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Journal

The Indigenous Peoples' Journal of Law, Culture & Resistance, 10(1)

ISSN

2575-4270

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Publication Date

2026-10-30

DOI

None/uclalaw_ipj|cr.70046

Peer reviewed

FIRST AMENDMENT NONEXISTENCE ON THE RESERVATION—IMPLEMENTING FREEDOM OF SPEECH WHILE PROTECTING TRIBAL CUSTOMS AND VALUES

Amber Van Fleet

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I. INTRODUCTION

Being a tribal member, I always assumed the Constitution and its Bill of Rights applied to tribal members when we are on the reservation.¹ Attending American public schools, I have pledged my allegiance to the flag, sung “America (My Country, ’Tis of Thee)” and learned about the duties and rights of being an American citizen.² I relied on those rights when I picketed outside the Colorado River Indian Tribes’ government administration building in attempts to petition the tribal government for a redress of grievances, and again when we started a grassroots movement to expose secret water deals by the tribal government. It was not until I was 40 years old and in my second year of law school that I learned that tribal governments could restrict or limit tribal member’s First Amendment rights on the reservation. How? Because the Bill of Rights does not exist on the reservation for tribal people.

What can be done, if anything? This paper looks briefly at the complex history of Native people in the United States to show how First Amendment rights do not apply to them. Then reviews how tribes have used their unique political status to self-govern federal reservation lands and tribal members, how tribal members face challenges when using what they believe to be First Amendment rights, and the responses by tribal councils and leaders. Because First Amendment rights are not applicable, “many free speech claims heard in tribal courts” are settled applying “federal law as persuasive authority to decide” cases.³ If tribes do not want U.S. courts’ precedent infringing upon tribal sovereignty, especially when constitutional protections are not inherent for tribal members on a reservation, tribes may want to review and possibly amend their tribal constitutions to reflect their customs and values unique to their tribe, not the United States; considering there are valid reasons tribes would want to limit or restrict speech on the reservation. Finally, rather than allowing the First Amendment to fill constitutional gaps in tribal courts, this paper argues that tribes should affirmatively define speech protections and limitations through constitutionally grounded provisions rooted in tribal customs and values. This approach preserves sovereignty, reduces reliance on federal precedent, and equips tribal communities to address modern challenges on their own terms.

¹ This, and other experiences expressed in this paper, are my experiences on the Colorado River Indian Tribes (CRIT) reservation in Parker, Arizona. I am an enrolled member of CRIT as Mohave and Tohono O’odham.

² SAMUEL FRANCIS SMITH, MY COUNTRY, ’TIS OF THEE (Oliver Ditson Co. 1874). The song also refers to the lessons of American government and history that are taught in American history, social studies, civic and other American public school settings and courses throughout elementary, junior high and high school.

³ Matthew L.M. Fletcher, *Resisting Congress: Free Speech and Tribal Law* 136, 140, 147 (Mich. Univ. L. Stud. Rsch. Paper No. 10-05, 2012) (“tribal courts have no obligation to apply federal and state constitutional law as it relates to free speech. Some tribal courts apply strict, intermediate, or rational basis scrutiny to analyze government restrictions on speech in relevant contexts, whereas others do not. Some courts rely heavily on tribal customary or traditional law whereas others rely less”).

II. BACKGROUND

Federally recognized tribes within the United States have a unique, complex relationship with the federal government and with the lands the tribes now occupy and have inhabited “since time immemorial.”⁴ It is like no other State or government relationship⁵—it is a complex relationship that began across the Atlantic Ocean, after Columbus mistook the Caribbean for South Asia, and Pope Alexander VI issued the papal bull *Inter Caetera* to Spain’s King Ferdinand and Queen Isabella claiming the “newly discovered” lands for the monarch in the name of religion.⁶ Hundreds of years of federal policy and Supreme Court decisions shaped the laws governing how Native people would be treated in the United States. Today Native Americans residing or located within the exterior boundaries of a reservation are not afforded the same civil rights, like First Amendment rights, as U.S. citizens residing within the exterior boundaries of the United States.⁷ In fact, for Native Americans on the reservation the Bill of Rights is functionally nonexistent.⁸ Instead, their *rights* are statutorily granted to them through the Indian Civil Rights Act.⁹ Still, they are governed by a sovereign tribal nation that has inherent rights to create their own laws to manage internal affairs and protect their interests, many times centering around tribal cultural values.¹⁰ A brief review of how tribal law came to be may help explain why this unique relationship has developed into a political status that poses different challenges for tribal members who want to challenge actions taken against their perceived First Amendment rights, only to find out that these rights do not exist. How it got to this point for Native Americans started when the Pope issued a papal bull, *Inter Caetera*, also known as the discovery doctrine.¹¹

As encroachment began along the Eastern coast of North America, over 550 years ago, European colonizers had a well-established principle in place for when they *discovered* Indigenous people abroad.¹² In *Johnson v. M’Intosh*,¹³ Chief Justice Marshall explained the foundational principle of the U.S. laws governing Native people and tribal lands.¹⁴ The principle, shared across Eu-

⁴ See JOHN BELSHAW, ET AL., HISTORIES OF INDIGENOUS PEOPLES AND CANADA 12–14 (2020) (“Indigenous people often use this phrase to describe the temporal depth of their connections with ancestral lands”).

⁵ See STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 2–3 (4th ed. 2012).

⁶ See ROBERT T. ANDERSON, SARAH A. KRAKOFF & BETHANY BERGER, AMERICAN INDIAN LAW CASES AND COMMENTARY 17 (4th ed. 2020).

⁷ See PEVAR, *supra* note 5, at 241–43.

⁸ *Id.*

⁹ 25 U.S.C. § 1302.

¹⁰ See Angelique EagleWoman, *Jurisprudence and Recommendations for Tribal Court Authority Due to Imposition of U.S. Limitations*, 47 MITCHELL HAMLINE L. REV. 342, 352–53, 360–61 (2021).

¹¹ *The Doctrine of Discovery, 1493: A Spotlight on a Primary Source by Pope Alexander VI*, THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/doctrine-discovery-1493> [<https://perma.cc/T9YC-K7PN>].

¹² See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572–78 (1823).

¹³ *Id.*

¹⁴ *Id.*

ropean countries contemporaneous to first contact in the Americas, was that whichever nation discovered lands previously unknown or unclaimed by these European powers would thereafter have rightful claim and title to that land in the name of their particular monarch or empire.¹⁵ No other European nation could interfere with claiming title once these lands were possessed by those who “discovered” them.¹⁶ The Natives that happened to inhabit those same lands suddenly became subjects of the monarch.¹⁷ Monarchs have long held principles of discovery, acknowledging that the “rights of the original inhabitants were [not] entirely disregarded [because] . . . [Native peoples] were admitted to be the rightful occupants of the soil.”¹⁸

This rightful occupancy, as understood by the U.S. Supreme Court, recognizes Native peoples have “a legal as well as just claim” to possess and use the land “according to their own discretion,” but those rights are “necessarily diminished” and their power to freely sell the land is “denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”¹⁹ Denying Natives the right to make land deals reserved for the “discoverer” the decision-making power over who owned the land. This was a way for settler empires to control the original inhabitants and prevent land from being sold to other European powers.

This principle carried over as European nations began selling or relinquishing their titles to land, eventually ceded by Great Britain to the newly forming United States.²⁰ This remained in place and, beginning with the seminal case *Johnson v. M’Intosh* discussed above, the Supreme Court began to set precedents for Native American law—building the foundation for the present legal landscape in which Congress has plenary power over Native peoples and tribes, with whom the United States has a unique political relationship.²¹

¹⁵ *Id.*

¹⁶ *Id.* at 573.

¹⁷ *Id.* at 573–74.

¹⁸ *Id.* at 574. This concept existed during the Crusades—Pope Innocent IV stated “it was legitimate for Christians to invade the lands of infidels . . . [in] ‘defense’ of Christianity.” However, “pagans had natural rights, but . . . had to comply with European concepts of natural law and religion or risk subjugation.” Robert J. Miller, *Christianity, American Indians, and the Doctrine of Discovery*, 52–53 (Mitchell Lewis & Clark L. Sch. L. Studies Rsch. Paper No. 2011-13 2011).

