# Transplanted Rights in the Choctaw Nation: Threats to Sovereignty and Potential Solutions

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ABSTRACT

*The constitutions of federally recognized Indian Tribes are varied, but nearly all contain a bill of rights. The Choctaw Nation's Constitution, like that of several other Tribes, contains a single catch-all provision protecting the same rights available to citizens of the State of Oklahoma rather than specifically enumerating rights. Recently, the Choctaw Nation's Constitutional Court adopted a broad interpretation of this provision, potentially allowing non-Tribal sovereigns, like the State of Oklahoma, to indirectly control the laws and public policy of the Tribe. This is a serious threat to the Tribe's sovereignty, touching on issues of transplanted law raised by Indian law scholars Elmer Rusco and Wenona Singel. To address this threat, the Choctaw Nation, and other Tribal nations with similar constitutional provisions, ought to adopt a practice of selectively incorporating rights. Under this approach, only those rights fundamental to the Tribal structure of liberty and democracy would be incorporated, thus preserving the Tribe's right to be different from other sovereigns. Little has been written regarding these "transplanted rights" provisions in Tribal constitutions, and nearly nothing has been published proposing judicial and legislative solutions to the problems raised by these provisions. This Note fills this gap in the literature by proposing judicially-focused solutions, legislative solutions, and solutions involving constitutional reform.*

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## INTRODUCTION

The Indian Civil Rights Act of 1968 (ICRA) and its subsequent amendments imposed limits on the sovereign authority of Tribal nations, mandating that Tribal nations guarantee a minimum set of rights to their citizens and others within their jurisdiction.[1] Perceiving this legislation as a threat to the right of Tribal nations to govern themselves, scholars and Tribal leaders alike warned against a far-reaching enactment.[2] After ICRA's passage, many Tribal nations operating under written constitutions simply adopted ICRA's provisions verbatim as a bill of rights.[3] In contrast, the Choctaw Nation of Oklahoma appears to have chosen to comply with ICRA by adopting Article IV, Section 1 of its constitution, which provides: "Nothing in this Constitution shall be interpreted in a way which would diminish the rights and privileges that

[1] 25 U.S.C. §§ 1302–1303.

[2] *See, e.g.*, G. Kenneth Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 Ariz. L. Rev. 617, 644 (1968).

[3] *See, e.g.*, PASCUA YAQUI TRIBE CONST. art. I.

tribal members have as citizens of this Nation, the State of Oklahoma, the United States of America or under any Act of the Congress of the United States."[4]

In 2023, the Choctaw Nation Constitutional Court decided *Choctaw Nation of Oklahoma v. Morrison*,[5] relying on this section of the constitution to hold the nation's laws prohibiting recognition of same-sex marriage to be unconstitutional.[6] The Court reasoned that because the right to marry one's partner, regardless of their sex, was held by the U.S. Supreme Court to be a fundamental right, Article IV, Section 1 of the Choctaw Nation Constitution forbade the nation from diminishing that right.[7] In doing so, the Choctaw Nation Constitutional Court apparently confirmed the late Professor Elmer Rusco's interpretation of similar provisions in other Tribal constitutions. Specifically, provisions like this one act as a double-edged sword: they protect a significant number of individual rights held by Tribal citizens while also severely damaging a Tribal nation's "right to be different."[8] Applying the Choctaw Nation Constitutional Court's reasoning beyond just the federal rights at issue, not only are the enumerated rights of ICRA incorporated against the Nation, but so too are each and every right that Tribal members hold as citizens of Oklahoma and the United States.

Part I takes the Court's decision in *Morrison* to its logical conclusion and demonstrates how, absent a limiting principle, a vast number of rights may be incorporated against the nation. This may include rights that are incompatible with the Nation's existing public policy.

Next, Part II argues that, absent a constitutional amendment, the Nation's judiciary can prevent a complete opening of the floodgates by adopting a modified selective incorporation approach, treating Article IV, Section 1 of its constitution similarly to the Fourteenth Amendment to the U.S. Constitution.

Part III examines the practical problems presented by aligning the Nation's statement of fundamental rights with those set forth by separate sovereigns, especially when those sovereigns diminish the fundamental rights they have established.

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[4] CHOCTAW NATION OF OKLA. CONST. art. IV, § 1.

[5] Choctaw Nation of Okla. v. Morrison, No. CC-23-02 (Choctaw Const. Ct. May 23, 2023).

[6] *Id.* at 5.

[7] *Id.* at 4–5.

[8] Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 291 (1989) (noting that the most obvious meaning of such provisions applies "the full panoply of individual rights" against tribal governments, leaving little left of the "right to be different").

Part IV argues that the nation can protect against the incidental diminution of its citizens' rights while exercising its sovereignty by specifically enumerating certain rights, while also making it clear that the interpretation of those rights in Tribal courts is not dependent on the interpretations made by the courts of other sovereigns.

Finally, Part V observes that several other Tribes, particularly in Oklahoma, make use of constitutional provisions which are identical or nearly identical to that of Article IV, Section 1 of the Choctaw Nation Constitution. This Part notes some of the distinctions among the various provisions and concludes with a call for additional scholarship on transplanted rights provisions such as these.

## I. APPLYING *MORRISON* WITHOUT A LIMITING PRINCIPLE

When the Choctaw Nation Constitutional Court struck down laws against same-sex marriage in *Morrison*, the Court's logic took essentially the following form.

First, Article IV, Section 1 of the Choctaw Nation Constitution prohibits the nation from enforcing any law which would infringe upon the rights which Tribal members have as citizens of the State of Oklahoma or the United States.[9] Second, the Tribal Council of the Choctaw Nation of Oklahoma has enacted, and the Choctaw Nation District Court has enforced, statutes that prohibit the recognition of otherwise legal same-sex marriages.[10] Third, as citizens of the United States, Tribal members have the right to marry regardless of their own sex or the sex of their partner, as recognized under *Obergefell v. Hodges*.[11]

Finally, because the Nation has enacted and enforced laws infringing upon a right which Tribal members have as citizens of the United States, Article IV, Section 1 of the Choctaw Nation Constitution requires that the district court's order be vacated, and that the Tribe be prohibited from enforcing the infringing law.[12] While the right incorporated against the nation in *Morrison* was one held by Tribal members as citizens of the United States, the Court did not make any inquiry into the right beyond asking whether it existed and whether it was one held by a Tribal member as a citizen of the United States, a citizen of the State of Oklahoma, or under an act of Congress.[13] Simply stated, under a *Morrison* analysis, the Choctaw Nation Constitutional Court is very

[9] Choctaw Nation of Okla. v. Morrison, No. CC-23-02, slip op. at 4 (Choctaw Const. Ct. May 23, 2023).

[10] *Id.* at 5.

[11] Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

[12] *Morrison*, slip op. at 5.

[13] *Id.* at 4.

likely to hold as unconstitutional any enactments of the Tribal council that infringe on any right that Tribal members hold as citizens of Oklahoma, citizens of the United States, or under any act of Congress.

While this author celebrates the result in *Morrison* as a well-deserved victory for same-sex couples in the Choctaw Nation of Oklahoma, it nonetheless poses a challenge for effective governance of the nation for two primary reasons. First, by neglecting to establish a limiting principle against which rights may be incorporated against the nation under Article IV, Section 1 of the Choctaw Nation Constitution, the Constitutional Court has unintentionally opened the doors to the incorporation of a host of substantive and procedural rights to which the people of the Nation might not have consented. Troublingly, because many of these rights are transplanted from Oklahoma state law, the Choctaw Nation makes the Oklahoma state legislature, rather than its own Tribal council, the captain of its ship of state. Second, by rooting the minimum rights afforded to tribal members in the rights granted by other sovereigns, the Nation risks incidentally diminishing the rights of its own members should those other sovereigns diminish the rights available to their own citizens.

This Part will focus on the first challenge by examining scenarios in which other rights may be incorporated against the nation and the consequences arising therefrom. We begin with the right to a trial by jury.

### A. Right to Trial by Jury

The Sixth Amendment to the U.S. Constitution guarantees the right to trial by an impartial jury in all criminal prosecutions.[14] Similarly, ICRA mandates that Tribal nations must not deny a criminal defendant's request to trial by a jury consisting of at least six people when the offense is punishable by imprisonment.[15] However, the Oklahoma State Constitution includes a somewhat different provision, requiring in part that juries for felony criminal cases must consist of twelve persons, while all other juries need only consist of six persons.[16]

Aligned with the U.S. Constitution and ICRA, Choctaw Nation law mandates that all juries consist of six jurors and a minimum of one alternate juror.[17] However, this statute does not mandate different numbers of jurors based on whether a defendant has been charged with a felony.[18]

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[14] U.S. CONST. amend. VI.

