

## The Durability and Dynamism of American Indian Constitutional Reform

*Elizabeth H. Reese*

### 11.1 INTRODUCTION

There are hundreds of self-governing tribes in the United States. Not all are democracies. Not all have constitutions. But because of cultural and colonial forces, the constitutional democracy is undoubtedly the most common form of tribal government. The constitutional provisions that structure the democracies of American Indian tribes are not only strikingly different from one another, they are by in large far more in flux than the constitutions of United States federal and state governments that colonized them. Within their constitutional structures, tribes are trying out different representative structures, different qualifications for their elected leaders, different restrictions on the right to vote, different practices for voting, and granting different parts of their governments the power to oversee elections.

As this chapter will discuss, many tribes are dynamically remolding their constitutional structures. In doing so they are demonstrating what I suggest is a notably high tolerance for reform or failures that catalyze reform. Nowhere is this dynamism more on display than in the different ways that tribes now politically order themselves – in the reshaping and restructuring of their representative democratic institutions. The takeaway from this chapter is that these tribal governments are carefully experimenting with democracy and that they view the need for institutional change as a moment of *growth* rather than a *failure* in their practice of self-government. Reforms have become an almost natural – if not celebrated – part of perfecting their government structure.

Part of this story of different attitudes to constitutional change is undoubtedly tied to complex origins of many tribal constitutions as well as a humility about the role of law and institutions within the identity of a nation. The two tribes profiled in this chapter demonstrate how tribes have survived and avoided democratic crises – not by having *constitutional structures* that are durable but by having *constitutional cultures* that accept the need for change and value resilience.

## 11.2 UNINSPIRING CONSTITUTIONAL ORIGINS STORIES

With a few exceptions,<sup>1</sup> the hundreds of self-governance documents that are tribal constitutions began as post-contact creations, written under complex political circumstances often involving varying degrees of pressure, or even oversight from the United States. Most prominently, under the Indian Reorganization Act (IRA) of 1934, Indian tribes were encouraged to adopt, by majority vote, written constitutions that were generally reminiscent of the US federal constitution.<sup>2</sup> The IRA not only made it clear that adopting tribal constitutions was the clear policy preference of the United States but also created an incentive for tribal governments to adopt a constitution: power.

The IRA specified that: “In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments.”<sup>3</sup> While the right to retain counsel and negotiate with other governments were arguably rights that tribes already had or were exercising, the right to prevent the further sale of their lands without their consent loomed large against the backdrop of recent federal policies that resulted in the dramatic loss of tribal lands. Ultimately, 181 tribes accepted the IRA, while 77 rejected it.<sup>4</sup> Today, around 60 percent of the 574 federally recognized Indian tribes have a constitutional system with origins in the IRA.<sup>5</sup>

Some tribes who did not adopt IRA constitutions nevertheless adopted written constitutions as a result of efforts from within the tribe to transform their government systems. This, of course, did not happen in a vacuum. The pressures of American colonialism and norms of American democracy had a tremendous effect on tribal

<sup>1</sup> Most famously, the Iroquois Confederacy had a constitution, recorded in wampum, that predated the arrival of Europeans to the Americas. See Robert B. Porter, “Building a New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee,” *Buffalo Law Review* 46: 805, 814 (1998) (discussing the origins and history of the Iroquois or Haudenosaunee Constitution and contemporary prospects for reform.)

<sup>2</sup> Indian Reorganization Act of 1934, Pub. L. No. 73-383, 8 Stat. 984 (1934), Sec. 16; The Harvard Project on American Indian Economic Development, “Introduction,” in *The State of the Native Nations: Conditions Under U.S. Policies of Self-Determination*. Oxford University Press, 2008, 19. Following considerable scholarly debate, it is now generally accepted that there was no “model” constitution that the Bureau of Indian Affairs suggested tribes adopt, though several tribes did receive some kind of model document. Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act*. University of Nevada Press, 2000; David Wilkins, “Introduction,” to *On the Drafting of Tribal Constitutions* ed. Felix S. Cohen. University of Oklahoma Press, 2006.

<sup>3</sup> Indian Reorganization Act of 1934, Pub. L. No. 73-383, 8 Stat. 984 (1934), Sec. 16(e).

<sup>4</sup> Theodore H. Haas, “Ten Years of Tribal Government Under the I.R.A.,” Department of the Interior – United States Indian Service (1947), 3.

<sup>5</sup> National Congress of American Indians, “Tribal Nations and the United States: An Introduction” (2020), 22.

decision-making. Some tribes chose American-style constitutional democracies more out of a desire to win favor or approval from the United States than out of genuine admiration for the system or a belief that it was best suited to their project of self-governance. For that reason, even tribes that seemed to have independently chosen constitutional democracies often harbored seeds of structural instability or doubts about the suitability of their constitutions for their own people.<sup>6</sup> Many tribal governments' initial constitutions were not an accurate, or even workable, expression of a tribe's political culture or priorities.<sup>7</sup> That is why the wave of tribal constitutional reforms in the last fifty years is both expected and vital.<sup>8</sup>

Because of these initial circumstances surrounding the adoption of their written constitutions, constitutional reform has become a highly conscientious reckoning for tribes. A reckoning about their past, present, and future identity as Nations.<sup>9</sup> Many, if not most all of these tribes fit the description of postcolonial constitutionalism developed to describe the experience of many other newly independent nations in Africa and Asia who adopted nominal constitutions that largely reflected the constitutional order of their former colonizer and then entered into "a dialectical process involving an ongoing struggle between absorption and rejection of the former colonizer's" institutions, political culture, and identity.<sup>10</sup>

What the constitutional design and reform process of American Indian tribal governments brings to the fore, however, is just how important and transformative *the dialectical process itself* is for political communities who are struggling not only with their relationships to their colonial past (and present), but with their connections to their precolonial past and the character of their hopes for a postcolonial

<sup>6</sup> See Robert B. Porter, "Strengthening Tribal Sovereignty through Government Reform: What Are the Issues?," *Kansas Journal Law & Public Policy*: 72, 82 (Winter 1997) (describing such nations as autonomous constitutional governments).

