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LIBERAL DEFAULTS: THE PENDING PERCEPTION OF “SPECIAL FINANCIAL RIGHTS” AMONG AMERICAN INDIAN NATIONS

Raymond I. Orr, Ph.D*

INTRODUCTION

Chief Justice John Marshall noted that the “condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.”¹ This description, part of his 1831 decision in *Cherokee Nation v. State of Georgia*, is a now well-worn passage in the annals of American Indian legal scholarship.² A seminal sentiment — and possibly emblematic — it describes the ambiguous relationship between federal, state, and tribal governments. Both alone and in conjunction with subsequent court decisions, Marshall’s majority decision, has complicated as much as it has clarified the unusual status of American Indian tribes in the American legal and political system.³ With *Johnson v. M’Intosh*⁴ and *Worcester v. State of Georgia*⁵ (the other two decisions that comprise what is considered *The Marshall Trilogy*⁶), *Cherokee Nation v. State of Georgia*⁷ proved indicative not only of future decisions on the status of American Indians, but also of how such decisions could, on the one hand, illuminate Indian Nations’ rights in relation to outside governments and, on the other, muddle or undermine that status.⁸

The place of indigenous communities (and individuals) — their rights, obligations, entitlements, privileges, responsibilities, political position, and status in the larger system — has been, as Marshall attested, “unlike that of any other two people.”⁹ Yet, the tremendous flux surrounding this status and relationship complicates this uniqueness.¹⁰

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1. *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1, 16 (1831).

2. *See id.*

3. That Indian policy has changed over time is not a controversial or contested point. Numerous writers have talked about various periods and inconsistency in Indian policy. An oft-cited text is FRANCIS PRUCHA, *INDIAN POLICY IN THE UNITED STATES: HISTORICAL ESSAYS* (1981).

4. *Johnson v. M’Intosh*, 21 U.S. (1 Wheat.) 543 (1823).

5. *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515 (1832), *abrogated by* *Nevada v. Hicks*, 533 U.S. 353, 361, (2001).

6. Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 *GUILD PRAC.* 207, 211 (2008).

7. *See Cherokee Nation*, 30 U.S. at 1.

8. *See* Goetting, *supra* note 6.

9. *Cherokee Nation*, 30 U.S. at 16.

10. *See* PRUCHA, *supra* note 3.

The peculiar relationship has multiple implications, not the least of which concerns how American Indians confront the state.¹¹ For example, political theorist Kevin Bruyneel contends that indigenous Americans' struggle in petitioning the American government results from their unique status.¹² Bruyneel terms the irregular location of American Indian politics as a "third space" — one that results from the idiosyncratic position American Indians have in the larger United States political system.¹³ For Bruyneel, this "third space," neither spatial nor temporal, awkwardly exists somewhere between the two.¹⁴ At its broadest, this essay speculates on why certain types of events have the potential to shape the unusual space that exists between American Indians and the federal government.

More specific, however, this essay focuses on how the recent tribal defaults on debts resulting from the 2008 global financial crisis (in conjunction with tribal over-spending) might set into motion a process with implications for the status of tribes in the American political system. In particular, this essay highlights the interplay between court decisions and public opinion on this fiscal issue of bankruptcy and economic rights. Although Native Nations' policy and status might change through multiple methods, this article emphasizes the paradox between *pluralism* and *liberalism*.¹⁵ This paradox is at the center of philosophical and legal debates about the special status of Native Nations in the United States. It is a paradox that, I argue, will likely activate either court or public opinion. Furthermore, this elemental debate will likely play a crucial role in framing arguments both for and against a future movement to change the legal and political status of Native Nations. This paper dissects the financial crisis' potential to inspire criticisms of tribes for playing by a different, and more generous, set of rules, as well as the financial crisis' potential to precipitate calls for policy shifts in the treatment of Native Nations.¹⁶ The tension in the *status quo*, and thus the specific inspiration for such a change, may be financiers' growing losses and lack of redress after backing Indian gaming operations. This article also identifies another potential source for policy change: pre-existing anti-Indian and anti-"special rights" social movements. Already present anti-Indian casino social movements may generate greater outrage that standard default rules do not apply to American Indian tribal businesses.

To clarify, in the midst of such intense and charged issues, my intent is not to make a normative argument that financiers have legitimate claims; instead, I argue that

11. *Id.*

12. KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY* xvi-xvii (2007).

13. *Id.* at xvii.

