QUADERNI FIORENTINI

per la storia del pensiero giuridico moderno

32

(2003)

giuffrè editore milano

BARTOLOMÉ CLAVERO

MINORITY-MAKING: INDIGENOUS PEOPLE AND NON-INDIGENOUS LAW BETWEEN MEXICO AND THE UNITED STATES (1785-2003)

Se tsontlixiuitl in techmachte tlen kineni koyotl.
Nahuatl Lyrics (*)

(*) "Four hundred years have taught us what the coyote wants" (Gordon BROTHERSTON, *Book of the Fourth World: Reading the Native Americas through their Literature*, Cambridge University Press, 1992, 312, quoting from Joel Martínez Hernández). Nahuatl is the *Mexican* language (the today mother tongue of *Nahuas* or *Mexicas*, also named in the past *Aztecs*, the people stemming from a lost town called Aztlan); even in colonial times under Spanish rule, Nahuatl was the Mesoamerican lingua franca, expanding as such from Nicaragua to the present United States Southwest, where Aztlan perhaps settled. As for the time, 1785 (Christian calendar) was the year of the failed confederacy between the Cherokee Nation and the United States, as we shall see; 2003 is just today, when I end, yet history does not. Nonetheless, 2003 is the year of the Fundamental Laws of the Diné — the Navaho polity — that we will reach, to be sure.

9.2. Born citizens and native rights. — 10. The Arizona Territory and Arizonan polity. — 11. Indian Territory and American State: Oklahoma and New Mexico-Arizona likened. — 12. Arizona federated: Union powers over Indian reservations. — 13. Reservations and states' constitutions contrasted. — 14. Among histories and rights: legal domesticity and constitutional legality. — 15. Toward a post-colonial world: out of primitive law of nations and far away. — 16. Beyond minority: current human rights. — 17. Non-indigenous constitutions and indigenous entitlements. — 18. Epilogue: from (American) freedom's law to (Human) freedom's rights.

1. *Trompe-l'œil in both history and law: majority as minority.*

My point is as easy to formulate as it is hard to tackle, or so it seems in the light of current academic literature. In fact, both historiography and constitutionalism (I mean the present research and imaginary about the past, and the present thinking and discussion about rights to human freedom and consequent framing and functioning of powers) notice the point as often as they neglect it. In these fields (historiographical, constitutional, and both together) almost everybody appears to be at once sighted and blind. They see, yet do not see. They know there is a point, but they do not know how to address it. They give things names, but they hardly utter anything else besides their own, not alien words. So if you want to learn about the issue, you cannot ordinarily trust either historians or constitutionalists, but must resort to involved, isolated experts. Usually, concerning the subject matter, the former, the academic masters of history and law, hold no dialogue with the latter, with those strange specialists in a question that appears to interest their kin and folks, together with empathizing queer people, but by no means leading intellectuals and average faculty. As an ordinary scholar, I try to link up and move on. First of all let us name, locate and call into question the point.

The name is indigenous; the place, the Americas; and mainly, for the present discussion, the United States of Mexico and its neighboring partner, the so-called United States of America. The point emerges in the constitutional settings on which Euro-American States, both Latin and Anglo, were founded, as the majority of the population through the continent, by then indigenous, had to assume the role of legal minority from the beginning. How has it turned out that current American *States* are *Euro*, either Latin or Anglo, but not *Indian*, regardless of the presence of indigenous

peoples as majority groups in their own territories or, in some glaring cases such as Guatemala or Bolivia, even today, in relation to the State as a whole? When the acts of independence took place and constituencies were framed, the latter was the general case. Furthermore, in the Americas, even in our constitutional and democratic age, social majorities may be legal minorities if they happen to be indigenous. This is the name and the point, both past and present. Here the question lay and may still lie.

Therefore I intend to face constituent challenges common to the United States and Mexico, to Anglo and Latin America, as regards legal making of constitutional minorities out of indigenous peoples. Now I am not concerned with devices such as harassment, deprivation, removal, confinement, and exhaustion by strong politics or bare violence leading to straight subjugation or even to brutal slaughter. Here I am dealing with no other power and force than those of the law, namely constitutional law founded on the authority of rights — the today so-called freedom's law so as to distinguish itself from constitutionalism committed to powers. Both are closely related, to be sure, yet the emphasis can make a difference when human freedom is at stake.

People "are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries". Together with both continuation — to some extent — of distinctiveness and self-identification, this is the qualification we shall learn at the end, when arriving at present international law, as actually conveyed by the International Labor Organization. It may be our working definition. Thus, we are referring to some million people in the Americas yesterday and today (over thirty at present). At odds with mainstream approaches by constitutionalism and *indigenism* (I mean the involved, lonesome experts together with empathizing, queer people), divergent and unrelated as these fields are, let me proceed. Purposely I have retained the rhythm and mood of oral presentation (1).

(1) The present paper comes from a two-day seminar that I taught in the spring of 2003 at the University of Arizona James E. Rogers College of Law, *Indigenous Peoples*

Let me offer advice for readings rather than support from authorities since current constitutional and historical expertise, regarding indigenous point, is faulty or at least does not help. Therefore, I am not complying with any standard citation practice but interspersing discussions to spur criticism beyond what is usual or even deemed correct in the academic milieu. Despite some bibliography that I trust, my support is quite textual. My argument will mostly depend on documents extensively quoted. Besides supporting my presentation, the collection is also aimed at reflective reading for further discussion. Purposively, sources and references are built in the body of my text and I am not exhausting comment. I would rather rely on the reader's intelligence so as to make sense in common facing the *white man*'s legal common sense. This is what we are heading for.

For an opening reading, begin with Timothy E. Anna, *Forging Mexico, 1821-1835*, University of Nebraska Press, 1998 (paperback, Bison Books Corporation, 2001), an interesting essay on the early political and legal making of Mexico as a plural State through a federalist form of government according to its own conditions and needs, rather than being a copycat of either the United States neighbor or any European intended prototype. The author is a Canadian scholar, apparently aware of the present indigenous constitutional challenge in the case of Canada. As a researcher on Mexico-making who is concerned with Mexican pluralism, he observes the presence of an indigenous majority in both society and citizenship. However, he never wonders why Mexico did not become an Indian Confederacy, or even why there has not been any Indian state within the Mexican Federation, or by itself and recognized by others, considering that indigenous people were then an overwhelming majority in most areas, and a majority entitled to

---

Law and Policy Program (*www.law.arizona.edu/depts/triballaw/iplp/index.htm*). For encouragement, attendance, queries, and suggestions, I am indebted to its faculty and students, and most grateful to professor James Anaya. Moira Bryson in Seville and Marina Hadjioannou in Tucson helped with the language. As usual, the overall cooperation from Luis Rodríguez-Piñero, at that time there, at the University of Arizona as research assistant, has been pretty useful. The mere visit to Navajo and Hopi reservations held no lesser import than the academic job. José María Portillo, visiting professor by then at the University of Reno, Nevada, lent a hand with the search for texts. Magdalena Gómez advised on peoples in Mexico. *Imagineros Brothers* took care over the illustrations. Besides the specific grant from the University of Arizona, the research is included in a project on constitutional history funded by the Spanish Government Department of Science and Technology (BJU 2000-1378, HICOES working group) as well as in a program on *Legal Multiculturalism and Indigenous Peoples* of the International University of Andalusia. Moreover, I deal with the matter, unusual as it is, in regular courses on *History of Public Law* at the University of Seville that I devote to comparative, intercultural constitutionalism, as well as in seasonal lectures on *Indigenous Peoples' Rights* at other Universities, namely *La Cordillera* (La Paz, Bolivia) and *Deusto* (Bilbao, Basque Country). The teaching challenge before diverse audiences helps a good deal by itself and especially through feedback. I love to tie research options with both concerns as a citizen and duties as a professor so that unilateral text may be authorized by dialogic test and thus lend itself to the ongoing discussion.

constitutional rights on the part of Mexico. As if conjuring, the point is seen and not seen. Often, as in the Mexican historiography or also in the mainstream constitutional history of the United States, it is unseen. For telling evidence, focusing on rights (and the author having dealt in the past with some topics of Indian legal history), see John Phillip Reid, *Constitutional History of the American Revolution*, University of Wisconsin Press, 1987-1993.

2. *Opening challenge: indigenous citizenship from European Spain to Hispanic Mexico.*

In Mexican history, the crucial point is the citizenship of indigenous people rather than their simple being there. The backdrop of Mexican constitutional history, established in 1821 at the very moment of independence, is the common polity of indigenous and non-indigenous people, the former being the majority and the latter the minority (under twenty per cent). At that time, a Spanish constitutional system had just been established, where both indigenous and non-indigenous men were citizens while women and African-Americans were excluded from constitutional rights. That early Spanish constitutionalism kept slavery alive and denied citizenship to emancipated male African-American slaves, unless they demonstrated extraordinary individual merits. They were however declared Spaniards. Regarding the definition of constituency or polity and citizenship (I mean the human support and agency of constitutional fabric and policy), the main provisions of the 1812 Spanish Constitution were the following.

Spanish Constitution (1812). Title I. *On the Spanish Nation and Spaniards*. Chapter I. *On the Spanish Nation*. Art. 1. The Spanish Nation consists of all Spaniards of both hemispheres. Chapter II. *On Spaniards*. Art. 5. Are Spaniards: 1. All free men, born and dwelling in the Spanish dominions, and their children; 2. Foreigners who may have obtained from the *Cortes* [Congress] letters of naturalization; 3. Those who, without them, reside ten years in any village or town of the monarchy, according to the law; 4. Manumitted freedmen, as soon as they obtain their liberty in Spanish territory. Title II. *On the Territory of Spain, its Religion and Government, and on Spanish Citizens*. Chapter IV. *On Spanish Citizens*. Art. 18. Those are Spanish citizens who descent from parents both of the Spanish territories of either hemisphere, and are settled in any town or district of the same. Art. 22. The *Cortes* leaves open the channels of virtue and merit to Spaniards reputed of African origin on either side to become citizens; accordingly, the *Cortes* will grant letters of citizenship to those who may perform reasonable service to the country, or to those who distinguish themselves by their

talents, diligence, and good conduct, on condition that they are the children, in lawful marriage, of fathers naturally free, that they are married to a woman also naturally free, and settle in the Spanish dominions, exercising any profession, office, or useful branch of industry, with an adequate capital. Art. 24. The condition or quality of a Spanish citizen is lost: 1. By obtaining letters of naturalization in a foreign country; 2. Accepting employment under any other government; 3. By any sentence imposing severe or infamous penalties, as long as it remains unrevoked; 4. By residing four years following out of the Spanish territory, without a commission or leave of government. Art. 25. The exercise of the said rights is suspended: 1. In virtue of any judicial prohibition from physical or moral incapacity; 2. In cases of bankruptcy, or of debtor to the public; 3. In the state of domestic servitude; 4. From not holding any employment, office, or known means of life; 5. From having undergone a criminal prosecution; 6. From the year one thousand eight hundred and thirty, all those who claim the right of citizenship must know how to read and write.

2.1. *Imperial Constitution and indigenous people.*

Let us address at once the starting point on the American side. The first Mexican constitutional system was the Spanish one, in which indigenous people shared citizenship with non-indigenous. This rule resulted from a settlement among American and European representatives, during the founding Spanish Congress in Cadiz (1810-1813). The aim was to balance parliamentary seats between America and Spain, or rather then American Spain and European Spain. The 1812 Spanish Constitution, framed by this Cadiz assembly, explicitly addressed the European, American and Asian *Spains* (in the plural), and thus the entire colonial empire from Mexico (*New Spain*) to the Philippines. Empire was the constitutional set. The Constitution did not call imperialism, or rather colonialism, into question. Then, on these partially new grounds, the arguments for a balance between European and non-European constituencies and even for the definition of the constituency itself were most critical.

Because the elections for the founding Congress had partially allocated and the definitive Constitution would fully allocate parliamentary seats in proportion to the population, a great imbalance was produced as long as indigenous people were not counted. Then, in accordance with demography, American representatives would constitute a definitive minority in the imperial Spanish Congress, what they blatantly rejected. But by taking into account both indigenous and non-indigenous male individuals as Spaniards and citizens, and

their entire families as the former, these parliamentary constituencies, the European and the non-European, were to be quite balanced in the common Congress according to contemporaneous reckoning (about ten million people, or *souls* in Cadiz constitutional language, and one hundred and fifty representatives, on each part, the European and the American, at that time). To this end, so that an inter-continental, Euro-American equilibrium could be reached in the imperial Congress, indigenous people became citizens. Indigenous citizenship was granted on the grounds of balance regarding political representation between continents, not of equality regarding constitutional entitlement between peoples.

At any rate, indigenous people were therefore entitled to civil and even political rights, and so to be called to constitutional elections for the imperial Spanish Congress, for the Provincial Deputations and for local Municipalities (*Province* meant inner polity somehow like in Canada or Argentina today). For this constitutional approach, which engineered the *Spanish Nation* through upward representation rather than downward administration, the Municipalities could be either indigenous or non-indigenous, while Congress and Deputations were intended to be non-indigenous as for agency. Constituency meant both. A complex electoral system based upon widespread suffrage and going through a variety of stages was aimed at and implemented to achieve this discriminating purpose. The procedures fostered cooptation amongst the establishment, rather than election from the people. The constitutional inclusion of the Catholic religion for the latter and the Catholic Church for the former — the establishment — helped. In the cast of this European and American constitutionalism thus common, bishoprics, parishes, and even missionary orders had a regular ruling and disciplining role to play, the importance of which, especially of the latter, increased out of Europe as regards indigenous people (in fact, it is the only moment of explicit mention of them, namely of *Indian infidels*, in this at once European and American Constitution).

> *Spanish Constitution* (1812). Title II. *On the Territory of Spain, its Religion and Government, and on Spanish Citizens*. Chapter II. *On Religion*. Art. 12. The Religion of the Spanish Nation is and shall be perpetually Catholic, Apostolic, and Roman, the only true religion (...). Title III. *On the Cortes*. Chapter VII. *On the assembly of the* Cortes. Art. 117 (...). [A]ll the deputies shall take the following oaths on the holy Evangelists: "I swear to

defend and preserve the Catholic, Apostolic, and Roman religion, without admitting any other into the kingdom (...)". Title V. *On the Civil and Criminal Courts of Justice, and the Administration thereof.* Chapter I. *On the Courts of Law*. Art. 275. *Alcaldes* shall be established in all settlements; and the laws shall define the extent of their powers, both in matters of litigation, and of economy. Title VI. *On the Political Government of the Provinces and Towns*. Chapter I. *On the* Ayuntamientos [Municipalities]. Art. 310. An *Ayuntamiento* shall be established in those settlements that are without it, and in which it is desirable; all those which possess, either in themselves or in their territories, a population of a thousand souls, being required to have it, and a proportional district shall be assigned it. Chapter II. *On the Political Government of the Provinces, and the Provincial Deputations.* Art. 325. There shall be in every province a deputation, styled provincial, for the purpose of promoting its prosperity (...). Art. 335. It will be the duty of these deputations. 3. To take care that *Ayuntamientos* are established in proper places, conformable to the 310th article. 10. The deputations of the provinces beyond sea will vigilantly observe the management, order, and progress of the missions for the conversion of the Indian infidels, whose ministers will give them an account of their proceeding therein, for the purpose of avoiding abuses; all which the deputations will submit to government. Title IX. *On the Public Education*. Art. 366. Preparatory schools shall be established in all the towns of the monarchy, in which children shall be taught to read, write, cast accounts, and the catechism of the Roman, Catholic religion, which shall also contain a brief explanation of their civil duties.

2.2. *Cultural approach and family affairs.*

Add cultural assumptions. The Constitution was produced in Spanish; as would politics work. Spanish-speaking people were deemed to be the natural representatives of the indigenous party on behalf of the American common constituency. Furthermore, in this early constitutionalism, a watershed operated between economics and politics, the former meaning private affairs and the latter public affairs. Local Municipalities were considered mostly *economic* bodies together with families and corporations such as commercial or even religious ones. *Politic* body was the Congress. Provincial Deputations were somehow mixed entities, both economic and politic. As sole Municipalities' constituents and actors, the proper place for indigenous peoples, manners and languages was deemed to be provided and fixed by the economy or rather *oeconomy* (that is, in the old sense implying domestic or private status, not public or constitutional standing for a lot of people — women, hired worker, slaves, and so on; *oeconomy* meaning literarily home rule), as an additional or even preceding order to that represented by constitu-

tionalism. Public space entailed constitutional freedom while the private level resulted in human subjugation. On these grounds, indigenous citizenship, overall in textual theory and just local in contextual practice, was a real challenge.

The 1810-1813 founding imperial Congress collected its regulations when concluding the task. Both the 1812 Constitution and a prior 1810 provision establishing the shared equal condition between Europeans and Americans were of course included. In the 1810 language, "Spanish dominions of both hemispheres form a sole and only Monarchy, a sole and only Nation, and a sole Family". In the index of this authoritative collection, the corresponding entry reads as follows: "*America*, its Native, primary people form a sole family together with the Spanish Europeans". *Family*, neither Monarchy nor Nation, apparently was the relevant classification as for indigenous people. In fact, from start to finish, even after the Constitution, this founding Congress usually referred to them as the minors of the family in need of either *oeconomical* guardianship (for *Indian infidels*) or political representation (for *civilized Indians*) on the part of big brothers or mommas (Europeans together with Euro-Americans or Creoles; the Catholic Church alongside the Spanish Monarchy). Coming from pre-constitutional into constitutional times, it was the *oeconomy* — the private order previous to the public fabric. Remember this if you want to get the picture of the indigenous peoples' standing throughout the constitutional history.

James F. King, "The Colored Castes and American Representation in the Cortes of Cadiz", *The Hispanic American Historical Review*, 33, 1953, 33-64, brought to light the motives for the extension of citizenship and so put a break point on speculations about constitutional equality between Spaniards and Indians. Later, on the occasion of 1992 neo-colonial celebrations, the topic has been widely addressed by historiography mostly in Spanish, both in Spain and Latin America, often unaware of the caveat. Time and again, the presence of indigenous people is not even taken into account. Let me register Marie-Laure Rieu-Millán, *Los diputados americanos en las Cortes de Cádiz*, Consejo Superior de Investigaciones Científicas, 1990, adding a subtitle inside: *Igualdad o Independencia*. Mark the latter. You can bet that the announced dilemma between *equality* and *independence* really implies the attention, as counterpart of Spaniards, to only Euro-American minority and not indigenous majority, as the latter is not thought as entitled to either equality or independence by contemporaneous politician and present historian. This is still the usual pattern. Trying to keep within dates as much as possible, the translation of the 1812 Spanish Constitution I am

relying on (correcting the minimum) is the one published by *The Pamphleteer*, vol. XXII, nº XLIII (London 1823), 62-87 (2).

2.3. *Indigenous citizenship and colonial rule.*

Municipality incorporation was construed as a constitutional right to local polity. It was not dependent on further enactment in most cases. Local communities with over one thousand *souls* or inhabitants were constitutionally entitled to self-administration as municipal corporations. The rest could be given a franchise to incorporate as such together with others or by themselves. Indigenous communities were deemed to be included as for both right and grant. Indians converted by missionaries — so considered to shift from *infidels* into *civilized* people — would join. Indigenous people could participate in local as well as in other elections for constitutional bodies, even Congress. Indians were real citizens entitled to political, not only civil rights. African-American freedmen were not so, and slaves were not even Spaniards. As for the overwhelming majority in America, the non-European indigenous people, they were considered to be citizens before 1821 Mexican independence, whatever the motivation. Indigenous citizenship existed or rather indigenous people had a share in a Euro-American citizenry. This was taken for granted by Mexican independent constitutionalism.

In 1810, a first effort at independence might have turned out differently regarding indigenous standing. In this failed attempt,

(2) The anonymous *Translator* added some notes, but only one on the non-translated, here quoted terms: "*Ayuntamiento*. No single word or expression in English will give the proper signification of this word. It embraces the terms and duties of Corporations, Town Halls, Court Leets, Courts of Conservancy, of Lieutenancies of Counties, and, in short, all descriptions of Courts for municipal, internal regulations". Stemming from the Latin, the meaning of *Cortes*, as parliament besides judiciary, was instead taken for granted (originally being the same word, as *Court* had been the place where the king or queen — head of the highest bodies both political and judicial — stayed or was supposed to be present; through the separation of powers, *Cortes* today means in Spain parliament and in Latin America judiciary bodies). *Alcalde*, the main local overall authority, meant judge from the Arabic. As for the contemporaneous translations of Mexican texts, I will also add brief definitions in square brackets just when needed.

slavery was abolished, as well as *castas*, meaning indigenous legally subjugated position, and a widespread common citizenship was proclaimed. However, Spanish law, including its acceptance of slavery, was soon reestablished. In 1821, when the separation finally took place, the 1812 Spanish Constitution was transitorily in force as the Constitution of *New Spain* (Mexico and Central America). Eventually, on the way from Spain to Mesoamerica, because of the independence, there was no discontinuity of constitutionalism, nor a termination of colonialism, this is, true colonialism, that which submits non-European people to people either stemming from or remaining in Europe. Here I am not concerned with the relationship between European and Euro-American people that was also deemed colonial for the sake of American independence conducted by the latter.

This independence put an end to Spanish imperialism, but not to Hispanic colonialism. The latter raises the key question to this Euro-American constitutionalism. In the matter of fact or rather of law, from imperial Spain to independent Mexico, there was a continuity of colonial constitutionalism or rather constitutional colonialism. Constitutionalism itself was established without indigenous consent and on the unequal footing stemming from prior colonial times. How could this occur in a constitutional setting and through constitutional procedures? That is the question.

The next recommended reading may be Nancy M. Farriss, *Maya Society and Colonial Rule: The Collective Enterprise of Survival*, Princeton University Press, 1984, discussing the situation previous to Anna' s *Forging Mexico*. She studies the history of the Yucatan people throughout colonial times under the Spanish rule extending to the first Hispanic constitutionalism, namely the one launched by the Cadiz Congress. Every single step in the course of this history is extremely interesting. However, for our present purposes, the final section should be noted. It analyses the indigenous strategies operating under the novel constitutional framework, which, through their own agency, brought benefits to them even beyond the regulations of the Constitution. There we may observe some actual performances of indigenous citizenship. As the initial experience demonstrated that constitutionalism could operate through the exercise of rights beyond its aim, the upholding of shared citizenship after independence therefore becomes even more significant. Matthew Restall, *The Maya World: Yucatec Culture and Society, 1550-1850*, Stanford University Press, 1997, relying on indigenous sources, yet less concerned with constitutional polities, takes the point. Further evidence on the extent of active indigenous citizenship is available: Antonio Annino, "Cádiz y la revolución territorial de los pueblos mexicanos, 1812-1821", A.

Annino (ed.), *Historia de las elecciones en Iberoamérica, Siglo XIX. De la formación del espacio político nacional*, Fondo de Cultura Económica, 1995, 177-226; add now Karen D. Caplan, "The Legal Revolution in Town Politics: Oaxaca and Yucatan, 1812-1825", *Hispanic American Historical Review*, 83, 2003, 255-293. Unfortunately, the most interesting studies regarding indigenous background do not reach the constitutional moment — the last stage of the Spanish dominance: James Lockhart, *The Nahuas After the Conquest: A Social and Cultural History of the Indians of Central Mexico, Sixteenth Through Eighteenth Century*, Stanford University Press, 1992; Kevin Terraciano, *The Mixtecs of Colonial Oaxaca: Ñudzahui History, Sixteenth through Eighteenth Centuries*, Stanford University Press, 2001. Disregarding this literature, Tamar Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America*, Yale University Press, 2003, addresses colonial township belonging as if it could explain indigenous citizenship. The usual legal approach does not contemplate by any means *Indian* peoples as human active participant, as if only Europeans and Euro-Americans held the capacity to define both themselves and others on the way (3).

3. *Constitutional strategies: the location of the individuals.*

The federal Mexican Constitution of 1824 was framed from the launching set of the Spanish Constitution of 1812. Establishment of religion was not discontinued, neither were other cultural and social assumptions. Provincial Deputations might become constitutional states now contributing to the founding of the Mexican United States. Indigenous people held citizenship. Here is the point. If indigenous people were a full majority in both the federated states and in the United States of Mexico, and they shared citizenship with non-indigenous people, why did they not become the ruling people through their own languages and cultures, customs and ways? The Spanish language was not even a second tongue or lingua franca for many indigenous peoples (Nahuatl still prevailed as such). Neither were ways of life. How was it that Mexico and all its inner states, besides other Latin American States, were finally constituted as Hispanic polities, just as the ones in the North would be Anglo?

As the question is constitutional, the answer must be constitutional as well. Here I am not concerned with unconstitutional or

(3) Currently, HICOES — the mentioned research working group to which I belong — cope with Spanish imperial policy and constitutionalism between European, Hispanic and indigenous people; particularly, José María Portillo, Marta Lorente and Carlos Garriga are studying the American issue.

illegal procedures such as direct harassment and pure deprivation by strong politics or bare force leading to subjugation or even slaughter. Here we are not dealing with force other than that of the law, as we know. Culture must be added as a legal task force. In short, this is the question: What were the constitutional devices required to shift the social basis of indigenous character into the political outcome of the European kind, either Latin or Anglo? Let us take a look at the constitutions themselves, as the question is constitutional. Regarding indigenous people, there may be a hidden agenda, a kind of overlapped constitutionalism, or rather internal un-constitutionalism, which might easily go unnoticed. Let us pay attention. If we keep watch, the constitutional agenda for indigenous people proves not so hidden.

At first glance, we find two different brands of legal devices that may affect indigenous people in an excluding or impairing trend — the individual and the collective. On the one hand, the 1812 Spanish Constitution contained rules excluding individuals from the exercise of political rights that may feasibly apply to indigenous peoples (for instance, the exclusion of those illiterate in Spanish, to become effective in 1830, providing for the estimated time of a single generation, the first to be subjected to mandatory education). The 1824 Mexican federal Constitution had no say regarding these qualifications for citizenship because of the decentralizing assumption that the matter of political and civil rights was one of states' concerns, not the Federation's. Next, the Mexican state constitutions directly followed the lead of the Spanish 1812 Constitution and reinstated or rather continued provisions for suspension of citizenship on an individual basis. The 1827 Constitution of Texas and Coahuila, which purported to establish a *Coahuiltexian* polity, is one of them.

> *Constitution of Mexico* (1824). Art. 9. The qualifications of the electors shall be constitutionally prescribed by the legislatures of the states, to which it also belongs to regulate the elections conformably to the principles established by this Constitution.
>
> *Constitution of the State of Coahuila and Texas* (1827). *Preliminary Provisions*. Art. 22. The exercise of the said rights [of a citizen] shall be suspended. First: For moral or physical disability, after judicial investigation. Second: For not having attained the age of twenty one years, except married persons, who shall enjoy the said rights from the time they marry, whatever be their age. Third: For being debtor to the public funds, the time of

payment having expired, and payment having been demanded. Fourth: For being under criminal prosecution, until acquitted or sentenced to a punishment not corporal or disgraceful. Fifth: For having no employment, trade, or know way of support. Sixth: For not being able to read and write, but this provision shall not take effect until after the year 1850, and with respect to those who shall enter on the exercise of the rights of citizens after that time.