<sup>7</sup> Harvard Project, "State of the Native Nations," 19–20 (contrasting several Apache nations who made IRA constitutions work with several Lakota tribes who continue to struggle with political instability).

<sup>8</sup> See also, Jason P. Hipp, "Rethinking, Rewriting: Tribal Constitutional Amendment and Reform," *Columbia Journal Race & Law* 4: 73, 81 (2013) (examining tribal constitution drafting as subnational constitutions drafted in the federal framework's shadow or responsive to it); Eric Lemont, "Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe," *American Indian Law Review* 26: 147, 148 (2002).

<sup>9</sup> See generally Eric D. Lemont, ed., *American Indian Constitutional Reform and the Rebuilding of Native Nations*. University of Texas Press, 2006; see also Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation*. University of North Carolina Press, 2012; Keith Richotte Jr., *Claiming Turtle Mountain's Constitution: The History, Legacy, and Future of a Tribal Nation's Founding Documents*. University of North Carolina Press, 2017; Gerald Vizenor and Jill Doerfler, *The White Earth Nation: Ratification of a Native Democratic Constitution*. University of Nebraska Press, 2012.

<sup>10</sup> Michael Rosenfeld, "Constitutional Identity," in *The Oxford Handbook of Comparative Constitutional Law* ed. Michael Rosenfeld and Andras Sajó. Oxford University Press, 2012, 765–766.

future. Telling a story of political and cultural *continuity* throughout all these changes is a vital part of what holds these nations together. There is no sense that tribes have *failed* as nations if they did not get it right the first time or need to revisit their constitutional structure. Tribal political identities and pride in their self-governance persist despite moments where it was clear that their current government structure was failing them. Instead, there is comfort with recognizing and accepting the need for change – a comfort that has made them remarkably resilient.

The source of this comfort is no mystery. It developed as a reaction to the number of forced changes that tribal governments have experienced already and will undoubtedly continue to experience going forward. Throughout all these changes, these tribes describe their nations as political survivors. These reforms are not simply questions of what form of political ordering can best safeguard rights or express the interests of the people but who the people are now compared to who they were and who they hope to become.<sup>11</sup> No matter what path they choose, the narrative of continuity and survival in the face of change is an animating part of the tribal constitutional reform process. Even when the underlying reforms are quite drastic and could be characterized as re-foundings, they are, importantly, not viewed as such.

### 11.3 STORIES OF REFORM

The remainder of this chapter showcases two examples of tribal constitutional reform concerning democratic rights and orderings and how the constitutional culture of continuity I described above got them through the democratic reform process, including constitutional crises provoked by factionalism. It presents how these tribes – the Cherokee Nation and the Citizen Potawatomi Nation – have remade the structure of their democratic institutions from the laws delineating citizenship, voting, and office holding to the configuration of their representative institutions themselves.<sup>12</sup> Specifically, it describes how both tribes pulled themselves out of periods of democratic crisis by reforming their constitutions.

<sup>11</sup> Joseph Kalt, “Constitutional Rule and the Effective Governance of Native Nations,” in *American Indian Constitutional Reform and the Rebuilding of Native Nations* ed. University of Texas Press, 2006, 185–219; Eric Lemont, “Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention,” *American Indian Law Review* 28: 1, 3 (2004) (describing how tribes are “engaged in a fundamental rethinking over how to balance entrenched, western institutions with often competing traditional, cultural and political values”); David E. Wilkins, “Sovereignty, Democracy, Constitution: An Introduction,” in *The White Earth Nation: Ratification of a Native Democratic Constitution* ed. Gerald Vizenor and Jill Doerfler. University of Nebraska Press, 2012, 8.

<sup>12</sup> One question that looms in the background of these reforms and their diversity or creativity is just how much tribal nations have been explicitly borrowing from other models, usually foreign ones, or coming up with solutions independently. While this is difficult to know for certain, Eric Lemont has suggested, and my experience largely confirms the intuition that “most

These two tribes have notable differences. While they are both presently located in Oklahoma, they are originally from very different parts of the United States and had quite different precolonial political cultures. They are very different sizes – Citizen Potawatomi has approximately 37,000 citizens,<sup>13</sup> while Cherokee Nation has 430,000 citizens.<sup>14</sup> Although both are constitutional democracies today, Cherokee Nation became one long before the IRA, while Citizen Potawatomi is an IRA tribe.

### 11.3.1 *Cherokee Nation*

The Cherokee originally occupied territory that extended across seven states in what is now the American South. After a series of treaties between the Cherokee and various southern colonies and, then, eventually, the United States, the tribe had lost a great deal of land but secured promises that their remaining lands and the sovereignty of their borders would be protected thereafter.<sup>15</sup> But the United States broke these treaty promises against the mounting pressure for land in the south and consistent attempts by the southern states to claim authority over Cherokee lands.<sup>16</sup>

Many of Cherokee Nation's leaders hoped that by adapting to American ways, they could bolster the legitimacy of Cherokee Nation's government and its land claims in the eyes of the United States – and maybe even prevent forced removal out west. The Cherokee developed a written form of the Cherokee language that was used to print a tribal newspaper, and in 1827, adopted a written constitution that established a republican form of government for the Cherokee.<sup>17</sup> But removal came despite these changes. Congress, at the urging of newly elected President Andrew Jackson, passed the Indian Removal Act of 1830, and the Cherokee signed the Treaty of New Echota, which relinquished all their original territory in exchange for lands in present-day Oklahoma.