¹⁹ *Johnson*, 21 U.S., at 574.

²⁰ See *id.* at 584–85 (holding that after the Revolution, Great Britain relinquished all claim to the United States by treaty).

²¹ See EagleWoman, *supra* note 10, at 343–44; See Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection From our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV’T. & ADMIN. L. 397, 421 (2017) (“[T]he commerce and treaty clauses have been recognized as the basis for the ‘plenary and exclusive’ power of Congress over Indian affairs.”); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf.”) (emphasis added).

Over time, the U.S. would use its powers to remove, relocate, exterminate, or assimilate Native Americans into or out of American society.²² This “federal power over Indian affairs and the federal trust responsibilities . . . predate[s] and continue[s] beyond the Constitution.”²³ Because certain powers transferred and vested to Congress, while Native peoples retained the right to self-govern had been established prior to the Constitution, this reasoning paved the way for the Courts to question whether the U.S. Constitution governs Native people and tribes.²⁴

In *Talton v. Mayes*,²⁵ a Cherokee tribal member was indicted by five jurors for the murder of another Cherokee tribal member on Cherokee land under Cherokee laws.²⁶ Being a matter of internal tribal affairs, Cherokee laws governing the adjudication of the case would apply.²⁷ The defendant claimed that his rights under the Fifth and Fourteenth Amendments of the U.S. Constitution were violated, because a five-person grand jury was an insufficient number of jurors.²⁸ The Court found that when a Native American tribal member kills another Native American tribal member on tribal land, it “clearly [is] not an offence [sic] against the United States,” but an offense against that tribal nation that should be dealt with by the laws of the tribe, not the laws of the United States.²⁹ The Court held that constitutional provisions such as the Fifth and Fourteenth Amendments fall under the general rule that the “statutes of the United States which provide for . . . the number of persons who shall constitute [a grand jury] have no application” on tribal land.³⁰ The right to self-govern has existed prior to the Constitution and is “subject to the supreme legislative authority of the United States.”³¹ The Court reiterated tribal nations are “semi-independent,” they lack the “full attributes of sovereignty,” and they are not states or nations, but a “separate people” with the power to regulate “their internal and social relations.”³² To date, tribal nations have not been brought “under the laws of the Union, or of the State” where they are located.³³

²² See, e.g., *President Andrew Jackson's Message to Congress on 'On Indian Removal'*, NAT'L ARCHIVES (May 10, 2022), <https://www.archives.gov/milestone-documents/jacksons-message-to-congress-on-indian-removal> [<https://perma.cc/KBQ7-PPVN>].

²³ Rey-Bear & Fletcher, *supra* note 21, at 422.

²⁴ Patrick M. Garry, Candice Spurlin, Jennifer Keating & Derek Nelsen, *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota*, 53 S.D. L. REV. 335, 336 (2008).

²⁵ 163 U.S. 376 (1896).

²⁶ See *id.* at 376, 379 (1896).

²⁷ See *id.* at 380–81.

²⁸ See *id.* at 379.

²⁹ *Id.* at 381.

³⁰ *Id.* at 381–82.

³¹ *Id.* at 384.

³² *Id.* at 384 (citations omitted).

³³ While there are various exceptions, nuances, and contours to the ways state and federal laws can apply to tribal members or on tribal land, this Article refers specifically to the inapplicability of the U.S. Constitution and its Bill of Rights on tribal land—aside from, of course, the rights addressed by the Indian Civil Rights Act (25 U.S.C. § 1302).

This ultimately meant that tribes were free to self-govern without the limitations of the Constitution.³⁴ Federal courts were precluded from hearing claims filed against tribes involving internal tribal issues.³⁵ For tribal members, this meant no recourse against tribal government actions believed to be abusive or discriminatory, other than turning to that same tribal government to find resolution.³⁶ Tribal law during these times prioritized community over the rights of individual tribal members.³⁷ Those designated within the tribal community to make decisions tended to weigh the interests of the entire tribal community as more important than individual claims of fairness, whereas the United States tends to focus on protecting individual rights from government interference.³⁸ Tribal members had always had a place within their communities to speak up,³⁹ but outside of the reservation, the concept of limiting and embracing freedoms of the First Amendment were putting pressure on tribal communities and the federal government to do something.⁴⁰ In 1962, the Senate Subcommittee on Constitutional Rights began hearings to address tribal members' concerns about the way tribal governments were handling issues raised by their members, and the lack of recourse against tribal governments in light of members' concerns about their individual rights.⁴¹ Many members of Congress were not aware that the Bill of Rights did not apply to tribal members on reservations, and the individual testimonies by Native people about their tribal governments left them distressed, shocked, and appalled that "tribal members' basic constitutional rights had been denied at every level."⁴² So, they concluded the hearings and proceeded with the enactment of a law to address this subject, using their plenary power over Indian affairs.⁴³

In 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. § 1302(a). The Indian Civil Rights Act ("ICRA") expresses "[legislative] intent

³⁴ PEVAR, *supra* note 5, at 241.

³⁵ *Id.* at 242.

³⁶ *Id.*

³⁷ *See* Fletcher, *supra* note 3, at 136–40.

³⁸ *Id.* at 134.

³⁹ *Id.* at 138.

⁴⁰ Compare *id.* with PEVAR, *supra* note 5, at 242; and Donald L. Burnett Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 557, 575–88 (1971) (a preliminary inquiry into whether "immunity from constitutional restraint had resulted in actual deprivations of constitutional rights by the Indian tribes" and if so, they are improper and require correction. The inquiry resulted in hearings that disclosed: few, if any, tribal courts were not allowing professional attorneys to appear before them; and, many tribal courts did not observe or advise the rights against self-incrimination; tribal councils were enacting ordinances prohibiting private drunkenness; BIA had never attempted to supply Indian courts with adequate law libraries and failed to request funding for them; outside law enforcement agencies, lacking jurisdiction, were making arrests on tribal lands; tribal members dying while incarcerated for drunkenness; arrests were being made for crimes that whites would not have been prosecuted for; and, lack of law enforcement in areas affected by Public Law 280. The field hearings ended in 1963, 1,100 pages of testimony had been recorded.).

⁴¹ PEVAR, *supra* note 5, at 242.

⁴² *Id.*; Garry et al., *supra* note 24, at 339.

⁴³ PEVAR, *supra* note 5, at 242.

to protect the individual rights of Indians while fostering tribal self-government and cultural identity.”⁴⁴ The first provision reads as follows:

No Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances.⁴⁵

ICRA is similar to the United States’ Bill of Rights, but there are differences.⁴⁶ Tribal sovereignty and ICRA allow “tribes to decide for themselves what individual speech rights mean in each tribal community,” and there are over three hundred different tribal courts currently operating to uphold their respective tribal laws and constitutions.⁴⁷ Some tribal courts suggest that Congress had no authority to impose the U.S. Constitution’s civil rights standards on tribes when Congress implemented the Indian Civil Rights Act.⁴⁸ Arguably, the plenary powers of Congress over tribal people are not “powers authorized by the United States Constitution or consented to by Tribal Nations.”⁴⁹ Angelique EagleWoman, Native American legal scholar and law school professor, finds that “there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty. . . . [N]either Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent.”⁵⁰

Nonetheless, ICRA was enacted and is in place still; however, that does not prevent tribes or tribal members from pushing the bar on what is statutorily permissible on tribal lands under subsection one of ICRA’s freedom of speech provision, in accordance with tribal constitutions and laws.

III. WHAT RESTRICTING RIGHTS MIGHT LOOK LIKE

A. *Restrictions and Limitations on First Amendment Rights*

Restrictions and limitations on First Amendment rights for nontribal United States citizens, or tribal citizens off federal reservations, have been challenged and set by judicial precedent. The laws surrounding free speech and press “ha[ve] been developing for centuries,” however, it was not until the 1900s when limitations on free speech and free press were imposed by the

⁴⁴ Garry et al., *supra* note 24, at 341.