[15] 25 U.S.C. § 1302(a)(10).

[16] OKLA. CONST. art. 2, § 19.

[17] CHOCTAW NATION OF OKLA. JUROR CODE § 9 (2020), https://www.choctawnation.com/wp-content/uploads/2022/05/cb-07-21.pdf [https://perma.cc/A83J-2Q3U].

[18] *Id.*

One could easily foresee a scenario in which the Choctaw Nation of Oklahoma charges a defendant with a felony offense and the defendant insists on being tried by a twelve-person jury, rather than only a six-person jury. After all, the Oklahoma Court of Criminal Appeals has recognized the right to trial by a jury of twelve persons in felony cases as a fundamental right.[19] Suppose the Choctaw Nation District Court denies the defendant's request, citing Choctaw Nation statutes requiring that the jury consist of six persons.[20]

Suppose further that the defendant is then convicted of the charged offense by the six-person jury and unsuccessfully moves for a new trial based on the trial court's error of law in denying his request for a twelve-person jury.[21] From here, the defendant petitions the Choctaw Nation Constitutional Court for writs of mandamus and prohibition, arguing that the district court should be prohibited from enforcing the six-person jury statute as it applies to felony cases, and that the district court must grant his motion for a new trial with a twelve-person jury. This scenario would yield a procedural posture strikingly similar to that of *Morrison*.

From here, the Constitutional Court would be faced with the exact same problem it faced in *Morrison*: whether rights granted by the laws of an external sovereign ought to be incorporated into the Choctaw constitution and thus invalidate an existing Choctaw statute. Functionally, the only structural difference between this hypothetical and *Morrison* is that the right which the petitioner seeks to enforce here is one guaranteed to him as a citizen of Oklahoma, rather than as a citizen of the United States. The Court in *Morrison* made no distinction between those rights, only noting that its opinion would focus on federal, rather than state rights, as only federal rights were implicated.[22] Applying the same logic that the Court applied in *Morrison*, one would expect that it would grant both the writ of prohibition and the writ of mandamus because the Choctaw constitution incorporates the right to a twelve-person jury, thus rendering the six-person jury statute unconstitutional and unenforceable.

Aside from the criminal context, the right to trial by jury may be implicated in a *Morrison* analysis for family law proceedings. Oklahoma statutory law grants parents the right to a trial by jury on the sole issue of termination of parental rights.[23] Similarly, the Supreme Court of

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[19] Swift v. State, 510 P.2d 286, 287 (Okla. Crim. App. 1973).

[20] CHOCTAW NATION OF OKLA. JUROR CODE § 9 (2020), https://www.choctawnation.com/wp-content/uploads/2022/05/cb-07-21.pdf [https://perma.cc/A83J-2Q3U].

[21] CHOCTAW NATION CRIM. PROC. CODE § 952 (2015), https://www.choctawnation.com/wp-content/uploads/2024/09/criminal-procedure-code.pdf [https://perma.cc/JTC2-2SWG].

[22] Choctaw Nation of Okla. v. Morrison, No. CC-23-02, slip op. at 4 (Choctaw Const. Ct. May 23, 2023).

[23] OKLA. STAT. tit. 10A, § 10A-1-4-502 (2023).

Oklahoma has held that the same right is implicitly supported by the Oklahoma Constitution.[24] This right is not recognized by the Choctaw Nation of Oklahoma; its statutes require that the termination of parental rights be tried by the district court without a jury.[25]

Just as in the criminal context, one could easily foresee a scenario in which a parent who has been denied the right to trial by jury in a proceeding to terminate their parental rights could seek review from the Choctaw Nation Constitutional Court. Here, under the Constitutional Court's *Morrison* analysis, absent a limiting principle, the following line of logic would likely prevail. First, the right to trial by jury in a proceeding for the termination of parental rights is one guaranteed to Tribal members as citizens of the State of Oklahoma.[26] Second, the Choctaw Nation of Oklahoma has enacted and enforced statutes which deny this right to its members.[27] Thus, because Article IV, Section 1 of the Choctaw Nation Constitution prohibits the nation from enforcing any law which infringes upon the rights which members have as citizens of the State of Oklahoma,[28] the statute requiring that proceedings for the termination of parental rights be tried without a jury is likely unconstitutional.

In sum, absent a principle to limit the Court's decision in *Morrison*, the Choctaw Nation of Oklahoma's laws regarding trial by jury may be significantly disrupted. Moreover, rather than jury trial practices being rooted in the statutory law of the nation itself, they would be tethered to and limited by the laws of two other sovereigns, which does not bode particularly well for principles of tribal self-determination.

### B. Right to Bear Arms

Though previous iterations of the Choctaw Nation's Bill of Rights enumerated a right to bear arms, the current constitution offers no such enumeration.[29] Likewise, ICRA does not mandate that Tribal nations incorporate a functional equivalent to the Second Amendment to the U.S.

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[24] Gray v. Upp, 943 P.2d 592, 592 (Okla. 1997) (citing A.E. v. State, 743 P.2d 1041, 1047 (Okla. 1987); *In re* D.D.F., 801 P.2d 703, 705 (Okla. 1990)).

[25] CHOCTAW NATION CHILD. & JUV. CODE § 1-4-502 (2018), https://www.choctawnation.com/wp-content/uploads/2023/10/cno-childrens-code-updated-10-4-2023.pdf [https://perma.cc/2JCM-BY4D].

[26] *Gray*, 943 P.2d at 592.

[27] CHOCTAW NATION CHILD. & JUV. CODE § 1-4-502 (2018), https://www.choctawnation.com/wp-content/uploads/2023/10/cno-childrens-code-updated-10-4-2023.pdf [https://perma.cc/2JCM-BY4D].

[28] *Supra* note 10 and accompanying text.

[29] *Compare* CHOCTAW NATION OF OKLA. CONST. art. IV (2024), *with* CHOCTAW NATION OF OKLA. CONST. art. I, § 8 (1860).

Constitution.[30] Nevertheless, under a *Morrison* analysis, the Choctaw Nation may well have incorporated a right to bear arms under two different theories. First, Article IV, Section 1 of the Choctaw Nation Constitution quite likely incorporates the Second Amendment to the U.S. Constitution. Second, Article IV, Section 1 of the Choctaw Nation Constitution likely also incorporates the right to bear arms enumerated in Article II, Section 26 of the Oklahoma Constitution.[31]

The U.S. Supreme Court held in *District of Columbia v. Heller* that the Second Amendment "conferred an individual right to keep and bear arms."[32] Later, in *McDonald v. City of Chicago*, the Court held that the Fourteenth Amendment applied the provisions of the Second Amendment to the states.[33] Most recently, the Court held in *New York State Rifle & Pistol Ass'n v. Bruen* that the Second Amendment protects an individual's right to carry a handgun for self-defense outside of his own home.[34] The Court further held that for a law regulating firearms to withstand constitutional muster, the government must demonstrate how the law is consistent with the "historical tradition that delimits the outer bounds of the right to keep and bear arms."[35]

Because of the Court's holding in *Heller* that possession of firearms is a protected individual right held by American citizens, the Choctaw Nation Constitutional Court would likely have very little trouble holding unconstitutional any tribal firearm regulations which would run afoul of the U.S. Supreme Court's Second Amendment jurisprudence. This despite the fact that ICRA did not require Tribal nations to adopt their own equivalent to the Second Amendment.[36] Further, as the Court's Second Amendment jurisprudence evolves as it did in *Bruen*, so too must the right to bear arms which the Choctaw Nation likely incorporated against itself.

Aside from the right to bear arms as set forth in the Second Amendment to the U.S. Constitution, the Oklahoma Constitution contains its own provision protecting the right to bear arms.[37] Oklahoma courts have rarely applied this provision in recent years, as federal Second Amendment jurisprudence since *Heller* appears to have made this section

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[30] 25 U.S.C. § 1302.

[31] OKLA. CONST. art. II, § 26.

[32] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[33] McDonald v. City of Chicago, 561 U.S. 742, 750, 778 (2010).

[34] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10 (2022).

[35] *Id.* at 19.

[36] 25 U.S.C. § 1302.