The 1827 Cherokee Nation Constitution created a three-branch system of government with a legislature, executive, and judiciary.<sup>18</sup> The Cherokee legislature, known as the General Council, was composed of two separate bodies, a Committee and Council.<sup>19</sup> Two representatives to the Committee and three representatives to the Council, were each selected by the same eight districts of the Cherokee nation that

American Indian nations have traveled along their own roads of reform in a context of informational isolation." Lemont, "Overcoming the Politics of Reform," 4.

<sup>13</sup> "Tribal Rolls," Citizen Potawatomi Nation (2002), [www.potawatomi.org/government/tribal-rolls/](http://www.potawatomi.org/government/tribal-rolls/).

<sup>14</sup> "Home," Cherokee Nation of Oklahoma, [www.cherokee.org/](http://www.cherokee.org/).

<sup>15</sup> Ben O. Bridgers, "An Historical Analysis of the Legal Status of the North Carolina Cherokees," *North Carolina Law Review* 58: 1075, 1077–1078 (1980).

<sup>16</sup> *Ibid.* 1079–1082.

<sup>17</sup> *Ibid.* 1082.

<sup>18</sup> Cherokee Nation Constitution of 1827, art. II, sec. 1.

<sup>19</sup> *Ibid.* art. III, sec. 1.

sent delegates to the constitutional convention.<sup>20</sup> The General Council was given the power to select the executive branch leader, the Principal Chief,<sup>21</sup> and to make the laws governing Cherokee elections after the initial election of 1828, other than the requirement that elections be conducted via voice vote.<sup>22</sup> The right to vote was extended to all free male citizens over eighteen<sup>23</sup> and eligibility for General Council was further limited to those over twenty-five.<sup>24</sup> Eligibility for the office of Principal chief was limited to men over thirty-five, and – like the United States Constitution – who were natural born citizens.<sup>25</sup> Though the constitution did not have a Cherokee Nation residency requirement, it specified that citizens who move away from the Nation and “become citizens of any other government” would lose the rights and privileges of Cherokee citizenship unless they petitioned the General Council for readmission.<sup>26</sup>

After removal, the Cherokee Nation was reunited with the Western Cherokee who were already settled out west. The two governments passed a formal act of union<sup>27</sup> and held a new constitutional convention. The constitution ratified in 1839 was quite similar to the one that preceded it.<sup>28</sup> The legislature, now called the National Council, was tasked with dividing the new lands of Cherokee Nation into a new set of eight districts and given the power to add one or two more “if subsequently it should be deemed expedient.”<sup>29</sup> They also kept the practice of voice voting.<sup>30</sup> The largest change was to the method of selecting a Principal Chief. The office was now chosen by an at-large vote instead of by the National Council.<sup>31</sup>

The 1839 Constitution governed the Cherokee for about sixty years before the Curtis Act dissolved tribal governments in Indian Territory in 1907 as part of the preparation for transitioning the territory into the State of Oklahoma.<sup>32</sup> The tribe

<sup>20</sup> *Ibid.* preamble, art. III, sec. 2–3.

<sup>21</sup> *Ibid.* art. IV, sec. 1.

<sup>22</sup> *Ibid.* art. III, sec. 6.

<sup>23</sup> *Ibid.* art. III, sec. 7. The Constitution also acknowledged the rights and privileges of the Nation would extend to all descendants of Cherokee women, and those descendants of Cherokee men from a marriage recognized by Cherokee Nation – excluding those offspring that were mixed with Black or non-free persons. *Ibid.* art. III, sec. 4. There have been considerable disputes about the role of race in Cherokee citizenship, including the rights of former Cherokee Nation Slaves, known as the Freedmen. This includes their rights to citizenship, to vote, and hold political office. This issue – though certainly part of the story of Cherokee reform, particularly since it led to constitutional amendments in 2007, is simply too complex to cover in sufficient detail in this article. For this reason, the rights of Black Cherokees are set aside as beyond the scope of this chapter.

<sup>24</sup> *Ibid.* art. III, sec. 4.

<sup>25</sup> *Ibid.* art. IV, sec. 2.

<sup>26</sup> *Ibid.* art. I, sec. 2.

<sup>27</sup> Act of Union between the Eastern and Western Cherokees, July 12, 1838.

<sup>28</sup> Cherokee Nation Constitution of 1939, art. II, sec. 1; art. III, sec. 1, 3.

<sup>29</sup> *Ibid.* art. III, sec. 2.

<sup>30</sup> *Ibid.* art. III, sec. 7.

<sup>31</sup> *Ibid.* art. IV, sec. 1.

<sup>32</sup> Curtis Act, ch. 517, 30 Stat. 495 (1907).

elected a Chief for the first time since the Curtis Act in 1971, and his first order of business was for the Cherokee Nation to draft a new Constitution<sup>33</sup> for the reconstituted nation that would grow from a mostly defunct entity that funneled resources to members, into robust government once again.<sup>34</sup>

The Cherokee Constitution of 1975 enacted substantial changes to the political arrangements of Cherokee Nation. These changes reflected the vastly changed political circumstances of the Nation, and a very different relationship to the United States than the one the Nation had in the nineteenth century. It did away with the bicameral legislature, instead providing for a single Council composed of fifteen council members who were all elected at-large.<sup>35</sup> This constitution also included the first membership definition, limiting Cherokee citizenship to those persons with ties to the Dawes Commission rolls.<sup>36</sup> The 1975 constitution lowered the age requirement for Principal Chief to thirty and a Cherokee “by blood” requirement was added to the qualifications for both Council and Principal Chief.<sup>37</sup> Voice voting was also eliminated, and secret balloting was adopted instead.<sup>38</sup>

