
TRIBES CAN PROHIBIT ABORTIONS IN INDIAN COUNTRY

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights

— *Worcester v. Georgia*¹

That articulation of retained sovereignty by Chief Justice Marshall later crystallized into the rule that the Bill of Rights does not apply to tribal governments.² As early as 1896, in *Talton v. Mayes*,³ the Court held that “as the powers of local self government enjoyed by the Cherokee [N]ation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution.”⁴ Congress filled this constitutional vacuum in 1968 by passing the Indian Civil Rights Act⁵ (ICRA), seeking to limit tribes’ power over their citizens.⁶ The statute applies to tribal nations provisions similar to those in the Bill of Rights, particularly those relating to the rights of criminal defendants in tribal courts.⁷

One of the most hotly contested rights under the Bill of Rights and the Fourteenth Amendment is the right to an abortion recognized in *Roe v. Wade*⁸ and its offspring, yet that central right to obtain an abortion without the state imposing an “undue burden” seems to remain good law.⁹ This Note asks whether tribal governments are similarly limited. They are not. This Note’s argument is that the right to abortion is inapplicable to tribal governments, and, therefore, that tribal governments may prohibit abortions performed or obtained by their citizens on their reservations. This conclusion follows from the well-settled black letter law that the rights in the Constitution do not apply to tribal governments and from the absence of any such right in the text of ICRA. Further, even if a court “creat[ed the] right”¹⁰ out of the text of ICRA,

¹ 31 U.S. (6 Pet.) 515, 559 (1832).

² *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

³ 163 U.S. 376.

⁴ *Id.* at 384.

⁵ 25 U.S.C. §§ 1301–1304.

⁶ *See id.*

⁷ Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1356, 1359 (1969) [hereinafter *Indian Bill of Rights*].

⁸ 410 U.S. 113, 153 (1973).

⁹ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020) (plurality opinion); *see also*, e.g., *id.* at 2148 (Thomas, J., dissenting).

¹⁰ *Id.* at 2148 (Thomas, J., dissenting) (alteration in original) (quoting *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 (2016) (Thomas, J., dissenting)).

Congress purposely limited the remedies available under ICRA and thereby allowed tribes to prohibit abortions as long as their prohibition would not give rise to a path for relief through a petition for habeas corpus.¹¹

Part I lays out the doctrinal background that establishes the rule that the Bill of Rights and the Fourteenth Amendment do not apply to tribal governments. Part II briefly revisits the right to abortion in American law. Part III focuses on the interpretation of ICRA. It establishes that a textual read of the provisions in that bill does not include a right to abortion applied against tribal governments, particularly because the provisions in ICRA must be read in accordance with their understanding at the moment of their enactment, which preceded the decision in *Roe*. It also considers a quasi-constitutional interpretation of ICRA in which the interpretations of the Bill of Rights and the Fourteenth Amendment developed *after the passage of ICRA* are superimposed onto ICRA. It argues this methodology is improper and that, even when implemented, it may still not provide the right to an abortion through ICRA. Part III also briefly discusses a third possible methodology — deference to tribal interpretations — that also preserves tribal authority to prohibit abortions. Part IV argues that the limited remedy provided by ICRA further confirms Congress’s intent to defer to tribal governments, and shows, as a practical matter, that tribes may prohibit abortions even if the substantive provisions of ICRA are improperly interpreted. Part V explores jurisdictional frameworks to show what a prohibition by a tribal government could look like.

I. CONSTITUTIONAL RIGHTS AND INDIAN TRIBES

The question whether the Constitution operated upon Indian tribes was raised in the early nineteenth century. In *Worcester*, Chief Justice Marshall held that Indian tribes were “distinct political communities, having territorial boundaries, within which their authority is exclusive.”¹² *Worcester*’s strong articulation of retained tribal sovereignty laid the foundation for future cases dealing with the relationship of Indian tribes to the United States, culminating in the Supreme Court’s conclusion in *Talton* that the Constitution does not apply to Indian tribes.

The first notable consideration of the Constitution as applied to Indian tribes came in *Ex parte Crow Dog*,¹³ where the Court held that tribal governments have exclusive jurisdiction over Indians committing

¹¹ See 25 U.S.C. § 1303.

¹² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

¹³ 109 U.S. 556 (1883).

crimes against Indians on reservations.¹⁴ Justice Matthews wrote for the Court that to exercise federal jurisdiction over such a case would “judge[] [Indians] by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions.”¹⁵ In reaction to that holding, Congress passed the Major Crimes Act¹⁶ in 1885, establishing federal jurisdiction to prosecute certain crimes committed by Indians in Indian Country.¹⁷ Even while upholding the constitutionality of the Major Crimes Act, the Supreme Court suggested that the rights in the Constitution did not apply to Indian tribes.¹⁸

About ten years later, the Supreme Court decisively settled the question when it heard a petition for a writ of habeas corpus by a citizen of the Cherokee Nation.¹⁹ Bob Talton had been convicted of murder in a Cherokee court and was being held in the Cherokee national jail in Tahlequah, then Indian Territory, now Oklahoma (and Indian Country).²⁰ Talton alleged his criminal trial was deficient under the U.S. Constitution because the grand jury did not meet the requirements of the Fifth Amendment.²¹ The question before the Court was whether “the Fifth Amendment to the Constitution appl[ies] to the local legislation of the Cherokee [N]ation.”²² The answer to that question was as clear to the Court then as it is now: the laws of the Cherokee Nation “are not operated upon by the Fifth Amendment.”²³

The Court has repeatedly reaffirmed this principle. It was first and perhaps most explicitly reaffirmed in *Oliphant v. Suquamish Indian Tribe*.²⁴ That case, usually seen as a severe blow to tribal sovereignty,²⁵ was explicit in reaffirming that the rights guaranteed in the Bill of

¹⁴ *Id.* at 571–72.

¹⁵ *Id.* at 571.

¹⁶ 18 U.S.C. § 1153.

¹⁷ *Id.*

¹⁸ See *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) (“They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; . . . as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.”).

¹⁹ *Talton v. Mayes*, 163 U.S. 376, 376–78 (1896).

²⁰ *Id.* at 377; see also *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (holding that the Muscogee (Creek) Nation’s reservation remained intact). It is likely all the Five Tribes, including the Cherokee Nation, have present-day reservations. See, e.g., CHEROKEE NATION, <https://cherokee.org> [<https://perma.cc/YH8V-GHZK>] (quoting Principal Chief Chuck Hoskin Jr. about the Cherokee Nation’s reservation boundaries now on Google Maps).

²¹ *Talton*, 163 U.S. at 379.

²² *Id.* at 382.

²³ *Id.* at 384.

²⁴ 435 U.S. 191 (1978).

²⁵ See *id.* at 211–12; see also, e.g., Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979) (criticizing the decision for limiting tribal sovereignty).