Following likewise Spanish patterns regarding rights, other state constitutions included clauses providing for suspension of citizenship on such an additional basis as "status of domestic servant" (meaning hired worker in the general, except in some cases that qualified the category by "personal service"), or as "the conducting of an immoral way of life" (meaning being neither sedentary nor industrious or even being "customarily unclothed"). This provision was usually phrased without the Texan (and former Spanish) caveat for judicial investigation. All of these deprivations of citizenship on an individual basis might have had a severe effect on indigenous people. Nevertheless, they were not enough to make the constitutional majority be a legal minority. In fact, they were not even intended for this major purpose.

There were further devices, the collective ones, as will be discussed below. Working together, these devices could produce the massive effect of making the indigenous majority a constitutional kind of minority. Minority making through legal procedures is the point. As I have already reiterated, I am not concerned here with clearly unconstitutional or illegal past or present procedures or performances.

Further suggested readings in English could be two that I authored, namely "Culture versus Rights: Indian Law and *Derecho Indiano*", Julius Kirshner and Laurent Mayali (eds.), *Privileges and Rights of Citizenship: Law and the Juridical Construction of Civil Society*, Robbins Collection Publications, University of California at Berkeley, 2002, 277-297, and "Freedom's Law and Oeconomical Status: The Euroamerican Constitutional Moment in the 18th Century", *Quaderni Fiorentini*, 30, 2001, 81-135. As the former sets forth the comparison between Mexico and the neighbor United States and takes into consideration cultural pre-juridical factors rather than the constitutional ones, it addresses the main point, namely the challenging question on indigenous citizenship as a majority constituency (later, I will return to some of the remaining issues, as they actually contribute to the constitutional exclusion of indigenous people or legal discrimination against them). The latter, *Freedom's Law*, introduces historical *oeconomy*, this is, the home rule or *domestic* order concerning women, hired workers, slaves, and indigenous people too, which, as indicated a propos of the 1812 Spanish Constitution,

we have to take into account so to understand constitutional or rather unconstitutional standings. The English edition of the whole volume being planned, I may also direct you to Pietro Costa and Danilo Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Feltrinelli, 2002, 537-565: "Stato di diritto, diritti collettivi e presenza indigena in America".

4. *Accommodation through allocation of powers.*

As for the Mexican constitutionalism, let us now focus on the collective side. The devices affecting whole groups and not just individuals are at least fourfold: first, the municipal incorporation or rather local downgrading and even confining; second, the federal territorial regime as opposed to state self-government; third, the institution of trial by jury and its involvement of the issue of customary law; and, last but not least, the communal form of ownership with the respective implication of a specific, indigenous form of government. All of these are also constitutional devices, some relating to governmental powers and others to plain rights. Let us consider each of them separately in order to arrive at an overall reflection. In the final analysis, in the case of independent Mexico and throughout the Americas, we will have to take necessarily into account culture in the singular and cultures in the plural so as to be able to realize and explain the very historical working of the constitutional devices. But every item must wait its due turn. Be patient. Let us move on step by step.

In a Spanish language book (although its title is in Quechua, *Ama Llunku*, and Kuna, *Abya Yala*, meaning Indian pride throughout the Americas), I have dealt with the municipal incorporation as a collective device for the constitutional location of indigenous peoples: *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América*, Centro de Estudios Políticos y Constitucionales, 2000, in the last comparative chapter between the Basque people in Europe and the Quiché people, a Mesoamerican people, the former not being restricted to the local layer and the latter tellingly otherwise, even obliged to this institutional confinement into municipal communities. Here, in *Ama Llunku*, I name the trompe-l'œil *O'Reilly's Theorem* after a Mexican lawyer and politician (Justo Sierra O'Reilly) who witnessed the active use of the Spanish Constitution by Tzotzil and Tzeltal peoples, the majority in Yucatan, and proposed to counterattack the indigenous intent in legal terms, not through warfare. As for the early Mexican states' constitutions, they were edited by Mariano Galván Rivera, *Colección de Constituciones de los Estados Unidos Mexicanos* (1828), Ediciones Purrúa, 1988. The translations of the Mexican and the Coahuiltexian constitutions that I am quoting were published and disseminated, together

with federal and state colonization laws, in that time in both the United States and Great Britain, with a view to attracting Anglo, this is most white, people, *whitening* being the explicit name of this policy. You may find the texts on the internet browsing through *Nineteenth-Century Texas Law Online*, University of North Texas (*texinfo.library.unt.edu/lawsoftexas/default.html*). Most of the documents I refer to are available through searchers on the widening web.

4.1. *Municipal incorporation as reservation.*

The Mexican state constitutions under the 1824 federal Constitution retained the Spanish approach regarding indigenous municipality, but also embraced another trend towards an important shift. Through similar provisions and with significant nuances, these Mexican constitutions cease to stress community entitlement in order to empower the state executives and legislatures, that is, the non-indigenous institutions, instead. From that point on, municipal incorporation was no longer a collective right but a political grant. Significantly, in the constitutional design revealed in the indices of these constitutional texts, the municipalities or *Ayuntamientos* are in one case, the Spanish, representative institutions along with the Provincial Deputations and the Congress itself, while in others, the Texan and other Mexican constitutions, they fall under the section establishing the *Executive Power of the State* as its local facilities.

Given all this, you can even suspect that one of the main motives for independence was the Euro-American determination to lead and keep control of the conversion of indigenous communities into municipal bodies. This might be a true key for *Nation* building, meaning State founding, framing, and empowering. Thus, the constitutional accommodation would definitively become social downgrading and cultural confinement. Textual changes in the fundamental norms implied this evolution or rather regression to colonial settings that were not alien to the Spanish 1812 Constitution, but that would be more feasible under the Mexican counterparts. With this purpose, some Mexican states bluntly recovered for the indigenous communities the so-called castes or *castas* regime as contained in the *Leyes de Indias* or colonial Spanish legal consolidation (we shall find it in force in the United States Southwest as well). Colonial acts could be then constitutional regulations as regards indigenous people.

> *Constitution of the State of Coahuila and Texas* (1827). Title II. *Executive Power of the State*. Sec. VII. *Ayuntamientos*. Art. 156. *Ayuntamientos* shall be established in towns where there are none, wherein it is proper they should exist, and they shall be established without fail in the district capitals, whatever be the population thereof, and in towns which, of themselves or with the territory they embrace contain a population to the amount of one thousand souls, unless said towns should be annexed to another municipality, in which case, since from other considerations it may not be proper for them to separate, in order that they may have an *Ayuntamiento*, it shall be so declared by congress, after receiving the report of the governor, and the dispatch that shall be formed, assigning the limits that are to embrace the new municipality. Art. 157. Towns that should not possess the population assigned, and which find it practicable being advantageously annexed to another or others, shall constitute a municipality, and the *Ayuntamiento* shall be established at the place most convenient in the opinion of the executive. Art. 158. In towns wherein *Ayuntamientos* cannot be established, and which are so distant from the other municipalities that the latter cannot attend to the internal administration thereof, the electoral *juntas* [boards] of that to which they belong shall choose a commissary of police and a *síndico procurador* [local ombudsman] to discharge the duties assigned them in the regulations for the political administration of the towns.

4.2. *Territory versus state regime.*

Founding a Federation, the 1824 Constitution of Mexico contemplated both states and territories, *states* entitled to their own constitutions and powers, and *territories* submitted to the federal institutions. This difference between *territory* and *state* was motivated by a single aim, that is, non-indigenous domination over indigenous peoples. The distribution of powers between center and periphery was actually conceived not just to integrate non-indigenous polities, but also to subdue indigenous peoples. Where the former could keep control, there were states. Otherwise, it was the hour for territories. The territory regime fell short of fully recognizing political or civil rights, so that the federal powers in this regard could be far-reaching and capable of imposing non-indigenous forms of local entitlement and empowerment. The aim shared with states was to foster whitening immigration at the expense of indigenous presence.

With regard to this discrimination between state and territory, the United States represented a truly appreciated example then. By the time of the framing of the federal Constitution (1787), the United States had drawn up through ordinance that temporary kind

of *territorial* regime characterized by the shortage of constitutional autonomy as long as the population to be empowered became whitened enough. In the meantime, only colonizers were entitled to some rights. The invention was genuinely American, not European. In explicit defense of the *white race* against the indigenous control of most parts of the peninsula, for the sake of conquest, Yucatan tried in 1848 to withdraw from Mexico requesting in vain from the United States to be admitted as a *Territory*, not as a *State* like Texas but as New Mexico then. The point of discriminating between inner autonomous states and federal dependent territories was well known in Mexico. We shall deal with the question of these other territorial transferences, those of New Mexico that included, as part of the territory, Arizona, and, as a state, California.

At this point, an enlightening reading may be Florencia E. Mallon, *Peasant and Nation: The Making of Postcolonial Mexico and Peru*, University of California Press, 1994. The author is concerned with indigenous political participation rather than constitutional location and the history she takes into account deals with social conflicts and not legal constructs and procedures. However, she offers a fascinating narrative of the making of Mexico about mid-19th century. This reading may also broaden historical perspectives through the comparison between the quite diverse, as for Nation-making or rather State-framing, Mexican and Peruvian cases with the peasant, meaning indigenous, social and political agency always in mind. The use or misuse of names matters, because the non-indigenous or *peasant* wording implies relegation of the cultural differentiating factors that may imply a diversity of polities. Nation meaning exclusively State holds by itself an implication adverse to indigenous peoples, downgrading them as no-nations even in the cultural sense. On these assumptions, issues such as how territory regime operated specifically in Mexico, as a constitutional alternative against indigenous peoples, are bluntly ignored. Regarding the case of Yucatan, direct old sources are more telling than current historiographical treatment. In 1938, Héctor Pérez Martínez edited the diary of the lawyer, politician, and ambassador I have referred to: Justo Sierra O'Reilly, *Diario de nuestro viaje a los Estados Unidos. La pretendida anexión de Yucatán (1847-1848).*

5. *Accommodation through rights.*

There was no real accommodation through powers. Indigenous peoples did not fit in with the social downgrading and cultural confinement of local incorporation. First of all, indigenous communities were not successfully reduced to municipal bodies, as they adapted the new forms of local elections and authorities to maintain

and even strengthen the functioning and organization of their own jurisdictions, distinct customs, and effective home rule. While the non-indigenous aim was that diverse indigenous law and jurisdiction were bound to disappear with the announcement and arrival of *national* — meaning State — code and justice, beginning with the very constitution, this expectation was not accomplished at all. Instead, the indigenous communities tended to survive and even become reinforced as such under the constitutional umbrella offered by municipal incorporation. They did not comply with non-indigenous planning and engineering.

Constitutions were adopted by non-European peoples just as a subsidiary device on their own behalf. By and large, indigenous performance exceeded constitutional forecast. Indigenous presence and influence in Mexican politics were realized through initiative and conflict as much as adaptation and participation, although the latter under the restrictive ways of Spanish language and Hispanic manners. Nevertheless, Mexico was not Spain. Mexican policy could not be Spanish policy. At home, indigenous voices and actions could rather be heard and seen.

Indigenous people resorted to constitutional rights. Rights were effectively exercised. Even from the constitutional field, rights could be aimed at indigenous accommodation. There were approaches to constitutional entitlement of rights on behalf of indigenous people, namely to the right to trial by jury as a method of allowing and accommodating indigenous ways of justice and law, and also to the right of collective property as a device to assure the whole fabric of indigenous community, self-government included. The latter rather than the former constituted a genuine indigenous claim. Then, indigenous justice and law did not experience as much jeopardy from constitutional pressure as communal property. The private property policy arrived before the community prior to all the rest of state or federal judiciary and law. As a constitutional demand, right to trial by jury was expressed in Spanish. Constitutional right to communal property was also claimed in indigenous languages.

Mexican federalism, in fact broken down since the mid thirties, was reframed or rather re-founded and rebuilt by the 1857 Constitution that granted the Federation, and not the states, primary jurisdiction over recognition and guarantee of fundamental rights.

Thus, inasmuch as a matter of rights, indigenous peoples now fell under federal powers. In fact, beforehand, the Federation had intervened in the realm of constitutional rights. In 1829 slavery had been abolished by federal enactment, though some states could still resist on the constitutional grounds of state powers over rights. From 1857, the shoe could be on the other foot. Let us focus on the placement of indigenous peoples within the new constitutional scheme, either through rights or through want of rights. In the 1856-1857 re-founding Congress, both trial by jury and communal property were most controversial topics concerning indigenous people.

> As we are moving to the frontier between Mexico and the United States and, in addition, as I presented my paper first hand at the University of Arizona, perhaps I may suppose that you, attendant then, can read Spanish, as readers may. I know that, though addressing a multilingual society with the English as the latecomer, the Arizona Constitution requires only proficiency in the latter to be a good citizen and furthermore that this also is from the very beginning the implicit assumption of the United States constitutionalism facing few European and many indigenous languages, yet fortunately people go beyond law. Nevertheless, the reading of constitutions is worth the effort. The standard collection of Mexican central, federal or not, Constitutions (not the ones of the states) is edited and updated by Felipe Tena Ramírez (ed.), *Las Leyes Fundamentales de México*, Editorial Porrúa, 2002, where you can find more than strict constitutional texts; *cervantesvirtual.com/portal/constituciones/pais.formato?pais=Mexico* leads to a growing collection on the web. Let us keep drawing on old documents rather than present experts.

5.1. *Trial by jury and customary law.*

Sure enough, the right to jury trial was one of the most controversial topics in the 1856-1857 constituent Congress, precisely because it could imply a means of accommodation of indigenous jurisdiction and law in the constitutional fabric. By recognizing such a right as to be judged by peers through jury, the Constitution would provide cover for something else than a form of trial.

At first hand, the constitutional approach was that non-indigenous judges would assume their positions presiding juries and applying non-indigenous law after verdicts, but Mexican people and even Congress knew better. Neither the Federation nor the states had the resources to deploy judicial powers over all of Mexico.

Additionally, contrary to the 1812 and 1824 constitutional regimes, through 1857 Constitution Mexico was no longer a Catholic country in legal terms. Neither the Federation nor states could any longer rely on friars and priests for more or less constitutional purposes (there would be some exceptions). Therefore, local government would be overall in the hands of indigenous communities. People knew the secret. So did the framers.

As a constitutional and communal right, trial by jury could mean indigenous justice and indigenous law. Conceivably for those Mexican framers, indigenous jurisdiction could be an institution *de jure* as well as *de facto* and so would the jury there. In the given set, juries might hold the power to seek, find, consider, and therefore determine the communal, customary law. The recognition and establishment of the indigenous jury entailed the adoption and accommodation of indigenous law as well.

The 1857 Congress recognized the right to jury — jury as a constitutional right and not only as judicial procedure —, but it eventually disappeared from the parliamentary agreements and the published Constitution. In fact, the jury as a constitutional right accommodating indigenous justice and law, not just as a judicial institution for the matter of fact, has never been implemented in Mexico. Nevertheless, indigenous jurisdiction — customary law and adjudication — have not disappeared, maintaining communities' inner consent and use. They have managed to survive throughout precarious accommodation and no constitutional direct support at all.

Indigenous jurisdiction entails indigenous law, traditional customary law, which colonialism and, afterward, constitutionalism had deprived of tools to live and develop, such as legislative, judicial or administrative branches of their own. No indigenous self-rule or self-government was directly considered by Mexican constitutionalism. But it existed and could even be accommodated by indirect devices, such as the right to jury trial. The indigenous jury, constituted as a body competent to decide issues of law, based on that constitutional right, could have stood for an effective recognition of indigenous self-rule, yet we cannot know for sure. As far as I know, no Latin American State has ever tried the formula of the right to a

trial by jury in order to affirm indigenous jurisdiction and customary law. As for the Anglo side, we shall see.

> We know that there may be access to the indigenous side of constitutional rights through historical sources rather than current studies. Concerning the discussion on the parliamentary floor that refers to items such as the right to jury and the related one about indigenous jurisdictions which might be benefited, you may resort to the records of a journalist and representative in the constituent Congress, Francisco Zarco, *Crónica del Congreso Extraordinario Constituyente (1856-1857)*, edited by Catalina Sierra, Colegio de México, 1957, rather than on the official and less eloquent proceedings: *Actas Oficiales y Minutario de Decretos del Congreso Extraordinario Constituyente de 1856-1857*, same editor, Colegio de México, 1957 (these not published at the time). Francisco Zarco was concerned with constitutional rights, not with indigenous accommodation. He is more reliable regarding the former. If you, just like me, cannot understand any of the indigenous languages, it is truly hard or even unfeasible to become further acquainted. Anyway, I make an effort to deal with the question in "Jurisdicciones veteranas y Estados novicios: México y Texas, 1824-1866", Feliciano Barrios (ed.), *El Gobierno de un Mundo. Virreinatos y Audiencias en la América Hispana*, forthcoming.

5.1.1. *The Mexico-Texas confrontation on rights.*

The right to trial by jury, the jury as a constitutional right, had been one of the main matters of concern and complaint by Texas against Mexico as it made its way to independence out of Coahuila and eventual incorporation into northern neighboring United States. However, let us not get confused. It had nothing to do with indigenous accommodation and empowerment. On the contrary, it implied unconcern and exclusion. Texas separated from Mexico based on a defense of the federal system under the 1824 Mexican Constitution, a system that empowered states to maintain slavery and subdue indigenous peoples. By sacrificing in fact everybody's rights for the sake of centralized control, this federalism had overtly gone on the blink in the mid thirties.

Prior to the Civil War (1861-1865), the United States of America did not guarantee rights against states, just like first Mexican federalism had not done. However, until then, both African-American slavery and Indian plain exclusion were allowed by the United States and not by Mexico (since 1829 for the former issue, but we shall find that there were still forms of enslaving indigenous people, such as *peonage*). The Texan leading polity (meaning its

Anglo minority, a minority in regard then not to Hispanics, but to Indians, a Euro minority that appealed to and that was welcomed by early Mexican politics for whitening immigration) longed for a *free white* constituency with only *free white* people entitled to rights. According to this indigenous context and non-indigenous intent, a series of Texas's constitutional provisions and grievances in the course of its flight out of Mexico must be construed. We must look at the constituent polity so as to understand the constitutional rights. The former rules the latter. Right to jury in Texas would not entail the same meaning as right to jury in Mexico. For indigenous people, it could even mean somehow the opposite.

> *Constitution of Texas* (1833). *General Provisions.* Art. 4. The right of trial by jury, and the privilege of the writ of habeas corpus shall be established by law, and shall remain inviolable. Art. 23. All persons residing in Texas, at the date of this Constitution, except bonded servants, and other persons not liable to taxation by virtue of laws enacted under this Constitution, shall be regarded as citizens, and as being entitled to all the benefits of persons who emigrated to the country under the Colonization Law of 1825, and shall be acknowledged and admitted to all the rights and privileges of such immigrants.
>
> *Declaration of Independence* (1836). (...). It [Mexico] has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty and only safe guarantee for the life, liberty, and property of the citizen (...).
>
> *Constitution of Texas* (1836). Sec. 6. All free white persons who shall emigrate to this Republic, and who shall, after a residence of six months, make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this Constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship. Sec. 9. All persons of color who were slaves for life previous to their emigration to Texas, and who are now held in bondage, shall remain in the like state of servitude (...). No free person of African descent, either in whole or in part, shall be permitted to reside permanently in the Republic, without the consent of Congress (...). Sec. 10. All persons, Africans, the descendants of Africans, and Indians excepted, who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic, and entitled to all the privileges of such (...). *Declaration of Rights*. Ninth: No person, for the same offence, shall be twice put in jeopardy of life or limbs. And the right of trial by jury shall remain inviolate.

5.1.2. *The Mexican and Texan polities compared.*

We are in Texas. *Person*, as an individual entitled to rights, is the *free white person*. No need to repeat the qualification when the

Constitution proceeds to a *Declaration of Rights*. Thus, *Africans, the descendants of Africans*, even the *free person of African descent*, and *Indians* were *excepted*. Some confusion among *persons* in the constitutional (people entitled to rights) and colloquial (human beings) usages could arise. The 1836 Texan Declaration of Rights began with the following statement: "All men, when they form a social compact, have equal rights, and no man or set of men are entitled to exclusive public privileges or emoluments from the community". Do not doubt that *all men* were not all men. Not only women were excluded.

The Bill of Rights of the 1845 Constitution, replicating the pronouncement, took care over the wording and phrasing: "All freemen, when they form a social compact, have equal rights; and no man or set of men is entitled to exclusive, separate public emoluments or privileges, but in consideration of public services". Mark the word — *man* is *freeman*. Freedom was not an overall outcome from constitutional law but an exclusive prerequisite for constitutional rights. Indians and Africans were excluded in Texas, as by and large, to take the case in point, in the United States of America.

In Texas, the constitutional set of rights, such as the right to jury trial, could hardly be a device for indigenous accommodation. Indians did not share citizenship. They did not belong to this American, meaning Anglo, polity. For the State of Texas, indigenous people were by no means entitled to rights of the constitutional kind. In colonial terms, if there was something that made a difference with Mexico, it was the increasing of downgrading through outsourcing. According to the Anglo approach, State constitutions are not directly concerned with indigenous peoples. It is another way of framing the colonial constitutionalism or rather constitutional colonialism.

It is the time to resolutely suggest reading beyond the indigenous question. At this point, I recommend Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, Yale University Press, 1998, about the inexistence of federally recognized rights in the United States, in spite of the early constitutional Amendments, before the abolition of slavery. As in the 1824 Mexican Constitution and just as Texas most wanted, freedom was in states' hands. On slave law as the deterrent against rights all throughout the United States, add Robert J. Kaczorowski, "The Inverted Constitution: Enforcing Constitutional Rights in the Nineteenth Century", Sandra F. Vanburkleo, Kermit L. Hall, and R. J. Kaczorowski (eds.), *Constitutionalism and Ameri-*

can Culture: Writing the New Constitutional History, University Press of Kansas, 2002, 29-63 (a *new constitutional history* where an important topic is missing as the editors themselves confess; *Introduction*, xvii: "The essays that follow provide a panorama of rapidly changing subfields and methodological controversies. The essays do not, however, cover every possible perspective. We have not included an essay, for example, about the role of judicial policy in shaping American Indian-white relations"). As slavery interferes, the immediate recommendation must go to Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice. With a New Appendix for Classroom Discussion*, Basic Books, 1989, who does tellingly expose the deep-rooted handicaps of a racist system that was amended, yet not refounded nor regenerated, when abolition took place. Maybe, another *We Are Not Saved*, the toughest one, could also be written on behalf of Indians, rather by indigenous people and not by a male, *free white person* and *descendant* (old Texan Constitution's wording) as I am. James Anaya recommended this last reading to me. I hope not to be making strange bedfellows through my advising and quoting.

5.2. *Communal property and local government.*

Let us return to Mexico for the moment, as we shall come back to the north. There is a decisive point that remains. At last but not least, we arrive at the main historical device in Mexico for constitutional accommodation of indigenous people: the commons as a collective form of ownership. It was the last one to be taken into constitutional consideration. The suggestion was made in the 1857 Congress without success or even much echo. Clamor came instead from indigenous communities. Throughout the 19th century constitutionalism assumed private property as a fundamental right, specified or not by constitutions, pre-empting the formal acceptance of other forms of ownership. However, the subsequent policy of individual allotment of collective lands achieved a limited and uneven implementation in Mexico. Indigenous communities strongly resisted here as well. They had their voice outside the Congress.

The 1917 Constitution of Mexico, the one arising from the Mexican Revolution, made the difference. Under the eminent domain of the Mexican Nation, it conveyed recognition and guarantee of communal property and, through this precise way, constitutional cover and accommodation for the indigenous community itself. The new approach aimed only at recognizing collective property but ended up sheltering a form of local government — indigenous

home-rule. Under that umbrella, indigenous communities could even evolve, if not flourish. In this context, communal property could result in communitarian ways, not only for agrarian purposes. Customary law remained and could be developed as local law. There were indigenous communities who conserved their own organization together with municipal incorporation. Based on the recognition of communal property, others could come to identify themselves plainly with the respective municipality. Municipal incorporation itself was strengthened, albeit unevenly, beyond constitutional intent. Customary law could remain even in those cases in which indigenous forms of justice disappeared.

Although with amendments in wording, the 1917 constitutional accommodation of indigenous local government through recognition of communal property has lasted for nearly the entirety of the 20th century. In 1992, an in-depth Amendment terminated the constitutional effective guarantee of communal property by empowering the statutory law to regulate it so to ease and prompt an allotment policy. The subsidiary enactment followed at once. At the very same time that this constitutional shelter of indigenous community was thus dismantled, the Constitution was also amended to recognize multiculturality: *La Nación mexicana tiene una composición pluricultural sustentada originalmente en sus pueblos indígenas*; "the Mexican Nation has a multicultural composition, originally founded in its indigenous peoples" (so, a historical assertion, not a legal commitment, on the *Nation* in the singular through the plural of *peoples* and with an antiquarian and possessive stress — *sus*, "its", Nation's — as for the decisive reference, that to indigenous peoples). It is no joke. Some reforms have been serious. The amendment on property proves to be deeper than the one on identity.

> *Constitution of Mexico* (1917). Title I. Chapter I. *Guaranties for Individuals*. Art. 27. Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property (...). Legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions: VI. The *condueñazgos, rancherías, pueblos, congregaciones, tribus y demás corporaciones de población* [rural condominiums and communities, villages, customary associations, tribes, and others corporate local groups] that, either by law or in fact, hold a communitarian status shall have capacity to enjoy common

possession of lands, forests, and waters belonging to them or which have been or may be restored to them (...).

Constitution of Mexico (amended in 1934). Title I. Chapter I. *Guaranties for Individuals*. Art. 27.VII The centers of population which, by law or in fact, possess a communal status shall have legal capacity to enjoy common possession of the lands, forests, and waters belonging to them or which have been or may be restored to them. All questions, regardless of their origin, concerning the boundaries of communal lands, which are now pending or that may arise hereafter between two or more centers of population, are matters of federal jurisdiction. The Federal Executive shall take cognizance of such controversies and propose a solution to the interested parties. If the latter agree thereto, the proposal of the Executive shall take full effect as a final decision and shall be irrevocable; should they not be in conformity, the party or parties may appeal to the Supreme Court of Justice of the Nation, without prejudice to immediate enforcement of the presidential proposal. The law shall specify the brief procedure to which the settling of such controversies shall conform. X. Centers of population which lack communal lands or which are unable to have them restored to them due to lack of titles, impossibility of identification, or because they had been legally transferred, shall be granted sufficient lands and waters to constitute them, in accordance with the needs of the population; but in no case shall they fail to be granted the area needed, and for this purpose the land needed shall be expropriated, at the expense of the Federal Government, to be taken from lands adjoining the villages in question.