⁴⁵ 25 U.S.C. § 1302(a).

⁴⁶ PEVAR, *supra* note 5, at 243 (explaining that ICRA included “nearly all the civil rights found in the Constitution” but omitted some because they would undermine or destroy tribal sovereignty. Others were precluded because tribes strong in tribal customs and rituals would not be able to separate from *religion* as the Constitution and Founding Fathers aimed to achieve; yet, provisions affording counsel or certain grand jury coverage are not guaranteed unless other provisions are met first.). Compare *id.*; with EagleWoman, *supra* note 10, at 356 (noting that ICRA “severely restrain[ed] criminal sentencing authority of tribal courts”).

⁴⁷ Fletcher, *supra* note 3, at 138, 136.

⁴⁸ *Id.* at 152.

⁴⁹ EagleWoman, *supra* note 10, at 371.

⁵⁰ *Id.* (quoting Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115–16 (2002)).

Supreme Court, making First Amendment litigation by the mass media “a relatively recent phenomenon.”⁵¹ In *Near v. Minnesota ex rel. Olson*,⁵² the Court held that the press must be free from prior restraints by the state, including legislative restraints, with the following exceptions: “(1) when the nation is at war and publishing would be a hindrance to national effort, 2) obscene publications, or 3) publications inciting to acts of violence and overthrow by force of orderly government.”⁵³

For U.S. citizens, including tribal members off federal reservations, lawmakers and the courts may impose certain restrictions or limitations on an individual’s First Amendment rights, particularly to speech. As established in *Chaplinsky v. New Hampshire*,⁵⁴ the freedom of speech is not absolute and there are classes of speech that would not be protected by the First Amendment.⁵⁵ Those classes of speech not protected include “the lewd and obscene, the profane, the libelous, and insulting or ‘fighting’ words — [words that] inflict injury or tend to incite an immediate breach of the peace.”⁵⁶ A test was established in *Roth v. United States* to determine whether material is obscene, then was refined in *Miller v. California*.⁵⁷ The Supreme Court has also ruled that states may impose statutes that prohibit the dissemination of material that depicts sexual conduct by a child less than a certain age.⁵⁸ Other varying limitations placed on U.S. citizens’ freedom of speech rights comes in the form of defamation prohibitions.⁵⁹

⁵¹ MARC A. FRANKLIN, DAVID A. ANDERSON, LYRISSA C. BARNETT LIDSKY, & AMY GAJDA, *MEDIA LAW: CASES AND MATERIALS* 19 (9th ed. 2016).

⁵² 283 U.S. 697 (1931).

⁵³ *Id.* at 713–14, 716.

⁵⁴ 315 U.S. 568 (1942).

⁵⁵ *Id.* at 571–72.

⁵⁶ *Id.* at 572.

⁵⁷ See *Roth v. United States*, 354 U.S. 476, 489 (1957); see also *Miller v. California*, 413 U.S. 15, 24 (1973) (Material is obscene if (a) “the average person, applying contemporary community standards” would find the material, taken as a whole, has or encourages excessive sexual interest (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)); (b) the material offensively depicts or describes sexual conduct; and (c) the material, “taken as a whole, lacks serious literary, artistic, political, or scientific value.”).

⁵⁸ See *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

⁵⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281–83 (1964) (anyone claiming to be defamed by the communication must show actual malice or damages cannot be claimed, this privilege extends to matters of public concern, public men, and candidates for office). This case further established that, “[i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.”

B. *Cultural Customs & Values: Restrictions and Limitations on Freedoms of Speech*

On the Navajo reservation, which spreads across four states—Arizona, New Mexico, Utah and Colorado—the Navajo have varying traditions that may impose restrictions and limitations on speech. According to Navajo common law, “an individual has a fundamental right to express his or her mind by way of the spoken word and/or actions . . . people speak with caution and respect, choosing their words carefully to avoid harm to others.”⁶⁰ This may apply differently depending on the context of the speech. For example, according to the Navajo belief system, sharing oral stories or traditions is limited by the time of year; there are certain times of the year in which oral stories are permitted to be shared, in other times, tribal members are prohibited from reciting them.⁶¹

In Navajo relationships, there are traditional requirements that have been memorialized in Navajo common law “mandat[ing] that controversies and arguments be resolved by ‘talking things out,’” which “allows each member of the group to cooperate and talk about how to resolve a problem.”⁶² To the Navajo, this makes a “disgruntled” party speak directly to their relative about the issue before taking the issue to “strangers” for a resolution.⁶³ Navajo traditions even place value and customs in other areas of Navajo life. For example, at work, if an “employee has a complaint about a supervisor, . . . [they] should first approach the supervisor and discuss the problem in a respectful manner.”⁶⁴ In fact, under Navajo common law and customs, an “employee should not seek to correct the person by summoning the coercive powers of a powerful person or entity, but should seek to correct the wrongful action by ‘talking things out.’”⁶⁵ Only until the employee has “talked things out” with their supervisor can an employee have access to a grievance process to address any further or looming issues that an employee may have with a supervisor.⁶⁶

Amongst the Mohave people, along the Colorado River valley in three states, Nevada, Arizona and California, there are cultural traditions about restricting and limiting speech when it comes to speaking the names of tribal members who have passed away.⁶⁷ There are strong cultural beliefs that prohibit saying the names of passed tribal members; however, there are no formal laws or constitutional restrictions on speech to acknowledge the custom.⁶⁸

On the Pine Ridge Reservation in South Dakota, the Oglala Sioux Tribal Council has put a requirement in place that all churches and missions must register with the tribe in order to visit the reservation.⁶⁹ One missionary was

⁶⁰ *Navajo Nation v. Crockett*, 7 Navajo Rptr. 237, 240 (Navajo, 1996); No. SC-CV-14-94, 1996 Navajo Sup. LEXIS 14, at *8 (Navajo Nov. 26, 1996).

⁶¹ See *Crockett*, 1996 Navajo Sup. LEXIS 14, at *9.

⁶² *Id.* at *9–10.

⁶³ *Id.* at *10.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Van Fleet, *supra* note 1.

⁶⁸ Cf. CONST. & BYLAWS OF THE COLO. RIVER INDIAN TRIBES, art. III, § 3.

⁶⁹ Lee Strubinger, *A Reservation in South Dakota Bans Outside Missionaries*, N.P.R., (Aug.

banned from the reservation after distributing a pamphlet to tribal members on the reservation denouncing Lakota spirituality that was shared across social media, stoking outrage in the community. Former President of the Oglala Sioux Tribe Kevin Killer stated that expelling that missionary and passing the subsequent law was necessary to “protect the community.”⁷⁰

C. *No Apparent Cultural Customs & Values: Restrictions and Limitations on Freedoms of Speech*

When tribal members want to file claims against tribal governments alleging violations on freedom of speech, they must first determine if the tribe has waived their sovereign immunity, and then, they must exhaust tribal court remedies before attempting to file action in federal court.⁷¹ If a tribal government cannot be sued because of sovereign immunity but tribal members feel their freedoms of speech have been violated, recourse may often be to submit a petition for redress to their tribal government—the same entity accused of violating their rights in the first place.⁷² Tribal members who air grievances or raise claims about their rights being violated by tribal authorities may then face retaliatory consequences.

For example, on the Cherokee Nation in Oklahoma, a 70-year-old woman was confronted by marshals and read her Miranda rights because of her involvement with an advocate group that spoke out against tribal corruption.⁷³ At the time, her son was running as a candidate in the tribal election for Chief but had been on the Cherokee Nation council for eight years prior.

In the Seminole Tribe in Florida, two tribal members faced disenrollment from the tribe after talking to a “watchdog news” organization located off the reservation about alleged corruption by the Tribe’s Chairman.⁷⁴ Another member who published an article in an off-reservation Native American newspaper also faced disenrollment for writing about corruption and abuse of power.⁷⁵ One of the tribal members published a story alleging possible nepotism regarding the Chairman’s son, days later they received a letter from the Chairman demanding they “cease and desist contacting off reservation media outlets for

15, 2022), <https://www.npr.org/2022/08/15/1117605626/a-reservation-in-south-dakota-bans-outside-missionaries> [https://perma.cc/8HLT-3XXT].