Rights do not apply to tribal governments.²⁶ There, Justice Rehnquist stated clearly: “In *Talton [v.] Mayes*, this Court held that the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments.”²⁷ That same year, the Court again reaffirmed the principle. In *United States v. Wheeler*,²⁸ the Court held that the Fifth Amendment’s Double Jeopardy Clause did not apply to a federal prosecution when the Navajo Nation had previously prosecuted the same person for a lesser included offense.²⁹ The Court reasoned that, since tribal sovereignty is not a product of the Constitution, successive prosecutions by tribal and federal governments do not violate the Double Jeopardy Clause.³⁰ Recently, the Court reaffirmed this dual sovereignty approach.³¹

A natural read of the text of the Fourteenth Amendment suggests that it too does not apply against tribal governments. In relevant part it reads: “No *State* shall . . . deprive any person of life, liberty, or property without due process of law”³² Scholars agree that the amendment does not apply to tribes, and no court has ever contradicted this point.³³

It is thus essentially undisputed that the Bill of Rights and Fourteenth Amendment do not apply to tribal governments.³⁴ While that could change, and it is possible that the precedents are wrong or

²⁶ *Oliphant*, 435 U.S. at 194 & n.3.

²⁷ *Id.* at 194 n.3 (citation omitted).

²⁸ 435 U.S. 313 (1978).

²⁹ *See id.* at 331–32.

³⁰ *Id.* at 322–23, 330.

³¹ *United States v. Lara*, 541 U.S. 193, 210 (2004). Even more recently, the Supreme Court has reaffirmed the principle that constitutional rights do not apply to tribal governments. *United States v. Bryant*, 136 S. Ct. 1954, 1958 (2016) (“[T]he Sixth Amendment does not apply to tribal-court proceedings.”).

³² U.S. CONST. amend. XIV, § 1 (emphasis added).

³³ *Developments in the Law — Indian Law*, 129 HARV. L. REV. 1652, 1715 (2016) [hereinafter *Developments in the Law*] (noting that, based on its text, the Fourteenth Amendment does not seem to apply to the tribes); *see also* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165 (2010) (recounting the history, text, and tradition of the Fourteenth Amendment and arguing that all support a reading that is consistent with distinct tribal sovereignty). For a case making the same argument, *see Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

³⁴ Exhaustive review of the literature turned up a single commenter who has argued that the Bill of Rights applies to tribal governments. *See* James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51 (1998). *But see id.* at 74 (agreeing that the Fourteenth Amendment does not apply to tribes). However, other commenters have explained why this position is wrong. *See, e.g.,* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 693 (2006).

perhaps wrong in regard to certain tribes,³⁵ this Note proceeds under the assumption that this proposition is good law.³⁶

II. THE RIGHT TO ABORTION IN AMERICAN LAW

To frame the rest of the discussion in this Note, it is necessary to recount briefly the doctrinal framework that undergirds the right to abortion. The right to abortion has its foundations in *Griswold v. Connecticut*,³⁷ decided in 1965.³⁸ Writing for the majority, Justice Douglas explained that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”³⁹ Those guarantees “create zones of privacy.”⁴⁰ The Court then went on to cite the amendments in the Bill of Rights that it believed led to that conclusion: the First Amendment’s right of association, the Third Amendment’s prohibition on quartering in the home, the Fourth Amendment’s right against unreasonable searches and seizures, the Fifth Amendment’s right against self-incrimination, and the Ninth Amendment’s reservation of rights to be retained by the people.⁴¹ Three concurring Justices emphasized “the relevance of [the Ninth] Amendment to the Court’s holding” that a right to privacy was “within the protected penumbra of specific guarantees of the Bill of Rights.”⁴² Justice Harlan, by contrast, would have based the decision

³⁵ See generally, e.g., Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (arguing that tribes are not all similarly situated and that our current federal Indian law jurisprudence and commentary fail to recognize that); see also *Bryant*, 136 S. Ct. at 1968 (Thomas, J., concurring) (“[B]y treating all tribes as possessing an identical quantum of sovereignty, the Court’s precedents have made it all but impossible to understand the ultimate source of each tribe’s sovereignty and whether it endures.”). While Justice Thomas has called for the Court to reexamine its inherent sovereignty jurisprudence, he is the only member of the Court to have done so. See *Bryant*, 136 S. Ct. at 1967 (Thomas, J., concurring); *Lara*, 541 U.S. at 226 (Thomas, J., concurring in the judgment).

³⁶ Some commentators have suggested that the federal courts could “incorporate” the rights in the Constitution to apply against Indian tribal governments as the courts have in the context of states. See Burton D. Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NAT. RES. J. 581, 600 (1966). But since no federal court has done or suggested this, such a discussion is outside the scope of this Note.

³⁷ 381 U.S. 479 (1965).

³⁸ See Robert C. Timmons, Cases Noted, *The Abortion Decision: Right of Privacy Extended*, *Roe v. Wade*, 93 S. Ct. 705 (1973), 27 U. MIAMI L. REV. 481, 483 (1973) (noting that “[t]he fountainhead upon which virtually all of the abortion cases have relied is *Griswold v. Connecticut*”); cf. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744 (1989) (“The Court first announced the new privacy doctrine . . . in *Griswold v. Connecticut*.”).

³⁹ *Griswold*, 381 U.S. at 484.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 487 (Goldberg, J., concurring). Justice Goldberg was joined by Chief Justice Warren and Justice Brennan. *Id.* at 486.

directly on the concept of liberty protected by the Due Process Clause of the Fourteenth Amendment.⁴³

Eight years later, the Court decided *Roe*. After discussing the right to privacy found in *Griswold*, the Court in *Roe* expanded its scope:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁴⁴

While *Roe* relied more heavily on the "liberty" of the Due Process Clause than had *Griswold*, it still invoked the specific provisions of the Bill of Rights, their penumbras, and the Ninth Amendment to support its holding.⁴⁵

Decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁶ the Court upheld the central premise of *Roe*.⁴⁷ It grounded its decision firmly in substantive due process⁴⁸ but continued to rely on both the Ninth Amendment and *Griswold* to support its reasoning.⁴⁹ The Court's most recent decision in the abortion context, *June Medical Services L.L.C. v. Russo*,⁵⁰ did not address the roots of the doctrine.⁵¹ As Justice Thomas noted in dissent, the line of cases that established the right to abortion began with *Griswold*,⁵² and the Court has never repudiated that lineage.⁵³

⁴³ *Id.* at 500 (Harlan, J., concurring in the judgment). Justice White also took this approach. *Id.* at 502 (White, J., concurring in the judgment).

⁴⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁴⁵ *See id.* at 152–53; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928 (1973) (explaining that in *Roe* "[t]he general right of privacy is inferred, as it was in *Griswold v. Connecticut*, from various provisions of the Bill of Rights manifesting a concern with privacy" (footnote omitted)).

⁴⁶ 505 U.S. 833 (1992).

⁴⁷ *See id.* at 848–53 (plurality opinion).

⁴⁸ *See id.* at 846.

⁴⁹ The plurality cited the Ninth Amendment to support the proposition that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Id.* at 848. *Casey* also recharacterized *Griswold* as a case about "the liberty guaranteed by the Due Process Clause." *See id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); *see also id.* at 849. And *Casey* maintained that "the abortion decision is of the same character as the decision to use contraception," which *Griswold* and its progeny protected. *Id.* at 852.