Constitution of Mexico (amended in 1992). Title I. Chapter I. *Guaranties for Individuals*. Art. 4. The Mexican Nation has a multicultural composition originally founded in its indigenous peoples. The law protects and promotes the development of their languages, uses, customs, resources, and specific forms of social organization and guarantees their members' effective access to the full range of the State' s jurisdictions. In the agrarian trials and proceedings the law will take into account their practices and customs (...). Art. 27.VII (...). Provided that the will and convenience of *ejidatarios y comuneros* [communitarian co-owners and neighbors] are respected so as they benefit from the productive common resources, it will be regulated through statutory law the communal rights over the lands and the individual rights to the single shares. Likewise, the statutes will arrange the procedures for the community members to associate among them, with the state, or with other people, in order to transfer the use of their lands (...).

6. *Oaxaca versus Mexico on indigenous self-determination: ways and means backwards and forwards.*

In 2001, a seemingly major amendment of the Mexican federal Constitution, and a most controversial one, takes place. It literally recognizes "the right of indigenous peoples to self-determination" and shows some criterion to identify them, yet does not provide any means through which they might constitute themselves beyond their

present forms of existence as peoples who have so far resisted without any constitutional help but the communal property that have just been cancelled as such an enabling device.

Thus, the federal Constitution returns to the approach of affirming indigenous collectivities under the shelter of the municipalities, thus intending to confine communities and peoples into local corporations either by themselves or associated, yet subordinated at any rate to the federation and the states. Again, the main empowerment in the face of indigenous presence goes back to the latter, the one that does not take into account peoples but localities. State legislatures and executives are now assigned by the federal Constitution the competence to rule and monitor the indigenous local government as the form of implementation of the so-said rule of self-determination.

Much like the beginning of this constitutional history, communities may be incorporated, but peoples instead, though now acknowledged by the Constitution, cannot reach any legal existence by themselves. As *pueblo* means in Spanish both the town as municipality on the one hand and the people as polity on the other, some ambiguity is ever possible, nonetheless the Mexican constitutional intent is clear. The people' s right is framed into the municipal law. Moreover, the recipe is strongly dressed with welfare policy in order to further empower non-indigenous institutions. It is too soon to know what difference the mixing of old policy with renewed wording, phrasing, and dressing will make, yet it is not so hard to figure out. Given the current claim for indigenous self-determination, a constitutional recognition that strengthens municipal incorporation and political subordination, as well as economical dependence, may be pre-emptive. We shall return to this point later, a propos of international law. The right to self-determination exceeds state and even federal spheres.

Inside Mexico, there are indications that the federal approach to indigenous peoples does not match the actual state of affairs. Oaxaca is a Mexican southern state where the specific law in this regard has gone far beyond the general one, at least prior to the 2001 federal constitutional amendment. In 1998, the Oaxacan Constitution was amended in order to further accommodate indigenous peoples through municipal incorporation. The municipalities were

allowed to rule according to their own customary law in both local and state elections, thus pre-empting the political representation through non-indigenous parties and procedures. Most of them, an overwhelming majority of the Oaxacan municipalities, have decided to do so. The state constitution does not empower local institutions for self-determination and self-government any further. No indigenous legislatures, judiciaries or executives are constitutionally allowed as such. Indigenous jurisdictions continue, to be sure. Customary law may now stand for the Indian reservation (I mean both the municipal variety and the kind we shall see in the United States). This Oaxacan set — custom and tradition before enactment and government — is a position that downgrades too. Nevertheless, indigenous law is recognized and even fostered in constitutional Oaxaca.

The interesting result is that the Oaxaca State does not welcome the 2001 federal Amendment and, furthermore, that a large branch of indigenous Oaxacan municipalities together with other ones in diverse states have challenged it through judicial actions. The Mexican Supreme Court has just ruled that constitutional reforms are political decisions not suitable to judicial review, but the very fact that a significant indigenous party rejected the 2001 Amendment constitutes an appealing symptom. Oaxacan municipalities are not alone in this open opposition to a federal recognition of the right to self-determination together with municipal framing and patronizing policies. It is easy to say, as usually alleged by the federal party, that indigenous peoples do not appreciate the benefit, yet they do know the shortcoming through their own experience. Self-determination means self-assessment. Supremacist prejudices apart, everybody is the best referee for the respective interest. In constitutional collective terms, all peoples ought to be entitled on an equal footing to the same rights and powers, beginning with the capacity to reach and share founding and framing agreements by themselves and with others. After all, in international legal terms, on human rights law, this seems to be the meaning of the right to self-determination. We better come to the question later on.

Constitution of Mexico (amended in 2001). Title I. Chapter I. *Guarantees for Individuals*. Art. 2. The Mexican Nation is unique and indivisible. The Nation has a multicultural composition, originating in its indigenous

peoples, who are descended from people who lived in the current territory of the country, who live in it now, and who keep their own social, economic, cultural, and political institutions or parts of these. The awareness of their indigenous identity shall be the fundamental criterion to determine to whom applies the disposition on indigenous peoples. Communities of indigenous people are those that form a social, economic, and cultural unit, situated in a territory, and recognize authorities in agreement with their traditions and customs. The right of indigenous peoples to self-determination will be exercised in a constitutional way that assures national unity. The recognition of indigenous peoples and communities will be made in the Constitutions and laws of the federated States, which will take them into account, besides the general principles established in the previous paragraphs of this article, ethno-linguistic criteria, and physical location.

A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination, and, in consequence, autonomy to: I. Decide their internal forms of living and social, economic, political, and cultural organization. II. Apply their own standards in regulation and solution of their internal conflicts, subject to the general principles of this Constitution, respecting individual guarantees, human rights, and, in a relevant manner, the dignity and completeness of women. The law will establish the cases and procedures of validation by the appropriate judges or courts. III. Elect, in accord with their traditional standards, procedures, and practices, authorities or representatives for the exercise of their own forms of internal government, guaranteeing the participation of women in conditions of equality to those of men, in a way that respects the Federal Pact and the sovereignty of the States. IV. Preserve and enrich their languages, awareness of their heritage, and all the elements that constitute their culture and identity. V. Conserve and improve their habitat, and preserve their lands in the terms established in this Constitution. VI. Enjoy, with respect to the forms and means of property and land use established in this Constitution and the laws about these, as well as to the rights acquired by third parties or by members of the community, the preferential use of natural resources of the places that these communities occupy and live, except for those that correspond to strategic areas in terms of this Constitution. For these effects, communities may act in terms of the law. VII. Elect, in municipalities with indigenous people, representatives to municipal governments. The Constitutions and laws of the federated States will recognize and regulate these rights in municipalities, with the objective of strengthening indigenous participation and political representation, in conformity with the peoples'traditions and internal standards. VIII. Accede fully to the jurisdiction of the State to guarantee those rights, in all trials and proceedings in which it takes part, individually or collectively. The State will take into account their customs and cultural specifics, respecting the precepts of this Constitution. Indigenous people have at all times the right to be assisted by interpreters and defenders who are acquainted with their language and culture. The constitutions and laws of the federated States will establish the characteristics of self-determination and autonomy that best express the situations and aspirations of the indigenous peoples in each State, as well as the standards for recognition of their indigenous communities of public interest.

B. The Federation, States, and municipalities, to promote equal oppor-

tunity for indigenous people and eliminate any discriminatory practice, will establish the institutions and determine the necessary policies to guarantee the rights of indigenous peoples and the complete development of their people and communities. These will be designed and operated together with them. To eliminate the scarcities and leftovers that affect indigenous peoples and communities, these authorities have the obligation to: I. Stimulate the regional development of indigenous zones, with the objective of strengthening their local economies and bettering the conditions of life of their peoples, by means of actions coordinated among the three levels of government, with the participation of the communities. Municipal authorities will fairly determine budget allocations that the communities will directly administer for specific ends. II. Guarantee and increment the levels of education, favoring bilingual and bicultural education, literacy, completion of basic education, vocational training, and mid-superior and superior education. Establish a system of grants for indigenous students at all levels. Define and develop educational programs of regional level that recognize the cultural heritage of their peoples, in agreement with the laws about the matter and in consultation with indigenous communities. Stimulate the respect and knowledge of the diverse cultures that exist in the nation. III. Assure effective access to health services by means of the expansion of the coverage of the national system, also using traditional medicine, as well as support good nutrition for indigenous peoples by means of programs of food, especially for their children. IV. Improve the conditions of indigenous communities and their spaces for common living and recreation, by means of actions that facilitate access to public and private financing for the construction and improvement of housing, as well as expand the coverage of basic social services. V. Aid the incorporation of indigenous women into the development of the community, by means of support for productive projects, the protection of their health, the granting of stipends to aid their education, and the promotion of their participation in decisions relating to community life. VI. Extend the network of communications that permits the integration of communities into the larger society, by means of construction and expansion of ways of communication and telecommunication. Establish conditions by which indigenous peoples and communities may acquire, operate, and administer means of communication, in the terms that the laws on the matter determine. VII. Support productive activities and sustainable development of indigenous communities, by means of actions that permit them to be economically self-sufficient, the application of stimuli for public and private investments for the creation of jobs, the incorporation of technologies to increase their own productive capacity, as well as to assure equal access to the systems of supply and trade. VIII. Establish social policies to protect migrants who are indigenous people, within national as well as foreign territory, by means of actions to guarantee the rights of laborers and day agricultural workers, improve health conditions of women, support families of migrants with children and youth with special programs of education and nutrition, watch for the respect of their human rights, and promote the knowledge of their cultures. IX. Consult indigenous peoples in the making of the national plan of development and those of states and municipalities, and, in their case, incorporate the recommendations and proposals that result. To guarantee the fulfillment of the obligations given in this part, the Chamber of Deputies of the Congress of the Union, the

> legislatures of the federated States, and municipal councils, in the area of their respective jurisdictions, will establish the specific parts earmarked to the fulfillment of these obligations in the budgets of spending they approve, as well as the forms and procedures for communities to participate in the exercise and watching over of these, without endangering the rights established in favor of indigenous peoples and their communities, all people in their communities will have the same rights, as the law establishes.
>
> Title V. *On the States of the Federation*. Art. 115.III. (…) Within the municipal sphere, the indigenous communities will be able to associate and co-ordinate amongst themselves in the terms and for the effects sanctioned by laws.

The moral of the Oaxacan experience is not unprecedented but is a very well known and maybe crucial one. Perhaps it is a key for the future not yet properly recognized in any of the Mexican — state or federal — constitutions, nor provided by any American — Latin or Anglo — constitution today. Indigenous consent to the making up of a common constituency is always missing. Many indigenous peoples have come to accommodation and even participation without ever explicitly surrendering their sovereignty, a title more clearly held when they openly resist, to be sure. Whatever the case, constitutions — at least States constitutions — cannot suffice. The Mexico and Oaxaca of today may offer a mirror for the Americas in the plural, as we shall verify.

Sovereignty is an old word for the right to self-determination to be taken seriously in the constitutional times. May it depend on constitutional grants and grounds? I consider this decisive question later. We shall return to the Mexican constitutional present twice more, when discussing on the one hand the practice of treaties between States to foster a free trade international policy, and on the other, the development of the human rights international law from the United Nations and the International Labor Organization. Both moments will affect the United States too. There we head following the shared path of the so-called law of nations.

> Up to this point, I have not discussed literature dealing with indigenous accommodation on constitutional grounds throughout the 20th century in Mexico — from the Mexican Revolution until the dismantling of the resultant PRI (Institutional Revolutionary Party) regime — because, to my knowledge, there is none. There is not even anything comparable to Anna' s *Forging Mexico* or Mallon's *Peasant and Nation*, as if a Mexican Nation were definitively forged. Politics may rule. The historiographical blind spot proves to be a blatant effect of the political myth of a Mexican Nation arising

from the Mexican Revolution. On the legal point after the 2001 constitutional reform, encompassing Oaxaca alongside other Mexican states, you may resort to Francisco López Bárcenas, *Legislación y Derechos Indígenas en México*, Ediciones Casa Vieja, 2002. For a Latin American panorama on indigenous peoples' standing according to constitutional pronouncements, there are accurate surveys on hand, in Spanish too: Marco Aparicio, *Los pueblos indígenas y el Estado. El reconocimiento constitucional de los derechos indígenas en América*, Centro de Estudios de Derecho, Economía y Ciencias Sociales, 2002; Cletus Gregor Barié, *Pueblos indígenas y derechos constitucionales en América Latina. Un panorama*, Comisión Nacional para el Desarrollo de los Pueblos Indígenas, 2003. Nevertheless, we need to read not just constitutional words, but constitutional silences too. Silence may be most meaningful.

In fact, silence is the regular stance in the constitutional history of the Americas. It is even the usual rule in an American past bearing constituent effects for the American present. Imagine a lot of blank pages as extensive constitutional quotations in this essay. What would it mean? How could we make silence speak out? How could the sense of stillness become apparent? How could we heed the sounds of silence? Is there some real meaning inside the constitutional impassiveness concerning indigenous people? Are all the constitutions in the Americas through their entire development and performance referring silently to them? If it is so, what does the hush mean? For indigenous people, what is better or rather, if neither is good, what is worse, constitutional silence or explicit guardianship? As the latter means blatant colonial continuity, does the former imply somehow discontinuity or rather concealment? And what would it hide from constitutional view? This depends on policy of course, on the policy that makes sense as linked to constitutional assumptions and not any other that could be implemented. This may be the zero point in case. Can we address it? One has to become further informed, no doubt. Moreover, one needs local knowledge, the kind of information you do not get through either the media or the academy. To become aware of existing law, one mainly needs to succeed in listening to silenced voices. Established intent and practice do not convey the only and excluding view to understand legal mandates, whether loud or mute. As long as they are there, peoples may give renewed meaning to State law or even establish a new constitutional sense on their own behalf at the expense of non-indigenous assumptions. Fortunately, actual constitutionalism may go far beyond texts and presumptions that are in force through State enactment, policy, and expediency. Constitutionless peoples challenge given constitutionalism even reading unreadable signs and between the lines of constitutions themselves. In brief, to read both black and white in constitutional texts, one has to know better than texts themselves.

Even so, for reading silence and understanding sound, there may be a primary significant factor such as the normative value of the constitutions, either wordy or quiet. What do constitutions mean in the legal field itself? Constitutions may wield a derogatory force against unmentioned issues, or otherwise they may be construed as directive norms leaving room for unstated standings and even rights. Do we need examples? As for the latter, you may have liberties not specified by constitutional declarations; on the other side, as for the former, it may be the case of indigenous customary law when, as usual, it is not accepted by the constitutional party as a constituent

right of the concerned peoples, but rather suffered. The very first construing question may lie just there. What is the meaning of each single constitution throughout American history, both Latin and Anglo? Wondering must extend to the whole range of constitutional rules, including vacuums, shortcomings, and outsourcings. And like text, like silence, since the latter is an offspring of the former. Silence only means question pitting, just the same as pronouncements. Even affirmative insertion of indigenous rights in constitutional declarations may involve question marks. In the Latin kind of legal system at least, if such a thing exists, the judiciary is often placed under statutory law. Look at Mexico. Neither judges nor juries are empowered to directly decide on constitutional grounds, as they are supposed to rely on subsidiary legislation. Therefore, rights, especially collective rights, even if recognized by constitutions, may need the mediation of political will and parliamentary enactment to be guaranteed and enforced. As for indigenous rights, when there is constitutional recognition together with statutory silence (legislation not complying with higher mandate), the binding effect may easily be none at all, even today (other intents apart, such as propaganda or even pre-emption of indigenous claims). Even when they try to do their best, current special jurisdictions guaranteeing constitutional rights are not very sensitive to the indigenous kind alien for State judges and colleges. Look at Mexico. Constitutions may still be easily curtailed by statutory and judicial action or stillness. There is a moral: one has to question legal systems before questioning specific rules. Wondering is always the method. When current constitutions mention indigenous people so as to entrust rights such as communal property to State legislative, judiciary, executive, or the whole trinity, are constitutions recognizing peoples' rights or empowering alien bodies? Today, you may even find constitutions approaching indigenous collective self-government through State and states legislative regulation added to constitutional grant. Look at Mexico. In fact, currently, indigenous people are usual guests in declarations of rights. Keep wondering always. Remember that, in the course of a history such as the all-American one implying in fact no break between colonialism and constitutionalism, colonized peoples do not cease to exist so to patiently wait for colonial license or constitutional grant. If they are there, when constitutions register rights of indigenous people and forward for implementation to law meaning State enactment and administration, policy and even expediency, or so it is construed anyhow, are rights really what constitutions recognize? If not, what is actually there in non-indigenous constitutions as for indigenous peoples? The answer lies at once inside and outside of the constitutional texts, no doubt.

7. *Back to a constituent moment: the law of nations and treaty-making.*

Among collective devices, we have contemplated four of a constitutional character, but we also know that there remains another device of a pre-constitutional nature, a device regarding culture in the singular or rather cultures in the plural. In 1992, the

Mexican Constitution recognized the latter, although in fact still assumed the former, the singular and not the plural in the cultural field. The extreme difficulty for the constitutional accommodation of indigenous peoples, even when they are recognized as such in the plural, may derive from the deep-rooted assumption that there is one single culture able to rule and govern and that it is the non-indigenous one in America, the one received from Europe. Thus, for constitutional purposes, inside the constitutional paradigm, the indigenous location may always be a subsidiary position. Notwithstanding all the observable differences between Mexico and the United States (we shall check much further and could do, of course, for other cases), such a kind of cultural prejudice is the common ground for American — Latin and Anglo — constitutionalism, both practical or institutional and theoretical or doctrinal. This cultural handicap, pre-empting equal standing, can greatly affect constitutional fabric.

In legal terms, the handicap had a specific name, the *law of nations*, also historically deemed *law of nature*, law in force by itself, by normative virtue of human nature, not needing any kind of enactment or political backing and responsibility to function and prevail. When American — Latin and Anglo — States were born and their constitutional working and thinking were brought into being, the discourse with such a name, the so-called law of nations, assumed that only European culture provided the human skill and social authority to found and frame. Other peoples were expected to surrender their territories and polities — themselves in brief — under this cultural construct of alien supremacy and dominance. They were reputed to lack culture for self-sustained constituent purposes. Europe pretended and Euro-America assumed.

When relationships were established or contentions arose, the law of nations conveyed two paths depending on the actual position of the indigenous party and on the religious background, Catholic or Protestant, of the colonizers. The paths were on the one hand settlement through treaties and on the other hand, a more advantageous device coming from the Dark Ages (European time); this is Catholic downgrading of non-Christian people into wards under Christian guardianship. The latter was the older approach, the specific assumption of the *ius gentium* (*gentes* in Latin as peoples)

that preceded the *law of nations*, the English (and Protestant) version. Thus, the hour of old Europe came upon America unless treaties avoided it, which was not an easy task at all.

As treaty agreement may imply equal footing, the two paths seem divergent at face value, but this was not the assumption from the all-Christian viewpoint for the indigenous party. They were not alternative or incompatible ways. *Law of nations* did not discontinue *ius gentium*. Non-indigenous people could sign treaties with indigenous peoples and construe them unilaterally, according to the law of nations, because the guardian (non-indigenous party) could always pretend to hold the knowledge of what is in the best interest of the ward (indigenous party). Then, in the case of non-compliance from the non-indigenous party, a breach of a contract was not deemed to occur. Respect for the agreement might be convenient only to begin with, as it allowed and even legitimated (in addition to the own presumptions) the occupancy of new land or as it conveyed peace as well. The maintenance of treaties might help to establish disparaged obligations, outlawing the resort to defensive war for indigenous people and legitimizing offensive warfare from the non-indigenous party. At any rate, according to the law of nations, treaties with indigenous peoples could not be exactly the same as treaties between States, between polities recognized by each other on equal terms. Warfare could match as it turned out to be unlawful for indigenous self-defense and lawful for non-indigenous invasion. Even the resort to genocide was legally accepted.

> Emer de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). Book I. *Of Nations conceived in themselves*. Chapter VII. *Of the cultivation of the soil*. § 81. *The cultivation of the soil a natural obligation.* The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share; and it has no right to enlarge its boundaries, or have recourse to the assistance of other nations, but in proportion as the land in its possession is incapable of furnishing it with necessaries. Those nations (such as the ancient Germans, and some modern Tartars) who inhabit fertile countries, but disdain to cultivate their lands and choose rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts. There are others, who, to avoid labour, choose to live only by hunting, and their flocks. This

> might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them. Chapter XVIII. *Of the Establishment of a Nation in a Country*. § 203. *Possession of a Country by a Nation*. Hitherto we have considered the nation merely with respect to itself, without any regard to the country it possesses. Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labour, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of property and dominion: and it was a sufficient ground to justify their establishment. Since their introduction, the right which was common to all mankind is individually restricted to what each lawfully possesses. The country which a nation inhabits, whether that nation has emigrated thither in a body, or the different families of which it consists were previously scattered over the country, and, there uniting, formed themselves into a political society, that country, I say, is the settlement of the nation, and it has a peculiar and exclusive right to it.

Mexico signed treaties with some indigenous peoples despite considering them citizens, according mainly to the federal powers in the territories. The neighboring United States resorted most systematically and consistently to this practice, even through judiciary support and jurisprudence, as the indigenous peoples did not share citizenship, as we know for Texas and shall see further. However, in both cases, the cultural presumption operated in a manner that enabled the agreements to be easily overruled or, from indigenous vision, misconstrued. Guardians knew better than wards.

In the early United States this supremacy policy through treaties was even construed as constitutional jurisprudence by the federal Supreme Court. Since indigenous people were citizens on some downgrading institutional accommodation, Mexico was not so much in need of such a construction in constitutional times and legal terms. In both cases, treaties could be subsidiaries to the colonial constitutionalism or rather the constitutional colonialism that we already know. We shall return to all of this more than once, mainly as for the United States, to be sure.

> *Johnson versus McIntosh* (1823). Opinion of the [United States Supreme] Court. Mr. Chief Justice Marshall (...). According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators (...). In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired (...). Their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.
>
> *Cherokee People versus Georgia* (1831). Opinion of the [United States Supreme] Court. Mr. Chief Justice Marshall (...). The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.
>
> *Worcester versus Georgia* (1832). Opinion of the [United States Supreme] Court. Mr. Chief Justice Marshall (...). America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied, or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the preexisting rights of its ancient possessors. After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous

> sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing. Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers? But power, war, conquest, give rights, which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions. The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. This principle, acknowledged by all Europeans because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it, not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political, but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

8. *Indigenous Peoples after the Treaty of Guadalupe-Hidalgo.*

As Spain earlier, Mexico waged wars against and signed treaties with indigenous peoples according to *ius gentium*. As we know,

colonialist practice was not discontinued by either constitution or independence. Chief Justice Marshall has just explained to us that it could also be the case from Great Britain to the United States. Good manners among States — which began then to be named international law — were not terminated either. As for their lofty interests, they convened by themselves and did not mix with simple people. States' treaties were settled in this way, disregarding peoples. Good manners for the former could mean bad manners for the latter.

Mexico did not imagine that there could be any need or benefit to attain any consent from indigenous peoples when the 1848 Treaty of Guadalupe-Hidalgo was signed with the United States transferring extensive territories mostly inhabited by them. Likewise, the United States did not consider that the Indian consent made any sense for a treaty between sovereign independent States, the so-recognized by each other, even if the deed harshly affected indigenous peoples yet in fact independent, and thus sovereign themselves. The Treaty of Guadalupe-Hidalgo had effective, severe consequences for these peoples who did not participate, concerning their position in the transference as well as their location in the United States, both explicitly and implicitly, as indigenous people were citizens from the Mexican point of view. Thus, the very rules about citizenship contained without their consent in the treaty could strike them.

> *Treaty of Guadalupe-Hidalgo* (1848). Art. 8. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present Treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax or charge whatever. Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But, they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty: and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States. In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States.
>
> Art. 9. The Mexicans who, in the territories aforesaid, shall not preserve

the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding Article, shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States. In the mean time, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws. With respect to political rights, their condition shall be on an equality with that of the inhabitants of the other territories of the United States; and at least equally good as that of the inhabitants of Louisiana and the Floridas, when these provinces, by transfer from the French Republic and the Crown of Spain, became territories of the United States. The same most ample guaranty shall be enjoyed by all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry, as in the enjoyment of their property of every kind, whether individuals or corporate (...).

Art. 11. Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme; it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States, whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted: all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory against its own citizens. It shall not be lawful, under any pretext whatever, for any inhabitant of the United States, to purchase or acquire any Mexican or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two Republics; nor to purchase or acquire horses, mules, cattle or property of any kind, stolen within Mexican territory by such Indians. And, in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them, and return them to their country, or deliver them to the agent or representative of the Mexican Government. The Mexican Authorities will, as far as practicable, give to the Government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American Authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated. For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of

> the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for it's being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

In short, Mexican citizens could remain as such or become citizens of the United States if they so chose, with the exception of non-sedentary peoples, that is, the so-called *savage tribes*, which did not necessarily include all indigenous people. Rights and lands, even *corporate property*, were guaranteed to Mexican people while they did not actually become citizens of the United States or even if they did choose to maintain their citizenship, but in no case did this apply to *Indians* belonging to *savage tribes*. According to the treaty and thus the law in-between the United States and Mexico, the latter could be the target of warfare, removal and confinement into reservations. Anyway, there was a gap regarding citizenship. Indians living in sedentary communities were unquestionably citizens for Mexico and on the contrary, they could not share citizenship with non-indigenous people in the United States at that time.

When in 1846, before Guadalupe-Hidalgo, a bill of rights had been proclaimed for the just conquered New Mexico Territory (Arizona and California then included) by general Kearny, commander in chief of the annexing army, nobody considered that this commitment to constitutional freedom might be applied to indigenous people or could benefit them in any way. At the same time and unaware of any contradiction, the chief promised to protect "all quiet and peaceable inhabitants within its boundaries [the United States'] against their enemies", Indians to be sure: "the Navajoes and others".

> *Bill of Rights for the Territory of New Mexico* (1846). Art. 1. That all political power is vested in and belongs to the people. Art. 2. That the people have the right peaceably to assemble for their common good, and to apply to those in power for redress of grievances by petition or remonstrance. Art. 3. That (…) no person can ever be hurt, molested or restrained in his religious professions if he do not disturb others in their religious worship; and that all Christian churches shall be protected and none oppressed, and that no person on account of his religious opinions shall be rendered ineligible to any office of honor, trust or profit. Art. 4. That courts of justice shall be open to every person, just remedy given for every injury to person

> or property, and that right and justice shall be administered without sale, denial or delay, and that no private property shall be taken for public use without just compensation. Art. 5. That the right of trial by jury shall remain inviolate. Art. 11. That the people shall be secure in their persons, papers, houses and effects from unreasonable searches and seizures (...). Done at the government house, in the city of Santa Fe, in the territory of New Mexico, by Brigadier General Stephen W. Kearny, by virtue of the authority conferred upon him by the government of the United States.
>
> *Letter of General Kearny* (1846). I enclose herewith a copy of the laws prepared for the government of the territory of New Mexico (...). These laws are taken, part from the laws of Mexico, retained as in the original, a part with such modifications as our lives and constitution made necessary; a part are from the laws of the Missouri territory; a part from the laws of Texas, and also of Texas and Coahuila; a part from the statues of Missouri; and the remainder from the Livingston code [Louisiana].
>
> *Organic Law for the Territory of New Mexico* (1846). *Executive Power.* Sec. 1. The executive power shall be vested in a governor (...). He shall be the commander-in-chief of the militia of the said territory, except when called into the service of the United States, and *ex officio* superintendent of Indian affairs. *Miscellaneous.* Sec. 2. The governor, secretary of the territory, marshal, and United States district attorney, shall be appointed by the President of the United States

8.1. *The awkward constitutional compliance in California.*

Something phony happened on the way from the Treaty of Guadalupe-Hidalgo to the establishment in continental California (the Peninsula remained in Mexico) of a formal state, not a federal territory. Some discrimination was introduced by the first Constitution. For the moment, the granting of United States citizenship was deemed to invest only the non-indigenous Mexican people. Yet, the 1849 California Constitution could seem to abide willingly by the Treaty of Guadalupe-Hidalgo also as regards indigenous people. With both the requirement of qualified voting for the eventual decision and the criterion of convenient proportion for future incorporation, an act to fix the political participation of indigenous people as Californian citizens was forecast by this brand-new Constitution. Such a specific enactment never took place.