⁷⁰ *Id.*

⁷¹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59, 61 (1978) (“[S]uits against the tribe under . . . ICRA are barred by its sovereign immunity from suits.”). See also *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855–57 (1985) (holding that until the tribal court system is exhausted, it is “premature for a federal court to consider any relief”).

⁷² *Cf.* U.S. CONST. amend. I; with ICRA 25 U.S.C. §1302(a)(1).

⁷³ See Ray Carter, *Abuse of Tribal Police Alleged in Cherokee Nation*, OKLA. COUNCIL OF PUB. AFFS., (Aug. 30, 2021), <https://ocpathink.org/post/independent-journalism/abuse-of-tribal-police-alleged-in-choerokee-nation> [https://perma.cc/Q399-QMQN].

⁷⁴ See Dan Christensen, *Seminole Tribe Leaders Look to Expel Trio for Going to Media About Corruption*, FLA. BULLDOG, (Jan. 1, 2023), <https://www.floridabulldog.org/2023/01/seminole-tribe-leaders-look-expel-trio-for-going-media-about-corruption/> [https://perma.cc/8YVP-3XXS].

⁷⁵ *Id.*

the purposes of making any unsubstantiated and false allegations” and to “[b]e governed accordingly.”⁷⁶

On the Fort Berthold Indian Reservation in North Dakota, a tribal member working for the tribal newspaper as a publisher was fired after publishing an article critical of tribal leaders who had complained about her reporting on tribal budget management,⁷⁷ an issue which is usually controversial in tribal communities.⁷⁸

⁷⁶ *Id.*

⁷⁷ Henry Scott, *Impeding the Free Press for Native Americans Inside the Quest for Independent Journalism on Tribal Lands Across the Country*, ED. & PUBLISHER MAG., (Dec. 3, 2021), <https://www.editorandpublisher.com/stories/impeding-the-free-press-for-native-americans,210621> [<https://perma.cc/L4AF-B6TQ>].

⁷⁸ Growing up on the reservation, tribal politics were often discussed by my late grandmother, my father, and many relatives and friends of the family. Discussions were usually around the kitchen table, where criticisms about tribal officials’ budget and spending practices were exchanged, and where children were hardly seen and never heard. As an adult that has attended many tribal council meetings, tribal budget issues often incite the attending membership to question tribal officials at great lengths which brings constructive and not so constructive criticisms. Corruption plagues tribal governments, just as any other government, and just as any other citizen does, tribal members often talk about corruption that plagues their tribal government. Often, tribal members utilize media sources to report tribal corruption. See Sarah Motter, *Kickapoo Leadership Ousted After Failure to Adhere to Budget, Noncompliance*, 13 WIBW (Jun. 11, 2023), <https://www.wibw.com/2023/06/11/kickapoo-leadership-ousted-after-failure-adhere-budget-noncompliance/> [<https://perma.cc/W9KX-Y2AU>] (discussing membership demanding a vote for the removal of the tribal council for failure to follow the budget and other noncompliance issues); Associated Press, *Montana’s Crow Tribe Can’t Account for \$14.5 Million*, GREAT FALLS TRIB. (June 25, 2018), <https://www.greatfallstribune.com/story/news/2018/06/25/montana-crow-tribe-cant-account-14-5-million-corruption/733313002/> [<https://perma.cc/2WWL-ZJXY>]; WTKO Staff, *Former Tribal Council Member Sentenced for Fraud*, WTKO (Jun. 3, 2021), <https://www.wtok.com/2021/06/03/former-tribal-council-member-sentenced-for-fraud/> [<https://perma.cc/V4N3-TMMJ>] (discussing a former tribal council official being charged and convicted of defrauding the tribal government); WTKO Staff, *Former MBCI Tribal Council Member Sentenced to Prison*, WTKO (Oct. 18, 2021), <https://www.wtok.com/2021/10/18/former-mbci-tribal-council-member-sentenced-prison/> [<https://perma.cc/B8LQ-L6AR>] (discussing another former tribal council member being indicted for defrauding the tribal government); Sarah Childress, *Spirit Lake Nation Elders Vote to Oust Tribal Council*, FRONTLINE (Apr. 12, 2013), <https://www.pbs.org/wgbh/frontline/article/spirit-lake-nation-elders-vote-to-oust-tribal-council/> [<https://perma.cc/EHJ2-SJB3>] (discussing tribal elders voicing concern over allegations of corruption and ongoing reports of child abuse and neglect after a tribal council member went to a local news outlet revealing documents showing the alleged corruption); Asad Jung, *Former Mashpee Wampanoag Chairman Cedric Cromwell Sentenced to 3 Years in Prison*, CAPE COD TIMES (Nov. 16, 2022), <https://www.capecodtimes.com/story/news/2022/11/16/former-mashpee-wampanoag-chairman-cedric-cromwell-gets-3-years-in-prison/69647874007/> [<https://perma.cc/7CP4-5WPW>] (discussing a former Chairman of the Mashpee Wampanoag Tribe whose actions were labeled “textbook example of public corruption”); Sam Stanton, *Gold Country Casino Owners Claim Fraud, Sue Former Tribal Leaders Seeking \$38 Million*, SACRAMENTO BEE (Oct. 23, 2020), <https://www.sacbee.com/news/local/article246644198.html> [<https://perma.cc/MAY9-BM8U>] (discussing how numerous expenses were improper leading to fraudulent charges against the former chief financial officer and tribal administrator at the tribe’s casino); Marc Benjamin, *At Long Last, Chukchansi Casino Reopens on Thursday*, FRESNO BEE (Dec. 30, 2015), <https://www.fresnobee.com/news/local/article52385220.html> [<https://perma.cc/H3HM-2CDU>]

On the Pueblo of Jemez Nation located in New Mexico, the Governor⁷⁹ banned sales of a newspaper being sold on the reservation after the newspaper failed to exercise restraint from publishing what the tribal council called “appalling” and “gruesome” details surrounding a murder by one tribal member against another.⁸⁰ To the Governor, this lack of restraint was enough to show that the newspaper was out of touch with the community’s values.⁸¹ Furthermore, the Governor would not permit the newspaper to be sold again until “the newspaper [was] respectful toward the pueblo and the other communities.”⁸²

The Confederated Tribes of Grand Ronde in Oregon barred *Smoke Signals*, a newspaper covering tribal issues, from reporting on highly controversial decisions from the tribal council which disenrolled more than eighty members of the tribe. Disenrollment would ultimately deny them financial benefits ranging between \$3,500 and \$5,000 per year and health care coverage, as well as the many other benefits and protections of being an enrolled member of a tribe such as political participation.⁸³

On the Colorado River Indian Tribes reservation, in Arizona, a fellow tribal member—my good friend—Tim Stevens-Welsh— began a grassroots movement to inform and bring awareness to tribal council actions concealing details about water lease negotiations that were occurring with water agencies and state officials.⁸⁴ In tribal council meetings, where tribal members are granted constitutional rights to access, speak, and be informed about tribal council actions, tribal council members were misleading audience members that no such deals were happening.⁸⁵ Tim Stevens-Welsh submitted petitions to collect

(discussing a tribal casino shut down by tribal factions after casino and tribal officials failed to file audits for two years).

⁷⁹ *Government*, PUEBLO OF JEMEZ, <https://www.jemezpuablo.org/government/> [<https://perma.cc/3B4F-A2B8>], (“The Governor represents the Pueblo of Jemez as an official Head of State and serves as the head of the tribal government.”). The Pueblo Jemez tribe has very strict restrictions on media on the reservation. According to their website, “Tribal Code Sections 3-2-88 and 3-2-92, it is unlawful for any person to photograph, videotape, sketch or record the Pueblo village, shrines or religious sites, or any cultural dances or events performed within the plaza. Violators of these Sections will have their electronic devices/sketchbooks confiscated. Violators may be fined and/or face jail sentences, and have their equipment destroyed, as deemed appropriate by the Tribal Court or the Governor.” The website goes on to list “Rules of Etiquette” that should be observed when visiting their tribal lands. *Visitor Etiquette*, PUEBLO OF JEMEZ, <https://www.jemezpuablo.org/visit/visitor-etiquette/> [<https://perma.cc/WVA4-7475>].