14. *Id.*

15. More nuanced definitions will follow, but I use *liberalism* in the sense that there is a commitment to a shared and universal good that takes the form of protecting universal goods. By *pluralism*, I mean the value of cultural diversity, distinctness, and multiple goods that demand some variation from one universal good espoused by liberalism. The lexicon used to describe American Indian tensions within these two is slightly different. Scholars might juxtapose *liberalism* against the *sovereignty* or *self-determination* of tribes. This paper will more often use *liberalism* versus *pluralism* as it is most widely identified in the debate. One of the more well-known scholars on this subject, and whose works are cited often, is Will Kymlicka. See WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 135-57 (1989). See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

16. See generally JEFFERY DUDAS, *THE CULTIVATION OF RESENTMENT: TREATY RIGHTS AND THE NEW RIGHT* (2008) (discussing resentment and the activation of right leaning social movements against tribal sovereignty and tribes' special rights).

conservative social movements might use tribal sovereign status as a point of criticism in these situations.

As suggested at the start of this essay, tribal relationships with state, federal, and colonial governments have rarely remained consistent since their inception.¹⁷ Major events, and even events that initially seemed limited, have had the tendency to precipitate significant changes in the relationship between tribal and non-tribal governments.¹⁸ An event as small and singular as a “case” carries the potential to alter the policy between nations or entire peoples. The nature of the common law system allows for this bottom-up versus top-down dialectic. As a supplemental question to that of defaults’ effects on public opinion, I examine an event’s ability to structure and re-structure American Indian political relationships through law or public opinion in this paper.

In accord with the nature of American Indian law, individual cases might embed tenuous theoretical concerns about national identity and political ideology. Cases involving American Indians tend to involve broader political concerns such as state power, equal protection, and individual liberties. In the case of the 2008 financial crisis and its ongoing effects, including tribal defaults, one should also consider these trends within the literature on *liberalism* and *pluralism* in addition to financial regulation or contract theory. The 2008 global financial crisis that caused or hastened tribal debt defaults may not be comparable initially with the emotive and broader debates associated with *liberalism* and *pluralism*. The dramatic debates in jurisprudence around due process, *habeas corpus*, or equal protection as applied to tribal communities do not arise easily in relation to the recent tribal defaults; tribal defaults are not identifiable civil liberty concerns that prompt high judicial review and, therefore, will not be covered by such literature. However, many of these same issues — those “charging” the public’s opinions on American Indian “special rights,” “illiberalism,” or “sovereign distinctness”¹⁹ — may arise in the issues surrounding tribal defaults. Furthermore, the history of congressional activism, when court decisions seemingly exclude American Indian nations from what are understood as universal obligations, also plays a role in this discussion.

In addition to the relationship between indigenous communities and the United States having a complicated policy history checkered by inconsistency, the relationship also evokes multiple, intricate social commitments that extend into fundamental paradoxes of modern and liberal social order.²⁰ *Liberalism* and *pluralism* lie at the center of modern political credos, but work in conflicting ways as they pertain to tribes comprised of individuals who are simultaneously both tribal members and American citizens.²¹ One consideration is the liberal commitment to universal liberties and

17. For a summary and clear analysis of the changing role of the judiciary in Indian country, see DAVID WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT* (1997), which convincingly claims both that court decisions have been inconsistent and that the way the court injects itself into Indian Country has not been a constant in American history.

18. *Id.* at 186-234.

19. See DUDAS, *supra* note 16.

20. Angela R. Riley, (*Tribal*) *Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 800 (2007).

21. *Id.*

equality.²² The idea that “no one” shall possess greater rights than another embodies the element of universality.²³ Despite this, a commitment to the sovereignty of Native Nations fits within — although it was not caused by — conceptions of pluralism and the value of cultural diversity.²⁴

The case *Santa Clara Pueblo v. Martinez* evidences (and recognizes) this pluralistic tendency; it acknowledged, “Indian tribes are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.”²⁵ Perhaps philosopher John Rawls characterized the paradox best, albeit abstractly:

A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good . . . [and that Liberalism] tries to show both that a plurality of conceptions of the good is desirable and how a regime of liberty can accommodate this plurality as to achieve the many benefits of human diversity.²⁶

This dual commitment, that of *pluralism* to diversity and *liberalism* to universal protection, manifests both in the desire to allow tribes to govern according to their own preferences and the need to protect the liberties of United States citizens who are within tribal jurisdiction.²⁷ Legal scholar Angela Riley contends that, regarding *sovereignty* and *liberalism*, Rawls’ description of this paradox remains intact: “Indian tribes are both symptom and solution within this [Rawls’] philosophical debate.”²⁸

In order to highlight the possible implications debt defaults may have for Native Nations because of their unique statuses, this essay presents four sections. The first provides background on the increase in tribal debt defaults and how those debts are being restructured. The second section outlines the major theoretical concerns of *liberalism* and *pluralism* and how tribal “special rights” amplify those concerns. The next section presents an anthology of previous Supreme Court cases that make intellectual contact with *liberalism* and *pluralism* to varying degrees. Finally, the conclusion focuses on how the “newness” of defaults hearkens back to the unique nature of Indian law and policy in the United States.