In 1879, the following Constitution forgot all about the concern with the Treaty of Guadalupe-Hidalgo except for the behalf of Euro-American citizenship including *white* Hispanics. However, from then on, the Californian polity was construed as mainly Anglo. After this year, the California Constitution, which had up to this

point considered the use of the Spanish language as a right for the people of Mexican background, also forgot about this tongue. The constitutions of California have always overlooked the indigenous languages. No special wonder within the United States (in fact, only an oversea Constitution, the one of Hawaii, would proceed otherwise).

> *Constitution of California* (1849). Art. I. *Declaration of Rights*. Sec. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property: and pursuing and obtaining safety and happiness. Sec. 3. The right of trial by jury shall be secured to all, and remain inviolate for ever (...). Sec. 11. All laws of a general nature shall have a uniform operation. Art. II. *Right of Suffrage*. Sec. 1. Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro (4), on the 30th day of May, 1848 (...), shall be entitled to vote at all elections which are now or hereafter may be authorized by law. Provided that nothing herein contained shall be construed to prevent the Legislature, by a two-thirds concurrent votes, from admitting to the right of suffrage Indians, or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just and proper. Sec. 5. No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector. Art. XI. *Miscellaneous Provisions*. Sec. 21. All laws, decrees, regulations, and provisions, which for their nature require publication, shall be published in English and Spanish.
>
> *California Act for the Government and Protection of Indians* (1850). Sec. 9. It shall be the duty of the Justices of the Peace, in their respective townships, as well as all other peace officers in this State, to instruct the Indians in their neighborhood in the laws which relate to them, giving them such advice as they may deem necessary and proper; and if any tribe or village of Indians refuse or neglect to obey the laws, the Justice of the Peace may punish the guilty chiefs or principal men by reprimand or fine, or otherwise reasonably chastise them.
>
> *Constitution of California* (1879). Art. I. *Declaration of Rights*. Sec. 7. The right of trial by jury shall be secured to all, and remain inviolate (...). Sec. 21. No special privileges or immunities shall ever be granted which may not

(4) The Treaty of Queretaro is the same Treaty of Guadalupe-Hidalgo, agreed and signed here, on February 2, and ratified by Mexico and exchanged with the United States there, at Queretaro, on May 30 (*Tratados ratificados y convenios ejecutivos celebrados por México*, Senado de la República de los Estados Unidos Mexicanos, vol. I, *1823-1883*, 1972, 203-223, which is an official collection including no treaty with indigenous peoples, such as the one with the Navajos that I will show in English — an alien language for this people until the 20th century — not just for the reader's sake, as I have not found the Spanish version).

be altered, revoked, or repealed by the Legislature (...). Art. II. *Right of Suffrage*. Sec. 1 (as amended in 1894). Every white male citizen of the United States, every male citizen who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every male naturalized citizen thereof (...), shall be entitled to vote at all elections which are now or may hereafter be authorized by law; provided no native of China, no idiot, insane person, or person convicted of any infamous crime (...), shall ever exercise the privilege of an elector in this State.

Amendment to the Constitution of California (1989). *Art. III. State of California*. Sec. 6. (a) *Purpose*. English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution. (b) *English as the Official Language of California*. English is the official language of the State of California. (c) Enforcement. The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California. (d) *Personal Right of Action and Jurisdiction of Courts*. Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section, and the Courts of record of the State of California shall have jurisdiction to hear cases brought to enforce this section. The Legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this section.

8.2. *The Apache polity and non-sedentary peoples.*

The 1848 Treaty between Mexico and the United States was not enough for the transference and entitlement of powers. Nobody can give what is not held. Treaties with indigenous peoples, and not only Mexico, were badly needed. Indian polities existed. Thus, for instance, the United States had to sign successive treaties with the Apache people, alone or together with other Indian peoples, in 1852, 1853, 1854, 1858, 1865 and 1867 (some others were not ratified either by the United States or by the Indian party). Mexico (both the Federation and, less formally, states such as Sonora and Chihuahua), and Texas during the independent period (1836-1845), had also needed to sign treaties with Apache and other Indian peoples. The Apache series with the United States may offer illustration particularly as regards non-sedentary, so-said by Guadalupe-Hidalgo *savage tribes*. Apache was not a way of self-naming but a Zuni word for enemy that Spaniards adopted. So they were also

deemed by the conquering United States, being undoubtedly encompassed by the chief Kearny's hostile reference: "the Navajoes and others".

In the Southwest, after 1848, there was a crucial need for the United States, precisely the overcoming of Indian warfare by achieving their consent to its presence. The primary means was conveyed by treaty offer and making, to be sure, the main objective being the Indian withdrawal from their lands and confinement into reservations, so or otherwise, either willingly or unwillingly. The federal powers grounded on the impairing rule of collective guardianship could work out under military duress. Today, there are seven reservations with Apache names in Oklahoma (Apache Tribe, Fort Sill Apache Tribe), Arizona (San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe), and New Mexico (Jicarilla Apache Nation, Mercalero Apache Tribe).

In the end, as for the perspective of the United States, Indian reservations meant a kind of consolidation of the *territory* regime. As for the indigenous party, they gained the grant of relative self-rule inside definite, impoverished territory under federal guardianship. All this characterized especially the treatment of non-sedentary Indian people by the United States after the Treaty of Guadalupe-Hidalgo.

> *Treaty between the United States and the Apache Nation of Indians* (1852). Art. 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid [Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado] do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit. Art. 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.
>
> *Treaty between the United States and the Kiowa, Comanche, and Apache Indians* (1867). Art. 1. The said Apache tribe of Indians agree to confederate and become incorporated with the said Kiowa and Comanche Indians, and to accept as their permanent home the reservation described in the aforesaid treaty with said Kiowa and Comanche tribes, concluded as aforesaid at this place [Medicine Lodge Creek, and in the same day, October 21], and they pledge themselves to make no permanent settlement at any place, nor on any lands, outside of said reservation. Art. 4. In consideration of the advantages

> conferred by this supplementary treaty upon the Apache tribe of Indians, they agree to observe and faithfully comply with all the stipulations and agreements entered into by the Kiowas and Comanches in said original treaty. They agree, in the same manner, to keep the peace toward the whites and all other persons under the jurisdiction of the United States, and to do and perform all other things enjoined upon said tribes by the provisions of said treaty; and they hereby give up and forever relinquish to the United States all rights, privileges, and grants now vested in them, or intended to be transferred to them, by the treaty between the United States and the Cheyenne and Arapahoe tribes of Indians, concluded at the camp on the Little Arkansas River, in the State of Kansas, on the fourteenth day of October, one thousand eight hundred and sixty-five, and also by the supplementary treaty, concluded at the same place on the seventeenth day of the same month, between the United States, of the one part, and the Cheyenne, Arapahoe, and Apache tribes, of the other part.

8.3. Diné Bikeyá*, Navajo Reservation, and the last display of Indian treaties from the United States.*

The Navajos, these "enemies" together with the kindred Apaches and other Indian peoples according to chief Kearny, were they to be United States citizens or rather associates through treaties after Guadalupe-Hidalgo? Maybe you already have a negative answer to both options in mind, but the denial is not enough. Particulars matter. The Navajos showed that they constituted also a treaty making people, as the whole or in groups. How did they relate to the United States then, warfare aside? Every polity of indigenous peoples has their own voice and thus their own history, as well as their own law, to be sure. They are not interchangeable with each other.

In 1822, 1823, 1824, 1839, and 1844, Mexico signed treaties with the so-called *Navajo* people (*Diné Bikeyá* as they call themselves in their own language, Navajo being a Tewa word referring to their cultivated lands that Spaniards misunderstood), treaties as agreements between two different *nations*, not placing at all these indigenous peoples in a subordinated position. After 1848, the United States assumed another approach in their treaties with the Navajos, as if these people had been politically located within Mexican rule and could be transferred in a treaty between States, such as Guadalupe-Hidalgo did, void of indigenous participation or consent.

Indigenous and non-indigenous Mexican people were treated

by both Mexico and the United States as if they were cattle subsidiary to land, albeit entitled to an option between owners. Nevertheless, the former (non-indigenous people) rather than the latter (indigenous people) had the choice of United States citizenship after the Treaty of Guadalupe-Hidalgo. Of course, the indigenous stock was not less human, forming peoples with the capacity of voice and action, law and force. The United States was in the need to sign treaties with them, as did with the Navajo people in 1849, 1851, 1855, 1858, 1861, and 1868, although only the first and the last were ratified by the United States Senate. Essentially, one served to recognize the non-indigenous presence by this indigenous people and the other to confine the latter in an Indian reservation.

> *Treaty between the Mexican Republic and the Navajo Nation* (1839). Art. 1. There will be peace and commerce to carry out what those of the Navajo Tribe have promised with the citizens of the Department of New Mexico; with those of the Department of Chihuahua; and with those of Sonora as well as with all the citizens belonging to the Mexican Republic as well as with all the other citizens of the potential friends of the Mexican Republic. Art. 2. In fulfillment of this agreement and in order to carry out the good faith which animates the agreeing parties the Navajo chieftains have agreed to surrender our captives which are in their Nation who were seized from the fields in which they were caring for their flocks without protection and have agreed also those of their own remain among us as a just reprisal, acquired through an honorable war, without betrayal. Art. 7. In any case whatsoever, that the enemies of both nations attempt to invade, it shall be the obligation of the contracting parties to stop the aggression and give immediate notice so that they may free themselves from the insult which is being prepared for them (...).
>
> *Treaty between the United States and the Navajo Nation* (1849). Art. 1. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl. Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection. Art. 2. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States,

> or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement.

For the specific purpose of subordinating people, the United States complied with the Treaty of Guadalupe-Hidalgo as regards indigenous peoples. The settlement that provided for the definitive reservation of the Navajos as a vanquished people, albeit in the location they claimed for, came in 1868. Sure enough, this was the last of the series of treaties. It represented the ultimate step of a crucial shift in formal language and material perspective, evincing a growing and bottomless gap between the minds and hearts of the two parties, non indigenous and indigenous. There was left no trace whatsoever of equal terms between nations as contracting parties. The very agreement was practically obliged for the Navajo people given their final situation of material want. During the negotiation, they manifested their concern with the literal enslavement of many Navajos in New Mexico through the Mexican *peonage* (enduring indentured servitude or bondage through debts, the practice having been explicitly discontinued in 1867 by federal enactment as a corollary of the abolition of slavery), but the United States representative, general William T. Sherman, replied that the question was not proper for an overall resolution by treaty, even after the abolition of slavery, *peonage* so explicitly included, as the latter ought to be submitted to the judiciary or to federal officers, case by case, in order to scrutinize the respective hiring contract. So, regarding indigenous people, slavery could be yet, after the abolition, a matter of *oeconomy* — the private, domestic law prior to constitutionalism (5).

(5) *Barboncito* [Hastiin Dághaa] *said*: (...). After we get back to our country it will brighten up again and the Navajos will be as happy as the land, black clouds will rise, and there will be plenty of rain. Corn will grow in abundance and everything looks happy. Today is a day that anything black or red does not look right, everything should be white or yellow representing the flower and the corn. I want to drop this conversation now and talk about Navajo children held as prisoners by Mexicans. Some of those presents have lost a brother or a sister and I Know that they are in the hands of the Mexicans. I have seen some myself. *General Sherman said*: About their children being held as Peons by Mexicans, you ought to know that there is an Act of Congress against it. About four years ago we had slaves and there was a great war about it, now there are none. Congress our great council passed a law prohibiting peonage in New Mexico. So that if any Mexican holds a Navajo in peonage, he is liable to be put in the penitentiary.

As regards the Guadalupe-Hidalgo Treaty, it was the final turn of the screw by the United States. In fact, the clauses that implied rights were restrictively construed, while the ones relating to *savage tribes* were construed broadly. Eventually, the set of treaties between Mexico and the United States advanced the dispossession and disempowerment of indigenous peoples, not the affirmation of their rights at all.

Regarding the treaties themselves with indigenous peoples, as soon as they were militarily controlled and economically dependent, there was no longer a need for their consent to non-indigenous presence and entitlement. Consent had not been given in any case to shared constituency, neither was it there any polity in common. In fact, indigenous peoples have never given up their sovereignty as distinct polities.

> *Treaty between the United States and the Navajo Tribe* (1868). Art. 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it (...). Art. 2. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109 30' west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canyon is to be all included in this reservation, shall be, and the same hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations In discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article. Art. 6. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this

---

We do not know that there are any Navajos held by Mexicans as Peons, but if there are, you can apply to the judges of the Civil Courts and the Land Commissioners. They are the proper persons and they will decide whether the Navajo is to go back to his own people or remain with the Mexican. That is a matter with which we have nothing to do (*Treaty between the United States of America and the Navajo Tribe of Indians. With a record of the discussions that led to its signing*, KC Publications, 1968, 9).

> reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. Art. 9. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation (...). Art. 11. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble. Art. 13. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein describe their permanent home (...).
>
> *Act Making Appropriations for the Current and Contingent Expenses of the Indian Department* (1871) (…). Provided that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretobefore lawfully made and ratified with any such Indian nation or tribe (...).

So far, after the Civil War in the United States and the consequent federal empowerment, the clauses included in the final treaty with the Navajos, that of 1868, were not unusual in comparison with contemporaneous settlements with other indigenous peoples. In the same year, treaties of similar content were signed with the Sioux, the Crows, the Cheyennes, the Arapahoes, the Shoshones, the Bannocks, and the Nez Percé. Owing to my ignorance, I make regular use of the names that have gained currency, regardless of their coining either by colonial invaders or, also derogatorily, by other indigenous peoples.

As for treaties with indigenous peoples as *independent nations*, in 1871, after the set of 1868, the practice was formally terminated by the United States, at the same time declaring the determination to uphold the contracted commitments and hereafter maintaining a practice of mere agreements, if needed, rather than unilateral decisions. There might still be formal, binding treaties from indigenous vision and construction. Let us never forget that there is more than a single party. Nevertheless, altogether, over three hundred and fifty

strict Indian treaties (through the same constitutional procedures than the treaties with foreign States) have been signed and ratified by the United States.

> If you are looking for extended information on treaties between indigenous peoples and the United States, see Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly*, University of California Press, 1994. Mark the subtitle, coming as matter of course from the non-indigenous point of view. As for the last deployment, you may add the comparative essay by Jill St. Germain, *Indian Treaty-Making Policy in the United States and Canada, 1867-1877*, University of Nebraska Press, 2001; or you may rather resort to the very texts, so as for the United States through the register of Vine Deloria, Jr. and Raymond J. DeMallie (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979*, University of Oklahoma Press, 1999. If you are longing for a concerned and insightful exposition of background and development, you are really lucky, because you will find it: V. Deloria, Jr. and David E. Wilkins, *Tribe, Treaties, and Constitutional Tribulations*, University of Texas Press, 1999. Pay heed to the title to go beyond the traditional overlapping and avoid the actual masking together with the same incisive authors: V. Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (1974), University of Texas Press, 1984; D.E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, University of Texas Press, 1997. The electronic site of the University of Colorado at Boulder conveys links into *Native American Treaties and Information*: *www-libraries.colorado.edu/ps/gov/us/native.htm#Treaties*. Add the list on *Indian Nations and Tribes* at the Internet Law Library: *www.lectlaw.com/inll/31.htm*.

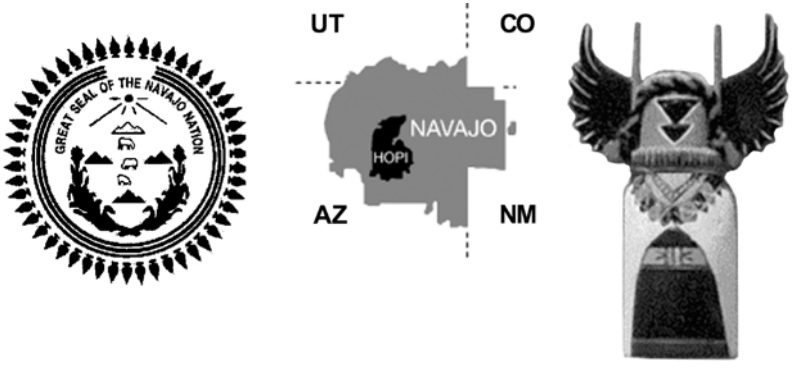
As for the Navajos, they officially constitute the *Navajo Nation* within the United States since 1988. They have changed their name from *Navajo Tribe* by a shift in the wording on their former tribal and now national seal, not through any constitutional provision. We will see that the Indian reservations have adopted subsidiary and patronized constitutions, except the Navajo and few others, these objecting on the grounds of title to a higher law from treaty or history — or both as expressions of sovereignty and self-determination previous to and independent of any grant from the United States.

Currently, as for the Navajo polity, the approach does not call their belonging to the United States into question. Without a shadow of either doubt or irony, the *Great Seal of the Navajo Nation* depicts their own stylized world (cattle, plant life, the sun, and mountains, yet not just any mountains, but the four peaks deemed to mark the Diné Bikeyá boundaries beyond the present Navajo Reservation) within a double ring, the inner one displaying, like a rainbow, some pristine

colors — red, yellow, and blue, from inside to outside — as a representation of Indian primary diversity, and the outer ring shaped by the parade of fifty arrowheads or projectile points so as to symbolize the fifty States of the Union, Alaska and Hawaii being the last included, at the same time that the shift from Tribe to Nation. The new points seal the circle left open by the rainbow. The 2003 Fundamental Laws of the Diné, which may be considered a kind of constitution, put into legal words that Navajo world.

For want of a Navajo constitution at least before these recent Fundamental Laws of the Diné, the seal does really stand for Navajo wishful constituent law at the expense of both the United States and Hopi Tribe as long as the latter is an actual double enclave, inside the Navajo reservation and the United States of America. There is also a Tewa enclosure inside the Hopi polity. It is not a game of Russian dolls or rather, in Hopi language, *kachinas* (in fact, more than toys, as they embody and display distinctive, constituent culture). Law is not always enclosed in written records and at times even it cannot be articulate in this specific way, especially if self-determination is lacking and needed. The *kachina* here may serve as a sphinx showing the harsh flaw of legal knowledge due to cultural ignorance. I am ignorant about Hopi ways.

Navajo and Hopi Polities among Arizona, New Mexico, Utah, and Colorado States.



The Fundamental Laws of the Diné (2003). § 1. *Diné Bi Beehhaz'aanii Bitse Silei — Declaration of the Foundation of Diné Law*. We, the Diné, the people of the Great Covenant, are the image of our ancestors and we are

> created in connection with all creation (...). Earth and universe embody thinking; water and the sacred mountains embody planning; air and variegated vegetation embody life; fire, light, and offering sites of variegated sacred stones embody wisdom (...). Accordingly, we are identified by our Diné name, our clan, our language, our life way, our shadow, our footprints. Therefore, we were called the Holy Earth-Surface-People. From here growth began and the journey proceeds. Different thinking, planning, life ways, languages, beliefs, and laws appear among us, but the fundamental laws placed by the Holy People remain unchanged. Hence, as we were created with living soul, we remain Diné forever.
>
> *Draft Constitution of the Hopi Tribe* (2003). *Preamble*. The Constitution is adopted by the self-governing Hopi and Tewa Peoples of the Hopi Tribe to provide a way of working together for peace and agreement between Villages (...). Art. 1. *Territory and Jurisdiction*. Sec. 2. *Jurisdiction*. The Tribe shall posses inherent Sovereignty. The Jurisdiction of the Tribe shall extend to all persons, activities, and property based upon inherent territorial or popular Sovereignty (...).

8.4. *Pueblo Peoples, Tohono O'odham Nation, and the constitutional limbo within the United States.*

The Hopi is one of the Pueblo polities, an undoubtedly sedentary people (whence the Spanish name *Pueblo*, in the sense of town, comes). They may be the oldest known continuous human presence in the area, a circumstance usually disregarded because of the scholarly style of multiplying names, inventing peoples, and making them disappear, such as the *Anasazi* and *Sinagua* who really were ancient Pueblos (*Anasazi* being a Navajo word for former enemy, and *Sinagua* a Spanish wording for water shortage, sometimes given by anthropologists even to people who settled by a river). Anyway, as the so-called Pueblo peoples are most sedentary, it may be contended that they benefited from the Treaty of Guadalupe-Hidalgo.

Were they Mexican citizens who could become citizens of the United States and be therefore entitled to rights and guarantees on an equal footing? So in fact it has been contended on the grounds of Guadalupe-Hidalgo. Nevertheless, although the access to citizenship could be true, the equal footing would turn out to be false. Citizenship and entitlement were not the same things for indigenous peoples, nor were they for women or for African-American before and even after the emancipation from African slavery in the United States. And for Indians, even citizenship could be most controver-

sial. Additionally, no formal, articulated treaty was ever signed by the United States with Pueblo peoples (in 1848 and 1850, some drafts were not ratified by the United States Senate; in 1858 a "treaty of peace and friendship", not containing any further provisions, was signed with the Taos Pueblo together with Arapahoes, Cheyennes, Muahuache Utahs, and Jicarilla Apaches). As for Pueblos, there was neither indigenous consent nor non-indigenous grant through treaty. Today, there are about twenty Pueblo reservations in New Mexico and Arizona, plus a single one in Texas.

> *United States versus Sandoval* (1913). United States Supreme Court. (...) The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people. Upon the termination of the Spanish sovereignty they were given enlarged political and civil rights by Mexico, but it remains an open question whether they have become citizens of the United States. See treaty of Guadalupe Hidalgo, arts. 8 and 9 (...). During the Spanish dominion the Indians of the pueblos were treated as wards requiring special protection (...). Laws of the Indies, Bk. 6, title 1, laws 27 and 36, title 2, law 1; Bk. 5, title 2, law 7; Bk. 4, title 12, laws 7, 9, 16-20 (6) (...). After the Mexican secession they were elevated to citizenship and civil rights not before enjoyed, but whether the prior tutelage and restrictions were wholly terminated has been the subject of differing opinions (...). Be this as it may, they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities (...). Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

In general, as the access to constitutional citizenship was construed in individual rather than collective terms and no exception

(6) *Recopilacion de las Leyes de los Reynos de las Indias*, 1681, Libro IV, Titulo Doze, *De la venta, composicion y repartimiento de tierras, solares y aguas*. Leyes 7, *Que las tierras se repartan sin accepcion de personas, y agravio de los Indios*; 9, *Que no se den tierras en perjuicio de los Indios, y las dadas se debuelvan a sus dueños*; 18, *Que a los Indios se les dexen tierras*; etc. Libro 6, Titulo Primero, *De los Indios*. Leyes 27, *Que los Indios puedan vender sus haziendas con autoridad de justicia*; 36, *Que no se pueda vender vino a los Indios*; etc..

was made for the sake of people handed over by Mexico, indigenous or not, the indigenous entitlement could not come easily from Guadalupe-Hidalgo by itself. Then, the United States did not imagine citizenship shared with indigenous peoples as long as the latter maintained their own communal customs or did not adopt the non-indigenous way of life by allotting property and so on. Let alone racism, cultural assumptions or rather prejudices could be pre-emptive. In fact, sedentary indigenous peoples' rights were not guaranteed by the United States. Is there any need of evidence? The Hopi people were to some extent dispossessed after the 1868 Navajo Treaty, as the reservations overlapped, through further agreements between the Diné Bikeyá and the United States granting new lands for the Navajo polity in the Arizona Territory; later, in the 20th century, a substantial number of Navajo families would be on the contrary deprived of title to land through federal enactment on behalf of the Hopi people not allowing for any judicial remedy either.

Guadalupe-Hidalgo was framed under the assumption that Mexican citizens, as they had not been consulted, could prefer to remain as such and therefore they were granted the option. As for indigenous peoples, besides the lack of their consent to the great deal, there was the hidden problem of their self-identification. Had they actually identified themselves as Mexican citizens, thus endorsing a constitutionalism alien to them? In fact, they had never supplied consent to the former Mexican citizenship. Guadalupe-Hidalgo assumed otherwise. They were supposed to have the choice between two alien citizenships. However, if the option for Mexican citizenship was not filed in one year after the treaty, access to the United States citizenship was by no means automatic. Please, reread the text quoted above. Add that indigenous peoples did not take into account such a strange offer between two alien positions. Notice that, sedentary or not, passing from Mexico into the United States, they could only arrive at some kind of a legal limbo, a constitutional nowhere land, a most vulnerable place.

The milestone publication by Felix S. Cohen, *Handbook of Federal Indian Law* (1942), William S. Hein and Company, 1992, which dedicated a whole chapter to *Pueblos of New Mexico*, provides a good piece of both law and history, although somehow biased by the advocacy on behalf of indigenous people from the United States coordinates. He contends that Pueblo

Indians gained citizenship in Mexico and did not lose it in the United States. Perhaps the best historical science does not come from dedicated advocacy, as, in turn, best advocacy does not come from historical research and knowledge. In this regard, Cohen's *Handbook* shared the background of a movement for indigenous recovery that discontinued, as an Indian New Deal (the Indian Reorganization I shall refer to), the United States termination policy against Indian polities in the West after 1871 as in the East virtually since the beginning. It also contributed to the distorted extension of such current categories and practices as Indian constitutions and tribal sovereignty regardless of the sustained dependency from the United States, not challenging in its whole extent the plenary federal powers upon reason of trusteeship, the usual consequent euphemism for guardianship. On the Navajo-Hopi legal or rather political case, documents are available on a Navajo site, *Navajo-Hopi Land Dispute*: *www.lapahie.com/Treaties.cfm*; a mapping: *lcweb2.loc.gov/ammem/amlaw/lwss-ilc.html*. The conflict projects onto history along with law: Hopi historiography, for instance, dates Navajo arrival from the 17th century, after the Spaniards, Diné people claiming otherwise.

Limbo is literal. Like the Pueblo, the O'odham people, also called Papagos and Pimas, have been object rather than party in the practice of treaties. Only one was signed by the Tohono O'odham with the United States (1863, together with the Mohave, Maricopa, Yuma — including maybe Havasupai —, Chemehuevi, Hualapai, and kindred Akimel O'odham, equally called Pimas and Papagos, as an alliance between them all and with the United States against the Apaches). Pima identified the language.