⁵⁰ 140 S. Ct. 2103 (2020).

⁵¹ *See id.*

⁵² *See id.* at 2149 (Thomas, J., dissenting).

⁵³ Many scholars have noted that the right in *Roe* is at least partly based on the right to privacy and the reasoning in *Griswold*, and this seems to be the dominant view. *See, e.g.*, Robin West, *From Choice to Reproductive Justice: De-constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1425 (2009) ("[T]he dominant narrative puts *Roe* in line with cases protecting sexual expression On the dominant understanding, *Roe* is on a string of beads with *Griswold* . . ."). But to complicate matters, some scholars think that the right is — or should be — located in the Fourteenth

III. ICRA DOES NOT LIMIT A TRIBE'S ABILITY TO PROHIBIT ABORTIONS

This Part addresses each of the three ways that ICRA could conceivably be interpreted. The first and most obvious approach reads the plain text of the statute to determine the meaning of the text at the time of enactment. The second, and more questionable, method adopts a quasi-constitutional approach that incorporates contemporary developments in constitutional interpretation into ICRA. The final approach applies a style of interpretation favored by some that defers to Indian tribes for interpretations of ICRA. All three of these approaches lead to the same conclusion: that ICRA does not limit the sovereign power of a tribe to prohibit abortions.

A. *The Text of ICRA*

Since the Bill of Rights and the Fourteenth Amendment do not apply to tribal governments,⁵⁴ if their authority to prohibit abortion is limited, it is limited by ICRA. However, the plain text of the rather detailed provisions of ICRA is devoid of any reference to the right to obtain an abortion.⁵⁵

ICRA is a statute⁵⁶ and, just like all other statutes, the starting presumption is that the words of the statute express its meaning.⁵⁷ Scholars have noted that the Supreme Court has become more textualist over the years, and some have argued that recently the Court has embraced textualism as the “only legitimate method for reading statutes.”⁵⁸ Notably, this textualist trend is particularly apparent in the Court’s recent cases on statutes dealing with congressional limitations on tribal sovereignty.⁵⁹

Amendment Equal Protection Clause. See, e.g., Kathryn Holmes Snedaker, *Reconsidering Roe v. Wade: Equal Protection Analysis as an Alternative Approach*, 17 N.M. L. REV. 115, 116 (1987).

⁵⁴ See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property without due process of law . . .” (emphasis added)); see also *Developments in the Law*, *supra* note 33, at 1715 (noting that the Fourteenth Amendment seems not to apply to the tribes).

⁵⁵ The fact that ICRA is detailed in its enumerations, as this section explains, is relevant to its interpretation as a statute. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012).

⁵⁶ 25 U.S.C. §§ 1301–1304.

⁵⁷ See *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says . . .”); *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”).

⁵⁸ E.g., Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 674 (2016); see also, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

⁵⁹ See *The Supreme Court, 2020 Term — Leading Cases*, 134 HARV. L. REV. 410, 605–07 (2020) [hereinafter *Leading Cases*] (recounting all the recent major Indian law cases in the Supreme Court and pointing out that the Court required a clear congressional statement to limit tribal sovereignty to any degree).

In light of this trend, this section of the Note will establish that when one “begins and ends with what the text [of ICRA] says and fairly implies,” the statute does not limit the authority of tribes to prohibit abortions.⁶⁰ Furthermore, while provisions of the Constitution that are similar to ICRA were later interpreted to provide more expansive rights not explicitly available in the text, those interpretations are irrelevant to interpreting the text of ICRA because the text is to be interpreted as it was understood *at the time of enactment*.⁶¹

The central part of ICRA, § 1302, enumerates what “[n]o Indian tribe in exercising powers of self-government shall” do.⁶² It has ten subsections purporting to limit what a tribe may do while exercising the powers of self-government, which are defined as “all governmental powers possessed by an Indian tribe, executive, legislative, and judicial.”⁶³ These provisions consist of close, but not precise, analogues of the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.⁶⁴ ICRA does not contain provisions resembling the Second, Third, Seventh, or Ninth Amendments.⁶⁵ The provisions relevant to the current analysis will be the Fourth, Fifth, and Fourteenth Amendment analogues and the lack of a Ninth Amendment analogue.

Since ICRA closely mirrors the text of the Constitution in several respects,⁶⁶ it is necessary to determine how that should inform textual analysis of the statute. The best way to deal with this is to follow standard principles of statutory interpretation. So, when a provision of ICRA directly mirrors a provision of the Constitution, interpretation of that ICRA provision should be guided by the prevailing understanding of the constitutional provision at the time of ICRA’s enactment.⁶⁷ By contrast, when ICRA departs from the language of the Constitution, it should be presumed that such a departure changed the meaning of that

⁶⁰ SCALIA & GARNER, *supra* note 55, at 16.

⁶¹ *Id.* at 33.

⁶² 25 U.S.C. § 1302(a).

⁶³ *Id.* § 1301(2).

⁶⁴ *See id.* § 1302.

⁶⁵ *Id.*

⁶⁶ It is also worth noting that, because the title of § 1302 is “[c]onstitutional rights,” Congress likely meant for these terms to mean something similar to what they meant in the constitutional sense. *See* SCALIA & GARNER, *supra* note 55, at 221–24.

⁶⁷ *See* Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) (“[I]f a word is obviously transplanted from another legal source . . . , it brings the old soil with it.” (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947))); *In re* Fed. Bureau of Prisons’ Execution Protocol Cases, 955 F.3d 106, 116–18 (D.C. Cir. 2020) (Katsas, J., concurring) (applying the “old soil” canon to the Federal Death Penalty Act of 1994); *see also* SCALIA & GARNER, *supra* note 55, at 322–26.

provision to something different from what the constitutional provision meant at the time.⁶⁸

Turning to the meaning of the text, ICRA does not incorporate *Griswold*. The right to privacy in *Griswold* is not based on overlapping constitutional guarantees, but on the “zone of privacy” created by the *interaction* of several constitutional guarantees.⁶⁹ This reading of the case is reinforced by the Court’s reliance on the Ninth Amendment, since “its relevancy to . . . showing a zone of privacy is not apparent”⁷⁰ unless the right of privacy recognized is not fully captured by the First, Third, Fourth, and Fifth Amendments.⁷¹ Since Congress altered the constitutional text significantly, removing any analogue to the Ninth Amendment, it should be presumed that Congress intended to protect particular rights, but not all the rights contained in or inferred from the Bill of Rights.⁷²

If Congress had wanted to add unenumerated rights like the one found in *Griswold*, it would have added a Ninth Amendment analogue. Instead, Congress did not include such a provision, and this omission has two important implications. First, ICRA should not be read to incorporate *Griswold* because Congress did not include all the provisions *Griswold* depended on. Second, the absence of the Ninth Amendment supports the application of the canon of *expressio unius est exclusio alterius* to ICRA. The canon applies when the things specified “can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved.”⁷³ ICRA is a detailed statute providing for the particular limitations placed on tribal governments. Since there is neither a Ninth Amendment analogue nor any other provision implying the inclusion of prohibitions not expressed in ICRA, the *expressio unius* canon helps to clarify that ICRA’s limitations on tribal governments are confined to those expressed in the statute. As a result, if there is a right to abortion in ICRA, it would need to be contained within a specific provision of the statute. We now turn to the specific provisions.