GROWING DEFAULTS AND DEBT CRISIS IN INDIAN COUNTRY

The complicated status of American Indians in the American political arena has spawned significant literature on a broad range of subjects from violence to gender equality to fishing rights.²⁹ Because of how recent these tribal business defaults are,

22. *See id.* at 800, 804.

23. *Id.* at 800.

24. *Id.* at 847-48.

25. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515, 559 (1832)).

26. JOHN RAWLS, *POLITICAL LIBERALISM* 303-04 (expanded ed., 2005).

27. Riley, *supra* note 20, at 799.

28. *Id.* at 3. *See* RAWLS, *supra* note 26, at 303-04.

29. For sovereignty and jurisdiction over outsiders that tribes have or lack, see DUDAS, *supra* note 16, at 45,

combined with the historical lack of private investment in Indian Country until the last twenty years, legal scholars have not had the opportunity to significantly explore how these communities handle financial redress. However, defaults are likely to grow as a financial, political, legal, and possibly public opinion issue, given that, by 2010, the national Indian casino debt stood at twenty billion dollars.³⁰

The global financial crisis, the catalyst of which is widely believed to be the collapse of the Lehman Brothers investment bank in the fall of 2008,³¹ has led to the most severe recession since the end of World War II.³² As unemployment rose and net worth dropped, discretionary income became less available for most Americans.³³ Holiday and vacation spending steeply declined.³⁴ The sharp decline in discretionary spending left American Indian tribes, who had invested heavily in the resort business over the previous decade, highly vulnerable.³⁵ Casino-resort revenue fell drastically, leaving many tribes with gaming and resort investments unable to keep up with interest and capital payments on these loans.³⁶ In August 2011, the Foxwoods Casino and Resort, the largest casino in the United States and the centerpiece of the Mashantucket Pequot Tribal Nation's economic development over the last two decades, defaulted on more than two billion dollars of debt.³⁷ At the time, the Mohegan Sun, one of the largest Indian gaming facilities (located, along with Foxwoods, in Connecticut), as of August 2011, hovered near default and was attempting to restructure its debt,³⁸ which is not as sizable as the Mashantucket's.³⁹ In an attempt to restructure delinquent loans, tribes in other states, such as Michigan and New Mexico, have engaged in yearlong "standoffs"⁴⁰ with creditors.

60-65, 70-72 (discussing fishing rights in the Great Lakes). See also ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 27-33 (2005) (investigating the high rates of sexual violence against Native American women).

30. Alexandra Berzon & Mike Spector, *Taking a Hit at Indian Casino: Sovereignty Rules Hamstring Restructuring When Tribes Default on Bonds*, WALL ST. J., Dec. 9, 2010, at C1-C2.

31. Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES, Sept. 14, 2008, available at www.nytimes.com/2008/09/15/business/15lehman.html?pagewanted=all.

32. Emily Kaiser, *Economists See Longest Recession Since World War Two*, REUTERS (January 10, 2009, 12:35 AM), <http://www.reuters.com/article/2009/01/10/us-usa-economy-forecast-idUSTRE5090QL20090110>.

33. Jonathan McCarthy, *Discretionary Services Expenditures in This Business Cycle*, LIBERTY STREET ECONOMICS (July 06, 2011, 10:00 AM), <http://libertystreeteconomics.newyorkfed.org/2011/07/discretionary-services-expenditures-in-this-business-cycle.html> (analyzing figures from the U.S. Bureau of Economic Analysis, National Bureau of Economic Research). This data shows there was a 7% drop in discretionary spending, which was the largest since World War II.

34. See *id.*

35. Mike Spector, *Foxwoods Debt Talks Test Tribal Bets: Pequot Casino Seeks Big Lender Haircut; Sovereign Default?*, WALL ST. J., July 2, 2011, available at <http://online.wsj.com/article/SB10001424052748704525704575341310022442270.html> (discussing the financial crisis of several tribes after making large investments in the last decade).