The Council retained the power to regulate elections,<sup>39</sup> however, the most notable change to democratic governance was the inclusion of an entirely new article dedicated to popular referendums, initiatives, and amendments. The people now retained the power to enact referendums, legislation, and constitutional amendments by majority vote and to independently place them on the ballot after obtaining the signatures of 5, 10, or 15 percent of registered Cherokee voters – calculated based on the “total number of votes cast at the last general election for the officer receiving the highest number of votes at such election” – respectively.<sup>40</sup> The constitution specified careful rules for the inclusion and presentation of measures in a popular election, ensuring that overlapping subject matters or measures included on one ballot could not confuse voters.<sup>41</sup> Crucially, the people also retained the exclusive power to call for a constitutional convention and the

<sup>33</sup> Will Chavez, “1839 Cherokee Constitution born from Act of Union,” *Cherokee Phoenix* (August 26, 2014), [www.cherokeephox.org/news/1839-chokeee-constitution-born-from-act-of-union/article\\_5621e3f8-f65c-5990-8af2-c889b21boabc.html](http://www.cherokeephox.org/news/1839-chokeee-constitution-born-from-act-of-union/article_5621e3f8-f65c-5990-8af2-c889b21boabc.html).

<sup>34</sup> Lemont, “Overcoming the Politics of Reform,” 9–10.

<sup>35</sup> According to Chief Swimmer, a bicameral legislature was too “unwieldy” and ill-suited for some of the quick needs to respond and disperse federal funding. *Ibid.* at 9 (citing Ross Swimmer, former Principal Chief, Cherokee Nation of Oklahoma, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with Eric Lemont).

<sup>36</sup> Cherokee Nation Constitution of 1975, art. III, sec. 1–2.

<sup>37</sup> *Ibid.* art. VI, sec. 2; art. IX, sec. 2.

<sup>38</sup> *Ibid.* art. IX, sec. 3.

<sup>39</sup> *Ibid.* art. IX, sec. 3.

<sup>40</sup> *Ibid.* art. XV, sec. 1–3.

<sup>41</sup> *Ibid.* art. XV, sec. 6–8.

possibility of a constitutional convention was required to be submitted to the people at least once every twenty years.<sup>42</sup>

An unconventional change was a few instances of self-imposed subordination to the US federal government. The 1975 Constitution adopted US Constitutional supremacy, stating that “the Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.”<sup>43</sup> Moreover, the 1975 Constitution required that all constitutional amendments be approved by the president of the United States before they could take effect.<sup>44</sup>

After the passage of this new constitution, a series of amendments and Cherokee tribal court cases further tweaked or clarified the Nation’s democratic structure. In 1987, the people amended the constitution via referendum to do away with at-large voting for the Tribal Council and return to the old system of representation by legislative districts. The Tribal Council was directed to “establish representative districts which shall be within the historical boundaries of the Cherokee Nation of Oklahoma” that were to be “apportioned to afford a reasonably equal division of tribal membership among the districts.”<sup>45</sup> Some voters were taken aback by the Council’s decision to require citizens to register in their new districts for the 1995 election and initially challenged the Council’s power to institute such a requirement under its new constitutional authority.<sup>46</sup> The Nation’s Judicial Appeals Tribunal upheld the Council’s actions as a valid exercise of their newly specified powers.<sup>47</sup>

The Cherokee Courts also upheld legislation implementing district-specific residency requirements on Cherokee political candidates as contained within the Council’s power to create districts rather than exceeding its power by creating another affirmative qualification for office not otherwise specified in the constitution.<sup>48</sup> Councilmen also brought a lawsuit challenging the Council’s decision to pass a law delaying the reapportionment that was necessary after 1994 until 2002 and successfully struck down the district maps that would have been in place in 1999. Council was ordered to draw new maps reapportioned to reflect a

<sup>42</sup> Ibid. art. XV, sec. 9.

<sup>43</sup> Ibid. art. IX, sec 1.

<sup>44</sup> Ibid. art. XV, sec. 10.

<sup>45</sup> Ibid. art. V, sec. 3. (amended by Referendum on June 20, 1987, pursuant to Cherokee Nation Council Resolution No. 9-87).

<sup>46</sup> *Pfichett v. Cherokee Nation & Election Commission*, No. JAT 95-6 (Cherokee Nation Judicial Appeals Tribunal, July 24, 1995).

<sup>47</sup> Ibid.

<sup>48</sup> *Terrell v. Cherokee Nation Election Commission*, No. JAT-99-03, 1999 WL 33589130, at \*3 (Cherokee January 27, 1999).



constitutional right to equal representation contained within the 1987 constitutional amendments.<sup>49</sup>

During this period of judicial volleys and reform, however, the Cherokee Nation suffered through a widely publicized constitutional crisis.<sup>50</sup> In the 1995 general election, none of the candidates for Principal Chief received a majority of the votes, and so a runoff was scheduled between the top two candidates, George Bearpaw (38 percent) and Joe Byrd (29 percent).<sup>51</sup> However, ten days before the runoff, two petitions were filed in Cherokee Courts claiming that Bearpaw was ineligible to serve as Principal Chief since he had an Oklahoma felony conviction from twenty years prior.<sup>52</sup> The Tribal Election Commission disqualified Bearpaw and effectively handed the office to Byrd after setting aside all votes Bearpaw received in the runoff.<sup>53</sup> Based on this initial election conflict, battle lines were drawn, distrust was deeply ingrained, and a long shadow was cast over Byrd's administration.