⁶⁸ See *Crawford v. Burke*, 195 U.S. 176, 190 (1904) (“[A] change in phraseology creates a presumption of a change in intent . . .”).

⁶⁹ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); see also *id.* at 494 (Goldberg, J., concurring) (“I agree fully . . . [that] the right of privacy . . . emanat[es] ‘from the totality of the constitutional scheme under which we live.’” (quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting))); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421 (1974) (“Justice Douglas’s argument [seems to be that] . . . since the Constitution, in various ‘specifics’ of the Bill of Rights and in their penumbra, protects rights which partake of privacy, it protects other aspects of privacy as well, indeed it recognizes a general, complete right of privacy.”).

⁷⁰ Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 243 (1965).

⁷¹ See *Griswold*, 381 U.S. at 487–91 (Goldberg, J., concurring).

⁷² See *Crawford*, 195 U.S. at 190.

⁷³ SCALIA & GARNER, *supra* note 55, at 107.

The First, Fourth, and Fifth Amendment analogues, read fairly in the context of 1968, do not limit a tribe's ability to prohibit abortion. As an initial matter, no Justice has ever suggested that any of these amendments *independently* gives rise to the right to abortion. While Congress modified the First Amendment in its ICRA analogue, it preserved the associational right.⁷⁴ That language should be read as it was understood at the time,⁷⁵ and one might therefore point to *NAACP v. Alabama ex rel. Patterson*⁷⁶ as evidence that the First Amendment alone contains some sort of generalized right to privacy.⁷⁷ However, such an interpretation of that case would ignore how the Court treated it in *Griswold*, where the Court noted the case created a "peripheral" associational right that, when put together with the other amendments, could form the privacy right in *Griswold*.⁷⁸ At least one commentator argues that the substantive due process right to privacy could be entirely grounded within the Fourth Amendment.⁷⁹ However, even if that were the case, the ICRA analogue would not contain such a general right to privacy. The contextual background to the Fourth Amendment analogue in 1968 was set one year prior by the Supreme Court in *Katz v. United States*.⁸⁰ That case squarely rejected such a proposition, holding that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"⁸¹

The last relevant provision for our purposes reads: a tribe shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."⁸² This language may be somewhat recognizable from the first section of the Fourteenth Amendment.⁸³ However, there are important

⁷⁴ 25 U.S.C. § 1302(a)(1).

⁷⁵ See *supra* p. 1484.

⁷⁶ 357 U.S. 449 (1958).

⁷⁷ See *id.* at 462 (noting the "vital relationship between freedom to associate and privacy in one's associations" and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

⁷⁸ See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); see also *id.* at 484; Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 515 (1989) ("Unlike *Griswold*, the concept of privacy invoked in *NAACP* pertained to privacy in its more common sense of 'confidentiality' or 'secrecy.'").

⁷⁹ See Mary Helen Wimberly, Note, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 306 (2007).

⁸⁰ 389 U.S. 347 (1967); see also *supra* p. 1484 (explaining that ICRA adopted this legal backdrop because Congress closely copied the Fourth Amendment).

⁸¹ *Katz*, 389 U.S. at 350. A search found no support for the idea that the Fifth Amendment would support a generalized right to privacy, so this Note presumes that such an argument would be unlikely.

⁸² 25 U.S.C. § 1302(a)(8).

⁸³ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

differences between the text of ICRA and the text of the Fourteenth Amendment that show that they had different meanings even in 1968. Importantly, ICRA does not use the same formulation as the Fourteenth Amendment in regard to the background laws it is referring to. ICRA prohibits a tribe from denying “equal protection of *its* laws,”⁸⁴ thus referring to the tribe’s own laws.⁸⁵ The Fourteenth Amendment’s formulation of “equal protection of the laws” seems to be referring to either the laws of the United States or a state’s laws.⁸⁶ This is not the first time it has been pointed out that the “laws” described in ICRA and in the Fourteenth Amendment are different, or that this particular statutory phrasing indicates a desire of Congress not to enforce the exact equal protection requirements of the Fourteenth Amendment.⁸⁷ The reason for this difference is likely that Congress was carefully trying to preserve tribal sovereignty in enacting this statute, and the inclusion of “its” and the general lack of specificity are a recognition that tribal legal and cultural traditions might have different conceptions of equal protection and due process.⁸⁸

So, that leaves us with the question: What is a fair reading of the words of this due process guarantee in the context in which it was passed? While the legal contents of the terms “due process” and “liberty” in 1968 might be subject to a wide variety of interpretations, only one matters for this Note: in 1968, the Due Process Clause was not understood to include a right to abortion. The Supreme Court did not decide *Roe* under substantive due process until four-and-a-half years after ICRA was passed.⁸⁹ This inclusion of the right to abortion within the

of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁸⁴ 25 U.S.C. § 1302(a)(8) (emphasis added).

⁸⁵ See *id.* § 1302(a) (“[n]o Indian tribe”).

⁸⁶ The phrase could be referring back to “No State shall make or enforce any law” U.S. CONST. amend. XIV, § 1.

⁸⁷ See Comment, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 HARV. L. REV. 627, 632 (1977) (“Congress chose to grant equal protection of the tribe’s laws in ICRA rather than of ‘the’ laws as in the [F]ourteenth [A]mendment.”); see also Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 484 (2000) (noting a misunderstanding that “the substantive content of due process and other rights does not vary between Indian country and American society in general” (footnote omitted)); cf. *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) (“[Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.”). Further, as Part II discusses, the right to abortion, doctrinally, is not located in the Equal Protection Clause, and it certainly was not thought to reside there in 1968. See *supra* pp. 1481–82.

⁸⁸ See Rosen, *supra* note 87, at 484.

⁸⁹ *Roe v. Wade*, 410 U.S. 113, 152–54 (1973).

due process liberty guarantee was not expected, and not entertained by a court or in scholarship until after ICRA was passed.⁹⁰ The first court in the country to mention anything other than vagueness to invalidate an abortion prohibition made its decision more than a year after ICRA was passed, and that decision still relied on vagueness for voiding the statute.⁹¹ Indeed, even the earliest scholarship tentatively suggesting there might be a constitutional right to abortion came after ICRA and did not suggest that the right was located in the Due Process Clause.⁹² So the due process protection in ICRA in 1968 could not have meant that tribes were limited in their ability to prohibit abortions because “[n]obody ever thought the Constitution prevented restrictions on abortion” before ICRA.⁹³

In conclusion, the statute’s text fairly read in its context does not limit tribal authority to prohibit abortion.