[37] OKLA. CONST. art. II, § 26 ("The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.").

largely irrelevant. The few cases interpreting this section of the Oklahoma Constitution construe it to be less protective of gun rights than current interpretations of the Second Amendment.[38] However, the Oklahoma legislature proposed legislation amending this provision quite heavily, perhaps reviving its relevance in the case that the legislation is eventually adopted.[39] The proposed amendment would declare the right to bear arms to be a fundamental individual right extending to "handguns, rifles, shotguns, knives, nonlethal defensive weapons and other arms in common use, as well as ammunition and the components of arms and ammunition," and require that any state regulations of weapons be "narrowly tailored time, place, and manner regulations" that "serve a compelling state interest."[40] Further, it would prohibit the state from imposing a "registration or special taxation upon the keeping of arms including the acquisition, ownership, possession, or transfer of arms, ammunition, or the components of arms or ammunition."[41] A version of this legislation passed the Oklahoma House of Representatives in 2024, but never received a vote in the Oklahoma Senate.[42] Nevertheless, numerous bills have been introduced in the 2025 legislative session seeking to further expand firearm rights in Oklahoma.[43]

If Oklahoma ever does enact the amendment discussed above, it would almost certainly be incorporated against the Choctaw Nation as well, thus depriving it from making any independent decision regarding the rights of its own citizens to bear arms. A broad application of *Morrison* seriously undermines the Tribe's sovereignty.

### C. Other Rights

This Note does not attempt to produce a comprehensive list of all rights which could be incorporated against the Choctaw Nation under a *Morrison* analysis. However, the rights discussed above represent the most concerning types which could represent a threat to Tribal sovereignty if incorporated. These are: state constitutional rights which conflict with existing Choctaw Nation laws; rights established under federal or state law, but which exist in a state of legal variability or uncertainty; and non-fundamental rights established by state statute. This section discusses the

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[38] *See, e.g.*, Pierce v. State, 275 P. 393, 395 (Okla. Crim. App. 1929) (holding that "arms," as used in Art. II § 26 of the Oklahoma Constitution, does not include a pistol, and only includes those arms which a militiaman ordinarily carries).

[39] S.J. Res. 9, 59th Leg., 1st Sess. (Okla. 2023).

[40] *Id.*

[41] *Id.*

[42] H.J. Res. 1034, 59th Leg., 1st Sess. (Okla. 2023).

[43] *See, e.g.*, H.B. 1259, 60th Leg., 1st Sess. (Okla. 2025) (proposing to authorize the conce aled carry of handguns in polling places).

same types of rights, not to illustrate how they may be incorporated, but rather to demonstrate the potentially sweeping nature of applying *Morrison* without a limiting principle.

First, Oklahoma law sets forth rights and responsibilities for residential landlords and tenants across the state.[44] Choctaw Nation law also establishes landlord and tenant law, including rights and responsibilities which slightly differ from those found in Oklahoma law.[45] Incorporating landlords' and tenants' rights could be particularly problematic in that it could result in the nation being unable to adopt any policy which is substantively different from that of Oklahoma. Article IV, Section 1 nominally prohibits the nation from diminishing transplanted rights but leaves it free to expand those rights.[46] However, because some expansions of a landlord's rights would have the likely result of diminishing a tenant's rights, or vice-versa, even those expansions of rights could be unconstitutional. For example, title 41, section 118(C) of the Oklahoma Statutes requires residential landlords to disclose to potential tenants that the premises have been used in the manufacture of methamphetamine if the landlord knows or has reason to know that the premises were used in that manner.[47] In contrast, the Choctaw Nation's landlord and tenant laws do not contain this requirement.[48] This omission in the Choctaw law could reasonably be construed as expanding the landlord's right to privacy within his property, while eliminating the potential tenant's right to know whether the dwelling he intends to rent once functioned as a drug manufacturing site. Because Choctaw law is comparatively more protective of the landlord's rights in this respect, it necessarily diminishes the tenant's rights, and diminutions of rights are prohibited by Article IV, Section 1. Even a simple policy choice regarding landlord-tenant disclosures could be rendered unconstitutional in the absence of some limitation on the incorporation of external rights. As demonstrated, incorporating such rights could have the consequence of removing nearly every policy choice from the Choctaw Nation, handing them instead to the State of Oklahoma.

Another example of rights existing in a state of legal variability and uncertainty is the right to abortion. Previously protected under Supreme Court precedent, the right to abortion no longer exists on a federal level.[49]

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[44] OKLA. STAT. tit. 41, §§ 101-201 (2024).

[45] CHOCTAW STAT. tit. 140 §§ 100–418 (2024), https://www.choctawnation.com/wp-content/uploads/2024/05/2024-5-16-choctaw-nation-residential-landlord-tenant-act-and-landlord-tenant-procedures-act.pdf [https://perma.cc/4FXX-FAZM].

[46] CHOCTAW NATION OF OKLA. CONST. art. IV, § 1.

[47] OKLA. STAT. tit. 41, § 118(C) (2024).

[48] *Compare id.*, *with* CHOCTAW STAT. tit. 140, § 118 (2024).

[49] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231(2022).

Shortly after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the Oklahoma state legislature enacted a series of laws that criminalized the performance of many abortions and created a privately enforceable cause of action against anyone performing or aiding and abetting in the performance of an abortion.[50] The Oklahoma Supreme Court held that the Oklahoma Constitution protects a pregnant woman's inherent right to terminate a pregnancy when it is necessary to preserve her life, and held several statutes that banned abortions to be unconstitutional based on impermissibly restrictive exceptions.[51] As a result, the status of the right to terminate a pregnancy in Oklahoma changed at a breakneck pace; it was first generally protected, then outlawed, and then protected only so far as it is necessary to preserve the life of the mother. The difficulties, pitfalls, and opportunities for Tribal nations to legislate and regulate with respect to abortion was explored in the wake of the *Dobbs* decision.[52] However, viewed against the backdrop of ever-changing abortion rights, bans, and private rights of action to enforce bans, each in turn incorporated against the nation, it is practically impossible for the nation to take any kind of meaningful action on abortion.

Finally, Oklahoma maintains a broad right to use deadly force in self-defense against unlawful intruders on private property and against other assailants.[53] Specifically, under certain circumstances, the state's stand your ground law explicitly disclaims a duty to retreat and confers a right to "meet force with force, including deadly force," so long as the person has a reasonable belief that it is necessary to prevent death or great bodily harm to themselves or others.[54] The Choctaw Nation has enacted an identical statute.[55] Other states, such as Hawai'i, impose a duty to retreat only when the person subjectively "knows that [they] can avoid the necessity of using such force with complete safety by retreating."[56] However, if the Choctaw Nation wanted to impose even the most limited duty to retreat, like that of Hawai'i, it would likely be precluded under a *Morrison* analysis. This is because a duty to retreat, no matter how limited,

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[50] OKLA. STAT. tit. 21, § 861 (2021); OKLA. STAT. tit. 63, § 1-731.4 (2022).

[51] Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130–31 (Okla. 2023); Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023).

[52] *See generally* Lauren van Schilfgaarde et al., *Tribal Nations and Abortion Access: A Path Forward*, 46 HARV. J.L. & GENDER 1 (2023) (discussing the implications of the *Dobbs* decision as it relates to Tribal nations).

[53] OKLA. STAT. tit. 21, § 1289.25 (2024).

[54] OKLA. STAT. tit. 21, § 1289.25(D) (2024).

[55] CHOCTAW NATION CRIM. CODE § 1289.25 (2023), https://www.choctawnation.com/wp-content/uploads/2023/07/choctaw-nation-criminal-code.pdf [https://perma.cc/7U23-LKE4].

[56] *In re* Interest of DM, 526 P.3d 446, 451 (Haw. 2023) (alteration in original) (emphasis removed) (quoting HAW. REV. STAT. § 703-304(5)(b)).

would still diminish the right to "stand your ground" established under Oklahoma law.

The rights presented above demonstrate just how far-reaching the consequences of an unlimited reading of Article IV, Section 1 would be, impacting the ability of the Choctaw Nation to exercise its sovereign prerogative to contour rights in jury trials, firearm possession, abortion, and other individual rights independently of Oklahoma. Moreover, the unsettled nature of some rights, particularly abortion, are magnified with respect to Tribes because the constant churn of political debate stymies attempts to vindicate Tribal opinion. Finally, regardless of the policy merits of any given Oklahoma law, this analysis demonstrates a larger, more troubling truth: the Oklahoma state legislature could style virtually any policy decision as a declaration of "rights" that the Nation may then be forced to recognize. In short, an unbounded application of *Morrison* consigns Tribes to following the political winds of other sovereigns, rather than following the democratic will of their own citizens.