Once he took office, Byrd's political opponents accused him of financial misconduct. Rather than cooperating with the investigators, Byrd delayed turning over documents, forcing the Cherokee Courts to order a search of his office. Byrd responded by first firing all the Cherokee marshals involved in the search and then – once he had been charged with obstruction of justice – leaning on his supporters on Tribal Council to impeach all three members of the Judicial Appeals Tribunal.<sup>54</sup> The marshals and justices kept showing up to work until Byrd sent officers to confiscate the marshals weapons and close down the courthouse. The tribal prosecutor who protested the shutdown was arrested for resisting and then Byrd fired the tribe's other prosecutor – leaving the courthouse entirely empty as of August 1997.<sup>55</sup> Outraged, the minority of the Tribal Council who opposed Byrd's actions started boycotting Council meetings in April 1998, denying them a quorum to conduct business for over a year until the courts were reopened.<sup>56</sup>

What saved the nation from this political crisis was an unlikely provision of their constitution and a decision that predated the crisis. In the same 1995 general election that led to the Bearpaw–Byrd runoff, the question of a constitutional convention was on the ballot, as article XV, section 9 of the constitution requires

<sup>49</sup> *Lay v. Cherokee Nation*, No. JAT-97-05, 1998 WL 34067267 (Cherokee December 9, 1998) (striking down Cherokee Legislative Act 7–97, Section 4(C), (D) codified as 26 CNCA Section 4(C), (D), as unconstitutional under Cherokee Nation Constitution of 1975, art. V, sec 3).

<sup>50</sup> Lemont, "Developing Effective Processes," 157.

<sup>51</sup> *In Re: Contest of Joe Byrd as Announced Elected Candidate for Principal Chief v. Joe Byrd (or Chad Smith v. Joe Byrd)*, No. JAT-95-09 (Cherokee Nation J. App. Tribunal, August 25, 1995), slip op at 5 n.1.

<sup>52</sup> Lois Romano, "A Nation Divided," *Washington Post* (July 17, 1997), [www.washingtonpost.com/archive/lifestyle/1997/07/17/a-nation-divided/209aae32-9fc5-459f-8897-00328a9e7b64/](http://www.washingtonpost.com/archive/lifestyle/1997/07/17/a-nation-divided/209aae32-9fc5-459f-8897-00328a9e7b64/).

<sup>53</sup> *In Re: Contest of Joe Byrd as Announced Elected Candidate for Principal Chief v. Joe Byrd (or Chad Smith v. Joe Byrd)*, No. JAT-95-09 (Cherokee Nation J. App. Tribunal, August 25, 1995).

<sup>54</sup> Romano, "A Nation Divided."

<sup>55</sup> *Ibid.*

<sup>56</sup> Lemont, "Overcoming the Politics of Reform," 11.

must happen at least once every twenty years.<sup>57</sup> The Cherokee people had voted overwhelmingly for a constitutional convention, and after languishing for several years as a lower priority for the tribal council, the opportunity for reform coincided with the political crisis.

After consulting with outside experts on how to avoid letting the divisions take over the reform process, the Rules Committee decided to create a commission that would be composed of two representatives appointed from each branch and a seventh member chosen collectively by the first six.<sup>58</sup> Byrd loyalists would control the executive appointments, and the judiciary was staunchly anti-Byrd after his attempts to oust them. With the Tribal Council splitting their two members between Byrd and anti-Byrd factions that divided the body, the selection process ensured that the commission would be evenly divided. To further give credibility to the commission, the commissioners agreed to hold open meetings, took an oath of political neutrality, to act only upon unanimity, and to promise not to hold political offices in the new government. The Council attempted to limit the commission's authority to an advisory role for the Council, but the commission successfully preserved its independence by threatening to walk away entirely.<sup>59</sup> The commission's enabling legislation thus made it an entirely "independent commission" with the authority to put either a new constitution or set of amendments directly on the ballot.<sup>60</sup>

The commissioners set about their work, holding twenty meetings across Cherokee nation and in major US cities where a large number of Cherokee citizens lived.<sup>61</sup> The commission cataloged suggestions for reform by topic and frequency, accepted written testimony, and ultimately created an eight-hundred-page record of testimony from Cherokee citizens.<sup>62</sup>

The next task was selecting delegates for the convention. The commission decided on seventy-nine delegates composed of the seven commissioners, eight delegates each selected by the current branches of government, twenty-four delegates selected from a pool of those citizens who testified at the hearings, and twenty-four chosen by lottery from a pool of citizens who had either submitted a written request to serve as a delegate or had given oral or written testimony.<sup>63</sup> The constitutional convention was called to order on February 26, 1999. After nine days

<sup>57</sup> Cherokee Nation Constitution of 1975, art. XV, sec. 9.

<sup>58</sup> Lemont, "Overcoming the Politics of Reform," 12–13.

<sup>59</sup> *Ibid.* 14.

<sup>60</sup> Act Creating a Constitution Convention Commission § 4A, Legislative Act No. 10-98 (Cherokee Nation May 15, 1998).

<sup>61</sup> D. Jay Hannah, "The 1999 Constitution Convention of the Cherokee Nation," 35 *Arizona State Law Journal* 35: 1, 7 (2003).

<sup>62</sup> *Ibid.* 7–8.