⁹⁰ See, e.g., Laurence H. Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973) (“[I]n *Roe v. Wade* . . . [the Court] carried [substantive due process] to lengths few observers had expected, imposing limits on permissible abortion legislation so severe that no abortion law in the United States remained valid.”). At this point it should be noted that some will point to the recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), for the proposition that statutes sometimes contain legal rules that have applications that would not have been expected at the time the statute was enacted. See *id.* at 1737. However, it would misapply the majority’s opinion in *Bostock* to argue that ICRA would somehow incorporate *Roe*’s later conception of substantive due process. Unlike in *Bostock*, to include a limitation on abortion restrictions within ICRA would necessarily *expand* the contents of the words “due process” and “liberty” in ICRA. This is for two reasons. First, the *Griswold* majority explicitly declined to locate the right to privacy in the Due Process Clause itself, see Bloom, *supra* note 78, at 517, and it would be ahistorical to give ICRA’s due process provision a meaning that the Supreme Court had not yet given its constitutional counterpart. Second, even if ICRA’s due process clause did incorporate *Griswold* (though it did not), there is still a strong argument that the right to privacy announced in *Griswold* did not yet include the right to an abortion. See Ely, *supra* note 45, at 930; see also Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 220 (1987) (“Beginning in 1972 . . . the Supreme Court dramatically departed from the reasoning of *Griswold* and rapidly expanded the ‘right to privacy.’”). In *Bostock*, the majority argued that the text of the statute always included the unexpected application, and it made no claim about expanding the meaning of the words enacted. See *Bostock*, 140 S. Ct. at 1750.

⁹¹ *People v. Belous*, 458 P.2d 194, 199–200 (Cal. 1969) (mentioning privacy and liberty rights in its void-for-vagueness analysis); see also Ricky L. Welborn, Comment, *Abortion Laws: A Constitutional Right to Abortion*, 49 N.C. L. REV. 487, 495 (1971).

⁹² See Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 8 (1969); Welborn, *supra* note 91, at 498, 502. Neither article attempted to define the contours of the right and both preferred legislative reform to judicial imposition. See Clark, *supra*, at 10–11.

⁹³ *Scalia: Abortion, Death Penalty “Easy” Cases*, CBS NEWS (Oct. 5, 2012, 5:14 AM), <https://www.cbsnews.com/news/scalia-abortion-death-penalty-easy-cases> [https://perma.cc/RT38-UWXY]. Although no court has ever found the right to abortion within the Equal Protection Clause, many scholars believe it could or should be located there. See, e.g., Snedaker, *supra* note 53, at 116. This sort of analysis under ICRA is problematic for the same reason as it was in the Due Process context. The first case striking down a law under the Equal Protection Clause based on gender discrimination came after ICRA was adopted. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

B. Importing the Constitution into ICRA

Some federal courts have imported the constitutional jurisprudence of the various amendments that are similar to provisions of ICRA into their interpretations of ICRA.⁹⁴ However, it should be noted at the outset that the courts taking this approach have done so only in the realm of criminal procedure, and they have not imported the contents of the Fourteenth Amendment's Equal Protection and Due Process Clauses into ICRA.⁹⁵ Since some scholars and jurists have suggested this approach, albeit in the limited fashion just noted, it is necessary to address how this theory would still not restrict tribes from prohibiting abortion under ICRA. This section describes the approach, establishes that it is improper, shows how the approach as it is currently practiced would not limit tribes' ability to prohibit abortion, and suggests that the foundation for using the approach to incorporate the abortion jurisprudence into ICRA is tenuous.

This style of interpreting ICRA seems to have two underlying policy justifications. The first is that it improves administrability of the law in the context of criminal proceedings conducted by Indian tribes. A court, by looking to its usual precedents in the Fourth Amendment, for instance, saves itself from having to independently develop a doctrine that applies to investigations and prosecutions by Indian tribes.⁹⁶ The other justification seems to be the same concern that animated the inception of ICRA, a desire for constitutional rights to be the same in Indian Country as anywhere else.⁹⁷

However, there are at least four reasons why this approach is improper. First, the meaning at the time of enactment is the only permissible meaning of a statute.⁹⁸ That is to say, as discussed in section A, later developments in constitutional interpretation are irrelevant to interpreting ICRA, which involves discerning what its provisions meant

⁹⁴ See, e.g., *United States v. Cooley*, 947 F.3d 1215, 1219 (9th Cir. 2020) (Berzon & Hurwitz, JJ., concurring in the denial of rehearing en banc) (importing Fourth Amendment law into an ICRA case); see also *Developments in the Law*, *supra* note 33, at 1716 (noting that courts have used "existing federal constitutional law" to interpret ICRA provisions).

⁹⁵ See *Developments in the Law*, *supra* note 33, at 1716 (noting a trend of deference to tribal court interpretations when the provisions concern due process and equal protection); see also Note, *Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act*, 1979 WASH. U. L.Q. 897, 912–18 (collecting and discussing at length cases that defer to tribal courts on substantive interpretations of ICRA).

⁹⁶ See, e.g., *Cooley*, 947 F.3d at 1219 (Berzon & Hurwitz, JJ., concurring in the denial of rehearing en banc) (looking to Fourth Amendment doctrine under the U.S. Constitution, much of which developed after ICRA's passage, to analyze claims under ICRA's Fourth Amendment analogue).

⁹⁷ See, e.g., *id.* at 1236–38 (Collins, J., dissenting from denial of rehearing en banc) (arguing vigorously that the law should be the same in Indian country as elsewhere). As this Note discusses, this concern may not have ended up being the purpose of the statute. See *infra* pp. 1490–91.

⁹⁸ See SCALIA & GARNER, *supra* note 55, at 84–85 (pointing out that a statute having "vague" terms is not an invitation to rewrite it later to conform to contemporary values).

in 1968.⁹⁹ Second, going beyond what the text meant at the time of enactment would disrupt the careful balance Congress struck between affirming tribal sovereignty and ensuring rights for Indians.¹⁰⁰

Third, to do so would contravene canons of construction used when interpreting statutes limiting tribal sovereignty.¹⁰¹ There are two relevant “Indian Canons,” and the first is that statutes are to “be liberally construed in favor of the Indians.”¹⁰² This interpretive canon means that statutes like ICRA “must be ‘construed generously in order to comport with . . . [Indian] sovereignty and with the federal policy of encouraging tribal independence.’”¹⁰³ It would be a particularly strong departure from this canon to interpret ICRA to limit tribal sovereignty to prohibit abortions because it would require a generous reading of ICRA that *disfavors* tribal interests. The second canon is that tribal sovereignty is “preserved unless Congress’s intent to the contrary is clear and unambiguous.”¹⁰⁴ Recent cases before the Supreme Court like *McGirt v. Oklahoma*¹⁰⁵ suggest support for such a requirement of a clear statement from Congress to limit any aspect of tribal sovereignty.¹⁰⁶ Here, as pointed out in section III.A, ICRA lacks any clear statement indicating that tribes are limited from prohibiting abortion.