## II. SELECTIVE INCORPORATION AS A LIMITING PRINCIPLE

Prior to the adoption of the Fourteenth Amendment, the predominant consensus was that the Bill of Rights applied only to the federal government and not to the states.[57] Even after the adoption of the Fourteenth Amendment, the Supreme Court did not regard the Privileges or Immunities Clause as a mandate for states to abide by the Bill of Rights.[58] Some go so far as to state that the Supreme Court "strangled the Privileges or Immunities Clause in its crib" with its decision in the *Slaughterhouse Cases*.[59] Nevertheless, the Supreme Court eventually recognized that Section 1 of the Fourteenth Amendment imposed at least some of the rights enumerated in the Bill of Rights—their disagreements were focused on just how many of those rights would be incorporated.[60]

The two major viewpoints expressed by Justices on which provisions from the Bill of Rights ought to be incorporated against the states were total incorporation and selective incorporation.[61] Generally, total incorporation was the idea that Section 1 of the Fourteenth Amendment incorporated each provision of the Bill of Rights against the

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[57] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–48 (1833).

[58] Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 74–78 (1872).

[59] SANFORD LEVINSON ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 561 (8th ed. 2022).

[60] *See generally* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982) (discussing the Supreme Court's rejection of the total incorporation theory of the Fourteenth Amendment and its evolving jurisprudence on incorporation).

[61] *Id.* at 253–57.

states.[62] In his famous dissent in *Adamson v. California*, Justice Black contended:

> In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.[63]

In contrast, other Justices preferred a selective incorporation approach in which specific provisions within the Bill of Rights would be incorporated against the states if the right at issue was "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[64] This was ultimately the viewpoint adopted by the Court, though the specific wording used by the Court to express this methodology has evolved over time. More recently, the Court has determined whether the Fourteenth Amendment incorporates a right against the states by asking if the right in question is "'fundamental to our scheme of ordered liberty' or 'deeply rooted in this Nation's history and tradition.'"[65]

Much like the U.S. Supreme Court of eras past, the Choctaw Nation Constitutional Court has already answered in *Morrison* whether Article IV, Section 1 of the Choctaw Nation Constitution incorporates some rights against the Nation, but the question of just how many rights remains to be answered. It should be noted that there is a marked difference between the types of incorporation at issue in the U.S. Supreme Court and the Choctaw Nation Constitutional Court. Namely, the U.S. Supreme Court had to consider whether to impose provisions of the Bill of Rights against the states—separate sovereigns subordinate to the federal government[66]—through the Fourteenth Amendment., *Morrison* is different because there the Choctaw Nation Constitutional Court had to consider whether to impose rights protected by federal law—beyond the requirements of

[62] *Id.* at 257.

[63] Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting).

[64] Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)); *see also* Israel, *supra* note 61, at 253.

[65] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

[66] *See* U.S. CONST. art. VI, cl. 2.

ICRA—against *itself* through Article IV, Section 1 of *its own* Constitution.[67]

Despite this difference, the key similarity between Section 1 of the Fourteenth Amendment to the U.S. Constitution and Article IV, Section 1 of the Choctaw Nation of Oklahoma Constitution remains. Both have been interpreted as necessarily incorporative, broad pronouncements regarding individual rights, inviolable by state action. Because of this crucial similarity, it would stand to reason that the selective incorporation methodology employed by the U.S. Supreme Court would be highly convincing authority from which the Choctaw Nation Constitutional Court could draw inspiration.

For instance, if the Choctaw Nation Constitutional Court adopted a selective incorporation test which would only incorporate those rights which are "'fundamental to our scheme of ordered liberty' or 'deeply rooted in this Nation's history and tradition,'"[68] several essential goals of Tribal sovereignty would be served. First, this would serve as a practical limiting principle, preventing the floodgates from opening as a result of litigants seeking to incorporate every imaginable right under federal and Oklahoma law. Second, it would assist in preserving Choctaw culture within the Anglo-American legal system.

Some may argue that the plain text of Article IV, Section 1 precludes a limiting principle since it does not qualify the word "rights."[69] For instance, if the section said "fundamental" or "essential" before the word "rights," there would clearly be a textual basis for a limiting principle. Admittedly, there is no such term within Article IV, Section 1 of the Choctaw Nation Constitution.[70] However, a textual case for a limiting principle can nonetheless be drawn from two sources: the Preamble to the Choctaw Nation Constitution and Article XIII, Section 2 of the Choctaw Nation Constitution.

### A. The Preamble Supports a Limiting Principle

A textual case for a limiting principle can be drawn first from the Preamble to the Choctaw Nation Constitution, which states:

> We, the members of the Choctaw Nation of Oklahoma, invoking the will and guidance of Almighty God in order to promote the general welfare, to insure tranquility and *to*

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[67] Choctaw Nation of Okla. v. Morrison, No. CC-23-02, slip op. at 4 (Choctaw Const. Ct. May 23, 2023).

[68] *Timbs*, 139 S. Ct. at 687.

[69] *See* CHOCTAW NATION OF OKLA. CONST. art. IV, § 1.

[70] *See supra* note 4 and accompanying text.

> *secure to ourselves and our posterity the blessings of our ancestral heritage, culture and tribal sovereignty*, do hereby ordain and establish, pursuant to the inherent tribal sovereignty of the Choctaw Nation of Oklahoma, this Constitution for the Choctaw Nation of Oklahoma.[71]

Of particular note is the phrase: "to secure to ourselves and our posterity the blessings of our ancestral heritage, culture and tribal sovereignty," which can be read as a background rule to inform the substantive provisions of the Choctaw Nation Constitution.[72] Specifically, it sets forth securing the blessings of Tribal sovereignty as an overarching purpose behind enacting the constitution. This background principle of promoting, rather than abrogating, Tribal sovereignty ought to be useful in interpreting the substantive sections of the Choctaw Nation Constitution.

In American constitutional jurisprudence, the Preamble to the U.S. Constitution has been read to contain little, if any, legal force.[73] Justice John Marshall Harlan went so far as to state that the Preamble "has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments."[74] Nevertheless, other common law jurisdictions frequently utilize their constitutional preambles to aid in interpreting the substantive provisions of their constitutions.[75] For example, the high courts of South Africa and the Republic of Ireland have both invoked the principles set forth in their constitutional preambles to aid in interpreting ambiguities within the rest of their constitutions.[76]

The Choctaw Nation Constitutional Court could similarly use its own Constitution's preamble to find that an underlying purpose of preserving and advancing Tribal sovereignty permeates the substantive provisions of the nation's constitution. Thus, the Court could disfavor a reading of Article IV, Section 1 that incorporates such a vast number of rights as to render meaningless the nation's right to be different, as such a reading would defeat the preamble's principles. Under such an approach, selective incorporation would serve the nation well in determining which

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[71] Choctaw Nation of Okla. Const. pmbl. (emphasis added).

[72] *See id.*

[73] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) ("no power can be exerted . . . by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.").

[74] *Id.*

[75] *See* Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 723–26 (2010).

[76] *Id.* at 724.

rights could be incorporated without abrogating the nation's sovereignty as expressed in the preamble.

### B. Article XIII, Section 2 Supports a Limiting Principle

Another textual hook in favor of a limiting principle can be found implicitly in Article XIII, Section 2 of the Choctaw Nation Constitution, which states, "Rules of procedure for the Tribal Court shall be prescribed by the Tribal Council and shall insure the members due process of law."[77] The U.S. Supreme Court has held that the "due process of law" language in the Fourteenth Amendment confers both procedural and substantive due process rights.[78] However, because this section of the Choctaw Nation Constitution specifically mandates that the rules of *procedure* for the Tribal court afford all members due process of law, a caveat absent from the Fourteenth Amendment,[79] the plain meaning of this section appears to refer only to *procedural* due process rights, rather than *substantive* due process rights.

Because this provision quite obviously establishes that Tribal members have a right to procedural due process, a reading of Article IV, Section 1 that incorporates the same procedural due process right against the nation appears to be redundant. Such an interpretation would be clearly disfavored as violative of the canon against surplusage.[80] Further, the authorization for the Tribal council to produce rules of procedure for the Tribal court evinces an intent to preserve the right of the nation to enact rules of procedure different from those of the federal government and the State of Oklahoma while ultimately still protecting the right to procedural due process. Interpreting Article IV, Section 1 to incorporate each and every procedural right present in federal and state law as the minimum requirement for the nation's procedural due process would essentially destroy that right to be different.