<sup>63</sup> *Ibid.* 8.

of deliberation – the records of which capture around three-thousand pages of discussion – a new constitution was adopted by the convention on March 6, 1999.<sup>64</sup>

The new constitution, notably, created term limits for both the executive and legislative officers,<sup>65</sup> as well as staggered terms for the appointed judiciary to avoid court-stacking.<sup>66</sup> It also addressed the removal problems that had so quickly escalated in the recent political crisis. The Tribal Council kept its power to remove all elected and appointed officials, but this power was now limited to specific for cause failings such as willful neglect or a felony, requiring a two-thirds majority vote for removal and only after a trial before the Tribal Council that afforded the accused officials due process.<sup>67</sup> The judiciary, moreover, was given an additional removal protection in the creation of a Court of the Judiciary – made-up of seven persons using the same appointment process as the constitutional commissioners – that had the power to recommend removal of judicial officers.<sup>68</sup> On top of all of these new removal protections, the people were given the power to separately recall any elected official.<sup>69</sup>

To address the reality that 40 percent of Cherokee Nation citizens now lived outside the boundaries of the reservation, the 1999 Constitution created two new Council seats,<sup>70</sup> which would be chosen at-large by the off-reservation members of Cherokee Nation.<sup>71</sup> A separate election commission was also created to independently administer elections.<sup>72</sup> Finally, the 1999 Constitution removed the incorporation of the United States Constitution and the requirement that the president approve any amendments to the Constitution.

This last change, however, put the Nation in a bit of a legal bind. Article XV, Section 10 of the 1975 Constitution plainly required that no amendment or new Constitution shall become effective without the approval of the president of the United States or his authorized representative. The draft 1999 constitution had been submitted to the BIA, but the Nation spent years in an elaborate and, at times, contentious back and forth over its approval. At one point the Nation sought more limited approval for simply an amendment removing the presidential approval requirement. Talks eventually broke down in 2002, leading the Nation to give up and set elections for removing BIA oversight on May 24, 2003, and then the new

<sup>64</sup> *Ibid.* 11–12.

<sup>65</sup> Cherokee Nation Constitution, art. VI, sec. 3; art. VII, sec. 1.

<sup>66</sup> *Ibid.* art. VIII, sec. 3.

<sup>67</sup> *Ibid.* art. VIII, sec. 8; art. XI, sec. 1–3.

<sup>68</sup> *Ibid.* art. VIII, sec. 5.

<sup>69</sup> *Ibid.* art. VIII, sec. 8; art. XI, sec. 4.

<sup>70</sup> Lemont, “Developing Effective Processes,” 163–164.

<sup>71</sup> Cherokee Nation Constitution, art. VI, sec. 3.

<sup>72</sup> *Ibid.* art. IX, sec. 1–2.

constitution on July 26, 2003.<sup>73</sup> The 1999 Cherokee Constitution passed – narrowly – via popular vote on July 26, 2003.<sup>74</sup>

Though the constitutionality of the new constitution's adoption without presidential consent was challenged, the Nation's Supreme Court ultimately held that the people had the "inherent sovereign power" to "remove the self-imposed requirement" of presidential approval,<sup>75</sup> and thus, "the 1999 Constitution of the Cherokee Nation became effective on July 26, 2003."<sup>76</sup>

Per the requirements of the 1999 Constitution, the Council has been tasked with drawing and redrawing the fifteen legislative districts. On one occasion, their map was struck down by the Cherokee Courts since the districts deviated by 22.8 percent from equal representation.<sup>77</sup> On another occasion, the districts were upheld when they came close to 10 percent deviation, as the court acknowledged both deference to the Council where possible and that the 10 percent rule was persuasive guidance.<sup>78</sup>

Since 2003, the Nation has continued to have disputes over elections, but none have resulted in a similar crisis. In perhaps one of the best tests of the new Constitution's institutions, history closely repeated itself, but the nation avoided the political turmoil and crisis that followed the Byrd–Bearpaw crisis. In 2019, just days before the election, the Cherokee Nation Supreme Court upheld the Election Commission's decision, just a few weeks previously, to disqualify one of the leading candidates for Principal Chief for accepting illegal campaign contributions.<sup>79</sup> The candidate, councilmen David Walkingstick, had run a divisive campaign that criticized the Nation's ties to the Democratic Party<sup>80</sup> and though he claimed the election was "stolen,"<sup>81</sup> nothing else came of it. And more recently, in the 2021 election, a candidate for Tribal Council was disqualified by the Election Commission for accepting improper campaign contributions but did not contest the election even though he lost by only seven votes.<sup>82</sup> The Nation even survived a

<sup>73</sup> Hannah, "The 1999 Constitution Convention," 13–19.

<sup>74</sup> *In re Status & Implementation of 1999 Constitution of Cherokee Nation*, 65 American Tribal Law 63, 65 No. JAT 05-04, 2006 WL 5940407 (Cherokee Nation Sup. Ct, June 7, 2006).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* 67

<sup>77</sup> *Cowan-Watts v. Smith*, 10 American Tribal Law 297, 299 (Cherokee Nation Sup. Ct., November 18, 2010).

<sup>78</sup> *Anglen v. Council of the Cherokee Nation*, 12 American Tribal Law 140, 142 (2013).

<sup>79</sup> *In Re: the Protest of Chelsea Huber to Disqualify David Walkingstick as a candidate for Principal Chief*, No. SC-2019-07 (Cherokee Nation Sup. Ct., May 29, 2019).

<sup>80</sup> Graham Lee Brewer, "The Cherokee Nation's Next Chief Will Have a Big Footprint in Indian Country," *High Country News* (May 29, 2019), [www.hcn.org/articles/tribal-affairs-the-chokeee-nations-next-chief-will-have-a-big-footprint-in-indian-country](http://www.hcn.org/articles/tribal-affairs-the-chokeee-nations-next-chief-will-have-a-big-footprint-in-indian-country).

<sup>81</sup> "A 'Stolen' Election? Cherokee Nation Proceeds to Vote without Candidate David Walkingstick," *Indianz.com* (May 19, 2019), [www.indianz.com/News/2019/05/29/a-stolen-election-chokeee-nation-procee.asp](http://www.indianz.com/News/2019/05/29/a-stolen-election-chokeee-nation-procee.asp).

