷ Drawing on the tribal constitutions literature, we identified our own set of variables from 10 constitutional topics, and our novel coding scheme was tested on a preliminary analysis of 200 different constitutions from 82 tribes.

Coded Topics

1. **Preamble and Constitutional Purpose**, including protection of culture; self-determination and self-governance; enforcement of treaty rights and relationship with the federal government; promotion of tribal and member welfare; protection of environment and natural resources; maintenance and recovery of tribal land; and economic development or creation of economic organizations.

¹⁷ See <https://comparativeconstitutionsproject.org/>. This project launched the *Constitute* website in 2013, <https://www.constituteproject.org/>, building off the CCP data index.

2. **Membership and Citizenship**, including membership requirements such as lineal descent and specifics of blood quantum; year and name of the censuses or tribal rolls to which members must trace lineage. We also capture other forms of membership and related rules, such as: membership through marriage and adoption; membership in multiple tribes; expulsion of members; requirements for participating in elections and office holding; and residency requirements.
3. **Elections**, including voting eligibility and suffrage requirements; residency requirements; turnout requirements for an election to be valid; rules surrounding referendums and initiatives; and DOI or other federal approval requirements. We also capture rules related to who may hold public office.
4. **Constitutional Amendments**, including information on the number of amendments made to a given version of the constitution, along with requirements for passing an amendment, such as who must approve an amendment and rules around public approval.
5. **Executive Branch**, including the number of elected executive members; how the executive is chosen; terms of office; delineated executive powers and specific topic jurisdictions over which the branch has control; veto powers; content of the oath of office; procedures for filling vacancies; recall procedures and other limits on executive power; and whether some executive actions require federal approval.
6. **Legislative Branch**, including number of members and number of houses; terms of office; powers and topic jurisdictions; content of the oath of office; procedures for filling vacancies; recall procedures and other limits on legislative power; savings clauses; and whether some legislative actions require federal approval.
7. **Judicial Branch**, including the presence of a constitutionally created tribal court or the right of other branches to create a court; number of justices; process for selecting justices; terms of office; powers and topic jurisdictions; content of the oath of office; procedures for filling vacancies; recall procedures and other limits on judicial power; other tribal dispute resolution or arbitration mechanisms; and whether some judicial actions require federal approval.
8. **Sub-Committees**. Some tribal constitutions allow tribal governments to create sub-committees with specific jurisdictions to act with executive authority, and/or confer a right to create economic organizations that conduct business affairs on behalf of the tribe. TCP collects: the right to create committees or organizations; number of members and how they are selected; filling of vacancies; powers, jurisdiction, and terms of committee creation; oath of office for committee members; limits on power, recall, or other form of public accountability; and requirement of federal approval for creation or committee action.
9. **Rights**. We code for 72 rights, including: civil and political rights; economic rights; legal procedural rights; and social rights.
10. **MetaData**. To examine how documents are understood by the legal community, trained law students provide an assessment about the general content of the constitutions they code. This includes questions about: strength of the branches of government relative to other branches; importance of administrative bylaws to the functioning of the constitution; importance of tribal identity or membership to the constitution; importance of religion and culture; importance of economic growth; importance of tribal land and resources; how complex the constitutional government is compared to other tribes; how much power is left to the people; and the constitution's approach to federal relations. The TCP also captures the public vote outcome and turnout for the constitution or relevant amendment as a measure of public buy-in for the constitutional procedures created or amended in the document.

Although coding has had high inter-coder reliability, and post-coding review has indicated most of the constitutions have been coded without substantial omissions, we recognize areas of potential bias. The most significant concern is the influence of western worldviews: We have worked hard to ensure that coders do not import textual interpretations or expectations rooted in U.S. constitutional law into tribal constitutions, and we have sought to ensure our coders reject and counter existing majoritarian-cultural tropes of unsophisticated or incompetent tribal governance. We recognize, however, that it is unlikely such bias could ever be fully eliminated.

In the future, we seek to make both full documents and codes available for broad use. But given the ways in which tribal constitutions have been used by the dominant culture to imply a fully free expression of tribal values, we intend to take a slow and mindful approach to dissemination. Many tribes do not regard their written constitution as the only statement of their government but embrace a multi-modal approach, incorporating enduring traditions, cultural legacies, and sacred lifeways. Understanding how tribes create governance, within a system of colonial constraints and historic wrongs, is one of the key intellectual contributions of the project. Careful and ethical release of information, respecting the principles of data sovereignty, requires us to place these documents within their larger context. Our next stage is to seek tribal narration, to include memories and narratives of the adoption of these constitutions, as well as modern feelings and interpretations around their creation and implementation and hopes for the future of tribal self-determination.

3. Conclusion

Modern Indian tribes likely have multiple strategies available to them for reclaiming sovereignty. These different strategies will tend to create bundles of constitutional powers and provisions. One of the strong advantages of the TCP method is the ability to uncover these different strategies and to explore when such strategies are apt to arise. The method deployed in developing the TCP database is designed to understand constitutional provisions as parts of a *whole*. But, of course, the indigenous governments of Turtle Island themselves are part of many systems: a tribal system built on traditions and culture; a system of interconnected and related Native American societies; an ecological system of human and non-human relatives; a global system of Indigenous peoples and Nations; and a colonial system, built on stolen land and broken treaties. The TCP is a set of tools, developed for researchers across disciplines who want to unpack the factors that inspire and constrain tribal constitutional governments and to understand the wide-scale impacts of self-determination.

Tribal constitutions are not historical relics and they do more than narrate the landscape of Native claims to justice. They are the scaffolding that helps build real nations, against a backdrop of shifting challenges to sovereignty. And their lessons extend well beyond Indian Country. The use of constitutions to demarcate and define Indigenous governments brings tribes into the ongoing discourse about whether and how a written constitution contributes to the development of a just society, and hopefully sparks academic interest in the importance of Indigenous justice for American futures.