By the so-called Gadsden Purchase — an additional treaty to Guadalupe-Hidalgo setting in 1853 the frontier further southwards (James Gadsden was the United States ambassador to Mexico who made this real estate bargain) — the Papagos-O'odham were split between Mexico and the United States. Today, Tohono O'odham people born in the north of the frontier with family located on both sides do not succeed in qualifying for United States citizenship (which will be granted to Indian people in 1924, as we shall see). Furthermore, they suffer harsh encroachment of freedom of communication, movement, and interchange inside their own territory across alien, States' boundaries. Since the 1980s, a barbed wire fence has been laid and entry is illegal. Official checkpoints are placed around one hundred miles away from the reservation.

Against this policy, O'odham people unsuccessfully claim both the rights recognized by the Treaty of Guadalupe-Hidalgo and the

posterior granting by the United States of tribal membership — as for federal assistance such as health care — to Mexican Papagos alongside fellow American citizens. Through the guardianship powers, not by treaties, the United States has set up within its frontiers four non-contiguous reservations belonging to Papago people: Tohono O'odham, Gila Bend, San Xavier, and Florence Village. The first ones call themselves — officially through a new constitution since 1986 — the *Tohono O'Odham Nation*, as if standing for all the Papago people though being a part — a major part. The said grant from the United States has pre-empted American citizenship of the whole people, Papagos in Mexico included. In short, the United States recognizes the union of the Papago people and divides the Papago nation through exclusive citizenship, diverse reservations, and wired frontier.

The Papago people are disempowered as for their own belonging as a nation among nations, though few people among a great many. "d'ac 'O'odham c 'ia c ñenda gju:ki", "we are the desert people and sit here and wait for the rain". I am ignorant of American languages, but it seems like a Papago way to name limbo. *Tohono-O'odham*, meaning *Desert People*, is a case of final self-naming. At least, they are not deprived of the power to self-denomination. They possess a desert culture.

There are several electronic pages from the lobby for the United States citizenship to all the O'odham or Papago people. Currently (108th Congress, 1st Session) there is a bill introduced in the House of Representatives, available at the official site: *thomas.loc.gov/cgi-bin/query/z?c108:H.R.731*. Beyond the peoples we have met, you may get information on *Southwest Indian People* on the sites of the Council of Indian Nations (*www.cinprograms.org/people/index.html*) and the Inter Tribal Council of Arizona (*www.itcaonline.com/Home.htm*). It is advisable to add a visit to the site of the *Unidad de Información y Documentación de los Pueblos Nativos del Noroeste de México*: *www.geocities.com/pueblosnativos/index.htm*. On peoples affected by Guadalupe-Hidalgo, Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1530-1960*, University of Arizona Press, 1962, still furnishes a helpful introduction. *D'ac 'O'odham*, "We are Papago", a poem by Ofelia Zepeda, professor of linguistics at the University of Arizona, former director of its *American Indian Studies Program*, author of the first grammar of the Tohono O'odham language, is on the web too: *www.banksville.org/storytellers/zepeda/poems/rain2.html*.

Take a look at the location of the *Tohono O'odham Nation* by the frontier between the States of Arizona and Sonora, the United States and Mexico. In the map below, pay heed to the tracing of the borderline as if it

were definitive, as if there were no longer Papago people beyond the United States Tohono O'odham reservation, or as if there could be no more peoples beyond the States. It is the way in which the whole world is presently mapped. In the usual map of the United States, you do not find the Diné Bikeyá or Navajo Nation rooming all along the Northeast of Arizona and further into some part of Utah and New Mexico over the states lines. Neither do you meet the Hopi polity as an enclave surrounded by the Navajo reservation. There are official sites of both Navajo Nation and Hopi Tribe: *www.navajo.org*; *www.hopi.nsn.us*.

Source: *www.laruta.org/borderlands.htm*. A warning is added when an involved site, *www.hrusa.org/indig/reports/Tohono.pdf*, reproduces the map: "There is no designated Tohono O'odham reserve on the Mexico side of the Tohono O'odham Nation. However there are many Tohono O'odham communities in Sonora, up to some 90 miles south of Arizona into Mexico, as well as in the area of Sierra el Pinacate" (in fact, there are Pima-speaking people even further southwards. *Reserve* for reservation is Canadian wording).

8.5. *Indigenous rights and the treaties between Mexico and the United States.*

Let us note that there is no reference to the treaty of Guadalupe-Hidalgo among the settlement pieces investing Indians with rights through the United States grant. The purpose was subjection, not entitlement. The very treaty was not deemed as an agreement positively interesting to indigenous peoples as such. Furthermore, with the guiding principle of guardianship, the relationship between the United States and the Indian peoples remained essentially, all in all, outside the scope of any treaty, even when agreed with indigenous peoples. It even fell outside any written rule of law, agreed or not. This was what we may call overlapped constitutionalism, or

rather hidden unconstitutionalism, as the evidence demonstrates that indigenous rights also remained outside of both the United States and inner states constitutions and constitutional approaches, amended or not. As the treaties had effects on rights and thus entailed constitutional implications as well, indigenous standing was even out of agreements either between States or with the Indian peoples themselves.

When the United States and Mexico signed a treaty on extraditions in 1861, no provision was made referring to indigenous peoples who did not respect, as a matter of course, an alien frontier. Guadalupe-Hidalgo had provided for this purpose with expediency far from rule of law or any other constitutional pattern. No need to explain what is apparent in the very text of the treaty and implied by the guardianship rule.

In 1853, the additional treaty to Guadalupe-Hidalgo, the so-called Gadsden Purchase, had been signed by the United States and Mexico. It read thus: "In the Name of Almighty God. The Republic of Mexico and the United States of America desiring to remove every cause of disagreement which might interfere in any manner with the better friendship and intercourse between the two countries, and especially in respect to the true limits which should be established, when, notwithstanding what was covenanted in the treaty of Guadalupe Hidalgo in the year 1848, opposite interpretations have been urged, which might give occasion to questions of serious moment: to avoid these, and to strengthen and more firmly maintain the peace which happily prevails between the two republics (...)", etc.. No mention of Indians was made but an implicit one in order to release the United States "from all liability on account of the obligations contained in the eleventh article of the treaty of Guadalupe-Hidalgo".

If we give credit to the parties in those treaties, there was no pending problem on the relations with indigenous peoples for any of them, neither for Mexico nor for the United States. As a matter of fact, there was an understood agreement for subjection through policies of dispossession, removal, confining, and even cleansing up to killing fields (this especially in Texas and California on the United States side, such as in Chihuahua, Sonora, and Sinaloa on the other side). Somehow all of this was entailed, reflected, or implied by

Guadalupe-Hidalgo' s provisions on *tribes* deemed *savage*. Notice that this treaty took into account no other explicit indigenous classification. Others kept silent. You cannot say that the United States did not keep the word given to Mexico or vice versa, as the latter did its best too as for land dispossession and people cleansing. Both broke instead other commitments, those contracted with peoples.

Although frontier studies do not address the constitutional dimension, some reading is advisable: David J. Weber, *The Mexican Frontier, 1821-1846: The American Southwest under Mexico*, University of New Mexico Press, 1982, and *The Spanish Frontier in North America*, Yale University Press, 1992; Cynthia Radding, *Wandering Peoples: Colonialism, Ethnic Spaces, and Ecological Frontiers in Northwestern Mexico, 1700-1850*, Duke University Press, 1997; Donna J. Guy and Thomas E. Sheridan (eds.), *Contested Ground: Comparative Frontiers on the Northern and Southern Edges of the Spanish Empire*, University of Arizona Press, 1998. Add Kieran McCarty (ed.), *A Frontier Documentary: Sonora and Tucson, 1821-1848*, University of Arizona Press, 1997. D.J. Weber's concern with indigenous presence extends to the practice of treaties: *Spaniards and their Savages in the Age of Enlightenment*, forthcoming (see an advance in Christine Daniels and Michael V. Kennedy, eds., *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820*, Routledge, 2002, 79-103). On the contrary, you do not meet indigenous peoples in the mood and along the lines of Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700-1810*, University of New Mexico Press, 1995, or David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846*, University of Oklahoma Press, 1987. The clash is deemed to be exclusively between Latin and Anglo legal cultures as if indigenous peoples could not inherit, develop, and stand up for their own cultures regarding history, law, and beyond. For discussion of the Guadalupe-Hidalgo factor, you may now resort to Martha Menchaca, *Recovering History, Constructing Race: The Indian, Black, and White Roots of Mexican Americans*, University of Texas Press, 2001 (focused on ethnic rather than cultural heritage and dealing mainly with land grants and dispossession policy). Oscar J. Martínez (ed.), *U.S.-Mexico Borderlands: Historical and Comparative Perspectives*, Jaguar Books on Latin America, 1996, suggests further readings as well as movie watching (I would additionally include Salt of the Earth, 1954, written and directed by blacklisted Michael Wilson and Herbert Biberman respectively, starring New-Mexican trade unionist Juan Chacón and Mexican actress Rosaura Revueltas, who faced immigration problems because of her participation).

At the end of 1992 a treaty was signed by Mexico, Canada and the United States coming into force at the beginning of 1994. It is the well-known North American Free Trade Agreement (NAFTA or TLCAN, *Tratado de Libre Comercio de América del Norte*). It is not

so apparent that this treaty is pervasively, though unevenly, affecting indigenous peoples in those countries. No wonder that the latter were not consulted. We know it is bad manners for international legal standards to mix with simple people. States negotiate, come to terms, and try to implement treaties between themselves as if indigenous peoples did not exist even in those cases where their presence was explicitly acknowledged and some of their rights recognized by prior treaties between those very States and those very Indigenous Peoples. The concern may always be there.

Mark the date. The 1992 Mexican constitutional reform terminating communal property policy (which we contemplated as a way of accommodating indigenous polity) may be actually linked to the free trade policy. In fact, the 1994 Zapatista uprising in Chiapas, Southern Mexico, claimed to fight both TLCAN and 1992 Amendment. Through international media cover, non-indigenous people remember ski masks in the rain forest better than indigenous motivations. Thus, let us pay heed. When facing past and present States treaties, it is advisable to read even the silence between the lines.

> *North American Free Trade Agreement* (1994). *Preamble*. The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: strengthen the special bonds of friendship and cooperation among their nations; contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; create an expanded and secure market for the goods and services produced in their territories; reduce distortions to trade; establish clear and mutually advantageous rules governing their trade; ensure a predictable commercial framework for business planning and investment; build on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation; enhance the competitiveness of their firms in global markets; foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights; create new employment opportunities and improve working conditions and living standards in their respective territories; undertake each of the preceding in a manner consistent with environmental protection and conservation; preserve their flexibility to safeguard the public welfare; promote sustainable development; strengthen the development and enforcement of environmental laws and regulations; and protect, enhance and enforce basic workers'rights; have agreed as follows (…).
>
> *Joint Declaration from the Free Trade Summit of the Americas* (1995). 1. We, the Ministers responsible for trade representing the 34 nations which participated in the Summit of the Americas [Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia,

> Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent and the Grenadines, St. Lucia, St. Kitts and Nevis, Suriname, Trinidad and Tobago, Uruguay, the United States of America, and Venezuela] met in Denver for the first Trade Ministerial meeting mandated by our Heads of State and Government. We agreed to begin immediately al work program to prepare for the initiation of negotiations of the Free Trade Area of the Americas (…). 11. We are committed to transparency in the FTAA process. As economic integration in the Hemisphere proceeds, we welcome the contribution of the private sector and appropriate processes to address the protection of the environment and the further observance and promotion of worker rights, through our respective governments.

9. *American citizenship and indigenous standing.*

As stated earlier, citizenship and entitlement must be differentiated. They do not ever match. In 1924, after a series of particular grants, United States citizenship for all indigenous people born within the United States frontiers was established legislatively, not constitutionally, through enactment enabling the executive "to issue certificates of citizenship to Indians". No constitutional amendment has ever been accomplished on behalf of indigenous peoples in the United States. Anyway, some hindrance seemed to be overcome. Before 1924, there had been a close link between United States citizenship and the withdrawal from communal life. From then onwards, it could be otherwise. Statutory intent apart, given Indian resistance, the *tribal* way of life might no longer be considered an impediment for United States citizenship. The compatibility was seemingly accepted since the 1924 act referred to *tribal property* as an extant indigenous position. However, all in all, no plurality of citizenship itself, as for Indian and United States belonging, was taken into either constitutional or legal consideration.

Eventually, for the United States the Indians had not been citizens of their own nations but people either without any citizenship or stemming from another Euro-American one, like the Mexican. Furthermore, indigenous background represented by no means a letter of recommendation for the United States. On the grounds of both the Treaty of Guadalupe-Hidalgo and the Amendment XIV of the federal Constitution (1868, sec. 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside... Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed…)", throughout the Southwest during the last decades of the 19th century, Indians who, willingly or not, had given up tribal life, unsuccessfully claimed for the United States citizenship. Even being wealthy and hiring legal advice did not qualify if you were indigenous. *Indians*, even taxed, were seriously excepted. From 1887, they could become *American* citizens if they agreed to dissolve the tribe, and the communal lands were allotted. In short, born in a reservation did not mean born in the U.S.A. Somehow, reservations were neither States nor states nor United States.

Moreover, before the abolition of slavery and the subsequent constitutional amendments, you became a United States citizen through state citizenship or, otherwise, if you belonged to a federal territory and were a Euro-American colonizer. Furthermore, as for Indians, although eventually citizens, they might continue as legally incompetent wards. After the 1924 federal grant, the States of Arizona and New Mexico did openly challenge the enfranchisement of reservation Indians on the grounds that they were wards under the guardianship of the federal government. In the mid-19th century and afterward, was there any United States citizenship suitable for Indigenous Peoples as such and even for indigenous people on an individual basis? Even after 1924, the constitutional limbo — people in the desert waiting for the rain — could last.

> *Indian Allotment Act* (1887). An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon (…). Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every number of the

> respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner affecting the right of any such Indian to tribal or other property.
>
> *United States Indian Citizenship Act* (1924). An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

9.1. *Indian polities and the United States: from the constitutional limbo to a so-called self-determination policy.*

So far, for Euro-American and European people, Nation meant State, either in the singular or in the federal plural, and only State stood seriously for Nation. Prior to the 1924 grant of citizenship, *Hodenosaunee*, that is, the Iroquois Confederacy (Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora peoples; *iroquois* being a French nickname) that extended between Canada and the United States, and existed from times earlier to both, had filed a claim for nationhood, as a distinct polity, with the League of Nations at Geneva. The application did not succeed, but it was received and discussed.

Facing this advent of modern international organization from 1919, the 1924 United States' grant of citizenship to indigenous peoples may be seen as pre-emptive. They were like a pain in the Nation that could try to become a peer among Nations. Moreover, as far as Indian people were a definitive minority from coast to coast, there was no trouble for the United States with a common citizen-

ship. Between immigration and reservation policies, there was here no need for trompe-l'œil any longer but for the constitutional limbo of the reservations themselves as pieces now constituting the common body politic and never constituent of it. On these grounds, Indian citizenship has not disrupted the United States constitutionalism. No amendment was needed.

There is no indigenous consent to the sharing of citizenship. Neither is there a participatory revision of the constitutional fabric underlying this measure, nor even a unilateral constitutional amendment or any other significant rectification from Congress or from the judiciary. In the mid-20th century, the framing and working of an Indian Claims Commission aimed only at pecuniary indemnity for definitive political legitimization of the United States powers and takings did not make any constitutional difference. Neither did the 1934 Indian Reorganization Act, the New Deal policy authorizing subordinate self-administration — *home rule* in the enacting language — by the Indian reservations through inner constitutions without any noteworthy constitutional restriction or real disempowerment on the part of the United States, just as in previous times. Here, home rule may imply municipal regime like the one we have seen in Mexico. Things will even worsen on constitutional grounds as for the reservations' standing. The 1968 Civil Rights Act, although referring to Indian *self-government*, further empowered the federal judiciary and by no means the indigenous jurisdictions. The 1974 so-called Indian *Self-Determination* Act did not restrain federal powers; neither has the later shift in official language to *Self-Governance* since the federal launch of the self-styled Tribal Self-Governance Demonstration Project in 1988.

So far, the United States has adopted a rich set of idioms seemingly respectful toward indigenous peoples: *Indian inherent sovereignty*, *self-determination*, *self-governance*, *government-to-government relationship* (between the United States and the reservations' bodies)... Indeed, the series is always failing. The federal guardianship, now styled *trust responsibility*, is not discontinued. Just as in Mexico, before peoples, social policy substitutes recognition and respect. In the United States present practice, self-governance means Indian capacity and responsibility for negotiating and managing developments projects and assistance contracts with or

through the federal administration. The standing minor gains a growing say.

Shifts are real, yet they do not affect the constitutional core even when they appear to be constitutionalist as if seriously concerned with Indian rights. However important all these policies may be (we will see that in Arizona twenty reservations out of twenty-one — the largest one is the exception — complied with the Reorganization Act, under which, throughout the United States, over one hundred and fifty Indian constitutions were adopted), there has not been any remodeling nor even any rethinking of the overall constitutionalism, just as there had not been any reshaping of constitution itself in accordance with the reframing of citizenship, despite the enactment of amendments and although it was proposed, when the abolition of slavery took place.

> *Indian Reorganization Act* (1934). An Act to conserve and develop Indians lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes. Sec. 16. 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 addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal counsel of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and Congress. Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, that such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description,

real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Civil Rights Act (1964). Tit. VII. Equal Employment Opportunity. Sec. 703. Discrimination because of race, color, religion, sex, or national origin. (i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Civil Rights Act (1968). Tit. II. Rights of Indians. Art. 201 (1) For purposes of this title, the term "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government; (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses. Tit. III. Model Code Governing Courts Of Indian Offenses. Sec. 301. The Secretary of the Interior is authorized and directed to recommend to the Congress (…) a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual, (3) establish proper qualifications for the office of judge of the courts on Indian offenses, and (4) provide for the establishment of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this title, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

Indian Self-Determination and Education Assistance Act (1975). An Act to provide maximum Indian participation in the government and education of Indian people; to provide for the full participation of Indian tribes in program and services conducted by the Federal Government for Indians, and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes. Tit. I. Indian Self-Determination Act. Sec. 101. This title may be cited as "Indian Self-Determination Act". Sec. 102 (a). The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 [An Act authorizing the Secretary of the Interior to arrange with States or Territories for the education, medical attention,

relief of distress, and social welfare of Indians, and for other purposes], as amended by this Act (…). Tit. II. The Indian Education Assistance Act. Sec. 450 (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities; (f) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof.

Act to Regulate Gaming in Indian Lands (1988). Sec. 2. The Congress finds that (1) numerous Indian tribes have become engaged in or have licensed gaming activities as a means of generating tribal governmental revenues; (3) existing Federal law does not provide clear standards or regulation for the conduct of gaming on Indian lands; (5) Indians tribes have the exclusive right to regulate gaming activities on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Indian Self-Determination Act Amendment (1994). Tit. II. Tribal Self-Governance Act. Sec. 202. Congress finds that (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations; (2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes; (3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs; (5) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that (A) transferring control to tribal governments, upon tribal request, over funding and decision making for Federal programs, services, functions, and activities, or portions thereof, is an effective way to implement the Federal policy of government-to-government relations with Indian tribes; and (B) transferring control to tribal governments, upon tribal request, over funding and decision making for Federal programs, services, functions, and activities strengthens the Federal policy of Indian self-determination. Sec. 203. It is the policy of this title to permanently establish and implement tribal self-governance (1) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes; (2) to permit each Indian tribe to choose the extent of the participation of such tribe in self-governance; (4) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals.

9.2. *Born citizens and native rights.*

Let us look back again at the Amendment XIV (1868: "All persons born… in the United States… are citizens of the United

States and of the state wherein they reside... excluding Indians not taxed…)", and yet further backwards at the very Constitution (1787, art. I, sec. 2: "... Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indian non taxed, three fifths of all other persons"). Here you can find both indigenous exclusion and overrepresentation of slave-owners as signs ever-present, though nullified by amendment, in the constitutional text. The document is untouched. Take a look at any current edition of the United States Constitution and you will find such derogatory allusions to both Indians and African-Americans ("other persons" in colloquial sense).

In the United States, contrary, say, to Mexico, when constitutional law is amended, the constitutional document is not changed nor touched but just added to. Something more than text may continue. No revision of the constitutional fabric itself since the abolition of slavery took place. All the same, citizenship was granted in 1924 (not in 1868 as usually asserted) to "all persons born in the United States" and lastly to the first people in America — "all Indians born within the territorial limits of the United States". In the indigenous case, citizenship could be unwanted and peculiar, the former because of the latter. The grant did not help to discontinue the guardianship rule nor recover rights of indigenous peoples as such. At most, in the constitutional realm some language will change, wording *trusteeship* or the like instead of *guardianship* or phrasing definitively *federal responsibility* in the place of *Great Father*. Language always helps, sometimes to cover up misdeeds.

Remember Chief Justice Marshall, the constitutional oracle regarding Indian affairs: "They [the Indians] look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father". It always represents a way to endorse putative prejudices at the expense of others. According to the non-indigenous viewpoint, indigenous people would be the ones who trust either expansive powers or great fathers. We shall return to the consideration of federal authority over Indian affairs on these cultural grounds.

Thus far, we know well that common citizenship in the singular — either the United States or the Mexican citizenship — does not mean equal footing as regards rights. We are aware of this for both Anglo and Latin, for both *outsourcing* and *insourcing* unconstitutional devices in the constitutional fabric. Both approaches share the background of colonial assumption of Euro-American supremacy that establishes guardianship, the heavy burden of the white man. After the grant of United States citizenship, Anglo and Latin overlapping constitutional fabrics clearly evinced their sharing of a same exclusion of constituent pluralism. Regarding indigenous peoples, there may be legal plurality but not the constitutional kind at all. The subjugation stemming from colonial times continues to make the difference. Now on the pretended behalf of Indian rights, federal guardianship, whatsoever names it takes, endures.

On the not so shared citizenship regarding rights' entitlement, together with the non-indigenous distrust towards indigenous jurisdictions and the post civil war assumption of federal empowerment also against them, you may resort to John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights*, Oxford University Press, 1994. If so far you prefer the test and taste of a more telling presentation, this is your reading: Chief Oren Lyons and John Mohawk (eds.), *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, Clear Lights Publishers, 1992. As we are people of the scholarly kind, let us add some recommendations beyond the legal and even political field but regarding our cultural ways and professional manners: V. Deloria, Jr., *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*, Fulcrum Publishing, 1997; Devon A. Mihesuah, *Natives and Academics: Researching and Writing about American Indians*, University of Nebraska Press, 1998. Insofar as even scholarly people' s knowledge may unwittingly rely on pop fiction, add Peter C. Rollins y John E. O'Connor (eds.), *Hollywood's Indian: The Portrayal of the Native American in Film*, University Press of Kentucky, 1998.

As we are interested in the legal aspect, keep on adding: Sharon O'Brien, *American Indian Tribal Governments*, University of Oklahoma Press, 1989; D. E. Wilkins, *The Navajo Political Experience*, Diné College Press, 1999, on the main case; contrast — although containing no section on government — Scott Rushforth and Steadman Upham, *A Hopi Social History: Anthropological Perspectives on Sociocultural Persistence and Change*, University of Texas Press, 1992. On the missed opportunity for the United States constitutional re-founding at the great moment of the abolition of slavery, Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*, University Press of Kansas 1990; Bruce Ackerman, *We the People*, II, *Transformations*, Harvard University Press, 1998. The constitutional materials from the Indian New Deal are available on the *Native American Constitution and Law Digitization Project* at the University of Oklahoma Law Library and the National Indian Law Library of the Native

American Rights Fund: *thorpe.ou.edu/IRA.html* (*Indian Reorganization Act Era Constitutions and Charters*). We already know electronic addresses on indigenous issues in the Southwest, where we are turning to at this point as regards new states.

10. *The Arizona Territory and Arizonan polity.*

When the Arizona Territory was planned in 1862, a "memoir signed by more than five hundred resident voters", non-indigenous to be sure, depicted how they figured their opening challenge: "At the time of its acquisition [of the whole of New Mexico by the United States] there was scarcely [in Arizona] any population except a few scattering Mexicans in the Mesilla valley, and at the old town of Tucson, in the center of the territory. The Apache Indian, superior in strength to the Mexican, had gradually extirpated every trace of civilization, and roamed uninterrupted and unmolested, sole possessor of what was once a thriving and populous Spanish province (...). The Indians at length thoroughly aroused by the cruelties of the Spaniards, by whom they were deprived of their liberty (...). A superior civilization disappeared before their [Indians'] devastating career (...). The Apache Indian regards the soil as his own, and having expelled the Spanish and Mexican invader, he feels little inclination to submit to the American (...). Indians are the only persons who can successfully traverse these mountains and hunt up their hiding places. If this is not done, they [Indians] will surely break up our settlements here". The memoir ended with resolutions and claims addressed to the United States Congress: "The undersigned, your humble petitioners, citizens of the United States, and residents of the Territory known as the Gadsden Purchase [Southern Arizona], respectfully represent: That since the annexation of their [non-Indians'] Territory to the United States, they have been totally unprotected from Indian depredations and civil crimes (...)".

Between my brackets and in their lines, there are mixed evidences and prejudices. It is an eloquent manifesto loaded both by the recognition of the Indianness of the territory and the presumption of existence of non-Indian rights over this very territory. The non-Indian minority even realized that they needed Indians to expropriate and expel the Indians. Together with warfare, treaties were badly needed.

The 1863 *Act to Provide a Temporary Government for the Territory of Arizona*, "until such time as the people residing in said Territory shall, with the consent of Congress, form a State government", is concerned with African-Americans ("there shall neither be slavery nor involuntary servitude in the said Territory"), but had no say regarding Indians. None of them, African or Indian people, were deemed to be citizens. *People residing in said Territory*, the coming polity of the State of Arizona, as a matter of course in the United States, was to be non-Indian and non-African-American. For the former, treaties helped; for the whole, what worked was cultural prejudice. Additional racism aided too, to be sure.

Arizona Territory was severed from New Mexico Territory. The 1850 *Act to Establish a Territorial Government for New Mexico* had founded a government that encompassed Arizona and which rules could be kept here to some extent after the separation. New Mexican laws "not inconsistent with the provisions of this act [1863], are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation". The same 1863 Act, by excluding slavery, discontinued something most significant from the 1850 Act: "When admitted as a State, the said Territory [New Mexico-Arizona], or any portion of the same, shall be received into the Union, with or without slavery, as their Constitution may prescribe at the time", but none was revised on behalf of indigenous people between 1850 to 1863: "An apportionment shall be made, as nearly equal as practicable, among the [Arizona' s] several counties or districts, for the election of the Council and House of Representatives, giving to each section of the Territory representation in the ratio of its population, Indian excepted".