<sup>82</sup> Joe Tomlinson, "Cherokee Nation Election Concludes with Disqualified Candidate, Failed Legal Challenge," *Nondoc* (August 10, 2021), <https://nondoc.com/2021/08/10/chokeee-nation-election-concludes/>.

Bush–Gore style election in 2011, where the election was so close that the winner changed several times in various recounts<sup>83</sup> and so the Supreme Court threw out the election and ordered a new one after deciding that it would be “impossible to determine the results with mathematical certainty.”<sup>84</sup>

Through all of these election showdowns that tested the current formulation of Cherokee Nation’s institutions, they have held strong. And the legacy of Cherokee Nationhood remains one of change, continuity, and resilience all the way back to their original constitution. As their current Principal Chief, Chuck Hoskin, describes: “As the U.S. was growing around the Cherokee Nation . . . we changed how we governed ourselves . . . We developed a written constitution. We elected a chief. We centralized in strength and our government so we could deal with what was happening around us.”<sup>85</sup>

### 11.3.2 *Citizen Potawatomi Nation of Oklahoma*

The people who currently make up the Citizen Potawatomi Nation were once part of a confederation of tribes that included the Anishinaabe Nations of the Potawatomi, Ojibwe, and Odawa that originally controlled a large territory in the Great Lakes region of the United States.<sup>86</sup> However, by the late eighteenth century, white settlers and US treaties had eroded the Confederacy’s land base such that the United States was able to forcibly remove the three Nations.<sup>87</sup> In 1838, the Potawatomi were removed by the US military on what is called the “Trail of Death” from northern Indiana to Kansas.<sup>88</sup> In 1861, the Potawatomi in Kansas were offered a treaty that would require them to surrender tribal membership in exchange for US citizenship and private land ownership in Oklahoma.<sup>89</sup> Those who took the deal and moved to Oklahoma are now the Indians who make up the Citizen Potawatomi.

The Citizen Potawatomi’s original 1938 constitution was based on the Oklahoma Indian Welfare Act<sup>90</sup> model – an Oklahoma-specific IRA. It left all major decisions

<sup>83</sup> Will Chavez, “2011 Chief’s Race Tumultuous, 2015 Election Decided Quickly,” *Cherokee Phoenix* (May 16, 2019), [www.cherokeephoenix.org/news/2011-chiefs-race-tumultuous-2015-election-decided-quickly/article\\_5a12bde0-3316-5efd-baaf-832552e6bb03.html](http://www.cherokeephoenix.org/news/2011-chiefs-race-tumultuous-2015-election-decided-quickly/article_5a12bde0-3316-5efd-baaf-832552e6bb03.html).

<sup>84</sup> *In the Matter of the 2011 General Election*, No. SC-11-06 (Cherokee Nation Sup. Ct., July 2, 2011).

<sup>85</sup> “Cherokee Nation Chief Speaks on Tribal History at OSU,” *Oklahoma State University News* (February 3, 2020), <https://news.okstate.edu/articles/communications/2020/chokeee-nation-chief-speaks-on-tribal-history-at-osu.html>.

<sup>86</sup> “Culture,” Citizen Potawatomi Nation, [www.potawatomi.org/culture/](http://www.potawatomi.org/culture/).

<sup>87</sup> *Ibid.*

<sup>88</sup> “Native History: Potawatomi Removed at Gunpoint, Trail of Death Begins,” *Indian Country Today* (September 4, 2014).

<sup>89</sup> “The Treaty of 1861 Is CPN Origin Story,” Citizen Potawatomi Nation, (November 16, 2016), [www.potawatomi.org/the-treaty-of-1861-is-cpn-origin-story/](http://www.potawatomi.org/the-treaty-of-1861-is-cpn-origin-story/).

<sup>90</sup> 25 USC. §§ 501–509.

up to a “Council,” which was composed of all members over the age of twenty-one who attended a meeting on the last Thursday in June.<sup>91</sup> The meetings were chaotic and unproductive, and so in 1985 the tribe passed a constitutional amendment that redefined its supreme governing body as the entire voting electorate allowed for referendums by ballot. This reform allowed absentee voters to participate for the first time, a vital change given the diaspora of their population.<sup>92</sup>

In 1930, the vast majority of Indian people continued to live in rural reservation communities, with barely 10 percent of the total Native population living in urban areas.<sup>93</sup> However, as a result of federal relocation policies<sup>94</sup> and high rates of Native military service in World War II, by 1980 nearly half the population of Native people lived in urban areas.<sup>95</sup> The Citizen Potawatomi were no exception to this phenomenon. The Dust Bowl in the 1930s also contributed to their citizens moving away from Oklahoma, such that by the 2000s, two-thirds of the Citizen Potawatomi Nation’s citizens moved far from the tribe’s lands in Oklahoma and lived throughout the rest of the United States.<sup>96</sup> By this time, the tribe had politically stabilized and was experiencing rapid economic growth.<sup>97</sup> However, the Nation struggled with low voter turnout – especially from absentee voters – and a general sense of “apathy” about the nation’s government.<sup>98</sup> The Nation “decided to take the government to the people” and held meetings throughout the United States to solicit input from the large populations of off-reservation Citizen Potawatomi.<sup>99</sup> The result was a decision to completely overhaul the government in order to reengage the nation’s off-reservation population.

In 2007, the Nation amended its constitution to include a legislature comprising sixteen legislators.<sup>100</sup> Eight of these legislators are chosen from new legislative

<sup>91</sup> Citizen Potawatomi Constitution art. iii; art. iv (1938).

<sup>92</sup> “Modern Tribal Governments, Constitutions, and Sovereignty: John ‘Rocky’ Barrett,” NCAI, [www.youtube.com/watch?v=XzbGOny8IS8](http://www.youtube.com/watch?v=XzbGOny8IS8) (hereinafter Rocky Video).