Finally, the legislative history does not support such an approach.¹⁰⁷ ICRA, as it stands today, is the product of messy deliberations among Congress, tribes, and the Department of Interior. One scholar, who exhaustively analyzed the legislative history of the bill, describes the compromises made through the legislative process as a “change from an

⁹⁹ See *supra* p. 1484.

¹⁰⁰ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–66 (1978) (expressing “reluctan[ce] to disturb the balance between the dual statutory objectives which Congress apparently struck,” *id.* at 66, in ICRA: “protect[ing] tribal sovereignty from undue interference,” *id.* at 64, and “strengthening the position of individual tribal members vis-à-vis the tribe,” *id.* at 62).

¹⁰¹ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2019) [hereinafter COHEN]. For a recent reaffirmation of this principle, see *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020).

¹⁰² 1 COHEN, *supra* note 101, § 2.02.

¹⁰³ *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) (quoting *White Mountain Apache Tribe v. Braacker*, 448 U.S. 136, 144 (1980)).

¹⁰⁴ 1 COHEN, *supra* note 101, § 2.02.

¹⁰⁵ 140 S. Ct. 2452.

¹⁰⁶ See *Leading Cases*, *supra* note 59, at 605–07 (recounting all the recent major Indian law cases in the Supreme Court and pointing out that the Court required a clear congressional statement to limit tribal sovereignty in any sense).

¹⁰⁷ See 113 CONG. REC. 35,474 (1967) (statement of bill sponsor Sen. Ervin) (“The first title established the certain rights, giving the Indian citizen the basic rights and privileges in his relationship with his tribal government that every other American citizen *now* has in relationship with his State, local and Federal Governments.” (emphasis added)). This comment was on an earlier version when Congress still intended to impose the full set of constitutional limitations on tribal governments, and even in that more expansive form it was noted that the rights were to be those that existed at the time it was enacted.

approach of imposing on the tribes the constitutional limitations applicable to the federal government to an approach . . . of extending certain *specified* protections to members of the tribes as individuals.”¹⁰⁸ That scholar concluded that tribal concerns over limitations on their sovereignty led to a bill that “does not authorize the court to apply broadly such elusive and expanding concepts as due process [or] equal protection” upon tribal governments.¹⁰⁹ This conclusion followed from the fact that the original bill imposed, without modification, the constitutional legal system, with the goal of completely assimilating tribal governments into its workings.¹¹⁰ It read: “[A]ny Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution.”¹¹¹ In response to this bill, many tribes expressed extreme concern about their right to self-determination.¹¹² Over the course of seven years, the proposal was rejected for a much narrower bill that did not intend to impose the entire constitutional order, and specifically not the unenumerated jurisprudential ideas found in due process and equal protection, upon Indian tribes.¹¹³ So, the legislative history serves to confirm that the bill intended to leave such vague provisions for tribal determination,¹¹⁴ to confine its reaches to the specific enumerations, to continue abandoning the policy of forced westernization,¹¹⁵ and to avoid incorporating later judicial interpretations of constitutional rights not specifically enumerated.

While this interpretive method is improper, the way it is currently practiced would not limit a tribe’s ability to prohibit abortion. This is

¹⁰⁸ Donald L. Burnett, Jr., *An Historical Analysis of the 1968 “Indian Civil Rights” Act*, 9 HARV. J. ON LEGIS. 557, 617 (1972) (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 589. The only reason the Equal Protection Clause was omitted was to recognize that tribal laws could be aimed specifically at tribal members. *Id.*

¹¹¹ 110 CONG. REC. 17,329 (1964); *see also id.* at 17,327–29. Additional provisions included allowing for states to assume civil and criminal jurisdiction and oversight of all tribal actions. *Id.* at 17,327–29.

¹¹² Burnett, *supra* note 108, at 589.

¹¹³ *See id.* at 617, 621.

¹¹⁴ *See Developments in the Law, supra* note 33, at 1722; *see also id.* at 1716 (noting courts’ deference to tribes on equal protection and due process issues).

¹¹⁵ *See Indian Bill of Rights, supra* note 7, at 1351–53 (“While due process has come to have very definite meanings in the context of Anglo-American development of legal protections, application of these substantive standards . . . would infringe on what is asserted to be the tribal Indians’ right to differentness,” *id.* at 1352); *see also* *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter J., concurring) (“Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon . . . whether [the proceedings] offend those canons of decency and fairness which express the *notions of justice of English-speaking peoples . . .*” (emphasis added)); *cf.* 116 CONG. REC. 23,132 (1970) (statement of President Nixon) (“The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”).

because courts currently do not import later constitutional interpretations of the Equal Protection or Due Process Clauses into ICRA.¹¹⁶ The courts that have practiced such a method of interpretation have confined their importation of later constitutional developments to the context of criminal investigations and prosecutions.¹¹⁷ While this is still improper, it would be even more improper to do so in the equal protection and due process contexts due to all the reasons, and especially the legislative history, just discussed. It would also be an unjustifiable extension of an already improper method of interpretation to areas where it has not yet been applied.

Even if a court were to ignore all these reasons and charge ahead importing current constitutional doctrine into ICRA, the right to abortion, found through substantive due process, would still run into exceptional hurdles. Importing the idea that “liberty” is not a series of isolated points” but “a rational continuum”¹¹⁸ into ICRA would be inconsistent with both canons of interpretation applicable to Indian law and traditional canons of statutory interpretation. It would contravene the “Indian canons” because importing the right to abortion would limit tribal sovereignty without a clear expression from Congress.¹¹⁹ Further, because substantive due process is the mechanism by which most of the Bill of Rights has been incorporated, it is impossible to read substantive due process into ICRA without rendering parts of the statute superfluous¹²⁰ or contradictory.¹²¹ Congress’s choice to enforce specific amendments against tribal governments implicitly excludes substantive due process as a separate mechanism for limiting tribal authority. This is

¹¹⁶ See *Developments in the Law*, *supra* note 33, at 1716 (noting courts defer to tribes on equal protection and due process matters); see also, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 & n.14 (1978).

¹¹⁷ See, e.g., *United States v. Cooley*, 947 F.3d 1215, 1219 (9th Cir. 2020) (Berzon & Hurwitz, JJ., concurring in the denial of rehearing en banc) (importing Fourth Amendment law into an ICRA case).

¹¹⁸ *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

¹¹⁹ See *supra* p. 1490.

¹²⁰ The Fourth Amendment analogue would be rendered surplusage, contravening a principle of statutory interpretation, see SCALIA & GARNER, *supra* note 55, at 176, if ICRA’s due process provision incorporated substantive due process, cf. *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment through the Fourteenth Amendment Due Process Clause).