At all events, for the States of New Mexico and Arizona, either together or divorced, the polity was to be the same that we have found for Texas and eventually for California too. According to the 1850 Act common to both territories (New Mexico and Arizona first coupled), the individual entitled to political and civil rights was *every free white man*, the man so qualified by sex, race, and freedom as non-servitude, so far as slavery existed and even beyond on the grounds of prejudice, supremacy and racism. Nevertheless, this Act complied even with Guadalupe-Hidalgo: "The right of suffrage, and

of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico". No constitutional guarantee, jury trial included, was established to the benefit of other people than *free white man*, this is the citizen: "That no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of their peers and the laws of the land".

Let us resolutely recommend another reading on non-indigenous subject, albeit straight constitutional, namely from a treatise just cited, *We the People* by B. Ackerman, the first volume, *Foundations*, 1991, which poses for the United States a serious constituent predicament. It was founded literally by fathers, thus excluding women, slaves, and Indians in the moment of conception and naissance. Hence, the United States lacks the constituent consent of a social unequivocal majority and thus any truly democratic authority. But Ackerman considers a renaissance: the constitutional system would be regenerated by gender equality and civil rights, although the abolition of slavery did not lead to a new constitution and the constitutional amendment for non-discrimination based on sex never succeeded, other than for a single political right (Amendment XIX, 1920: "1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"). However, as for the regenerating momentum, some people are forgotten. Guess who. You are right. *We the People* names Indians for the question but not for the answer. Who cares? Scholarly folks are actually shortsighted, if not really blinded. Here, in *We the people*, at least the raw nerve is shown. Light rather than sight is missing in the American constitutional and historiographical laboratory, American meaning both the United States and the whole continent from Alaska to Patagonia, from Inuit people to Che people. Let us recall again and again that indigenous people, slaves, and women could share in common, under fathers' freedoms and powers, *oeconomical* standing excluded from *constitutional* rights, so there might actually be legal, uneven links between their cases.

Inner states' constitutional history is quite neglected in relation to the federal, so-called *American* one. As for the documents leading to the State of Arizona, they are available together with other constitutional and non-constitutional texts on the *Avalon Proyect* of the Yale Law School: *www.yale.edu/lawweb/avalon/avalon.htm*, containing a special section on *New Mexico Documents*. You may also browse through the *Core Documents of Arizona' s History* at the Arizona State Library online as well: *www.dlapr.lib.az.us/links/AZcoredocs.htm#American*.

11. *Indian Territory and American State: Oklahoma and New Mexico-Arizona likened.*

In 1906, all four territories including Arizona Territory, New Mexico Territory, Oklahoma Territory, and the Indian Territory,

shared the address of a federal *Act to enable the people* of each polity *to form a Constitution and State government* in pairs and in tandem, Arizona and New Mexico forming the State of Arizona; Oklahoma and the Indian Territory integrating the State of Oklahoma. The former failed and the latter succeeded. Here we are concerned with states insofar as peoples are affected. The former not just interfere but even substitute for the latter. They pretend to identify with and stand for peoples. What about indigenous peoples then?

In that legal encounter through federal enactment among four territories, one of them was singular indeed, that of the Indian Territory, a true indigenous polity where various peoples had converged with the expectation of forming a common polity as a state of their own according to the formal promises of the United States itself. The Indian Territory was the place where the Cherokees that had been expelled from Georgia were located, together with other peoples, for indigenous self-government. It was not a *territory* in the federal sense. The Cherokee removal took place just after the *Cherokee People v Georgia* and *Worcester v Georgia* cases quoted above and to which we shall return below because of its crucial importance for the somehow constitutional supporting of federal powers over Indian peoples. As for the Cherokee people, let us also recall that in their first treaty with the United States, before the 1787 Constitution, *the Indians* were offered incorporation into a common Confederacy at their choice. The definitive federal Constitution did not take this option into account, to be sure.

> *Treaty between the United States and the Cherokees* (1785). Art. 12. That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.
>
> *Treaty between the United States and the Cherokees* (1835). Art. 1. The Cherokee nation hereby cede, relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river (…). Art. 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation (…) shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse

with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

Constitution of the Cherokee Nation (1839). The Eastern and Western Cherokees having again re-united, and become one body politic, under the style and title of the Cherokee Nation: Therefore, We, the people of the Cherokee Nation, in National Convention assembled, in order to establish justice, insure tranquility, promote the common welfare, and secure to ourselves and our posterity the blessings of freedom acknowledging, with humility and gratitude, the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring His aid and guidance in its accomplishment, do ordain and establish this Constitution for the government of the Cherokee Nation.

The territory grant embraced Indian self-government and so it was during the early decades. The Indian polity in Oklahoma complied through constitutional framing with the federal requirements to become a state by itself (the "Republican Form of Government" demanded by the United States Constitution in art. IV, sec. 9), but Indians turned out to be excepted from a shared constitutionalism to further purposes than explicitly recognized. What is worse, the United States finally excepted the indigenous peoples even as for their own, inner constitutionalism, since it was discontinued. Eventually, in 1906, the United States broke its word and proposed a unique state through the gathering of Indian Territory with the non-indigenous Territory of Oklahoma. The proposal was the same for Arizona and New Mexico. It seemed equal for both couples, but it was not so. Through federal decision, one relied on equality between spouses and the other did not. No need to have a guess about who was who.

For the sake of final decision making, each territory had a citizenry that had to coincide with its partner citizenry in common statehood, Arizona with New Mexico, Oklahoma with Indian Territory, and vice versa. Just as the rules that applied to the first coupling (Arizona and New Mexico) were even, the rules applying to the second (the one forming the state of Oklahoma) were uneven. In the proceedings leading to statehood, an unbalance ran against the Indian Territory, where the law of the non-indigenous party was extended and federal commissioners intervened, acting under the guardianship policy. It was only in the case of Arizona and New

Mexico, unlike that of Oklahoma and the Indian Territory, that a referendum was held with the question: "Shall Arizona and New Mexico be united to form one State? □ Yes □ No".

It was no great surprise that an agreement was reached between the coupling members with an impaired party, Oklahoma on the one hand and the Indian Territory under guardianship on the other, while Arizona and New Mexico, the coupling of equals, failed to reach such an agreement. In fact, the absorption of the Indian Territory by the State of Oklahoma was part of a broader policy of allotment of communal lands, subjugation of peoples' jurisdictions and the ruin of indigenous heritages, the latter primarily through biased non-indigenous education with regular help from missionaries despite the constitutional disestablishment of religion in the United States. Indians were out and in. The Euro-American setting of non-indigenous states was intended to subdue indigenous polities, not to coexist with them.

The 1906 Act dealt with Indian affairs a smaller amount for the case of the Arizona and New Mexico Territories, of the common State of Arizona that they failed to create. Yet something was said. There was a principle: "The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indian not taxed". Indians remained under the federal powers of the United States. A cultural provision could also affect Indians, as well as Hispanics: "Ability to read, write, and speak the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all State officers", representatives included. As a good non-indigenous state, these rules appear in the 1912 and current Constitution of the State of Arizona.

> Let me recommend Jeffrey Burton, *Indian Territory and the United States, 1866-1906: Courts, Government, and the Movement for Oklahoma Statehood*, University of Oklahoma Press, 1995, for the history of an indigenous polity complying even with the republican form required by the United States Constitution to be finally dissolved into a non-indigenous state, the actual aim of the *territory* regime. The author stresses federal responsibility via judiciary and not just through bare policy or pure expediency. Wonder and no wonder, at the same time, that there is no Indian *State* in America. The judicial harassment and legal siege which had a bearing on the Indian Territory blackout are also well attended by Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and*

United States Law in the Nineteenth Century, Cambridge University Press, 1994, and Blue Clark, *Lone Wolf v Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*, University of Nebraska Press, 1999. On earlier moments interesting to the Indian Oklahoma case, Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics*, McGraw-Hill Case Studies in Constitutional History, 1995; William G. McLoughlin, *After the Trail of Tears: The Cherokees' Struggle for Sovereignty, 1839-1880*, University of North Carolina Press, 1994.

12. *Arizona federated: Union powers over Indian reservations.*

We have arrived at Arizona as a test of indigenous treatment in the frontier both between territory and state forms of government and between Mexican and United States, Latin and Anglo, polities. We are moving through a double, twice significant overlapping among regimes and constitutions. This is the time to take a look at the 1912 Constitution of Arizona, the first and only one, never amended regarding indigenous peoples. Here we find a reference to them as people alien to the state, because of the federal power over *Indian tribes*, as expressly recognized by the constitutional text itself. Thus, it must be eventually construed in the context of the so-called Federal Indian Law rather than the Treaty of Guadalupe-Hidalgo or any other agreement with Mexico, let alone the treaties with indigenous peoples.

As is well known, the remote equivocal support of the assignment of competence is the Commerce Clause of the Federal Constitution of 1787 (art. 1, sec. 8: "The Congress shall have power... to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes"), construed by the Supreme Court's jurisprudence derived from the European law of nations, thanks mainly to Chief Justice Marshall, John Marshall (tenure, 1801-1835). As long as *Indian tribes* under the Constitution were neither *foreign Nations* nor inner *States*, the Marshall Court squared the circle by deducing that they were *domestic dependent Nations in a state of pupilage* under the federal powers. Cited above is the paragraph from the case of *Cherokee People v Georgia* where the rule was so worded. It still remains the rationale for federal power versus the states and over the indigenous peoples. The *Indian tribes* are thus not located somewhere in the middle or in the vicinity of

Nations and *States*, as in the constitutional text, but well under both of them, either nations or states.

In the case of Arizona, federal power over Indian affairs was a further strict condition posed by the enabling enactment for the statehood, by the failed one in 1906 and by the definitive one following in 1910. The phrasing is rather telling. It was an obligation imposed by the United States on the *people inhabiting this State*, Arizona, regarding *Indian tribes*. Thus, legally, the indigenous peoples were not inhabitants of the state and, consequently, their territories were not state lands either. Indigenous people were entitled to own estate property if granted by *the United States or any prior sovereignty*, either Spanish or any other European one, but not on the basis of their own original, inherent titles. *Sovereignty* was in no case indigenous for either the enabling enactment or the Constitution of Arizona. No Indian property law or any indigenous law as such was constitutionally recognized. Termination of Indian entitlement either by federal enactment or the Constitution of Arizona was considered a feasible possibility. Spanish title could be construed as a benefit stemming from Guadalupe-Hidalgo, and yet it depended on the federal powers of the United States, irrespective of any international commitment.

The federal powers over Indian people were based on doctrine of domestic dependence or rather the Commerce Clause of the Constitution as it is so awkwardly construed. They were the ultimate tools for the extension of alien law to Indian Territory and for the termination of indigenous sovereignty, whatever the achievements. Yet, when citizenship of the United States was granted to indigenous people in 1924, all true *oklahomas* (the very word meaning *Indian Home* in the Muskogee or Creek language) dissipated among non-indigenous statehoods, allotment of lands, invasions of powers, harassment for alien education, and impoverishment of communities. Alaska and Hawaii as states and other overseas cases as territories would follow.

If you look for constitutional support of the entire history, there is no other than the Marshall Court's un-constitutional construction on pre-constitutional assumptions. It was borrowed from the colonial law of nations as *law of nature*. Somehow overlapped under wordings such as *trust responsibility* and the like, it is a jurisprudential ruling that remains in force. It is the heart, mind and soul of the

Federal Indian Law, law placed by the United States upon indigenous people and not law generated by the indigenous peoples for themselves, albeit inside the United States.

> *Act to Provide a Temporary Government for the Territory of Arizona* (1863). Sec. 3. That there shall never be slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted; and all acts or part of acts, either of Congress or of the Territory of New Mexico, establishing, regulating or in any way recognizing the relation of master and slave in said Territory, are hereby repealed.
>
> *Enabling Act for Oklahoma and Arizona* (1906). Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed. Sec. 2. That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nationality or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed State for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State (…). That the election laws of the Territory of Oklahoma now in force, as far as applicable and not in conflict with this Act, including the penal laws of said Territory of Oklahoma relating to elections and illegal voting, are hereby extended to and put in force in said Indian Territory until the legislature of said proposed State shall otherwise provide, and until all persons offending against said laws in the election aforesaid shall have been dealt with in the manner therein provided. And the United States courts of said Indian Territory shall have the same power to enforce the laws of the Territory of Oklahoma, hereby extended to and put in force in said Territory, as have the courts of the Territory of Oklahoma (…).
>
> *Enabling Act* (1910; sec. 20.2) and *Constitution of Arizona* (1912). Art. 20.4 (in force). The following ordinance shall be irrevocable without the consent of the United States and the people of this State: (…). *Public Lands and Indian Lands*. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the

disposition and under the absolute jurisdiction and control of the Congress of the United States.

Indian Reservations in Arizona Framework (mid-2000).

Tribe, Community, or Nation	*Organization process*	*Year constitution, incorporation, enactment, or treaty*	*Year(s) amendment(s) or new constitution(s)*
Ak-Chin Indian Community — Maricopa Reservation	IRA	Constitution, 1961	1966, 1969, 1971, 1973
Cocopah Tribe	IRA	Constitution, 1964	1964
Colorado River Indian Tribes (Arizona-California)	IRA	Constitution, 1937	1975
Fort McDowell Yavapai Nation (formerly Fort McDowell Mohave-Apache Community)	IRA	Constitution, 1936 Incorporation, 1938	— 1999
Fort Mohave Indian Tribe (Arizona-California-Nevada)	IRA	Constitution, 1977 Incorporation, 1988	No amendment
Fort Yuma — Quechan Tribe (Arizona-California)	IRA	Constitution, 1936	No amendment
Gila River Indian Community	IRA	Constitution, 1936 Incorporation, 1938	1960, 1974 —
Havasupai Tribe	IRA	Constitution, 1939 Incorporation, 1946	1967, 1968, 1972, 1991 —
Hopi Tribe	IRA	Constitution, 1936	1969, 1980, 1993
Hualapai Tribe	IRA	Constitution, 1938 Incorporation, 1943	1955, 1990 1955, 1998
Kaibab Band of Paiute Indians	IRA	Incorporation, 1934	1987
Navajo Nation (Arizona-Utah-New Mexico)	Treaty	Treaty, 1868	Neither constitution nor incorporation
Pascua Yaqui Tribe	IRA	Constitution, 1988	No amendment
Salt River — Pima-Maricopa Community	IRA	Constitution, 1940	1971, 1990, 1996

Tribe, Community, or Nation	*Organization process*	*Year constitution, incorporation, enactment, or treaty*	*Year(s) amendment(s) or new constitution(s)*
San Carlos Apache Tribe	IRA	Constitution, 1936 Incorporation, 1940	1954, 1984 1955
San Juan Southern Paiute Tribe	IRA	Constitution, 1996	No amendment
Tohono O'odham Nation	IRA	Constitution, 1937	1986
Tonto Apache Tribe	IRA	Federal enactment, 1972	Total revision 1995
White Mountain Apache Tribe	IRA	Constitution, 1938	Last amended 1993
Yavapai-Apache Nation — Camp Verde Reservation	IRA	Incorporation, 1948	Total revision 1991
Yavapai-Prescott Tribe	IRA	Incorporation, 1962	1970, 1975

Source: *www.indianaffairs.state.az.us/townhall/22nd%20ITH%20Report.pdf*, home of the Arizona Commission of Indian Affairs, report of the 22nd Arizona Indian Town Hall, 2002 (fifteen reservations participating — Navajo, Tohono O'odham, and Hopi included — out of the recognized twenty-one, together with the federal Bureau of Indian Affairs). IRA stands for the 1934 Indian Reorganization Act that provided for both constitution and business charter, this is incorporation (sections 16 and 17, quoted above). As we know, *Indian Reorganization Act Era Constitutions and Charters* are available on the web: *thorpe.ou.edu/IRA.html*; as it is here the *Federal Register* of *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*: *www.census.gov/pubinfo/www/FRN02.pdf* (mid-2002, no reservation either added or terminated in Arizona). I have made some additions and corrections on the table from the Arizona Commission of Indian Affairs with the help of the other two sites.

13. *Reservations and states' constitutions contrasted.*

I am not dealing here with the entire history of Mexican, Texan, United States or Arizonan constitutionalism, neither of Inuit, all Apaches, Navajo, Comanche, Kiowa, Cheyenne, Arapahoe, Sioux, Crow, Utah, Shoshone, Bannock, Nez Percé, Cherokee, Shawnee, Muskogee, Seneca, Cayuga, Onondaga, Oneida, Mohawk, Tuscarora, Mohave, Maricopa, Yuma, Havasupai, Chemehuevi, Hualapai,

Tohono O'odham, Pima, or Pueblos (Tao, Zuni, Hopi, Tewa…) polities, to name only the peoples within the present United States borders who have appeared so far throughout this paper (add others from the Arizonan table). I am not following the whole course of this handful of histories, either separated or merged, and not even complying with any chronological itinerary or systematic inquiry, nor proceeding to any thick local description. I am not dotting every 'i' nor crossing every 't', either constitutional or historical or anthropological or just legal with the necessary, concurrent aid of history and anthropology. I lack both experience and knowledge, both world and time for such an extensive and exhausting task. All I am trying to do is to assess the legal position of indigenous peoples through a set of more or less constitutional happenings within some American States, American in the broader sense both Latin and Anglo, namely through the United States Southwest and Northern Mexico with their telling overlapped histories up to the present.

In the United States, indigenous people are eventually federal and state citizens, and indigenous peoples may hold their own polities downgraded into reservations under unchecked and unbalanced federal powers. Is this the framework of Indian Law? Signs such as the compatibility between United States citizenship and communal life that we have rather found in the 1924 Act — despite the very statutory intent — might signify that federal powers are not the only or even main background for Indian law. It might also imply continuity of indigenous titles despite States presumptions. After the grant of citizenship and in spite of numerous and severe episodes of intended termination, the reservation system itself managed to endure with the gradual recovery of Indian communities, the framing of Indian constitutions, the practice of Indian governments, and the claims for Indian sovereignty, this latter as the prime and eventual, historical and inherent title to all the rest.

Throughout Indian reservations today, there is a good array of quasi-constitutions, quasi-governments, and semi-independent quasi-sovereignties — so to mark a difference. The credit for the quasi and semi expressive qualifying goes to the United States judiciary as intent to retain the full kinds out of Indians' reach. Let us not become confused. There are always two parties. One matter is the sovereignty that has never been legally surrendered by indig-

enous peoples; another quite different matter is the quasi and semi proxy, the so-called tribal inherent sovereignty that is granted by federal law and that one can find in the so-styled constitutions of Indian reservations. Things merge, to be sure. Reservations' constitutions from the Indian New Deal required federal approval. Today, by either amendments or practice, they are instead coming to indigenous determination. Tribes change their names into Nations. The alleged title is sovereignty, the inherent sovereignty even recognized, albeit nominally, by the United States. The very meaning of reservation may finally change once more.

At the beginning of this American constitutional history, reservations could be the territories reserved by the indigenous peoples for themselves through treaties granting lands to the United States. Later in time, the contrary may be the case, reservations becoming very alike territories in the constitutional sense, lands granted by and subjected to federal powers which go unchecked or hardly checked by the non-indigenous judiciary and by the indigenous peoples themselves. Reservations currently are quasi-states claiming and performing self-rule on the basis of superior principles of their own, such as the said Indian sovereignty, yet in fact doing so under federal powers on standards inferior to those of the states of the Union themselves.

> *Oliphant versus Suquamish Indian Tribe* (1978). Supreme Court of the United States. [A]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government (...). Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status". Indian reservations are "a part of the territory of the United States" (...). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority" (...). Under incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.
>
> *White Mountain Apache Tribe versus Bracker* (1980). Supreme Court of the United States. Congress has broad powers to regulate tribal affairs under the Indian Commerce Clause (...). This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority

> over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law (...). Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them" (...). Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination of whether the exercise of state authority has been pre-empted by operation of federal law (...). [T]his tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

Maybe there are three parties or rather many, as Indians are not a single people, yet forming two teams, the Indian on the one hand and together federal and state on the other. The United States is not the neutral arbitrator in between. It is the first part of the second party, no joke. As people being there before, you know who the first party — the first sovereignty — is, or should be. Let us put together and check constitutions.

Let me encourage you, attendant or reader, to make by yourself the comparison between texts from, say, the Cherokee, Navajo, Apache, Muskogee, or Pueblos and kindred peoples on the one hand, and on the other, the states of Texas, California, Arizona, New Mexico, or Oklahoma, along with the United States of course. Please, remember quoted instruments and keep on adding treaties and constitutions, both states and Indians'. Reservations and states' constitutions are available on the web. Search also for *Indian treaties*, *Indian nations*, or still more specific items. For sure, you will additionally find comments more interesting than mine, as actually involved. Look always at printed material too. Watch maps. Do you know any non-domestic mapping of the reservations together with the states? Internationally, the former are invisible except for folklore and tourism, gaming included.

Do you know about any collection of constitutions, either past or present, including Indian instruments? No wonder that the latter are not taken into account by standard research and thinking in the constitutional field. Watch filmed adverse pieces — the western kind — for further understanding of the extended blackout. Sometimes,

even scholarly people know through pop fiction what they pretend to master by true science. They cannot even imagine that there are constitutional polities other than States sovereign or federated. At least, as a remedy, let us take a look at a set of texts.

Treaty between the United States and the Cherokee Nation (1866). Art. 9. The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an Act of the National Council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees (…). Art. 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country (…). Should any such tribe or band of Indians settling in said country abandon their tribal organization (…), they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district (…).

Act of the Cherokee Nation (1868). Be it enacted by the National Council that the phrase *all the rights of Native Cherokees*, as used in the 9th and 15th Articles of the Treaty of July 19, 1866, between the United States and this Nation, is hereby construed to mean the individual rights, privileges and benefits enjoyed by white adopted citizens of this Nation, before and at the making of said Treaty, and who had been by law admitted to *all the rights of Native Cherokees*, civil, political, and personal.

Treaty between the Shawnees and the Cherokees (1869). Whereas it is provided by the fifteenth article of the treaty between the United States and the Cherokee Indians, concluded July 19th, 1866, that the United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval on the President of the United States (…).

Constitution of San Carlos Apache Tribe (1936). Art. 1. *Statement of Purpose*. We want the United States Government to continue among us for some time such establishments as health and educational service, a superintendent, advisory officers, and other such connecting links with the Federal Government. In our relation to it, a relation similar to that which a town or a county has to State and Federal Governments, our own internal affairs shall be managed, in so far as such management does not conflict with the laws of the United States, by a governing body which shall be known as the Council of the San Carlos Apache Tribe. Art. 5. *Law and Order*. Sec. 5. The judges of this [tribal] court shall be appointed by the tribal council, subject to the approval by the Secretary of the Interior. Art. 9. *Adoption*. After the

constitution has been thoroughly discussed in group meetings and a representative general meeting, it shall be made public by being posted for thirty days at the proposed voting places and other convenient public places on the reservation, with the notice that on the day terminating this said period a general election shall be held for the purpose of the proposed adoption of this constitution and by-laws. If this constitution and by-laws shall be approved by a majority of the qualified voters of the San Carlos Apache Tribe voting at this election, and if at least thirty percent of the qualified voters of the tribe vote therein, the constitution and by-laws so adopted shall be forwarded to the Secretary of the Interior for approval and shall be effective from and after the date of such approval.

Constitution of the Hopi Tribe (1936). *Preamble*. This Constitution, to be known as the Constitution and By-laws of the Hopi Tribe, is adopted by the self-governing Hopi and Tewa villages of Arizona to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems, with the United States government and with the outside world generally. Art. 1. *Jurisdiction*. The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in the future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote. Art. 6. *Adoption of Constitution and By-Laws*. This Constitution and By-laws, when ratified by a majority vote of the adult members of the Hopi Tribe voting at a referendum called for the purpose by the Secretary of the Interior, provided that at least thirty percent of those entitled to vote shall vote at such referendum, shall be submitted to the Secretary of the Interior, and if approved, shall take effect from the date of approval.

Constitution of the Havasupai Tribe (1939). *Preamble*. We, the Havasupai Tribe of the Havasupai Reservation, Arizona, in order to build up an independent and self-directing community life; to secure to ourselves and our children all rights guaranteed to us by treaties and by the Statutes of the United States; and to encourage and promote all movements and efforts for the best interests and welfare of our people, do establish this Constitution and By-laws.

Corporate Charter of the Havasupai Tribe (1946). Art. 1. *Corporate Existence and Purposes*. In order to further the economic development of the Havasupai Tribe of the Havasupai Reservation in Arizona by conferring upon the said Tribe certain corporate rights, powers, privileges, and immunities; to secure for the members of the Tribe an assured economic independence; and to provide for the proper exercise by the Tribe of various functions heretofore performed by the Department of the Interior the aforesaid Tribe is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Havasupai Tribe of the Havasupai Reservation". Art. 5. *Corporate Powers*. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the constitution and by-laws of the said Tribe shall have the following corporate powers in addition to all powers already conferred or guaranteed by the tribal constitution and by-laws (...).

Cherokee Nation Constitution (1975). *Preamble*. We, the people of the Cherokee Nation, in order to preserve and enrich our tribal culture, achieve and maintain a desirable measure of prosperity, insure tranquility and to secure to ourselves and our posterity the blessings of freedom, acknowledging, with humility and gratitude, the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring his aid and guidance in its accomplishment do ordain and establish this Constitution for the government of the Cherokee Nation. The term "Nation" as used in this Constitution is the same as "Tribe". Art. I. *Federal Regulations*. The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.

Constitution of the Muskogee-Creek Nation (1979). Art. 6. Sec. 6. (a) Every bill which shall have passed the Muscogee National Council, before it becomes ordinance, shall be presented to the Principal Chief of the Muscogee Nation. If he approves, he shall sign it; but, if not, he shall return it with his objections to the Muscogee National Council, who shall enter the objections at large on their journal and proceed to reconsider it if, after such reconsiderations, two-thirds (2/3) of the full membership of the Muscogee National Council shall pass the bill, it shall become an ordinance in such cases, the votes shall be determined by yeas and nays, and the names of the person voting for and against shall be entered on the journal of The Muscogee National Council. If any bill shall not be returned by the Principal Chief within ten (10) days, Sundays and holidays excepted, after it shall have been presented to him the same shall be an ordinance as if he had signed it. Art. 9. Sec.1.c. Amendments ratified shall be submitted to the Secretary of the Interior or his agent for his approval and shall have full force and effect from the date of approval.

Amendments to the Muskogee-Creek Constitution (1991). *Approval*. I. The Principal Chief of the Muscogee Nation, hereby affix my signature this 6th day of May, 1991, to the above Ordinance, authorizing it to become an Ordinance under Article VI, Section VI, of the Constitution.

Cherokee Nation Constitution (1999). *Preamble*. We, the People of the Cherokee Nation, in order to preserve our sovereignty, enrich our culture, achieve and maintain a desirable measure of prosperity and the blessings of freedom, acknowledging with humility and gratitude the goodness, aid and guidance of the Sovereign Ruler of the Universe in permitting us to do so, do ordain and establish this Constitution for the government of the Cherokee Nation. Art. 1. *Federal Relationship*. The Cherokee Nation reaffirms its sovereignty and mutually beneficial relationship with the United States of America.