⁸⁰ Scott, *supra* note 77.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Van Fleet, *supra* note 1; See also Tony Davis, *Colorado River Tribes’ Plan to Lease Water to Tucson Area on Hold After Recall*, ARIZ. DAILY STAR (May 12, 2018), https://tucson.com/news/local/colorado-river-tribes-plan-to-lease-water-to-tucson-area-is-on-hold-after-recall/article_be8232c8-dfec-59b7-82b1-8e7d7df54d13.html [<https://perma.cc/4W4N-KWBA>]. See Email from Chuck Cullom, Colo. River Programs Manager, Central Ariz. Water Conservation Dist., to Ted Cooke, General Manager, Central Ariz. Project, et al. (July 11, 2016) (on file) (summarizing the Chairman’s concerns from a recent meeting to conceal the deal from newspapers that are accessible to the reservation).

⁸⁵ *Id.* (because of the NDA they chose not to disclose to the membership). See COLO. RIVER

signatures to recall all nine CRIT tribal council members in an attempt to save the Colorado River from being leased off-reservation. In response, we began a Facebook page with the goal of sharing information we had obtained from a news reporter which showed that the Colorado River Indian Tribes were indeed in negotiations with different water agencies and state officials.⁸⁶ When we began to release the information, tribal council members, as well as their families and supporters, began immediate personal attacks in attempts to diminish the claims being made on the Facebook page. As one of the tribal members managing the Facebook page, I was physically attacked twice because of the information we were sharing on Facebook.⁸⁷ Both times, I was arrested and detained, but the attackers were not; this would lead to years of court hearings, conditional release orders and years of police and court scrutiny.⁸⁸ One of the attackers would repeatedly stand up during different court proceedings demanding that the authorities put a stop to the information being posted to social media. Ultimately, a tribal court staff member presented a Facebook post to the judge and claimed it was a violation of the Release Orders,⁸⁹ causing the judge to issue new release condition orders stating I was not to access social

INDIAN TRIBES CONST. art. IV § 10 (access to meetings). See *Colorado River Indian Tribes Regular Tribal Council Meeting*, (Oct. 2016). My friend Tim Stevens-Welsh, during this council meeting in 2016, about two years before the recall grassroots movement began, whispered to me to ask the Chairman if they were leasing the water (from the Colorado River) because he heard they were. I raised my hand and was called on. I asked if it was true that they were leasing the water. The Chairman *corrected* me and said that they were following the water, and then proceeded to explain the situation regarding Kudu Farms. See Email from Chuck Cullom, Colorado River Programs Manager, Central Arizona Water Conservation District, to Ted Cooke, General Manager, Central Arizona Project, *et al.* (July 11, 2016) (on file with author).

⁸⁶ See Amber Van Fleet, Facebook (Jan. 2018) to (Aug. 2018) (on file with author).

⁸⁷ See Amber Van Fleet, Facebook (Jan. 2018) to (Aug. 2018) (on file). See Amber Van Fleet, Facebook (May 22, 2018, 3:59 pm) (on file). Attacks occurred in response to local, nontribal police reports suspecting DUI's involving tribal council officials that were posted to the group's Facebook page. See Officer Maria Torres #501, Parker Police Department, Case No. 17-000439 (May 13, 2017), see Deputy D. Banuelos #528, La Paz County Sheriff's Department Investigate Narrative (Nov. 11, 2017), see Deputy D. Banuelos #528, La Paz County Sheriff's Department Investigate Narrative. In the different incidents, tribal officials were turned over to tribal police. These were posted to social media to show that the tribal council were not fit to hold their position, they were abusing their positions, and their character choices would continue to be detrimental to the tribe. Supporters of the ousted tribal officials retaliated with violence. See Officer T. Shannon, Colorado River Indian Tribes PD Incident Supplement Report, No. 2018-00005328 (Aug. 31, 2018) (on file) (showing the victim had issue with the content being posted to Facebook and admitted reacting aggressively).

⁸⁸ *Colorado River Indian Tribes v. Amber Van Fleet*, CR-AD-2018-0432 (2018); *Colorado River Indian Tribes v. Amber Van Fleet*, CR-AD-2018-0569 (2018).

⁸⁹ *Colorado River Indian Tribes v. Amber Van Fleet*, CR-AD-2018-0569, Minute Order (Sept. 7, 2018) ("Other: Clarification of Release Conditions" "Court found and ordered: Defendant is not allowed contact with victims or witnesses . . . directly, indirectly or third party through social media. May post about water issues and other matters. No mentioning victims or witness or commenting about this case during the duration of this case."). However, this was not the condition attached to the violation submitted to the court. [court-conditional release orders, Sept. 2018]

media for any purpose.⁹⁰ The restriction lasted for two years, after which point all the pending charges were dropped by the tribal judge.⁹¹ The tribe ultimately disclosed and passed a referendum to lease their allocated water.⁹²

The issue is widespread. Indeed, in a “2018 . . . survey [of] tribal media editors, reporters, and consumers . . . 46 percent of respondents said tribal media staffers had been subjected to intimidation and harassment when covering tribal affairs, with most of that coming from tribal elected leaders or senior officials.”⁹³

IV. TIMES HAVE CHANGED

A. *Advent of the Internet*

The fast paced development and growth of the internet, search engines, and social networking platforms, has changed the world we live in.⁹⁴ It is hard to conceptualize the idea that there are communities within the United States that still do not have access to broadband internet, but tribal communities are some of the largest demographics not connected to the internet through broadband lines.⁹⁵ Although access to the internet through hard lines is limited, many tribal members are connected to the internet through smartphones.⁹⁶ Also lacking on reservations are media sources available to provide an unbiased account of tribal government action.⁹⁷ Many times, media outlets on reservations are funded by the local tribal government, or tribal governments are contributing funding sources through advertisements, personal or business

⁹⁰ *Colorado River Indian Tribes v. Amber Van Fleet*, CR-AD-2020-0255, Complaint and Request for Summons (June 22, 2020) (“Elvira Aspa of the Colorado River Indian Tribes Tribal Court discovered” “Amber Van Fleet went on her social media account in violation of a court order in CR-AD-2018-0569.” She attached a screenshot of the Facebook post, Amber Van Fleet, Facebook (June 19, 2020). Pre-Trial Service Release Conditions, (July 13, 2020), (placed on “supervision of pretrial services while case was pending resulting in weekly check-ins with probation, no consumption of alcohol and drugs, subject to testing, confined to the reservation, and “no social media,” which was handwritten).

⁹¹ *Colorado River Indian Tribes v. Amber Van Fleet*, CR-AD-2018-0432, CR-AD-2018-0569, R-AD-2020-0255, Minute Entry and Order (Mar. 2, 2022) (“[I]n the interest of justice the Court shall dismiss the above captioned matters.”).

⁹² Colorado River Indian Tribes Water Resiliency Act of 2022, Pub. L. No. 117-343. *See also* Colorado River Indian Tribes, Referendum 2 (Jan. 19, 2019) (on file).

⁹³ Scott, *supra* note 77.

⁹⁴ *The Evolution of Social Media: How Did it Begin, and Where Could it Go Next?*, MARYVILLE UNIV. BLOG (May 28, 2020), <https://online.maryville.edu/blog/evolution-social-media/#back-to-top> [https://perma.cc/3SVG-ZFEW].

⁹⁵ *See* Emily S. Donnellan, *No Connection: The Issue of Internet on the Reservation*, 5 AM. INDIAN L.J.

346, 349 (2017) (63% of residents on tribal lands lacked access to fixed broadband, compared to 17% of the U.S. population).