Accordingly, applying the surplusage canon, procedural due process rights ought not to be incorporated through Article IV, Section 1, and are properly governed by Article XIII, Section 2. If procedural due process rights are properly governed only by Article XIII, Section 2, the constitutional structure appears to limit Article IV, Section 1 to only

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[77] CHOCTAW NATION OF OKLA. CONST. art. XIII, § 2.

[78] *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (discussing procedural due process); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (discussing substantive due process).

[79] U.S. CONST. amend. XIV, sec. 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[80] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

incorporate substantive rights. The contours of other rights could be similarly determined by other provisions, demonstrating a textual commitment to the nation's right to be different from other sovereigns and further limiting principles.

### C. Final Considerations

Ultimately, judicial limiting principles imposed on broadly enumerated rights for prudential purposes are nothing new. For instance, while the First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech,"[81] yet the U.S. Supreme Court has consistently held that there is certain speech undeserving of protection,[82] and that even for protected speech, state actors may still impose some reasonable restrictions, such as restrictions on the time, place, and manner of speech.[83] Just as the U.S. Supreme Court is the ultimate authority on interpreting the rights enumerated in the U.S. Constitution,[84] so too is the Choctaw Nation Constitutional Court the ultimate authority on interpreting Article IV, Section 1 of the Choctaw Nation Constitution.[85] If the U.S. Supreme Court can impose reasonable limiting principles on constitutional rights when it is prudent to do so, so too should the Choctaw Nation Constitutional Court.

Aside from preventing a complete opening of the floodgates, adopting a selective incorporation approach which would only incorporate those rights that are "'fundamental to our scheme of ordered liberty' or 'deeply rooted in this Nation's history and tradition,'"[86] would ostensibly serve to preserve Choctaw culture within the Anglo-American legal system. In a 2006 essay, Professor Wenona Singel warned of some of the potential pitfalls of utilizing "transplanted law" in Tribal legal systems, including the danger it poses to Tribal cultural sovereignty.[87] By utilizing

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[81] U.S. CONST. amend. I.

[82] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (endorsing the principle that speech likely to incite imminent lawless action is not protected by the First Amendment).

[83] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

[84] Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land") (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).

[85] *See* CHOCTAW NATION OF OKLA. CONST. art. XII, § 1 ("The judicial authority of the Choctaw Nation shall be vested in a Tribal Court").

[86] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010))

[87] *See generally* Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357, 362 (2006) (warning that transplanted law in Tribal legal systems threatens the cultural sovereignty of indigenous communities).

the stated selective incorporation approach, the Choctaw Nation Constitutional Court could choose to incorporate only those rights which are fundamental to the *Choctaw* scheme of ordered liberty or which are deeply rooted in the *Choctaw* Nation's history and tradition. Some rights, such as those set forth in ICRA, are quite obviously fundamental to the Choctaw Nation's scheme of ordered liberty, while others, such as the Oklahoma right to a jury of twelve persons in felony cases, would be much more difficult to prove as fundamental in the Choctaw context. Applied faithfully, this test would force litigants in Choctaw courts to show not only that they have a certain right under federal or state law, but also that the right comports with the unique history, tradition, and culture of the Choctaw Nation.

## III. THE INCIDENTAL DIMINUTION PROBLEM

The second major challenge posed by the Choctaw Nation Constitutional Court's decision in *Morrison* is the incidental diminution of the rights afforded to Tribal members. Because individual rights are largely unenumerated in the Choctaw Nation Constitution, the individual rights afforded to Tribal members are almost wholly derived from the incorporationist nature of Article IV, Section 1 of the constitution. Because of this, the Nation has effectively delegated the task of defining the scope and extent of the rights held by its members to the U.S. Congress, federal courts, and the State of Oklahoma. This is not an entirely foregone conclusion though. The Choctaw Nation Constitutional Court could adopt a primacy approach in applying incorporated rights, although this approach is typically employed in state courts where a state has actually enumerated a right within its constitution, rather than simply incorporating it by reference as has been done in the Choctaw Nation of Oklahoma Constitution.[88] Adopting such an approach is discussed later in Part IV as a potential solution to the incidental diminution problem.

In the absence of a primacy approach, when a right remains unenumerated and is merely incorporated, an incidental diminution problem inherently arises if other sovereign actors decide or determine that a right previously held by its constituents ought to be eliminated or abrogated. For example, if the right of same-sex couples to marry were eliminated at the federal level, it would cease to be a right held by members of the Choctaw Nation as citizens of the United States. Thus, the right would no longer be afforded the protection provided by Article IV, Section

[88] *See, e.g.*, Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 335–39 (2017) (discussing how state courts following the primacy approach look first to their own constitutions and laws before turning to the federal constitution).

1 of the Choctaw Nation Constitution, effectively reversing the practical outcome of *Morrison*. Similarly, suppose the right to trial by jury in proceedings for the termination of parental rights was repealed through an amendment to the Oklahoma Constitution and a repeal of the relevant statutes. This right would simply no longer exist for Tribal members as citizens of Oklahoma, so the Choctaw Nation would not be bound to enforce it under Article IV, Section 1. The inherent problem presented here is, like before, one of self-determination. Once again, by anchoring its own grant of rights in the laws of other sovereigns, the very existence of those rights is largely dependent on political processes to which the nation is not a formal party.

The incidental diminution problem is well documented in Florida, resulting from amendments made to the Florida Constitution in 1982 and 2002.[89] The 1982 amendment removed the power of Florida courts to interpret the state's constitutional protection against unreasonable searches and seizures to be more restrictive than the Fourth Amendment to the U.S. Constitution.[90] After amendment, the relevant provision of the Florida Constitution reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissible in evidence *if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution*.[91]

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[89] *See generally* Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-Inflicted Wounds of Thrown-Away Independence from the Control of the U.S. Supreme Court*, 66 ALB. L. REV. 701 (2003) (chronicling the incidental diminution of the rights of Floridians in the wake of Florida's 1982 and 1998 constitutional amendments).

[90] Bernie v. State, 524 So. 2d 988, 990–91 (Fla. 1988).

[91] FLA. CONST. art. I, § 12 (emphasis added).

Similarly, the 2002 amendment removed the power of Florida courts to interpret the state's constitutional protection against cruel and unusual punishment to be more restrictive than the Eighth Amendment to the U.S. Constitution.[92] After the amendment's adoption, the relevant provision of the Florida Constitution reads:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. *The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution.* Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.[93]

These amendments resulted in Florida courts tethering themselves to the relevant U.S. Supreme Court precedent in place at the time the amendments were adopted, as well as all *prospective* precedent due to the broadly worded nature of the amendments.[94] The court in interpreting the 1982 amendment stated:

> [D]ecisions rendered by the United States Supreme Court after adoption of the 1982 amendment must have the same controlling weight as those rendered before. The language of article I, section 12, clearly indicates an intention to

[92] Lightbourne v. McCollum, 969 So. 2d 326, 334–35 (Fla. 2007). Article I, Section 17 of the Florida Constitution was initially amended in 1998. However, that amendment was rescinded by the Florida Supreme Court in *Armstrong v. Harris*, 773 So. 2d 7, 22 (Fla. 2000). The amendment was subsequently reenacted in 2002. *See* H.J.R. 951, 2001 Leg., Reg. Sess. (Fla. 2001).

[93] FLA. CONST. art. I, § 17 (emphasis added).

[94] *Bernie*, 524 So. 2d at 991.