The Fundamental Laws of the Diné (2003). (...) § 2. *Diné Bi Beenahaz'aanii* (Diné Law). The Diné bi beenahaz'aanii embodies Diyin bitsaadee beehaz'aanii (Traditional Law), Diyin Dine'e bitsaadee beehaz'aanii (Customary Law), Nahasdzaan doo Yadilhil bitsaadee beehaz'aanii (Natural Law), and Diyin Nohookaa Diné bi beehaz'aanii (Common Law) (...). These laws provide the foundation of Diné bi nahat'a (providing leadership through developing and administering policies and plans utilizing these laws as guiding principles) and Diné sovereignty. In turn, Diné bi nahat'a is the foundation of the Diné bi nahat'a (government). Hence, the respect for honor, belief and trust in the Diné bi beenahaz'aanii preserves, protects and enhances the following inher-

ent rights, beliefs, practices and freedoms: A. The individual rights and freedoms of each Diné (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; and B. The collective rights and freedoms of the Diyin Nihookaa Diné as a distinct people as they are declared in these laws; and C. The fundamental values and principles of Diné Life Way as declared in these laws; and D. Self-governance (...).

14. *Among histories and rights: legal domesticity and constitutional legality.*

We are coping with constitutional questions but cannot confine ourselves to constitutional tokens. Regarding indigenous people, constitutional law leads back to law of nations and thus to an exclusive, even racist culture. This is a clue. You cannot understand nor can anybody explain this strange constitutionalism, the overlapping and the embedding, if you do not look face to face at its double life. As long as they are normative too, you have to take into account all the prejudices of non-indigenous minds to make any sense of the whole legal mess. You have to face all the working imaginaries of constitutionalism itself.

Mark again the words quoted from Chief Justice Marshall on "domestic dependent nations", "in a state of pupilage", in a relationship with the United States just like "that of a ward to his guardian", with "the President as their [Indians'] Great Father", moreover assuming that this is the spontaneous approach of the indigenous peoples themselves. It is not hollow rhetoric but effective rationale with deep historical background. It was a set of juridical categories coming to America from Europe through Spain in order to locate indigenous people in a position not of legality but of domesticity and so under unrestricted alien authority. No checks, no balances, no rights, no freedoms, no constitutional achievements provided by the State party, not even the checks stemming from the law of nations between unbalanced nations.

Emer de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). Book I. *Of Nations conceived in themselves*. Chapter I. *Of Nations or Sovereign States*. § 1. *Of the State, and Sovereignty*. A Nation or a State is (…) a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength (…). § 4. *What are Sovereign States*. Every Nation that governs itself, under what form

> soever, without dependence on any foreign power, is a Sovereign State (…). § 5. *States bound by unequal alliance*. We ought, therefore, to account as sovereign states those which have united themselves to another more powerful, by an unequal alliance, in which, as Aristotle says, to the more powerful is given more honour, and to the weaker, more assistance. The conditions of those unequal alliances may be infinitely varied, but whatever they are, provided the inferior ally reserve to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state, that keeps up an intercourse with others under the authority of the law of nations. § 6. *Or by treaties of protection*. Consequently a weak state, which, in order to provide for its safety, places itself under the protection of a more powerful one, and engages, in return, to perform several offices equivalent to that protection, without however divesting itself of the right of government and sovereignty, that state, I say, does not, on this account, cease to rank among the sovereigns who acknowledge no other law than that of nations.

Nevertheless, indigenous peoples were disempowered through private law rather than by the public or political law. Reread both the first quoted passage from Vattel and the Marshall Court's rulings in compliance with the law of nations: "According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity". Evidence was not even necessary to make this statement on property and infer the consequences as for polity. *Every theory* (*every* meaning non-indigenous, as if indigenous thinking could not exist) was a sufficient proof for all this, including the principle that private property was the only kind of property right, and that its lack may therefore legally deprive of political capacity. It was private, domestic law; this is *oeconomy* prior to constitutionalism. Private property and appropriation might rule. Bias did. The last resort, the actual title as we saw in Marshall's discourse, was the *doctrine of discovery*, the discourse of finding and taking, arriving and conquering by European people, not by others. "Discovery gave title" to the following occupancy and all the aftermath, Marshall stated in compliance with the law of nations as law of nature. As indigenous people did not exist as human, thinking actors by themselves, they could easily be the objects of discovery by others.

You may find all this normative discourse in the United States jurisprudence as if it were a legal construction by the Supreme Court on the federal Constitution, and not rather a colonial heritage from a more distant time and place. True enough, though constitutional, it was both pre-constitutional and un-constitutional. So far, we

know that this is not playing on words but ruling over human beings. The entire construct had a European genealogy and no constitutional rationale. It stems both from ages older and assumptions stranger than the times and reasons of the straight constitutional kind. Constitutionalism properly means rights and the powers subsidiary to rights.

Domesticity status was a pre-constitutional device also in the chronological sense. It was brought to America by Hispanic colonialism, whose Catholic doctrine assimilated indigenous people — all indigenous people — to the status of minors in need of guardianship that would be provided by both the Spanish Monarchy and the Roman Church. Of course, Catholics did not repute Protestants as good guardians. On their part, Justice Marshall and the United States jurisprudence would think otherwise. This was how majority become minority, or so it was deemed and engineered by the dominant party. In the 18th century, the *law of nations* as a modern version of the *ius gentium*, one version that was less Catholic, albeit ever Christian, preferred to resolve the indigenous question through apartheid, by treaty-making or otherwise, and hence escape responsibility as for their status, but the United States jurisprudence, facing troubles and wishing powers, turned to a minority framework in the early 19th century.

It was *oeconomy*, we know. It is a colonial approach that has never disappeared completely, even when the indigenous people came to be considered citizens, such as the Latin American States, including Mexico of course, did by and large since early times. We know that, all over the Americas, in the perspective of constitutional States, equal citizenship and degrading minority are compatible status for indigenous peoples. According to all American constitutional culture and practice, including reservations' constitutionalism, they may be citizens and wards at once and during their whole lives.

It may be the right time to warmly recommend two complementary readings by the same author: R.A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, Oxford University Press, 1990; *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, Oxford University Press, 1997. The former contains the most enthralling presentation of the culture medium of *ius gentium*, *derecho de gentes*, *droit des gens*, or *law of nations* from the European

medieval narrow-mindedness until the 19th century constitutionalizing of the unconstitutionalizable in the United States. *Linking Arms Together* shows the other side of the coin, the indigenous point of view on relations among free and equal peoples for mutual profit and well-being. You may add, if you can read Spanish, for information rather than approach, Abelardo Levaggi, *Diplomacia hispano-indígena en las fronteras de América. Historia de los tratados entre la Monarquía española y las comunidades aborígenes*, Centros de Estudios Políticos y Constitucionales, 2002. The outlook is the characteristic of the *Derecho Indiano*, the Hispanic construct somehow equivalent to the *Federal Indian Law*, a round set of law intended to legitimately come just from the European or Euro-American party and not from the American peoples themselves in the first place, as being in their own lands and facing invasion. Neither do you get a proper and accurate sight of non-indigenous law in colonial, even constitutional, environment if not taking into account the indigenous own vision restraining, counteracting and, above all, ruling by itself, on grounds of independence, competition, or concurrence. Nevertheless, as we are aware up thus far, mainstream historiographical and constitutional research is simply blind. And anthropologists hardly supply the needed kind of constitutionalist research and thinking. Usually, they patronize indigenous people and thus block the point, too.

Trying to help with the solving of the legal deadlock, I have borrowed some wording and thinking from James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, 1995, and Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, 2000. This recent branch of literature dealing with constituent diversity (with constitutional arrangements of diverse polities beyond federalism because of the constituent right which each one is entitled to, first including indigenous peoples) takes into account Anglo America (Canada and the United States), other Anglo States outside Europe (such as New Zealand and Australia), and even European cases, but not Latin America: Alain-G. Gagnon and J. Tully (eds.), *Multinational Democracies*, Cambridge University Press, 2001. For our comparative Anglo-Latin American purpose, this genre turns out to be of little help or even helpless, as it is not advisable to extrapolate. Comparison must rely on research. Mexico not excluded, we are badly in need of studies from Latin America or rather Indo-Latin America about the constitutional standing of indigenous peoples. The problem with this approach to constituent diversity is not that it does not address the Latin American challenge, but that it has no clear awareness of the gap. Anyway, as you may appreciate through the set of reading recommendations made and to be added, it is not precisely for want of literature that shortsightedness and even blindness occur in both the constitutional and historical field as they are closely related. More often than not, Anglo scholars, first including the United States to be sure, are simply unaware of their own ignorance of non-Anglo matters even despite current curricula on cultural, so-called subaltern studies, and the like at Anglo universities.

Constitutional standing of peoples may mean unconstitutional policy from States. Unconstitutional history matters to constitutional regimes. By linking with the not so constitutional present, the past of unconstitutional handling of indigenous peoples by non-indigenous States may still be most important both to catch sight and gain an insight. However, observation

does not ever match understanding. Specific research may turn out to reproduce mainstream stance. See Manuel Ferrer Muñoz and María Bono López, *Pueblos indígenas y Estado nacional en México en el siglo XIX*, Universidad Nacional Autónoma de México, 1998; M. Ferrer Muñoz (ed.), *Los pueblos indios y el parteaguas de la independencia de México*, Universidad Nacional Autónoma de México, 1999. In fact, the sequence of peoples and State goes in reverse, so that indigenous polities are not addressed. Notice the working presumption that *Mexico*, just like other American States, and not indigenous peoples, pre-existed in history and pre-exists in law as a body politic. All the rest, implying derogation of indigenous standing, can follow even when you feel and apply empathy and diligence. Thus, there is no constitutional challenge of *multinational democracy* to be faced. As cited, Timothy E. Anna, *Forging Mexico, 1821-1835*, contends the evidence that *Mexico* did not exist before cultural and institutional construction following independence, but, as usual, despite the clarifying, he does not therefore realize that indigenous *peoples* were instead there. Then, the Floridas delivered thus far, Mexico encompassed Texas, future New Mexico and Arizona, both (today Mexican and United States) Californias, not to say part of Nevada, Utah, Colorado and Oklahoma, and so Navajo, Apache, Papago, diverse Pueblo such as Hopi, and many other indigenous polities there. What could really be then *Mexico* and *the United States* as for the present extent and identity from Rio Grande to Chiapas and from Coast to Coast and beyond, respectively? What would they turn out to appear if indigenous polities are duly taken into account? History or rather historiography shuts its eyes to evidence. Historians help with minority making when, at worst, nullification is not what they instead render. Do not forget that legal or even plain historiography may bear a performative effect on constitutionalism itself through social imaginary. We know how both historians and anthropologists create and eliminate peoples in history and the present while the same peoples do not always succeed in achieving even self-naming. Remember *Anasazis*, *Sinaguas*, and remaining *Pueblos*.

One may see (as a matter of policy and law), yet not see (as a matter of polity and rights), all at once. Let us take a look at the impressive survey of American (meaning as usual the United States) last century legal history by Lawrence M. Friedman, *American Law in the 20th Century*, Yale University Press, 2002, *Introduction*, 9: "Once the United States grabbed Puerto Rico and the Philippines [from Spain in 1898], it became a true empire; for the first time, it held territories that it did not intend to groom for statehood. Those regions were something truly new and different; they were not *territories* in the classical sense; they were colonial possessions". Through this narrative, the experiences of Indian reservations are further ostracized; including the case of *Indian* Oklahoma "intended to groom for statehood" till the turn of the century. Between past *oeconomical* issues (in the *domestic* sense we know), both women and African-Americans are not disregarded as much, related as they are even by the 1964 Civil Rights Act, indigenous people not being included except through the more restrained and controversial sections on Indians of the 1968 Civil Rights Act. Constitutional integration does not represent such a challenge as constituent autonomy or the so-said Indian sovereignty, considered though it is (as a matter of index) by L.M. Friedman. Reservations "were (are) not *territories* in the classical sense; they were (are) colonial possessions", were (are) not they? On the

continuity between continental and overseas colonialism, including cases "groomed for statehood" such as Hawaii, you may resort to Ward Churchill, *Perversions of Justice: Indigenous Peoples and Angloamerican Law*, City Lights Books, 2003. Furthermore, let us notice that the seemingly complete index of L.M. Friedman's *American Law American Law* does not encompass international law *in the 20th Century* (7), which we are coming back to or rather, from mid-century, first arriving at.

15. *Toward a post-colonial world: out of primitive law of nations and far away.*

International law was there, first the law of nations standing for European and Euro-American supremacy; later the international organization challenging — not deeply — some established assumptions — not many — about who is a nation and how nations ought to behave themselves. Good manners were about to change apparently for the better. Maybe an international set would be arranged providing the indigenous nations with decent room in a human condominium freely shared with other peoples in the Americas and everywhere. Remember *Hodenosaunee*. What constitutionalism did

(7) Out of the index (582: "This [international branch] is a bulky body of law that might rival in size the federal code of laws. We have not examined it in this book..."), towards the end, together with bilateral treaties and globalization, international law takes up few pages containing no mention — needless to say — to Indian nations. Let me check a single, sensitive question. A brief reference is made to international child law (586, on custody disputes). Elsewhere (444-446), something has been added: "Children were taken from their homes and given to strangers... Native American adoptions were condemned as a form of genocide", never spelling out that the genocidal construction even for mandatory education in an alien culture through abduction is not an anonymous opinion, but a classification by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948). Regarding international further concern with indigenous childhood, we are going to take shortly into consideration the Convention on the Rights of the Child (1989), an instrument signed by all United Nations Member States apart from Somalia and the United States. A given policy conveys no sound explanation (586-587: "The United States has not, in fact, signed the International Custody Treaty. In many regards, the United States is a classic nonsigner"), as the United States approach is not characterized by inhibition. Actually, as a sort of alternative to the United Nations Convention, the United States advocates the lower profile policy on child rights, unconcerned with indigenous childhood, of the Hague Conference on Private International Law. Really, leave aside peremptory misidentification and misconstruction of international instruments, there is no place for the issue in *American Law in the 20th Century*. Comparatively, Mexico is a cooperative and yea-signer United Nations Member.

not render — Indian coming of age from the non-Indian standpoint — was expected from international law, as if this had the capacity. Is it the case?

It is at least a chance. Given the historical coordinates of the unequal and impaired standing of indigenous people (through both openly and overlapped constitutional devices and under the weight and force of the pre-constitutional culture which the law of nations inserted in constitutional times), development towards equality and fairness is more unlikely to come from constitutionalism than from the international realm. As a matter of fact, the States law, as we have observed both in Mexico and the United States, is arriving at a tour-of-force that seems a cul-de-sac, while the international system may instead develop in the direction of equal terms among both individuals and peoples concerning rights, all in the plural. You may compare the meanings of the right to self-determination in both the Constitution of Mexico and the legislation of the United States on the one hand and in international law on the other.

No doubt that constitutional law, as State law, is in a good position to recognize and guarantee individuals' freedoms but not peoples' rights to the same extent. It is even at odds with the accommodation of indigenous communities, let alone indigenous peoples. We have contemplated a constitutional history of hiding and failing, a constituent past of smoke and mirrors. Constitutionalism was not born as a self-sustainable creature. As long as it encapsulated and encrypted colonialism, constitutionalism, both Anglo and Latin, has relied on the law of nations. Law of nations determines polities on colonial grounds. Constitutions follow. To overcome the foundation on colonialism, can constitutionalism become self-sustained? Nonetheless, the very law of nations is shifting to a different class of international law, this is, the human rights constituent kind.

Indigenous peoples are involved. If constitutionalism may result in a present of effective accommodation and even active participation for them, this will not be on constitutional credit. According to the old law of nations, constitutionalism has assumed that indigenous peoples ought to give up their own means of individual existence and collective reproduction, such as languages, communities and cultures, or their entire sovereignty in brief, to be recog-

nized as people entitled to civil and political rights and to participate as full citizens on an equal footing. International law, if it is finally the law of human rights, must consider otherwise. Constitutionalism was born colonial between Europe and America and did not go native in the Americas. Yet something of this sort also happened with the birth of human rights international law in the mid-20th century (the Universal Declaration still assumed that you could hold individual freedom under alien political subjection or unnamed colonialism), but times have changed since then through the ongoing, not yet accomplished decolonization.

> *Universal Declaration of Human Rights* (1948). Art.2.1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Art. 29.1 Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960). Art. 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. Art. 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Let us go international to be inter-native. Suggesting this change of character and direction, I am not contending that the actual ground of indigenous rights must currently be international law. No doubt that the standing must be properly rooted and activated at home by the indigenous communities and peoples themselves. What I am about to argue is that maybe, as we live so far (since the mid-20th century) in a common legal humankind, the necessary additional reliance on non-indigenous law should be on international rather than on State law, let alone constitutional. History is not a decisive argument, but thus far it may show what constitutionalism is able to render. As we have clearly seen in the very case of the United States, even the colonial law of nations together with the older *ius gentium* may be yet overlapped inside the constitutional

system and amid Indian quasi-self-governments. In fact, this pre-constitutional kind of international law is still somehow obscurely in force all throughout America, Latin and Anglo. Thus, given all that, let us make the turn. Maybe we shall find a more promising scenario in the present international law.

At this level, after the introduction of human rights, the law of nations or international law is evolving into something different and far from the cultural prejudice or even racism that once sustained non-indigenous colonizing supremacy. International law no longer reflects what it used to be in the 19th century and before, since European medieval times, concerning non-European or non-Christian peoples. Today, the so-called international law is also constitutional law in the good sense that it is primarily based on rights, not on powers. It is committed to the entitlement of freedoms rather than the empowerment of States. The latter depends on the former.

Constitutionalism, State constitutionalism is never standing by itself. Yesterday it was backed and shadowed by the law of nations, and today it is framed and enlightened by the international law of human rights, whence both the current Mexican constitutional language and the United States Indian Law present phrasing come. Yet, the "right of indigenous peoples to self-determination" has been adopted by them and not yet by international law, which only takes its possibility into consideration. We know that States do not provide the way to implement such a principle. Perhaps they are pre-empting international legal evolution as well as indigenous claims.

The implementation may be an unfeasible task for State constitutionalism by itself and a hard one for international law as a supplementary form of constitutional order also based on rights, not on powers, the order finally in common among peoples, both non-indigenous and indigenous on an equal footing. The very right to self-determination for indigenous peoples or, to put it another way, the Indian sovereignty itself can be taken quite more seriously to its fullest extent by international law than through and amid State constitutions. Of course, this verification does not justify Mexican fake, neither does it excuse false sovereignty in the quasi-constitutions of Indian reservations within the United States, but it may help to explain actual problems and face present challenges. The defini-

tive accommodation of Indian peoples exclusively under non-international constitutionalism does not seem a good recipe.

International Covenant on Civil and Political Rights (1966). Art. 1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. Art. 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Covenant on Economic, Social, and Cultural Rights (1966). Art. 1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989). Art. 1. This Convention applies to: (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Convention on the Rights of the Child (1989). Art. 30. In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). Art. 1.1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. Art. 2.1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of

> discrimination. Art. 3.1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination. Art. 8.3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

At this point, we may be mostly interested in the broad definition of self-determination not just political but economic, social, and cultural too, all as a human right that might come to enable indigenous together with other peoples, no longer thus minorities. Anyhow, let us highlight that the definition is provided not by a particular author or political theory, but by legal instruments that are today in force generally as development of human rights law and especially, in the case of conventions, through optional ratification by Member States of the United Nations. Mexico usually signs to a greater extent than the United States.

Mexico has ratified the Convention Concerning Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization that grants no right to self-determination (and cannot do so, as this body is only a specialized agency of the United Nations), yet, on a lower profile, requires the indigenous peoples to be consulted by respective States when taking any normative or administrative decision affecting them. This is one of the grounds on which, as we saw, indigenous peoples fight the 2001 Mexican constitutional reform bearing the fake, maybe pre-emptive grant of self-determination. Thus, they have a legal point, although the Mexican Supreme Court, as we also saw, did not uphold the claim. Maybe, the International Labor Organization is also pre-empting proper acknowledgment of the right to self-determination as for indigenous peoples.

> *Draft United Nations Declaration of the Rights of Indigenous Peoples* (1994). Art. 1. Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Art. 2. Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity. Art. 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their

economic, social and cultural development. Art. 4. Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

16. *Beyond minority: current human rights.*

Today, for both indigenous and non-indigenous people, the international law of human rights, as represented by the United Nations, takes into consideration rights beyond the individuals' entitlement to freedom, but discriminating group categories such as peoples and minorities. Still we find the word *minority*. Is it the old colonial construction? Let us notice that, according to the international law in force today, indigenous peoples are not *peoples* but *minorities*. Sometimes they are called peoples in international practice and proceedings, yet they are treated as minorities all the same. Rights make the difference. Peoples are entitled to freedom, to collective freedom by themselves, while minorities are located under protection by States alien to them. Yet we find the guardianship that does not dare to show its face nowadays. So far, it is a power with no name.

For international law, minority is still a qualitative, not a quantitative category. On behalf on the United Nations, nobody travels to Guatemala, Bolivia, Oaxaca, other Southern States of Mexico, or all along the Americas, counting people, defining who are indigenous, and resolving whether they are minority or not in accordance with statistics. Basically, nobody wonders if the yardstick must be the States or the indigenous territories and communities themselves. And who is to be the definer of people as polity by themselves? For international law, minority is a category prior to and irrespective of any experience, evidence, definition, or determination. In fact, a minority today happens to be for international law the group with a culture alien to that of the respective State even if they are an actual majority on the spot, even if they have not been superseded in their own territory by the non-indigenous people who constitute or dominate the very State polity, by the people stemming from Europe in the case of America. Minority is minority even if it is majority. Thus, indigenous peoples are indigenous minorities and that is

deemed the end of the question pretending to be the end of history — colonial history.

It is not so, we know it. History is far from over, happily alive in the present time and for the long future. Today is also history and so will be tomorrow, the same and a different story. Freedom, everybody's freedom, can make the difference. Things are changing between past and present. In the very light of current law, there are rules that may now turn out to be misrules. If the legal category of political minority stems from current either reality or legality, it is through the European colonialism that assimilated non-Europeans with non-adults, regardless of their age. Constitutional minority comes from domestic *minority*. There still is *oeconomy* in the old sense inside constitutionalism. Yet there may be an overlapped thread from Hispanic colonialism to interamerican and international law through both the United States jurisprudence and all American legal culture and practice as regards indigenous people. However, the margin of historical continuity does not properly characterize the current legal situation. Thanks precisely to the evolution of human rights, the category of minority is today a problematic and controversial construction. It is actually in the process of being deconstructed as a kind of both collective and individual legal status. International law may be on the threshold of recognizing that peoples are by no means minorities and furthermore, that none, either person or group, deserves the downgrading designation of minority.

First of all, the basic category of individual minor is being revised. For the 1959 United Nations Declaration on the Rights of the Child, children and teenagers, the proper minors, were people entitled to rights only in relation with their future as adult individuals; meanwhile, for the time being, they were only credited protection — family or domestic care as a general rule or formal guardianship if needed. Four decades later, this is not the approach assumed by the 1989 United Nations Convention on Rights of the Child, whose vision is that children and, especially, teenagers are entitled to present and not only future rights to actual human freedom. Their upbringing must be developed on rights, and not only for rights, or better it should be performed for rights through rights at a gradual extent in accordance with their actual age. After

the Convention, teenagers, as legally minors, are now entitled to real exercise of freedoms.

The Convention repeats for children and teenagers the same basic set of rights to personal freedom given for adult people in international law. When it arrives at minorities' rights, there comes an innovation. Contrary to the 1966 International Covenant on Civil and Political Rights, where the collective minority classification was adopted as a development of human rights, the 1989 Convention on Rights of the Child considers indigenous background as establishing a position different from that condition — the minority. The effect and extent of the divergence is not specified, but the mere eloquent suggestion of the difference may be far-reaching in its future result. Precisely when the subordinating category of minor people in the individual sense is being superseded by the international law of human rights, it is thus insinuated that peoples such as the indigenous are not exactly minorities.

At their best, most constitutional regimes, including both Mexico and the United States — as the good guardians they consider themselves to be — treat indigenous people in just that way, as legal minorities without proper entitlement to their own rights to human freedom. In front of this, tomorrow or even today international law can make the difference. Constitutions may follow.

S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, 1996 (updated edition and Spanish translation forthcoming), *Introduction*: "Half a millennium ago, people living on the continent now called North and South America began to have encounters of a kind they had not experienced before. Europeans arrived and started to lay claim to their lands, overpowering their political institutions and disrupting the integrity of their economies and cultures. The European encroachments frequently were accompanied by the slaughter of the children, women, and men who stood in the way (...)".

David H. Getches, Charles F. Wilkinson and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 4th ed., West Group, 1998, 904: "(...) [I]t is clear that a global transformation in legal consciousness about the rights of indigenous peoples in the modern world is occurring, and the voices of indigenous peoples are a vital part of that movement. How those voices will continue to shape the domestic and international law of their colonizers represents one of the most important issues raised by the comparative study of indigenous peoples' rights".

Felix Cohen's *Handbook of Federal Indian Law*, chap. I, sec. 1, *The Field of Indian Law*: "Indians are human beings, and like other human beings become involved in lawsuits (...)". So reads the beginning of this classis handbook. Let us imagine a new, natural, genuine start: "Indians are

human beings, and like other human beings are entitled to human rights as both individuals and peoples (...)". Imagine there were no suspension points. John Lennon's tune may help.

Definitively, I am making strange bedfellows. To add another one, let me recommend Luís Rodríguez-Piñero, *Between Policy and Rights: The International Labour Organisation and Indigenous Peoples*, forthcoming.

17. *Non-indigenous constitutions and indigenous entitlements.*

We, both constitutional historians and constitutionalist lawyers, are accustomed to look at constitutions and consequent jurisprudence for rights. It is a good practice for the benefit of individuals, but not necessarily for the benefit of peoples, as the same constitutional — and constituent — rule of law does not always apply to people and peoples alike. People and peoples are not two different kinds of subjects entitled to freedom's rights. They are the same stuff. Peoples are made by people. Individuals' rights are currently recognized and guaranteed by peoples' rights through constitutional instruments even irrespective of collective self-identification. However, there are basic rights of the individual human being, such as all cultural rights, that cannot be properly enforced by other peoples' polities. Not even individuals' rights are strictly non-collective. Collective warrant and social exercise make sense out of individual's freedom. As a constitutional concern, all rights are collective.

There is logic and method in the 1967 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights — the main instruments developing human rights law — when they both begin with listing the single peoples' right to economic, social, cultural, and political self-determination in order to deploy individuals' freedoms immediately after. The former may be the condition for the latter. When you are an individual identifying yourself with a people or nation that holds the capacity to have a polity on its own, there is no constitutional hindrance for your individual freedom. When you are not, then the problem arises. Further, paying attention, we realize that States and peoples are not, as usually assumed, coterminous. As a matter of fact, there are unconstitutionalized peoples and thus unconstitutionalized people, human individuals not entitled to an equal entitlement of rights. Overlapped constitutionalism, or rather hidden unconstitutionalism,

does the dirty work. We are badly in need of an integrated constitutionalism for the sake of everybody, and not only for actual constitutionalized people.