<sup>93</sup> C. Matthew Snipp, “The Size and Distribution of the American Indian Population: Fertility, Mortality, Migration, and Residence,” in *National Research Council (US) Committee on Population, Changing Numbers, Changing Needs: American Indian Demography and Public Health* ed. Gary D. Sandefur, Ronald R. Rindfuss, and Barney Cohen. National Academy Press, 1996, [www.ncbi.nlm.nih.gov/books/NBK23098/](http://www.ncbi.nlm.nih.gov/books/NBK23098/).

<sup>94</sup> See, generally, The Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986 (1956) (federal program offering reservation Indians financial assistance and job training if they moved to cities in the hopes of assimilating Indians into the population of major urban areas).

<sup>95</sup> See Snipp, “Size and Distribution,” 13.

<sup>96</sup> “Constitutional Reform,” Citizen Potawatomi Nation – 2010 and 2014 Honoring Nations Award (July 1, 2010), The Harvard Project on American Indian Economic Development, <https://embed.culturalspot.org/embed/exhibit/pwJyYYgteeaiLg>; Rocky Video.

<sup>97</sup> “Honoring Nations All Stars Profile: Constitutional Reform Citizen Potawatomi Nation,” Harvard Program on American Indian Economic Development 5 (2014) (hereinafter All Stars) (the tribe went from contributing \$55 million to the Oklahoma economy in 2001, to \$350 million in 2006).

<sup>98</sup> *Ibid.* 6.

<sup>99</sup> Rocky Video.

<sup>100</sup> All Stars, 1.

districts drawn to equally represent citizens who live outside the state of Oklahoma, while five are chosen from districts within the state of Oklahoma and three belong to the at-large elected executive officials.<sup>101</sup> The tribe recognized that there was a risk that out-of-state constituents would be incentivized to undervalue in-state interests (such as land purchases) and so divided the legislature's weighted representation. Although out-of-state citizens make up two-thirds of the population, they receive only half of the seats on the legislature.<sup>102</sup> Similarly, an Oklahoma residency requirement ensures that executive positions are tied to in-state interests, although they are elected by Nation-wide popular vote.<sup>103</sup>

In 2017, Citizen Potawatomi conducted its first ten-year constitutionally mandated redistricting to reflect population growth.<sup>104</sup> Overall voter participation for the nation doubled as a result of these changes in the structure of the legislature. Moreover, the Nation saw significant increases in other forms of civic engagement and cultural participation. With these reforms, the Nation also achieved geographic participation parity, with out-of-state voters comprising 67 percent of the vote.<sup>105</sup>

The scope and impact of the Citizen Potawatomi system make it unique even compared to the handful of international examples of expatriate voting districts or other tribes such as the Cherokee Nation, which also provides for off-Reservation representation. Unlike in these cases, extraterritorial resident citizens are far from the exception. The Citizen Potawatomi extraterritorial districts make up half of their legislature. As such, Potawatomi legislative restructuring was not only a way to increase voter turnout and grant more of a voice to extraterritorial citizens, it was also a bold statement about how the Citizen Potawatomi view citizens across the country. These citizens are an important part of the Nation, as opposed to citizens who left the Nation by leaving its geographic borders.<sup>106</sup> Citizen Potawatomi pulled themselves out of a period of dysfunctional governance and voter apathy, like the Cherokee, through not only simple swift constitutional fixes but also constitutional changes that involved elaborate processes and rigorous processes that engaged their entire electorate.

#### 11.4 CONCLUSION

The choices that the two tribes have made reveals the strange boon that the chaos of colonialism has been for them. There have been countless disruptions or

<sup>101</sup> Citizen Potawatomi Constitution art. 7; art. 12.

<sup>102</sup> Rocky Video.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> All Stars, 9.

<sup>106</sup> See Peter J. Spiro, "Perfecting Political Diaspora," *New York University Law Review* 81: 207, 207 (2006) ("political rights of nonresident citizens" indicates a "changed conception of citizenship and nationhood, as political membership decouples from territorial location").

interference with their ability to freely self-govern, and yet, the tribe's political identity and will to self-govern persisted. The undeniable limitations and even outright failings of some of their governing documents allows for tribal constitutional reform efforts to not only be easier to achieve but seems to have allowed for tribes to think more creatively about their reforms than they would have if they were more strictly wedded to their prior version of democratic ordering. This complex postcolonial dialectic of institution building through constitutional reordering seems to be, in short, liberating for tribes who can contemplate and implement creative solutions to even their most basic political orderings problems.

The constitutional structure of representation and elections, in other words, has become one of the most important sites for American Indian tribal nations to set the boundaries and substance of their identities as nations. As Citizen Potawatomi Chairman Barrett puts it: "If you're not in the constitution-fixing business, you're not in economic development, you're not in self-governance; you're not sovereign."<sup>107</sup> And as Cherokee Nation Principal Chief Hoskin describes, the resilience of tribal governments is a key part of their identity as nations: "We were torn apart politically; our economy was destroyed, [and y]ou would predict it would take decades or generations to come back if they ever did. But what happened next is I think is one of the most remarkable stories in the history . . . of this country and the world. We rebuilt within about a decade. We invested in a system of law and justice. We have to remember, and we have to remind people . . . what the Indian nations have gone through."<sup>108</sup>

A key takeaway from these experiences, is the value of seeing the usefulness of failure – even in a democracy or a constitution – and the durability of the commitment to self-governance as a continual process rather than a singular ideal that can be perfected and captured in a single document.

<sup>107</sup> All Stars, 9.

<sup>108</sup> "Cherokee Nation Chief Speaks on Tribal History at OSU."