> apply to all United States Supreme Court decisions regardless of when they are rendered.[95]

The court further noted that because they would be bound by prospective precedent from the U.S. Supreme Court's Fourth Amendment jurisprudence, "an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court."[96] Prior to the 1982 constitutional amendment, Florida courts applied a more stringent exclusionary rule than federal courts, in part due to the specific statement in Article I, Section 12 that anything obtained in violation of the right against unreasonable searches and seizures "shall not be admissible in evidence."[97]

For example, in *State v. Sarmiento*, an undercover narcotics officer was equipped with a "body bug" to allow other officers to monitor his conversations with a suspect.[98] Posing as parties interested in buying heroin from the suspect, the undercover officer and a confidential informer entered the suspect's house trailer.[99] Within the suspect's house trailer, the officer had conversations with the suspect that "tended to establish that the defendant had participated in selling a quantity of heroin," all of which was captured on the body bug, none of which was approved under a warrant.[100]

The Florida Supreme Court held that the evidence gathered from the body bug, including the testimony offered by officers monitoring the bug remotely, was inadmissible.[101] The court reasoned that the defendant, Sarmiento, had a reasonable expectation of privacy inside his own home, and that the use of the body bug prior to obtaining a warrant was an unreasonable interception of private communications.[102] The dissent noted that the U.S. Supreme Court had already decided very similar cases and reached the conclusion that the Fourth Amendment does not mandate exclusion of this type of evidence.[103] The majority responded that the citizens of Florida may, and indeed did, provide for more protection from

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[95] *Id.*

[96] *Id.*

[97] FLA. CONST. art. I, § 12; *see also*, Marks, Jr., *supra* note 90, at 703 n.10.

[98] State v. Sarmiento, 397 So. 2d 643, 644 (Fla. 1981).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 645.

[102] *Id.*

[103] *Id.* at 646–48 (Fla. 1981) (Alderman, J., dissenting) (citing United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); United States v. Caceres, 440 U.S. 741 (1979)).

searches and seizures through their own constitution than was provided for under the U.S. Constitution.[104]

After the 1982 constitutional amendment, though, the rights of Floridians to be free from unreasonable searches and seizures could be incidentally diminished by action of the U.S. Supreme Court, even through cases that do not even tangentially involve the State of Florida. Florida's amendments demanding conformity with the U.S. Supreme Court reach only a few rights out of the total number held by Floridians. In contrast, Article IV, Section 1 of the Choctaw Nation of Oklahoma Constitution touches nearly every individual right held by the nation's members. The Choctaw Nation would do well to heed the warning presented by Florida and avoid interpreting Article IV, Section 1 as a conformity clause.

## IV. SOLUTIONS TO INCIDENTAL DIMINUTION

Incidental diminution is often the product of Tribal courts interpreting Tribal constitutional provisions in lockstep with the federal judiciary's interpretations of analogous provisions in the U.S. Constitution. However, because incidental diminution results from Tribal constitutional text and interpretation, both text and interpretive methodology can serve to prevent incidental diminution in the first place. This Part examines both of these options as potential solutions to the incidental diminution problem, beginning with constitutional amendments, then examining the primacy method of constitutional analysis. Finally, this Part examines the tension between the goal of enhancing Tribal sovereignty and using methods borrowed from American legal traditions to do so.

### A. Constitutional Amendment

Perhaps the strongest possible solution to the incidental diminution problem would be an amendment to the Choctaw Nation Constitution enumerating rights which the people of the nation wish to protect from the political whims of external actors such as the Oklahoma state legislature. The Choctaw Nation Constitution provides for two methods of proposing an amendment. Either the Tribal council may propose an amendment by an affirmative vote of eight out of twelve members, or the people may propose an amendment via a petition signed by at least thirty percent of the total number of qualified voters from the most recent Chief's election.[105] In either case, adoption of an amendment must be approved by at least fifty-one percent of the total number of qualified voters from the

[104] *Sarmiento*, 397 So. 2d at 645.
[105] CHOCTAW NATION OF OKLA. CONST. art. XVIII, § 1.

most recent Chief's election, and such approved amendments will become effective after the Secretary of the Interior approves.[106]

Should the nation choose to amend the constitution to specifically enumerate certain rights, there are a number of different models to which the nation could look. For example, many Tribes simply restate the requirements of ICRA as their entire bills of rights.[107] Others, like the Navajo Nation—which does not operate under a written constitution—enumerate rights through statute.[108] Still others adopt functional equivalents to the rights set forth in ICRA and the U.S. Bill of Rights more broadly, quite similar to standard practices of state-level constitutional drafting.[109]

Another interesting source from which the nation could draw inspiration is the nation itself. In 1934, Felix Cohen prepared his "Basic Memorandum on Drafting of Tribal Constitutions," which was re-published in 2006.[110] In it, after cautioning that enumerated rights are often violated by governments and can be used to obstruct the democratic will of the people, Cohen presents Article I of the 1860 Choctaw Nation Constitution as an example for other tribes to look to in developing their own enumerated rights.[111] This example contained twenty sections enumerating the rights that the Nation would guarantee to its citizens.[112] Because these rights were at one point the law of the Nation, they could serve as particularly useful starting points for modern amendments to the Choctaw Constitution. It should be noted that some have suggested Cohen specifically presented the extensive enumeration of rights from the 1860 Choctaw Constitution in an attempt to dissuade nations from adopting a written bill of rights.[113] While this contention may provide worthy advice to other Tribal nations, it is this author's opinion that the Choctaw Nation ought not fear its own constitutional shadow.

Other than an amendment explicitly enumerating distinct rights, the Choctaw Nation could pursue an amendment attaching a temporal limit to

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[106] CHOCTAW NATION OF OKLA. CONST. art. XVIII, § 2.

[107] *See supra* notes 1–4 and accompanying text.

[108] *See* NAVAJO NATION CODE ANN. tit. 1, §§ 1–9 (2010); *see also* Bennett v. Navajo Bd. of Election Supervisors, 6 Nav. Rptr. 319, 324 (Nav. Sup. Ct. 1990) ("The Navajo Nation Bill of Rights (1986) is a fundamental, overriding statute which, by its own terms and necessary implication, allows judicial review to decide whether another law or an act of the Navajo Nation Government is void because of a violation of fundamental rights.").

[109] *See* Rusco, *supra* note 8, at 275–90.

[110] FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS (David E. Wilkins ed., Univ. of Okla. Press 2006) (1934).

[111] *Id.* at 76.

[112] *Id.* at 76–78.

[113] Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 894–95 (2003).

rights which could be incorporated under Article IV, Section 1. For example, the Nation could enact an amendment stating that for all rights made applicable by Article IV, Section 1, the Nation must enforce and respect such rights to the same extent they are enforceable and respected in their jurisdiction of origin at the time of the amendment's enactment, notwithstanding subsequent actions of other sovereigns amending or repealing such rights. Such an amendment would effectively set a floor for incorporable rights such that any actions by other sovereigns to diminish those rights after passage of the amendment would have no effect on the ability of Choctaw Nation citizens to enforce those rights. This would be quite similar to an argument made in the wake of Florida's 1982 constitutional amendment, urging the Florida Supreme Court not to apply the new conformity amendment prospectively.[114] As noted above, this argument was rejected by the Florida Supreme Court.[115] Theoretically, if such an amendment were formally adopted through the constitutional amendment procedures, rather than presented as a prayer for relief to the judiciary, the Choctaw Nation's results would diverge from those of Florida.

### B. The Tribal Primacy Approach

Another potential approach to mitigate incidental diminution harms can be found in state court practices regarding the order in which courts ought to examine constitutional provisions. Specifically, where a state constitution contains a provision similar to one in the federal constitution, state courts have developed three different schools of thought regarding which document to examine first.[116] The first approach, "primacy," directs state courts to examine the state constitution first, independent of the interpretations of analogous provisions of the federal constitution.[117] The second approach, the "interstitial" approach, takes an opposite stance, preferring to turn to the federal constitution first, then to the state constitution only if the federal constitution does not offer adequate relief.[118] The final approach, "criteria," assumes that state constitutional provisions should be interpreted identically to their federal counterparts unless certain criteria supporting a departure in interpretation are met.[119] Still other states refuse to engage in the timing question at all, interpreting

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[114] Bernie v. State, 524 So. 2d 988, 991 (Fla. 1988).

[115] *Id*.

[116] Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 845 (2011).

[117] *Id.*

[118] *Id.* at 846.

[119] *Id.* at 846–47.

state constitutional provisions identically to their federal counterparts with no possibility for departure, a "lockstep" approach.[120] While there is variation among state courts as to which approach to adopt, several scholars and state supreme court justices have identified the primacy approach as the theoretical ideal, despite some difficulties with practical implementation.[121]

Tribal courts have utilized what could be fairly characterized as primacy or criteria approaches in applying ICRA, even to depart downwards from counterpart provisions in the federal Constitution.[122] In one instance, the Colville Tribal Court of Appeals held that ICRA was not violated when a criminal defendant received a probable cause hearing within 72 hours of detention, despite analogous Fourth Amendment jurisprudence requiring a probable cause hearing within 48 hours of detention.[123] In so doing, the Court stated: "Just as the United States is the ultimate authority on how the Bill of Rights applies to its citizens, so too is the Colville Tribe the authority on how the Indian Civil Rights Act (ICRA) applies to its members and others over whom it rightfully exercises jurisdiction."[124] Such a downward departure would likely be foreclosed in the Choctaw Nation by the prohibition on diminishing incorporated rights under Article IV, Section 1 of the Choctaw Nation Constitution. Nevertheless, this example is just one of numerous examples of Tribal nations departing or noting the right to depart from federal interpretations of analogous constitutional provisions.[125]

Importantly, instances where Tribal courts have departed from the interpretations offered by federal courts for analogous constitutional

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[120] *Id.* at 839 n.2.