¹²¹ Prior to ICRA’s enactment, the Court held that the Sixth Amendment, as incorporated, gave indigent criminal defendants a right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25, 27, 37 (1972) (extending that right after ICRA). Congress, however, made another choice in ICRA: it guaranteed a criminal defendant access to counsel only “at his own expense.” 25 U.S.C. § 1302(a)(6). Thus, any attempt to incorporate the Court’s substantive due process into ICRA would either be selective — and thus incoherent — or would contradict the plain meaning of certain ICRA provisions. See SCALIA & GARNER, *supra* note 55, at 180 (arguing that giving statutes a harmonious reading is “more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves”).

doubly true for rights, like the right to abortion, that are not found in the text of the Constitution.¹²²

C. Deference to Tribal Governments

The final avenue of interpretation, deferring to tribal institutions — and especially tribal courts — to develop their own interpretation of the meaning of ICRA, would also allow space for tribes to interpret the statute as to not preclude them from prohibiting abortions. The approach has been suggested forcefully in a student-written piece in this *Review*, which argues that “[t]he best way to rebuild tribes’ legal systems and reinforce individual Indian rights is to allow them to run governments and rights jurisprudence of their own making within the framework provided by ICRA.”¹²³ There might be some support for this style of interpretation found in the legislative history discussed in the previous section. But the crux of the argument for this method of interpretation is twofold. First, a deference regime would promote tribal sovereignty. Deferring to tribal court interpretations of ICRA would fulfill the promise that tribes may “make their own laws and be ruled by them.”¹²⁴ The second is that, to a large extent, this is already what is happening, and it has proved to be a workable solution.¹²⁵

Thus, whatever interpretive approach is taken, ICRA does not contain a right to abortion.

IV. THE LIMITED HABEAS REVIEW OF ICRA

The ability for federal courts to review a claim under ICRA is limited to “[t]he privilege of the writ of habeas corpus.”¹²⁶ This section seeks to accomplish three tasks. First, it describes what the current scope of habeas review is in the ICRA context. Second, it shows how the limited grant of remedy should inform the narrow reading of the statute advanced in section III.A. And finally, it establishes that the limited grant of remedy shows that tribes may ban abortions as a practical matter.

¹²² In the 1960s, there was not much support for using substantive due process to find unenumerated rights, and that is why the *Griswold* majority explicitly rejected that framing. See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 70–71 (2006). So, it is unlikely that Congress intended ICRA’s due process analogue to incorporate that practice. Moreover, in *Casey* the plurality pointed to the Ninth Amendment to support the contention that the Fourteenth Amendment protects rights beyond those enumerated in the Bill of Rights. *Casey v. Planned Parenthood of Se. Pa.*, 505 U.S. 833, 848 (1992) (plurality opinion). But ICRA does not contain a Ninth Amendment analogue. Whatever license to protect unenumerated rights can be inferred from the Constitution, the text, structure, and history of ICRA preclude a similar inference, as this Note demonstrates.

¹²³ *Developments in the Law*, *supra* note 33, at 1709.

¹²⁴ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

¹²⁵ *Developments in the Law*, *supra* note 33, at 1723–24.

¹²⁶ 25 U.S.C. § 1303.

In *Santa Clara Pueblo v. Martinez*,¹²⁷ the Court heard a challenge from a female member of the Santa Clara Pueblo Tribe and her daughter.¹²⁸ The plaintiffs had brought an action for declaratory and injunctive relief against the Pueblo tribe because the tribe had an ordinance that denied tribal membership to female members' children when they married men who were not members of the tribe.¹²⁹ The plaintiffs claimed that this provision violated the equal protection provision of ICRA.¹³⁰ The Court began its analysis with the threshold issue that "ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief."¹³¹ Justice Marshall dismissed the claim against the tribe as barred by sovereign immunity because "[n]othing" in the "ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."¹³² He analyzed an accompanying claim against a tribal officer slightly differently due to the lack of sovereign immunity.¹³³ Instead, he analyzed whether such a private cause of action was "implicit" within ICRA.¹³⁴ He concluded that it was not and noted "Congress . . . provid[ed] only for habeas corpus relief."¹³⁵

Lower courts in the wake of *Santa Clara Pueblo* have, for the most part, declined to grant jurisdiction to review actions under ICRA outside actual detention. It is well established that if the tribe is actually detaining someone, there is habeas relief to challenge the physical detention under ICRA.¹³⁶ Habeas relief also seems to be available when there are both the specter of imminent detention and restrictive pretrial release measures imposed.¹³⁷ However, courts have declined to find jurisdiction under ICRA when there is no detention or imminently threatened detention.¹³⁸ That is also true when there is a fine being imposed, even if that fine is a criminal one.¹³⁹ It is less clear whether there is jurisdiction to hear a habeas petition when a tribe banishes a member

¹²⁷ 436 U.S. 49 (1978).

¹²⁸ *Id.* at 51.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 59.

¹³³ *See id.*

¹³⁴ *Id.* at 60.

¹³⁵ *Id.* at 66.

¹³⁶ *See, e.g.,* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 894 (2d Cir. 1996).

¹³⁷ *See* Means v. Navajo Nation, 432 F.3d 924, 928–29 (9th Cir. 2005) (assuming jurisdiction when a Navajo prosecution was proceeding through Navajo court and the defendant was subject to restrictive pretrial release measures).

¹³⁸ *See, e.g.,* Moore v. Nelson, 270 F.3d 789, 790–91 (9th Cir. 2001).

¹³⁹ *See id.*

from the reservation.¹⁴⁰ In all cases, courts agree that to receive habeas relief a petitioner must exhaust all tribal remedies available to him.¹⁴¹ However, recent cases in the lower courts seem to be reading the grant of jurisdiction even more narrowly. These cases suggest that the two requirements for jurisdiction are custody and an exhaustion of tribal remedies.¹⁴² Further, at least one court has squarely held denial of access to medical facilities does not constitute custody.¹⁴³

The limited grant of jurisdiction should be read to confirm the analysis in Part III that the substantive guarantees of ICRA need to be read narrowly. Interpretation of statutes should “consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”¹⁴⁴ A reading of ICRA therefore must consider that Congress chose to allow only the limited remedy of habeas. That limited grant has led some courts to interpret the substantive provisions of the statute narrowly.¹⁴⁵ Using the limited grant of remedy to further inform a narrow reading of the substantive provisions leads to coherence, especially because the inception of ICRA was prompted by concern over the rights of detained criminals on reservations, and the statute was crafted to defer to tribal sovereignty.¹⁴⁶

Interpretive questions aside, the implication of the limited jurisdictional grant in ICRA is that, even if one disagrees with everything said in Part III, a tribe could still prohibit abortions.

V. A TRIBAL PROHIBITION ON ABORTION

To briefly recount the ground covered thus far, the text of ICRA contains no plausible textual hook that could limit tribal authority to prohibit abortions. Furthermore, all other plausible ways of interpreting ICRA confirm that tribes can prohibit abortions. Finally, even if all of Part III is wrong, the only relief available from a prohibition on abortion would be habeas relief, which does not appear to be available unless the tribal citizen has exhausted all tribal remedies, is detained by the tribal government or the threat of detention is imminent, and other restrictions

¹⁴⁰ Compare *Poodry*, 85 F.3d at 897 (finding jurisdiction to hear the petition when a tribal member was banished), with *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1126–28 (D. Or. 1999) (finding the opposite).

¹⁴¹ See *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953–54 (9th Cir. 1998); see also *Moore*, 270 F.3d at 792 n.1.

¹⁴² See *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010).