Is the task feasible in exclusive constitutional terms? History does not give a definitive answer, but indeed poses the doubt. In times of human rights and subsequent democracy, answering is up to people, not to masters of law and history. If we continue assuming that States and peoples are coterminous and thus that rights may be sufficiently accommodated by constitutions and State democracy, and if we do not turn to the constitutional dimension of international law regarding rights, then there is no way out of a history of dispossession and subjugation for some peoples, such as the indigenous, on the part of others, such as the ones from the European branch. Anyway, the whole of humanity in the singular is not a good polity. We need — duly integrated — both States' or rather peoples' Constitutions, and United Nations' Declarations and Covenants, both constitutional and international freedom's law.

International human rights law is not a replication that backs constitutional rights or assists in their construction. It adds something basic to both individuals' and peoples' rights. Today, most of the Latin American Constitutions recognize indigenous rights, if only, such as Mexico with the right to self-determination, under the legislative and judicial State and even inner states' powers. State conveys however a deficient ground and a defective authority for non-exclusively individuals' freedoms — all constitutional rights. Proper integral recognition and guarantee of indigenous titles may instead come, on the one hand, from the peoples themselves and, on the other, from international law. Contrary to the United States of America, some of these Latin American Constitutions also recognize the superior legal force of United Nations instruments on human rights and usually sign the international conventions.

As implying an international standing, treaties matter — the treaty-making device rather than the past contents of specific settlements. Between non-indigenous States and indigenous Peoples, treaties might be better constitutions than the constitutions themselves as long as the latter entitle and empower States over Peoples, while in the former, even in the most downgrading historical settlements, both are parties retaining bare title at least. On their part, still

in the case of upgrading contents, Indian quasi-constitutions do not match treaties, to be sure. All in all, for indigenous peoples, a friendly future may be better offered by international law than constitutional grant. Or maybe the approaching times belong to both of them in this precise order, beginning with the equal and fair recognition of rights, of human rights of course.

On the actual difference made by indigenous peoples in the international legal field, there are other updated advisable readings besides James Anaya' s *Indigenous Peoples in International Law*, mainly Patrick Thornberry, *Indigenous Peoples and Human Rights*, Manchester University Press, 2002, for information, and, for perspective, Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, University of California Press, 2003. For a Latin American constitutional panorama on indigenous peoples in English, Donna Lee van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, University of Pittsburg Press, 2000, focuses on Colombia and Bolivia, yet contains a comparative chapter about *Constitutional Multiculturalism* all through the region. For further fresh information (fresh when I prepare the paper for the seminar), David Maybury-Lewis (ed.), *The Politics of Ethnicity: Indigenous Peoples in Latin American States*, Harvard University Press, 2002; Kay B. Warren and Jean E. Jackson (eds.), *Indigenous Movements, Self-Representation, and the State in Latin America*, University of Texas Press, 2002. The specific constituent challenge of *multinational democracy* is not faced by this branch of Latin American studies. The proceedings of a workshop on *Indigenous Peoples, State Constitutions, and Treaties and Other Constructive Agreements between Peoples and States* (International University of Andalusia, mid-September, 2001), are to be published in *Law and Anthropology: International Yearbook for Legal Anthropology*.

Let me end these inserted notes with some reflection on sources and authorities. So far, we know that most of our supportive documents, the constitutional and the unconstitutional, are easily found on the internet. Today, you are supposed to rely on the computer screen even if it does not deserve as much credit as the long lasting standardized criteria of editions on paper. On this not so obsolete support, for the United States I have mainly resorted to Francis Newton Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies Now or Hereafter Forming the United States of America, Compiled and Edited Under the Act of Congress of June 20, 1906* (1909), William S. Hein and Company, 1993 (however, on the internet, *129.2.168.174/constitution*, the *NBER/Maryland States Constitutions Project* is currently proceeding to amend Thorpe' s edition). This collection happened to end precisely with the establishing of the State of Oklahoma: vol. 5, 2960-2981 (Enabling Act, the one together with Arizona and New Mexico), and, in extremis, vol. 7, 4269-4344 (Admission and Constitution, 1907), a most significant outcome in the historical formation of the United States and the actual termination of *Oklahoma* itself, this very word meaning Indian home as we know. You may also find on the internet, on the site of the Oklahoma State University Library (*digital.library.okstate.edu/kappler*), the equally official

collection of Indian treaties by Charles J. Kappler, *Indian Affairs: Laws and Treaties, 1778-1883* (1903-1941), vol. 2, *Indian Treaties*, reprint, Amereon House, 1972. It is worth taking a look between the lines at the 1907 Oklahoman constitutional document (as with every American constitution, past and present, Anglo and Latin), searching for the Indian presence as if it were on the negative of a photograph. It is up to you, kind attendant or attentive reader. Learned people do not always help. F.N. Thorpe, the editor of the state constitutions, was a concerned author and citizen of the constitutional kind, an insufficient qualification for the indigenous issue nowadays and yesterday if you belong or are related to a colonialist environment that fails to identify colonialism. Ignorance from expertise is most relevant for practice. Actually, minority making is a fait accompli by both careful institutional and careless intellectual devices. The latter is up to constitutionalism and historiography. Thinking and wording, teaching and writing, articulating and publishing, all are social and political actions bearing even legal effects. Any performance may be performative. Make-believe also engenders bare reality, or at least helps. We know that peoples are cleansed by virtual science prior to actual policy. Anthropologists may behave like conjurers making peoples appear in the past and disappear for the present. Historians follow. Historiography rather than history — fiction rather than fact — bears constituent effect on constitutional agency. It is the constitutions' turn (as for polities, they are definitively derivative). Genocide goes in between. I hope not to be overstating for the sake of the present argument (let me resort to *Genocidio y Justicia: La Destrucción de Las Indias Ayer y Hoy*, Marcial Pons, 2002). We were not to deal with brute force, yet we have found out that even killing fields could be covered by concurrent authorities: farsighted treaties, silent constitutions, unconcerned constitutionalism, outspoken law of nations...

Regarding ourselves — I mean academic people —, does language — I mean the English language I am now using first for a presentation and next in writing — make a difference as for authority? "Writing in Spanish means, at this time, to remain at the margin of contemporary theoretical discussions" (Walter D. Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization*, University of Michigan Press, 1995, *Preface*, viii). I do not dare to argue over such an overstatement and its aftermath (as the book links Hispanic culture to colonial venture along with indigenous articulation and multicultural outcome, it prompted controversy likewise Latin American and definitively in English; check Jorge Cañizares-Esguerra, *How to Write the History of the New World: Histories, Epistemologies, and Identities in the Eighteenth-Century Atlantic World*, Stanford University Press, 2002), but I stress linguistic interfaces through recommendations and references. We cannot chase our own shadows. Medium's authority is a colonial mechanism and no language is neutral, yet it makes no sense to lay the blame on English on behalf of Spanish. They share in common their enormous strength in front of stateless languages, the indigenous American languages. "The authority of the historian derives from the privilege of the historian — to do research, read, reflect, organize and present authoritative historical accounts. It is a privilege — and an authority — granted by the community, academic and non-academic, and at the same time taken and maintained by the historian through a process of claim (assertion, proposition) and dialogue in which s/he needs continuously to persuade the

community (primarily academic but, to a certain extent and at certain times, non-academic too) of her/his authority and expertise. The assent of the reader is a crucial part of the authority of a text" (Gyanendra Pandey, "Voices from the Edge: The Struggle to Write Subaltern Histories", Vinayak Chaturvedi (ed.), *Mapping Subaltern Studies and the Postcolonial*, New Left Review — Verso, 2000, 281-299, 298). *Reader* is supposed to mean *lector* scanning beyond Spanish, *tlamatinime* perusing more than Nahuatl, *reader* reading not just English, and a long both non-academic and academic — thus democratic — etcetera, ending the discrimination between silenced and silencing languages and peoples.

18. *Epilogue: from (American) freedom's law to (Human) freedom's rights.*

Nihighí yá'ádahoot' eéh.
Nihinagóó yá'adahoot'ééh.
Nihighan bich'ii 'atiingóó néiikah.
Diné Lyrics (8).

Once upon a time, over a pair of centuries ago, a creature was born and nicknamed rather than Christianized, even though it was undoubtedly a Christian offspring. Its name was and still is (happily alive) Constitution with the capital letter, thus designed to signify the basic and necessary legal and political structure of societies bound and eager to recognize and guarantee some basic human freedoms. Now grown up or even aged, it, she, or he bears other related names always embracing the specific commitment to some kind of actual liberty. Constitutionalism means, when words are not distorted or perverted, legal and political practice and thinking with the aim of rendering rights to freedom. Freedom's law is a fresher name for the same meaning, that is, law intended to provide freedom by recognizing and guaranteeing rights.

Human freedom is not the same creature as what today we academic people call freedom's law and the like, as long as the latter

(8) "Our hearts are good. All around us is good. We ride along on the home trail" (Peter IVERSON, *Diné: A History of the Navajos*, University of New Mexico Press, 2002, 172, quoting from Ann Nolan Clark). Remember the words of Hastiin Dághaa (alias *Barboncito* in the colonial, derogatory language) in 1868: "Today is a day that anything black or red does not look right, everything should be white or yellow representing the flower and the corn" (so the translation reads as Hastiin Dághaa spoke in Diné and Spanish during the talks leading to the last treaty).

was actually born as a biased venture and thence may bear the inheritance of social supremacy or even legal dominance by some people over others. As an accomplished Christian construct, American constitutionalism deployed the paradise of freedom, the purgatory of dependency, the hell of slavery, and the limbo — a nowhere place. Indigenous people were granted a shared site, the purgatory together with children, women, and workers, and an exclusive club, no other than the limbo.

European conquering people were the inventors of constitutionalism for their own benefit, not for everybody's sake, to be sure. As it entailed freedom just for male proprietors over women, workers (slaves included), and non-European people, it may still inspire and imply subjugation and inequality even on non-racist and egalitarian grounds. Being originally aimed and framed on such other assumptions, the challenge of universal freedom is for constitutionalism neither a fulfilled easy evolution nor an ever-feasible present. The bleeding crux is that in the very assertion of freedom's law subjugation's order may be embedded. The point is most disturbing, I know.

Remember the first statement of the first Declaration of Rights of the first proper Constitution in American and even human history: "All men are by nature equally free and independent and have certain inherent rights". This was stated in Virginia in 1776. Then and there, not everybody was the *man* so entitled to freedom and independence by the very nature. Women did not count. Hired labor was dependent. Slavery existed. Indigenous peoples were impaired and dispossessed on the constitutional way to the limbo. The statement referred to *men*'s rights and therefore, in such a context, powers. Freedom and subjection were at once established and guaranteed. Constitutionalism encompassed the two elements at the same time — rights' entitlement for the happy few and downgraded standings for the unlucky many. The former implied the latter. First of all, prior to anything else (including constitutionalism) law was a family affair with the *man* as paterfamilias entitled to both freedom as an individual and power as the head of the extended household, freedom and power indoors as well as elsewhere. The name of the game was strict minority-making out of an overwhelming and diverse majority.

On those impairing and unequal assumptions, European and American present States were constituted in the past, once upon a time (remember El Alamo: "All persons, Africans, the descendants of Africans, and Indians excepted", and women excluded from scratch). From then on, as the benefit and extent of freedom have really widened, as people other than the male European or Euro-American proprietor and paterfamilias are being incorporated, assumptions have changed and so are States themselves changing for the sake of everybody but indigenous people. As far as they represent peoples besides individuals, human cultures besides human beings, the pending question is not the same as, say, for women's and workers' sake, that of expanding, sharing, and especially reframing common rights to freedom.

As concerns Indigenous Peoples and maybe even African-Americans, social polity and political constituency matter (this is, as we know, human support and agency of law and constitution). Every State cannot give surety to every right of every human being. If so, what do we need the plurality of polities and constituencies for? And more of them are sure needed. Indigenous peoples are people invaded and dominated who therefore have not enjoyed the chance to determine the whole set of their constituency and law on behalf of their rights. The ensuing claims for their own polities appear to make sense, does it not?

"Our [United States'] Indians are a tiny though now a growing minority. But south of the Rio Grande, the Indians number not hundreds of thousands, but millions. Pure-blooded Indians are the major population in Mexico, Guatemala, Honduras, Peru, Ecuador. There are thirty million Indians — one growing race, and one of the world's great races. And that race is marching toward power. It may be that the most dependable guarantee of the survival and triumph of real democracy in our hemisphere, south of the Rio Grande, is this advance towards power of the Indians", so spoke John Collier, the second most prominent politician on Indian affairs maybe in all-American modern history. (Guess who deserves to be acknowledged as the first one. Bravo. You are right. He is, to be sure, the Chief Justice Marshall, the one who decided the Cherokee cases' trilogy on political rather than legal grounds and so the guy who set the still standing rule of indigenous minority relative to the United

States in spite of then present and future constitutions, treaties, and even New Deal, Civil Rights, and Self-Governance Project). As for the Collier's discourse, apart from the *race* language — apartheiding and amalgamating indigenous peoples — and the United States supposed difference, it has still a point. You make minorities even out of recognized majorities. *Race* wording turns out to also derogate from rights of African-American and Asian-American people. Thus, only Euro-Americans together with Europeans still manage to get themselves to constitutional safety. This way, all in all, what is at stake may actually be democracy, the *multinational* or multi-polities democracy instead needed, what is beyond Collier's point as well as the United States and Mexican federalism (9).

Human freedom is at stake indeed. The question involves a matter of law, of indigenous law, and not only a matter of rights, of human rights, if the latter would only mean individuals' together with collective but non-constituent rights. In fact, if we take human rights seriously, the universal title and particular claims to different human polities must be faced as collective and constituent freedom conve-

(9) John COLLIER, "American Handling of the Indigenous Indian Minority", a 1939 speech, quoted and commented by F.S. Cohen, *Handbook of Federal Indian Law*, reprint 1992, *Introduction*, VII. J. Collier — an anthropologist — was the Indian New Deal man as the Commissioner of Indian Affairs from 1936 to 1945. F.S. Cohen served in the Solicitor's Office of the Interior Department from 1933 through 1947, becoming in 1939 the Chief of the Indian Law Survey and thus Collier's legal stuntman. The impressive *Handbook*, actually a collective work (1941, other editions following since the definitive issue in 1942, some of them distorted; an updated one is scheduled for 2004), was a key weapon of the task force for the Indian Reorganization through constitutions and incorporations of the reservations, as we have seen (the *Handbook* is available on internet: *thorpe.ou.edu/cohen.html*, as well as the catalog of Cohen's files: *webtext.library.yale.edu/xml2html/beinecke.cohen.nav.html*). Over thirty million Indian people in the Americas is the present estimate, being a clear majority at least in Guatemala and Bolivia relative to States, and everywhere (included the United States) relative to themselves. If you begin by saying *our* Indians, you cannot observe the latter. Thus, you make minority out of peoples from the start: *The Indigenous Indian Minority* (peoples of Alaska, Hawaii, and other then and today overseas *territories* such as Guam, although likewise *minorities*, are not misnamed *Indians*). We know the current constitutional Mexican reference to *its* — Mexican Nation's — indigenous peoples. I cope with the stake on *national* democracy through "Virtual Citizenship, Electoral Observation, Indigenous Peoples, and Human Rights between Europe and America, Sweden and Peru", *Quaderni Fiorentini*, 31, 2002, 653-779.

nient or even necessary for individuals' rights. Why are there some peoples and not others entitled to cultural, social, economic, and political self-determination, to their own polities in a word? Why are there peoples empowered to make constitutions and others can only produce quasi-constitutions or no constitutions at all? Why are there only some peoples' histories and cultures relevant to polity-self-making and why are added for a rest of them — the indigenous kind — anthropologies adversely significant as alien constructs, what worsens it all? Why are there self-made and non-self-made polities?

Wording matters. Meaning does. Why today do words exist, words such as constitution, nation, polity, self-determination, self-rule, self-government, home-rule, self-administration, autonomy or also sovereignty, which hold a meaning for some peoples, State-makers or self-made-polities, and another different sense for the rest, that is, reservations, tribes, bands, communities, minorities, or groups' constituents? Remember *home rule*, *self-government*, *self-determination*, and *self-governance*, not to mention *Indian inherent sovereignty* and *government-to-government relationship*, all according to the seemingly constitutional approach from a set of the United States Acts (1934 Indian Reorganization, 1968 Civil Rights, 1975 Self-Determination, 1994 Tribal Self-Governance), and all regarding alien-made-polities in spite of the repeated self with hyphen. Despite so much *selfism*, meaning turns out to be inconstant and inconsistent.

Why do words, such as Indian or tribal, indigenous or communitarian, make such a difference? In the United States as well as in Mexico this wording does at least imply some intended kind of local confinement for Indian polities along with economical dependency through social policy not very far away from old *oeconomical*, *domestic* regime. *Oeconomy* meant home rule, a rule severely dependent on non-oeconomical law and policy. Home rule stood for both local sphere and indigenous standing, the former for municipalities in Europe and America, and the latter for colonized polities in Africa and Asia. As for the indigenous peoples' standing in the Americas, there has not been much actual discontinuity between colonial and constitutional times. To put it another way, there has been in the Americas no real decolonization, the unambiguous one that emancipates intruded from intruder, invaded people from the invader stock. Independent British Rhodesia and Anglo-Dutch South Africa were not

decolonized countries on the grounds of human rights. Do the Americas meet the terms? What about Mexico and the United States? Both do nominally recognize the right of indigenous peoples to self-determination. Yet colonialism is still in the balance.

At this point, sovereignty, as distinct from home rule, *selfism*, and all the like, does still matter. Do not credit the current scholarly commonplace that it is an obsolete category. Sovereignty means self-determination, the right to self-determination today according to human rights as listed by international instruments. Reread definitions, those of 1960, 1967, and 1994. Sovereignty entails political and also economic, social and cultural self-determination. It is not a lot to be taken or left. Peoples may even distinguish and prefer effective self-rule as for some of those realms — say culture and society — rather than others — say policy and economy —, or vice versa of course, but it is up to them, not at the choice of States either severally or jointly through the United Nations. Do usual home rule and the like fulfill the requirements of cultural, social, economic, and political self-determination? Remember municipalities and reservations. The United Nations is finally facing the real question. Nevertheless, so far, given the cultural backdrop, it is not an exclusive matter of law, either constitutional or international.

Language itself can be normative beyond the law, international or not, or rather prior to it. Both tribal and indigenous are also usual downgrading idioms as for Africa and Asia. Pejorative discrimination works even when (Indian or African pride aside) the appellation is adopted and used by the people concerned, the indigenous peoples or Indian tribes by themselves. Language always matters. It may go and stay colonial. Remedies can follow. We know that some indigenous peoples are changing their identification from tribes into nations or even recuperating their English second names now for self-dignifying purposes (we are acquainted, for instance, with the 1839 constitution of the Cherokee Nation and the subsequent constitutional policy of the Indian polity in Oklahoma, or the set of treaties of the Navajo Nation with Mexico and the United States). To go constitutional and international, you need even nicknames (10).

(10) *Constitutional* means constitutional exactly the same for the Cherokee Nation as for the United States (for both, say, slavery was legal in mid-19th century, but for the

Law may begin with wording and naming. So do rights. And nation means Nation. Equal acceptation implies equal capacity, not same results, such as new States. If the outcome were pre-determined, there would not be an actual right to self-determination. Maybe, international-constitutional law is in need of more nation-polities and less States-Nations or even no State pretending to be Nation with the capital letter. Law may begin with spelling. Actually, so do rights. Let us learn to spell the constituent right to one' s own first culture — the culture thanks to which you have not just socialized, but even become a human individual — together with the rich diversity of cultures. We all are in need of both our own spell and overall lower-case spelling.

Here you meet a collective right which is so fundamental that it may be decisive to individuals' rights. If you are lucky enough to identify through mother culture and tongue with the State polity you belong to, the one that determines your public nationality or citizenship, maybe the controversial question is far away and out of your mind and even hardly conceivable for you. On the contrary, if you are not so lucky, the issue is in sight and even comes to the fore as an actual matter of human rights, whatsoever the wording. If, as usual in both historiographical and constitutional fields, communi-

---

former freedmen would be full citizens in Indian Territory together with other indigenous and *white* naturalized people). I do not contend that a kind of polity could be per se better — or worse — than the other. It is unfair to compare on the part of historians, anthropologists, or, if they would concern, constitutionalists, as long as respective past and present are so deeply uneven. Cherokee constitutionalism was discontinued by the establishment of the State of Oklahoma and has been at all times encroached by federal policy. In short, what makes the difference is the non-indigenous double negative to indigenous polity and history as freedom's right and rule. By ignoring it, you produce bad historiography, worse anthropology, and worst constitutionalism. The trouble with usual Nation-State making and unmaking studies (more normative than they think) is really twofold, as regards both *nation* and *state*, categories that share in common an extreme excluding capacity. Add the devastating strength of Euro languages, not only English. Thus, *Diné Bikeyá* and even Navajo Nation do not suffice to qualify. Check further literature on nation making and polity framing. As it is a genre unconcerned with indigenous cultural nations and legal polities, whatever either on the one hand their own names and nicknames or on the other alien ignorance or recognition, let me spare additional references. I suggest a strategy alternative or rather supplementary to the scholarly library, that of internet, through which peoples may offer their self-descriptions world-widely. Today it is feasible.

cation keeps on failing between the blessed and the damned, the empowered and the disempowered, the happy few and the unlucky many, then we have the hard problem. The predicament may stem from the lack of communication rather than the issue itself.

Present constitutional authors and authorities are not concerned with indigenous data or literature. The same goes for indigenism as usually unaware of the convenience of going constitutional. We are all, both indigenous and non-indigenous, either Latin or Anglo, badly in need of integrated perceptions and explorations, of visions and studies at the same time and also on the same grounds, indigenous and constitutional, Latin or Anglo. To some extent, integration has made a start. International law has gone constitutional on the very grounds of human rights and is therefore moving toward taking into consideration the possibility of indigenous standing as peoples and no longer minorities. United Nations does at least know the difference. Mexico and the United States say *peoples* and do definitely mean *minorities*. From indigenous people, given their experience facing this and other non-indigenous both State and international practice, there are distrust and defiance, to be sure. Remember law of nations. *Se tsontlixiuitl in techmachte tlen kineni koyotl*. After so many years of colonial and constitutional history without a break, they have learnt what Euro polities want.

History can be neutralized only through overcoming the after-effects. Is that the case? White male owners' constituencies were the inventors of both constitutional and international law in days gone by. Today, are they really aware how handicapped the legacy is? At best, they are well settled and most satisfied in the wonderland of their own constitutional freedoms as the core of universal human rights. At worst, they do not even realize that there is not enough room left for all the others' freedoms, let alone how and where the depriving effect has appeared and is still at work. Ignorance by bliss is the case especially when rights to polity are concerned. If we pay heed, it is easy to check. Any average law school library or course will do. Let me encourage you, attendant or reader, to scrutinize current constitutionalism by yourself.

Currently, constitutionalism does not wonder whether given constituencies are suitable for the overall achievements of rights to freedom. The constitutionalist persuasion fails to do so in both

practice and theory. Nevertheless, a first matter of rights is the very rightness of backdrops and procedures for recognition, entitlement, and guarantee. As for law and constitution, for the legal system and the constitutional regime, if we do indeed take rights seriously, unconcern and unawareness convey an unfair alibi deserving no credit at all, however much it is actually held. As far as human polities are disregarded, freedom's law does not encompass everybody's freedoms. For the sake of freedom, let us not make definitive authorities from scholars and powers preaching and serving rights as well as ignoring a whole set of them, impairing people (11).

(11) Any need of evidence concerning unawareness? It is at hand. Start reading the 2003 Draft Treaty Establishing a Constitution for Europe (*european-convention.eu.int/docs/Treaty/cv00850.en03.pdf*) from the very beginning: "Conscious that Europe is a continent that has brought forth civilization; that its inhabitants, arriving in successive waves from earlier times, have developed the values underlying humanism: equality of persons, freedom, respect for reason — Drawing inspiration from the cultural, religious, and humanist inheritance of Europe, the values of it, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law — Believing that reunited Europe intends to continue along the path of civilisation…", etcetera. Comment is up to you, European or other. Let me only point out that the old and new Europe' s *civilisation* with an 's' is the new and old America's *civilization* with a 'z', no doubt. As regards freedom's [American] law, I have obviously borrowed both term and concept from Ronald DWORKIN, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, 1996. As long as his characteristic approach on behalf of liberties must draw on texts dating from the 18th century (the United States Constitution and main Amendments, the so-called *Bill of Rights* later incorporated from federal to state law, and related jurisprudence), the key point of past meanings and present implications is badly lacking. Even the *moral reading of the American Constitution* thus misses the specific challenge of the indigenous standing between treaties and constitutions. For further comment on my part, let me resort to "Constituyencia de Derechos entre América y Europa (Bill of Rights, We the People, Freedom's Law, American Constitution, Constitution of Europe)", *Quaderni Fiorentini*, 29, 2000, 87-171; on the constituent right to culture, to your own culture along with other cultures: "Multiculturalismo constitutional, con perdón, de veras y en frío", *Revista Internacional de Estudios Vascos*, 47, 2002, 35-62. At this point, for brevity's sake, let me quote Clifford GEERTZ, *Available Lights: Anthropological Reflections on Philosophical Topics*, Princeton University Press, 2000, 256 (ellipsis not indicated): "By rights, political theory should be a school for judgment, not a replacement for it — not a matter of laying down the law for the less reflective to follow (Ronald Dworkin's judges, John Rawls's policy makers, Robert Nozick's utility seekers), but a way of participat[ing] in the construction of what is most needed, a practical politics of cultural conciliation". I warned that we were going to face the *white man*'s legal common sense. Let us close with a quotation from the colonized party,

There are indeed peoples exiled even in their own lands. Hence, let us not deal with given constitutionalism as if entailing the universal capacity that it pretends. Let us put awareness and commitment in the very field of law and constitution. To begin with, let us attach and integrate human rights arising from international law, constitutional rights coming from State law, and, last but not least by any means, peoples and people' s rights stemming from peoples and people themselves. Maybe only in this way, by starting over from due rights rather than actual law — even tribal or communitarian, either enacted or customary — and through rebuilding on proper constitutional standards, the future will not necessarily be the past for damned, disempowered, unlucky people and peoples, individuals and groups, in Mexico, the United States, and elsewhere.

Nihighan bich'ii 'atiingóó néiikah. Maybe there is a way to real, unprecedented *oklahomas* among and along with a rich diversity of polities sharing in common, without exception, the lower-case spelling. There will be no legal minority by any means when there is no longer any majority rule. *Nihinagóó yá'adahoot'ééh*, then.

---

namely Dipesh CHAKRABARTY, "Radical Histories and Question of Enlightenment Rationalism", V. CHATURVEDI (ed.), *Mapping Subaltern Studies and the Postcolonial*, 256-289 (268): "Does it now become clear as to why it might be useful for us, intellectuals of a colonial formation, to maintain a critical watch on the history of (European) reason?" (Chakrabarty's clarifying brackets). I contend that such a (non-European) stance turns out be for the benefit of everybody — American or Asian Indian, African or Wasp, Maori or Anglo New Zealander, Creole or European, child or adult, woman or man, hired worker or idle proprietor...