[121] Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1, 2 (2023) (arguing that the primacy approach is "theoretically optimal, but inconsistently followed" because of its initial difficulties in implementation); *see also* Landau, *supra* note 117, at 845–47. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that state courts ought to interpret state constitutional provisions to be more protective of individual liberties than analogous provisions in the federal Constitution).

[122] *See, e.g.*, Williams v. Colville Confederated Tribes, 3 CTRC 46, 2002 WL 34540611, *2 (Colville Tribal Ct. App. 2002).

[123] *Id.* at *1–2.

[124] *Id.* at *2.

[125] *See, e.g.*, Kempf v. Snoqualmie Indian Tribe, 14 NICS App. 1, 8 (Snoqualmie Ct. App. 2016) ("We believe the hallmark of tribal self-government is a tribe's authority to make its own laws and to independently interpret and implement those laws . . . . It is our duty and authority to independently interpret the Snoqualmie Constitution and Snoqualmie laws.") (citing Puyallup Tribe v. VanEvery, 8 NICS App. 85, 89 (Puyallup Tribal Ct. App. 2008); *VanEvery*, 8 NICS App. at 89 (noting that Tribal courts are not bound by federal court interpretations of constitutional rights); Plummer v. Plummer, 17 Indian L. Rep. 6151 (Navajo 1990) (holding that Tribal courts are not bound by federal court interpretations of constitutional rights).

provisions have been supported by a direct enumeration of rights in Tribal constitutions or statutes.[126] In contrast, where Tribal nations simply refer to the Bill of Rights or otherwise incorporate rights by reference, courts most often employ a lockstep approach, leaving little to no room for departure from the standards set forth by federal courts.[127]

Because only a small number of rights are actually enumerated in the Choctaw Nation Constitution, there currently appears to be little constitutional justification for adopting a primacy approach. For the Choctaw Nation to have the option of employing a primacy approach, or even a criteria approach, it must enumerate the rights it wishes to protect from incidental diminution in some manner. If pursuing a constitutional amendment proves impractical, a legislative act of the Tribal council simply setting forth new statutory rights would likely suffice. Indeed, several other Tribal nations enumerate fundamental rights through statutes, including the Navajo Nation and the Confederated Tribes of the Colville Reservation.[128] Thus, should the Choctaw Nation Tribal Council enact a Tribal statute enumerating certain rights which it wishes to protect from incidental diminution, the Choctaw Nation Constitutional Court would be well justified in adopting a primacy approach, interpreting those rights in the Tribal context and thereby insulating them from the fluctuating interpretations employed by the courts of non-Tribal sovereigns.[129]

### C. A Fundamental Tension

At this juncture, it is necessary to take note of the fundamental tension underlying the discussion of transplanted law and methods of mitigating its harms. Specifically, there is a tension between the use of Anglo-American legal methodologies (such as the primacy approach of

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[126] *Id.*

[127] *See, e.g.*, Lummi Nation v. Kinley, 2 NICS App. 130, 134 (Lummi Nation Ct. App. 1991) (holding that because the Lummi Nation constitution incorporates certain rights under the U.S. Constitution, the interpretations of that right by the U.S. Supreme Court are also adopted as part of Lummi law); *In re* Melendez, 1999 WL 34995660, *2 (Inter-Tribal Ct. App. Nev. 1999) ("By embracing the terms of the U.S. Bill of Rights, the Tribe is subject to the interpretations given the protections of the Bill of Rights as interpreted by non-tribal courts, that have ruled in this area."). *But see* Suquamish Indian Tribe v. Lah-huh-bate-soot, 4 NICS App. 32, 42 n.4 (Suquamish Indian Tribe Ct. App. 1995) (noting in dicta that while certain language in the Suquamish Tribal Constitution appears to require the Tribal court to adopt federal interpretations of rights protected by the U.S. Constitution, Tribal court precedent cautions against "blindly" following federal interpretations).

[128] *See* NAVAJO NATION CODE ANN. tit. 1, §§ 1–9 (2010); COLVILLE TRIBAL L. & ORD. CODE tit. 1, ch. 5 §§ 1-8 (2021), https://static1.squarespace.com/static/572d09c54c2f85ddda868946/t/6089cfed3b60f42660387f69/1619644397804/1-5+Colville+Civil+Rights+Act+%28Final%29+2021.pdf [https://perma.cc/GG25-FSRM].

[129] *See supra* Subpart I(C).

state constitutional interpretation) to preserve a Tribal nation's sovereignty and the fact that the Anglo-American legal system has been a primary instrument of Tribal sovereignty's erosion. Does the use of Anglo-American legal methodology ultimately serve to legitimize the very system which has enabled the erosion of Tribal sovereignty, even if these methodologies are used for the preservation of sovereignty?

Some may answer that the use of these methodologies in Tribal law does more harm than good. For example, others have observed that the American conception of individual rights is incompatible with a more community-oriented Indigenous worldview.[130] In particular, Professor Carole Goldberg has argued that importing the American methodologies of analyzing individual rights into Tribal law does not lead to increased intergovernmental recognition and can undermine sovereignty by weakening a Tribe's argument that they have a distinctive way of life.[131] Goldberg has additionally questioned whether justifying the importation of these methodologies by framing them in a more communally focused, Indigenous light is the best course of action.[132] She notes that while that can be a creative method of enhancing a Tribal court's legitimacy, such a methodology ultimately still accommodates "alien values."[133]

This point is well taken, and I would similarly urge Tribal courts to exercise utmost caution before adopting aspects of American law that may conflict with or displace traditional ways. However, I do not believe that these concerns should work to undermine the use of a Tribal primacy approach in the interpretation of Tribal constitutions and Bills of Rights. This is because the primacy approach encourages not just a reframing of the American conceptions of individual rights, but a rethinking of how individual rights are conceived within the culture of a specific Tribal nation. It affords Tribal courts the opportunity to reformulate how they interact with individual rights, and courts need only seize that opportunity.

Finally, it is worth noting that ICRA demands Tribal nations respect individual rights to a legally cognizable extent.[134] Even if these individual rights are at odds with the traditional ways of an Indian nation, a Tribal nation is not free to simply ignore ICRA.[135] Until ICRA is repealed, modified, or held to be unenforceable, it remains binding law. Perhaps the sovereignty of Tribal nations would be better served by an amendment to

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[130] *See* Goldberg, *supra* note 114, at 898.

[131] *Id.* at 924.

[132] *Id.* at 898.

[133] *Id.*

[134] *See* 25 U.S.C. § 1302.

[135] *But see* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 199 (2002) (arguing, *inter alia*, that ICRA is unconstitutional).

ICRA to account for more traditional Tribal social structures, or even an outright repeal of the statute. In the present moment, though, neither legislative amendments to that effect nor federal court action invalidating ICRA appear within the realm of possibility.

In contrast, the solutions I have presented here only require action on the part of Tribal actors, and do not rely on acquiescence by Congress or federal courts. These solutions are not intended as the long-term civil rights destinations for Tribes in their sovereign journeys, but are simply the next achievable step along the path.

## V. SIMILAR PROVISIONS IN OTHER TRIBAL CONSTITUTIONS

The Choctaw Nation of Oklahoma is not the only Tribal nation that has adopted a transplanted rights section within its constitution. In fact, the late Professor Elmer Rusco identified fifty-nine Tribal constitutions which contain such provisions as of 1989.[136] This Note does not by any means attempt to catalog how many Tribal constitutions contain such provisions today but rather presents examples from several Tribal nations in Oklahoma.

First, the Chickasaw Nation Constitution contains a provision nearly identical to that of the Choctaw Nation. The only differences between the two are that where the Choctaw Nation Constitution uses the term "diminish," the Chickasaw Nation Constitution uses the term "change," and the Chickasaw Nation Constitution omits the "under any Act of the Congress of the United States" verbiage.[137] The change from "diminish" to "change," on a purely textual interpretation, could easily be read as requiring conformity with the rights of other sovereigns, rather than setting those rights as minimums.