¹⁴³ *Id.* at 918–19.

¹⁴⁴ SCALIA & GARNER, *supra* note 55, at 167.

¹⁴⁵ See *Poulson v. Tribal Ct. for the Ute Indian Tribe*, No. 2:12-CV-497, 2013 WL 1367045, at *1–2 (D. Utah Apr. 4, 2013) (discussing the limited grant of remedy as reason to not expand the scope of ICRA’s substantive provisions).

¹⁴⁶ *Indian Bill of Rights*, *supra* note 7, at 1356, 1359.

on liberty exist. This Note now turns to the consideration of what such a prohibition might look like in application.

A. Criminal Prohibition

Under this logic, a tribal government may criminalize abortions. However, that ability is restricted in certain ways by statute and common law. The Tribal Law and Order Act of 2010¹⁴⁷ limits what criminal penalties are available to tribal governments. The limit is three years per offense and tribes are allowed to “stack” a maximum of three offenses together in one prosecution, for a grand total of nine years in prison.¹⁴⁸ Under *Oliphant v. Suquamish Indian Tribe*, tribal courts “do not” have “criminal jurisdiction over non-Indians.”¹⁴⁹ So, while tribal governments do not have criminal jurisdiction over non-Indians, they have such jurisdiction over all Indians within “Indian Country.”¹⁵⁰

Thus, a tribe could criminalize performing abortions on its reservation by imposing a prison sentence of up to three years. This potential ban could be enforced against any Indian on the tribe’s reservation or within its dependent community.

Some tribes might not want to put providers of abortion in prison but would still want to criminalize abortion. They could impose criminal fines under the same jurisdictional scheme. Under the Tribal Law and Order Act, a tribe may impose a fine of up to \$15,000 per offense, as long as the trial conforms with all the procedural requirements in that Act.¹⁵¹ If this Note’s propositions are correct, such a fine would be unreviewable in federal court. As discussed, the only relief under ICRA is habeas relief in federal court. That habeas relief does not extend to a criminal fine, even if it carries the threat of detention when it is not paid.¹⁵²

B. Civil Regulations and Penalties

If a tribe does not want to prohibit abortion by criminalizing it, the tribe could exercise its civil regulatory authority to prohibit abortions

¹⁴⁷ Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 25 and 42 U.S.C.).

¹⁴⁸ 25 U.S.C. § 1302(a)(7).

¹⁴⁹ 435 U.S. 191, 195 (1978).

¹⁵⁰ This means that tribes and the federal government have exclusive jurisdiction over crimes committed by Indians against Indians, as well as victimless crimes committed by Indians within “Indian Country,” which includes reservations, fee land on reservations, dependent Indian communities, Indian allotments, and rights-of-ways through the reservations. 18 U.S.C. § 1151(a)–(c).

¹⁵¹ 25 U.S.C. § 1302(a)(7).

¹⁵² See *Moore v. Nelson*, 270 F.3d 789, 790–91 (9th Cir. 2001); see also *Dremann v. Francis*, 828 F.2d 6, 7 (9th Cir. 1987) (holding that when a criminal fine is imposed without provision for detention, and the detention is only a result of refusal to pay the fine, habeas relief is not available).

from being performed by their members. Unlike with criminal jurisdiction, tribes generally cannot exercise civil jurisdiction over nonmembers, including Indians who are not members of the tribe.¹⁵³

What such regulations could look like is open to imagination. For example, the civil regulations challenged in abortion cases before the Supreme Court since *Roe* could all be enacted by tribes. Admitting-privileges requirements,¹⁵⁴ age restrictions,¹⁵⁵ health and safety measures, and protections for unborn children whose hearts have begun to beat in the womb of their mothers¹⁵⁶ would all be opportunities for a tribe to pursue.¹⁵⁷

CONCLUSION

This Note has attempted to establish that tribal governments may to a large extent prohibit abortions from being performed on their reservations. The previous section lays out many possible options for how a tribe could prohibit abortion and the various penalties that they could attach to a violation of a law prohibiting abortions. The option that would be most resilient to challenges in federal court is criminalizing the act of an Indian performing an abortion on a reservation through a fine, because ICRA does not allow for habeas review of fines.

There is much to say about why a tribe may or may not want to prohibit abortions by Indians within their jurisdictions, a subject that this Note has so far left out. Since the debate over where human life begins and when it deserves protection is one of the most heated in political and moral thinking, there is significant literature on the topic. For

¹⁵³ *Montana v. United States*, 450 U.S. 544, 565 (1981). However, it has been suggested that the recent decision in *McGirt v. Oklahoma* might call into question the line of cases limiting civil regulatory authority over nonmembers on Indian reservations. See *Leading Cases*, *supra* note 59, at 607–09 (suggesting that *McGirt* might pave the way for more civil regulatory authority over nonmembers).

¹⁵⁴ See *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020) (plurality opinion) (declaring unconstitutional a provision that required doctors to have admitting privileges at a nearby hospital to be practicing abortionists in the state of Louisiana).

¹⁵⁵ Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (plurality opinion) (upholding a parental consent law that included a judicial bypass procedure).

¹⁵⁶ *Sistersong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1337, 1350 (N.D. Ga. 2019) (enjoining a civil regulation that would protect unborn children whose hearts had started beating from being aborted).

¹⁵⁷ This is as good a place as any to note that most Indians on reservations receive most of their healthcare from the Indian Health Service, which is subject to the Hyde Amendment. See KATI SCHINDLER, ANNA E. JACKSON & CHARON ASETOYER, NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT 4–6 (2002) (noting that the IHS seems to sometimes ignore the Hyde Amendment). However, there are private abortion facilities in Indian Country. See, e.g., TULSA WOMEN'S CLINIC, *Directions*, <http://tulsawomensclinic.com/directions> [<https://perma.cc/Z33S-7PNW>] (within the Muscogee (Creek) Reservation).

example, there are those like Professor Robert George who forcefully argue that life begins at conception, and an embryo is a “human person worthy of full moral respect,” and therefore abortions should be prohibited.¹⁵⁸ There are others like Professor Peter Singer who deny that the right to life applies to either embryos or infants, an argument that justifies abortions.¹⁵⁹ There are still others who see the issue in terms of equality for women.¹⁶⁰ This debate, however, is beyond the reach of a student Note. Here, it will suffice to point out that some tribes may want to act to protect unborn life, and others may not. The point is, as an expression of tribal sovereignty, they can. It is up to them.

¹⁵⁸ ROBERT P. GEORGE & CHRISTOPHER TOLLEFSON, *EMBRYO: A DEFENSE OF HUMAN LIFE* 2 (2d ed. 2011).

¹⁵⁹ PETER SINGER, *PRACTICAL ETHICS* 169 (2d ed. 1993).

¹⁶⁰ See, e.g., Katha Pollitt, *Gender Equality Is Not Possible Without Abortion*, *THE NATION* (Oct. 30, 2015), <https://www.thenation.com/article/archive/gender-equality-is-not-possible-without-abortion> [<https://perma.cc/ZU6C-UK2V>].