⁹⁶ *Tribal Broadband Resources*, ARIZ. STATE UNIV. AM. INDIAN POL’Y INST. (Feb. 2, 2022), <https://aipi.asu.edu/tribal-broadband-old#:~:text=In%202019%2C%20the%20American%20Indian,be%20a%20barrier%20to%20access> (18% of tribal reservation residents have no internet access, while 33% rely on smartphones for internet access).

⁹⁷ Scott, *supra* note 77.

relationships, or other financial connections.⁹⁸ Having access to the internet means having access to social media; tribes and tribal members are beginning to share information on social media platforms, which have become contemporary “marketplaces” of information for tribal members on reservations.⁹⁹ For reservations that are in rural areas or cover large areas of land wherein tribal members’ homes may be miles away from their nearest neighbors, tribal administration offices, or town, social media allows tribal members to have easier access to information that affects them and their tribal community.¹⁰⁰

B. *Current State of Tribal Constitutions*

A review of different tribal constitutions from federally recognized tribes¹⁰¹ indicates that many have implemented a “copy-and-paste” version of ICRA’s freedom of speech and press provision,¹⁰² whereas some tribes have different freedoms exceeding mere speech, like freedom of conscience, speech, and the press.¹⁰³ Some tribes have even enacted provisions that guarantee the same constitutional rights enjoyed by citizens of the United States, and also proclaim freedoms of religion and speech.¹⁰⁴ Many of the constitutions have

⁹⁸ *Id.*

⁹⁹ See Donnellan, *supra* note 96, at 349.

¹⁰⁰ See *id.* at 352–56.

¹⁰¹ CONST. OF THE FORT McDOWELL YAVAPAI NATION art. VIII, § 1; CONST. OF THE HUALAPAI INDIAN TRIBE art. IX; TOHONO O’ODHAM NATION CONST. art. III, § 2; CONST. & BY-LAWS OF THE RENO-SPARKS INDIAN COLONY art. VII, § 1; CONST. & BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WIS. art. IX, § 2; NAVAJO NATION BILL OF RIGHTS 1 N.N.C. §§ 4; CONST. OF THE OGLALA SIOUX TRIBE PINE RIDGE INDIAN RESERVATION art. XII; CONST. OF THE CHEROKEE NATION 1999 art. III; and CONST. OF THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OR. art. III, § 3.

¹⁰² Fletcher, *supra* note 3, at 140 (citations omitted).

¹⁰³ CONST. OF THE LOWER SIOUX INDIAN COMMUNITY IN MINN. pmb.; POARCH BAND OF CREEK INDIANS TRIBAL CONST. art. III, § 2; CONST. OF THE WHITE MOUNTAIN APACHE TRIBE — FORT APACHE RESERVATION art. V; CONST. OF THE STANDING ROCK SIOUX TRIBE art. XI, § 1; CONST. & BY-LAWS OF THE FORT MOJAVE TRIBE OF THE FORT MOJAVE RESERVATION ARIZ., NEV., & CAL. art. VII.

¹⁰⁴ Revised CONST. & BYLAWS OF THE MINN. CHIPPEWA TRIBE, MINN., art. XIII (“no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law;”); CONST. & BY-LAWS OF THE SEMINOLE TRIBE OF FLA. art. V (“Tribal Council of the Seminole Tribe of Florida shall exercise the following powers, subject to any limitation imposed by the Constitution or the Statutes of the United States, and subject further to all expressed restriction upon such powers contained in this Constitution and Bylaws.”); CONST. & BYLAWS OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION art. V, § 2 (“exercise of the powers granted by this Constitution is subject to any limitations imposed by the statutes of the United States or by this Constitution and Bylaws.”); MUSCOGEE CONST. (Annotated), art. II, § 2 (“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.”); and CONST. & BYLAWS OF THE COLO. RIVER INDIAN TRIBES, Art. III, § 3 (“All rights secured to the citizens of the United States of America by the Federal or State Constitutions shall not be impaired or abridged by this constitution and bylaws. These rights include freedom of religion, speech, the press, assembly and petition . . . and such other rights as may be

not been amended for many years and have not been amended to express the rights pertaining to ICRA.¹⁰⁵ There are some that reflect tribal cultural custom and values.¹⁰⁶ However, it appears the majority may have little to no such reflection, and many do not have constitutional protections relating to freedom of speech at all.¹⁰⁷ Tribal law develops daily and, since federal courts will generally no longer hear civil rights claims brought under ICRA, only those brought under habeas corpus—which covers only criminal actions—focusing on modern tribal law relating to free speech is appropriate.¹⁰⁸ Tribal courts generally interpret provisions from ICRA in accordance with the principle “where no tribal ‘custom or tradition has been argued to be implicated . . . tribal courts will look to general U.S. constitutional principles, as articulated by federal and state courts, for guidance.’”¹⁰⁹ So when there are no textual indicators to the contrary, tribal courts will apply federal law to decide free speech claims without regard to tribal custom or values.¹¹⁰

C. Tribes Using Mixed Media and Freedom of Speech Rights to Promote Tribal Cultural Customs & Values

Tribal members have begun to utilize social media platforms to disseminate information on the reservation regarding actions taken or discussed by tribal governments. Tribal members that post and share tribal news, events, law and order or court enforcement actions, or tribal government actions suddenly find themselves as a source of information for other tribal members. Potential issues may arise around whether they are journalists, public figures, or individuals simply voicing their opinions on local issues, and what consequences, if any, would exist for disseminating such information, especially if the information being shared is not fully vetted, fact-checked, non-defamatory, or is from reliable sources.

Along the southern border of Arizona, the Tohono O’odham are invoking their “constitutional right to express themselves” by using the protections of the First Amendment and tribal rights to protest the border wall from being built on sites sacred to the tribe.¹¹¹ After release of footage of state “troopers fir[ing] tear gas, smoke canisters and rubber bullets” into a nonviolent demonstration

protected by effective legislation of the Congress of the United States of America.”).

¹⁰⁵ See sources cited *supra* notes 97, 99–100 and accompanying text. It is important to note those constitutions had no such amendments.

¹⁰⁶ CONST. & BY-LAWS OF THE HOPI TRIBE art. IX, art. II.

¹⁰⁷ Fletcher, *supra* note 3, at 140.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Alisa Reznick, ‘Falling on Deaf Ears’: Tohono O’odham Nation Reacts to Use of Force at Indigenous Protest, AZPM NEWS (Oct. 15, 2020), <https://news.azpm.org/p/news-splash/2020/10/15/182181-falling-on-deaf-ears-tohono-oodham-nation-reacts-after-border-protest-turns-violent/> [<https://perma.cc/3QRG-K2J7>] (“[A]round 30 demonstrators formed a blockade across a Border Patrol checkpoint . . . praying, singing and speaking against border wall construction.”). While tribal members are not afforded their First Amendment rights while on reservation land, for reasons explained within this paper, when tribal members are off the reservation, they are afforded the freedoms and liberties as any other U.S. Citizen.

that included tribal members, tribal people being shot in the chest at close range with rubber bullets, and “officers tackling a protester to the ground,” the Chairman went to media sources to condemn the incident, especially the use of tear gas, and said “this escalation was the latest example of tribal rights along the border being ignored.”¹¹²

The Apache in Arizona used peaceful protest, social media, and grassroots movements to draw attention to the desecration of their sacred lands, Oak Flat, by the mining industry.¹¹³ The attention from social media also brought more awareness and support from surrounding Native communities, which ultimately brought their issue to different newsprint and online news outlets.¹¹⁴

Tribal members from the Standing Rock Sioux Nation and other local tribes rallied support from Native communities across the nation using various forms of media.¹¹⁵ It was possibly one of the largest gatherings supporting a Native cause since the Battle of the Little Bighorn, known to many as “Custer’s Last Stand.”¹¹⁶ Tribal governments sent vans of tribal members to support the cause and efforts of Standing Rock.¹¹⁷ Native people, allies, and others made the trek on their own to oppose Energy Transfer Partners building a pipeline across sacred sites and a fresh water source.¹¹⁸ The pipeline threatened a primary source of drinking water for the tribal community.¹¹⁹ Native people gathered, erecting an encampment for several months.¹²⁰ The rally garnered social media outrage from Native people across the nation, after media sources, primarily

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Emma Ricketts, *The Fight for Oak Flat: Indigenous Voices in the Green Energy Transition*, NATIVE NEWS ONLINE (Aug. 4, 2023), <https://nativenewsonline.net/environment/the-fight-for-oak-flat-indigenous-voices-in-the-green-energy-transition> [<https://perma.cc/E8RK-S7KD>]. The grassroots efforts mentioned, Apache-Stronghold, has its own website where social media platforms Facebook, Twitter or X, and Tumblr are listed as available.