Second, the Muscogee (Creek) Nation Constitution contains a very similar provision, stating: "This Constitution shall not abridge the rights and privileges of individual citizens of The Muscogee (Creek) Nation enjoyed as citizens of the State of Oklahoma and of the United States of America."[138] This is quite similar to the Choctaw Nation's provision, omitting only the incorporation of rights established by an Act of Congress. However, the Muscogee (Creek) Nation Supreme Court has recently adopted a non-incorporation interpretation of this provision, rejecting an appellant's attempt to incorporate the State of Oklahoma's

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[136] Rusco, *supra* note 8, at 291.

[137] *Compare* CHICKASAW NATION CONST. art. IV, § 1 ("Nothing in this Constitution shall be interpreted in a way which would change the individual rights and privileges the tribal members have as citizens of the Chickasaw Nation, the State of Oklahoma, and the United States of America."), *with* CHOCTAW NATION OF OKLA. CONST. art. IV, § 1.

[138] MUSCOGEE (CREEK) NATION CONST. art. II, § 2.

"stand your ground" law against the Nation.[139] In doing so, the Court raised similar concerns to those enumerated in Part I, stating:

> To accept the Respondent's argument would require a finding that the Nation's laws are subservient to the laws of the State of Oklahoma; that any time a state or federal law was in conflict with a law of the Nation, the state and/or federal law must prevail. Such a finding would be inconsistent with every notion of sovereignty, and would effectively strip the Nation of the authority to make its own law.[140]

The Muscogee (Creek) Nation has instead interpreted this provision to prohibit the Tribal government from interfering with a Tribal citizen's ability to exercise their rights within Oklahoma's state courts.[141] This rejection of an incorporation interpretation is admittedly at odds with the intuitive interpretation offered by Professor Rusco and the Choctaw Constitutional Court, but could serve as a useful blueprint for Tribal courts which wish to sidestep the question of incorporation altogether.

Third, the Constitution of the United Keetoowah Band of Cherokee Indians states: "This Constitution shall not in any way be construed to impair, abridge or otherwise jeopardize the rights and privileges of the members of this Band as citizens of the State of Oklahoma or of the United States."[142]

Fourth, the Seminole Nation of Oklahoma Constitution provides: "Nothing in this constitution shall be interpreted in a way which would change or adversely affect the rights and privileges the members of this body have as citizens of the United States."[143] This provision prohibits changing or adversely affecting the relevant rights, which appears to present something of a contradiction.[144] As discussed above, the term "change" could be read to require conformity, or a lockstep approach with respect to rights incorporated from external sovereigns.[145] In contrast, the prohibition on "adversely affect[ing]" such rights appears to imply that the nation could depart upward from those rights and establish *more*

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[139] Muscogee (Creek) Nation v. Paddlety, No. SC-2023-09, slip op. at 4–6 (MCN S. Ct. Aug. 21, 2024).

[140] *Id.* at 7.

[141] *Id.* at 6–7.

[142] UNITED KEETOOWAH BAND OF CHEROKEE INDIANS CONST. art. XI, § 2.

[143] SEMINOLE NATION OF OKLA. CONST. art. XII, § 2.

[144] *Id.*

[145] *See supra* note 138 and accompanying text; *see also* Rusco, *supra* note 9 ("the most obvious meaning of these provisions is that they go far beyond the ICRA to apply against tribal governments the full panoply of individual rights developed in non-Indian contexts.").

protections, but could not depart downward or eliminate protections.[146] Obviously, a nation cannot be required to adopt a lockstep approach yet also be free to depart upwards from the minimums set by the incorporation of externally established rights. Because this apparent contradiction deserves a far more thorough analysis than this Note can provide, additional scholarship on self-contradictory constitutional provisions is necessary. Even so, the mere existence of these contradictory interpretations indicates that unfettered incorporationism is an unsatisfying approach to rights secured by Tribal constitutions.

Finally, the Apache Tribe of Oklahoma Constitution similarly provides, "These rules and regulations shall not in any way alter, abridge or otherwise jeopardize the rights and privileges of the members of the Apache Tribe of Oklahoma as citizens of the State of Oklahoma or of the United States."[147] The presence of the term "alter" alongside the terms "abridge or otherwise jeopardize" presents the same contradiction present in the Seminole Nation of Oklahoma Constitution.[148]

Although these provisions have some variations, they follow similar patterns. Ultimately, they all appear to present the same problems presented by Article IV, Section 1 of the Choctaw Nation Constitution. Some present even more challenges due to the possibility that they could be interpreted as conformity clauses, rather than setting a metaphorical floor for rights. Additional scholarship on this topic would undoubtedly serve to aid Tribal courts in reaching legally sound conclusions when applying these provisions.

## CONCLUSION

In this Note, I have sought to identify the challenges presented by the Choctaw Nation Constitutional Court's interpretation of Article IV, Section 1 of the Choctaw Nation Constitution in *Choctaw Nation of Oklahoma v. Morrison*. In particular, I have demonstrated how the absence of a limiting principle in the court's decision can lead to a vast number of rights being incorporated against the nation to the point where, in several areas of law, the Nation could be precluded from enacting policies different from the State of Oklahoma. Perhaps even more troubling is the notion that the State of Oklahoma could intentionally construe even the most mundane of legislative enactments as grants of rights in order to prevent Tribal nations from meaningfully legislating in certain areas. I have further demonstrated how the incorporation of rights under Article

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[146] *See* SEMINOLE NATION OF OKLA. CONST. art. XII, § 2.

[147] APACHE TRIBE OF OKLA. CONST. art. X, § 2.

[148] *See id.*

IV, Section 1 would yield remarkable fragility in those rights, which could be further incidentally diminished by the actions of external, non-Tribal sovereigns.

In response to each of these challenges, I have identified a solution available to the Choctaw Nation. Specifically, the Nation's judiciary can prevent a complete opening of the floodgates by adopting a selective incorporation approach, incorporating only those rights which are fundamental in light of the nation's culture, history, and tradition. Certainly, at minimum, the rights set forth in the Indian Civil Rights Act would meet these criteria.[149] Additionally, the Nation can prevent the incidental diminution of incorporated rights by actually enumerating rights through statute. From here, the Choctaw judiciary could exercise the option of employing a primacy approach to interpret rights in light of the unique tribal context and depart from analogous federal and state caselaw, potentially departing upwards to more vigorously protect fundamental rights, or entirely reimagining how those rights should operate within Choctaw culture.

Alternatively, the Choctaw Nation could build its democratic muscle memory and pursue a constitutional amendment, which would more forcefully and permanently commit the nation to a new view of fundamental rights. While I personally prefer and encourage constitutional reform because it would be the most democratic and forceful method of clarifying Tribal civil rights law, Tribal leaders should ultimately examine their local needs and capabilities before deciding which solutions are most realistic and effective.

Finally, while this Note primarily focused on the Choctaw Nation, I have identified similar constitutional provisions enacted by other Tribal nations within Oklahoma, along with some of the curiosities presented by each individual provision. It is my hope that by demonstrating the challenges associated with these provisions, along with potential solutions that the Choctaw Nation could employ, other Tribal nations might act proactively to secure their own right to be different, despite these challenges. Whatever course of action is chosen by Tribal nations to respond to the challenges of transplanted rights provisions, maintaining Tribal sovereignty and ensuring that Tribal citizens are afforded equitable, reliable rights ought to be paramount considerations. As a final thought, these words of Felix Cohen ought to continue to guide Tribal nations:

> Whether or not such a statement of the rights of the people is included in any tribal constitution, it is important to remember that the rights of the people cannot be

[149] *See supra* notes 1–4 and accompanying text.

> guaranteed by any words of a constitution but must be defended by the enlightened understanding and resolute will of the people.[150]

Tribal leaders and citizens alike ought to remind themselves that a robust Tribal democracy, characterized by a truly engaged, diverse, and multi-generational Tribal electorate, is the only reliable method of ensuring that both sovereignty and the rights of Tribal members are protected for future generations. To Tribal nations: use this opportunity to nurture democracy in our communities and meaningfully facilitate engagement with citizens to determine what rights they want to see protected. To Tribal citizens: participate in our Tribal democracies, hold Tribal officials accountable, and let your voice be heard.

[150] COHEN, *supra* note 111, at 76.