¹¹⁵ See *Native Nations Rally in Support of Standing Rock Sioux*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://icnews.org/archive/native-nations-rally-in-support-of-standing-rock-sioux> [<https://perma.cc/TZ3Z-KD7L>].

¹¹⁶ See Leah Donnell, *The Standing Rock Resistance Is Unprecedented (It’s Also Centuries Old)*, N.P.R. (Nov. 22, 2016), <https://www.npr.org/sections/codeswitch/2016/11/22/502068751/the-standing-rock-resistance-is-unprecedented-it-s-also-centuries-old> [<https://perma.cc/EKN5-BWSN>].

¹¹⁷ See John Gutekunst, *CRIT Council Sends Letter of Support to Tribe Opposing Pipeline*, PARKER PIONEER (Sept. 5, 2016), https://www.parkerpioneer.net/news/article_af9b6bd4-73dc-11e6-82b9-5f5de1a9658d.html [<https://perma.cc/4N37-M9BJ>] (my tribe sent a couple of vans). The flag representation at the encampment reflects the amount of support from tribal nations across the nation.

¹¹⁸ See Daniel A. Medina, *Dakota Pipeline Protests: President Obama Tells Tribes ‘You’re Making Your Voices Heard,’* NBC NEWS (Sept. 26, 2016), <https://www.nbcnews.com/storyline/akota-pipeline-protests/akota-pipeline-protests-president-obama-tells-tribes-you-re-making-n654726> [<https://perma.cc/64KL-DACN>].

¹¹⁹ *Id.*

¹²⁰ See Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/> [<https://perma.cc/U9J9-UY5Y>].

social media at first, began reporting and displaying scenes depicting police officials using pepper spray and water cannons against protesters.¹²¹

Mauna Kea¹²² in Hawaii is one of the world's most remote places and considered sacred to Native Hawaiians.¹²³ Its summit has been desecrated by thirteen of the most influential astronomical research facilities on the planet, and plans to construct more have attracted international attention to the impact scientific research activities have on Native people's sacred sites.¹²⁴ To Native Hawaiians, Mauna Kea, or *Mauna a Wākea*, is where their people originated and was the first-born mountain son of *Wākea* and *Papa*. Mauna Kea is the island-child, Hawai'i, that connects the land to the heavens through *piko*, the umbilical cord connecting the two.¹²⁵ Protests by Native Hawaiians gained worldwide traction after media sources published images of Hawaiian elders being arrested and carried away at these demonstrations.¹²⁶ This caught the attention of celebrities like Jason Momoa and Dwayne "The Rock" Johnson, who joined those in opposition of expanding the facilities atop the sacred mountain.¹²⁷ Whether the celebrity attention made a difference in the effort, there was change and impact to future builds on Mauna Kea.¹²⁸

More recently, tribal leaders protested President Trump's 2020 appearance at Mount Rushmore, located in the Black Hills of South Dakota—sacred lands to the Tribes of the Sioux Nation, among others. There, Trump had an elaborate firework display in conjunction with his Fourth of July celebration honoring U.S. presidents.¹²⁹ The National Park Service had not allowed fire-

¹²¹ See Merrit Kennedy, *More Than 1 Million 'Check In' on Facebook to Support the Standing Rock Sioux*, N.P.R. (Nov. 1, 2016), <https://www.npr.org/sections/the-two-way/2016/11/01/500268879/more-than-a-million-check-in-on-facebook-to-support-the-standing-rock-sioux> [<https://perma.cc/8GK5-Z8KV>].

¹²² Referred to as "Maunakea" by Native Hawaiians.

¹²³ See *Clashes Over Telescope at Sacred Hawaiian Site*, CBS NEWS (Apr. 3, 2015), <https://www.cbsnews.com/news/clash-over-telescope-at-sacred-hawaiian-site/> [<https://perma.cc/NC9E-YNMU>].

¹²⁴ See Audrey McAvoy, *Native Hawaiians Gain More Authority Over Future of Sacred Mountain, Astronomy Site*, PBS NEWSHOUR (Aug. 20, 2022), <https://www.pbs.org/newshour/nation/native-hawaiians-gain-more-authority-over-future-of-sacred-mountain-astronomy-site> [<https://perma.cc/FH2B-2Z9S>].

¹²⁵ See Cultural Res. Mgmt., *Maunakea in Hawaiian Culture*, UNIV. MAUNAKEA STEWARDSHIP (Mar. 19, 2024), <https://hilo.hawaii.edu/maunakea/culture/> [<https://perma.cc/5TNU-3FUZ>].

¹²⁶ See Mihir Zaveri, *Hawaiian Elders Protesting Telescope Construction Are Arrested*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/science/mauna-kea-protest.html> (Last accessed Dec. 27, 2024); Sarah Emerson & Becky Ferreira, *The Battle Over a Telescope on Hawaii's Sacred Mountain Is Just Beginning*, VICE (July 26, 2019), <https://www.vice.com/en/article/8xzzz3/the-battle-over-a-telescope-on-hawaiiis-sacred-mountain-is-just-beginning> [<https://perma.cc/734C-3XKY>].

¹²⁷ See Danielle Wallace, *Jason Momoa, Dwayne 'The Rock' Johnson Back Hawaii's Anti-Telescope Protesters*, FOX NEWS (Aug. 1, 2019), <https://www.foxnews.com/entertainment/jason-momoa-dwayne-the-rock-johnson-hawaii-mauna-kea-telescope-tmt-protest-sacred-land> [<https://perma.cc/CAZ7-S723>].

¹²⁸ McAvoy, *supra* note 125 (as a result of the protest "a new state law saying Mauna Kea must be protected for future generations").

¹²⁹ See Juliet Eilperin, Darryl Fears & Teo Armus, *Rocket's Red Glare and Protests: Trump's Mount Rushmore Fireworks Anger Tribes*, WASH. POST (July 2, 2022), <https://www.washingtonpost.com/news/energy-environment/wp/2022/07/02/trump-rushmore-fireworks-anger-tribes/>.

works in the area for more than a decade due to risk of wildfires and concerns about contamination to drinking water supplies.¹³⁰ The Black Hills play central role in the Sioux Nation's spiritual beliefs and there is longstanding controversy regarding rightful claims to the mountain.¹³¹ As with all American lands, the Black Hills was Native land first, used extensively by the Natives prior to European encroachment and "discovery." Tribal leaders, tribal people, and allies were met with police force—many were arrested, and others forced to move from their own tribal land, in order to allow the U.S. President access to recognized Native lands.¹³²

These are stark differences in how state officials respond to nontribal people advocating for nontribal causes, which is even more reason why tribal people should utilize social media platforms when exercising their First Amendment rights, as it allows others to see how nonviolent actions, often in rural areas, are met with violence and force by state officials. This is far from the treatment that nontribal protestors receive from state officials. There appears to be far more acceptance toward organizers using their First Amendment when they are nontribal issues involving nontribal members, compared to when tribal people and allies organize for tribal efforts when utilizing their First Amendment rights.

This is evident in cases like in *Snyder v. Phelps* where anti-LGBT+ picketers were issued permits and allowed to protest at funerals with messages of hate toward gay servicepersons in the military, often relying on media to report their efforts.¹³³ In *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, nontribal members organized to protest against tribal member inherit fishery rights, and when protesting would not only shout racial slurs toward tribal members but would also commit acts of violence toward tribal members trying to fish while nontribal police and nontribal state officials stood by watching.¹³⁴ Even recent events at Washing-

washingtonpost.com/climate-environment/2020/07/02/mount-rushmore-protest-sioux-trump/ (Last accessed Dec. 14, 2024).

¹³⁰ *Id.*; see Angela Kennecke, *Fireworks at Mt. Rushmore Contaminated Water Supply*, KELOLAND TV (July 4, 2019), <https://www.keloland.com/news/investigates/fireworks-at-mt-rushmore-contaminated-water-supply/> (Last accessed, Dec. 17, 2024).

¹³¹ See Eilperin et al., *supra* note 130.

¹³² See Levi Rickert, *American Indian Protesters Told to "Go Home" by Trump Supporters at Mount Rushmore*, NATIVE NEWS ONLINE (July 4, 2020), <https://nativenewsonline.net/currents/american-indian-protesters-told-to-go-home-by-trump-supporters-at-mount-rushmore> [<https://perma.cc/QH9S-TE8K>].

¹³³ See *Snyder v. Phelps*, 562 U.S. 443, 448–49, 457, 461 (2011) (church group traveled from Kansas to Maryland to picket a military funeral for a soldier killed in Iraq with signs that read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates F***," "You're Going to Hell," and "God Hates You" approximately 1,000 feet from the church under police supervision. Because the picketing took place on public property and the messages displayed speech on issues that are of interest to society, in a peaceful manner, in compliance with the *guidance* of local officials, the courts protected the speech under the First Amendment.) (emphasis added).

¹³⁴ See *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284, 1288 (W.D. Wis. 1994) (for-profit corporation whose purpose

ton, D.C., on January 6, commonly known as the January 6 Insurrection, First Amendment rights invoked on behalf of nontribal efforts seemed to prevail for nontribal members. Protestors were permitted to enter restricted areas of the U.S. Capitol, federal government property, where current U.S. Congress members were certifying the election. They were allowed to progressively encroach onto government property, causing severe damage before police officials began to act against the protests in a similarly violent manner as police acted toward tribal people at Standing Rock, the Black Hills, or Mauna Kea.¹³⁵ In *Bundy v. United States Dist. Court*, “[m]any of Bundy’s supporters were armed[,] . . . the BLM agents ultimately withdrew from the area[,] . . . and the incident attracted national, and even international, attention.”¹³⁶ But for tribal people or tribal causes, peaceful protests are often met with force and violence from state or security officials.¹³⁷ Media coverage helped the incidents mentioned throughout this paper—and others not mentioned here—gain national attention and awareness to tribal social issues, and it can also help bring change and impact to communities.¹³⁸

V. PROPOSAL TO TRIBES TO LIMIT AND PROTECT FIRST AMENDMENT RIGHTS IN PROVISIONS THAT SUIT TRIBAL CUSTOMS AND VALUES.

The internet has raised areas of concern for users and legislators across the board, regardless of tribal status or reservation lines. From content to access, the internet poses its own challenges and risks to tribal communities, but it is also a resource.¹³⁹ Tribal members on the reservation should have access to sources of information affecting them or their tribal communities through a range of independent media outlets and sources—just as U.S. citizens have

was to stop tribal members from exercising their off-reservation treaty rights to spear and net fish protested at boat ramps using high-powered motorboats creating wakes, rocking the boats preventing standing to spear, threw rocks or used sling shots at tribal members, blocked launch sites with their boats preventing tribal members from gaining access to fish; taunting, mocking and threatening tribal members and supporters, yelling racial and sexual insults like, “What do you use that spawn for, to douche?” “N***** are better than Indians” “Go home, timber n*****,” “welfare warriors,” “wagon burners,” and “Spear an Indian, save a walleye. Drown ‘em, drown ‘em” despite the presence of numerous law enforcement called in from across the state).

¹³⁵ See Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here are the Weapons Prosecutors Say They Used*, N.P.R. (Mar. 19, 2021), <https://www.npr.org/2021/03/19/977879589/yes-capitol-rioters-were-armed-here-are-the-weapons-prosecutors-say-they-used> [https://perma.cc/JD5Y-7CNL].

¹³⁶ *In re Bundy*, 840 F.3d 1034, 1036 (9th Cir. 2016).

¹³⁷ Compare *supra* notes 107–128 and accompanying text; with *supra* notes 129–33 and accompanying text.

¹³⁸ See Jenni Monet, *The Crisis in Covering Indian Country*, COLUM. JOURNALISM REV. (Mar. 29, 2019), <https://www.cjr.org/opinion/indigenous-journalism-erasure.php> [https://perma.cc/3HKS-YL3B].

¹³⁹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-106096, CONSUMER DATA: INCREASING USE POSES RISKS TO PRIVACY (2022); DOMESTIC POL’Y COUNCIL, THE WHITE HOUSE TRIBAL NATIONS SUMMIT PROGRESS REPORT 23–25 (2022) (various initiatives to address internet concerns, primarily around access).

access to U.S. government actions, media outlets, and sources.¹⁴⁰ Access to the internet allows tribal members to stay informed about their tribal government and carry out their duties as informed tribal members.¹⁴¹ The most widely recognized and utilized tool to propagate information is the internet.¹⁴² Tribes often post their laws and codes online so that the public may have greater access to them.¹⁴³ When tribal governments rely on the internet and ignore other ways to promote and enhance communities in decision-making, they run the risk of empowering one segment of the community while ignoring others.¹⁴⁴ However, access to the internet opens the gates to media sources which in turn allows tribal members to create their own media outlets, sharing information and experiences with other tribal members, tribal officials, and the outside world about their tribal government and conditions of everyday living on the reservation.¹⁴⁵

When tribal members begin to utilize different media sources to access or share information about their tribal governments, challenges for tribal members and tribal governments need to be addressed, including the spread of misinformation, defamation of a tribal member, propriety protected information, financials, and other restricted or prohibited information as it may relate to cultural rights or customs not intended to be shared with outsiders. Because each tribal nation is unique in their own culture and customs, tribal councils and tribal members should amend their constitutions to reflect restrictions tribal practices and customs may impose on rights or freedoms, including First Amendment rights, after reviewing and analyzing their current and pre-contact tribal customs and values, language and archives. Native people should also address the parallels between First Amendment rights and the first subsection of ICRA to compare how courts have ruled on First Amendment challenges and ensure that tribal communities share the same values as the courts and legislators did when they came to their findings on matters of free speech. When it is explained to tribal communities that their current constitution is a boilerplate constitution adopted under the Indian Reorganization Act (“IRA”) back in 1934,¹⁴⁶ and that the Bill of Rights does not apply to them on the reservation, it is likely that they may want to address the changes that are surely on the horizon for tribal communities as access to media and the internet increase, and tribal council actions against tribal members, or vice versa, become more egregious.

¹⁴⁰ See Donnellan, *supra* note 96, at 348–49.

¹⁴¹ See *id.* at 352–62.

¹⁴² *Id.* at 357.

¹⁴³ *Id.* at 359.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 356.

¹⁴⁶ See EagleWoman, *supra* note 10, at 343.

VI. CONCLUSION

Until tribes or tribal members, through referendum,¹⁴⁷ change their tribal constitutions, tribal judges will default to what they know best when faced with claims that freedom of speech or press have been violated—state and federal precedent. This is harmful to tribal communities because each one is unique, with its own tribal customs that have changed over time from pre-contact to modern contact and influences. By having to review their pre-contact customs, language, and archives, tribes might be able to revitalize lost or changing customs, memorializing them into their constitutions so that tribal customs once valued before being infiltrated by U.S. policy will be restored and honored in tribal constitutions for generations of tribal members to uphold.

¹⁴⁷ See *supra* notes 97, 99–100 and accompanying text. Almost all tribal constitutions reviewed were boilerplate constitutions from the IRA and had an article pertaining to Referendum, which requires approval of the Secretary of Interior and at least one-third of eligible voters to approve such modifications to tribal constitutions. Tribal membership should utilize Referendums sections of their constitutions to show unity and support for changes being proposed.