36. *Id.*

37. *Id.*

38. Berzon & Spector, *supra* note 30, at C2; see *Mohegan Sun casino fails to refinance \$811M debt*, LAS VEGAS REV. J. (Dec. 31, 2011, 2:02 AM), <http://www.lvrj.com/business/mohegan-sun-casino-fails-to-refinance-811m-debt-136471243.html> (showing that the Mohegan Sun faced around \$811 million dollars in debt in 2011).

39. *Id.*

40. Berzon & Spector, *supra* note 30, at C1.

According to observers, these defaults carry relatively fewer consequences than in cases where these businesses are not owned by a tribe.⁴¹ Popular newspapers — in this case, the *Wall Street Journal* — generally present tribes as not being required to adhere to the same default rules as non-natives: “[n]ormal restructuring rules don’t apply to Indian casinos. Laws on Indian sovereignty mean creditors aren’t able to seize assets or take ownership stakes in the gambling enterprises after defaults.”⁴² Trust status limits not only the degree of ownership in Indian Country, but also who might hold what limited title does exist. This means the distinctness found in sovereignty exposes American Indian tribes into what political scientist Jeffery Dudas calls the American political right’s criticism of “special-rights.”⁴³ According to Dudas, such conservative social movements have mobilized sporadically over the last 30 years to work against American Indian treaty rights.⁴⁴ Criticisms stem from tribes’ greater access to fishing grounds,⁴⁵ their ability to harvest certain natural resources that others cannot,⁴⁶ or their building of casinos.⁴⁷ Most anti-treaty groups, label American Indian tribal status and the rights that go with this status as “*un-American*.”⁴⁸

Without seeming overly sympathetic to the large financial institutions that have at times charged higher interest rates to tribal enterprises because of the risks involved with lending to sovereign entities,⁴⁹ banks receive a comparatively low return from restructuring tribal debts.⁵⁰ In one case, the Mescalero Apache Tribe restructured 200 million dollars of debt for 30 cents on the dollar.⁵¹ The Mescalero case is not unique in the restrictions and terms offered by these financial institutions.⁵² More aggressive attempts by creditors attempting to take management control over gaming operations (a common provision of non-gaming finance contracts) have failed when challenged in court.⁵³ In *Wells Fargo Bank N.A. v. Lake of the Torches Economic Development Corporation*,⁵⁴ a Wisconsin court held that outside institutions are prohibited from seizing management control of tribal business entities even when stipulated in a contract between tribe and financier. The trust status of tribal land prevents outside creditors (or others) from seizing assets, unlike non-tribal contracts.

41. For an example of journalism covering the issue of default, among other stories, see *id.* at C1-C2. Comparing tribal business to regular business is only one interpretation. It is equally reasonable that tribal nations ought to be compared to a national government, which operates with sovereign immunity, typically a reserve bank, and possibly fewer consequences.

42. Berzon & Spector, *supra* note 30, at C1.

43. DUDAS, *supra* note 16, at 42-43, 97-105.

44. *Id.* at 41-47.

45. *Id.* at 44-45.

46. *Id.* at 91-92.

47. *Id.* at 98-105.

48. DUDAS, *supra* note 16, at 137-38 (emphasis added).

49. Berzon & Spector, *supra* note 30, at C2.

50. *Id.* at C1.

51. *Id.*

52. *Id.* at C1-C2 (noting that the Odawa and Mohegan Tribes dealt with similar negotiations in restructuring).

53. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp. 1056, 1058, 1060-61 (W.D. Wis. 2010) (dismissing a creditor’s claim that the tribe had violated a default provision in its contract with the tribe).

54. *Id.* at 1060-61.

In cases where outside financial institutions cannot find terms beneficial to them, the pressure to minimize their liabilities increases. To my knowledge, these institutions have not made a concerted effort to undermine tribal sovereignty or trust status. It is possible and likely, however, that a confluence of factors might turn the tribes' "special right" to escape asset seizure and redress by creditors into a public liability. The idea of "special rights" as a criticism of American Indian tribes was explored by Jeffery Dudas as being central to anti-treaty rights and Indian casino movements. Conservative social movements, as Dudas describes them, see "America under siege from irresponsible and corrosive politics. . . . that excoriates formerly excluded groups for claiming 'special' rights that violate the 'equal' rights of all other Americans."⁵⁵ Although not specifically a legal liability — the principles of sovereignty and self-determination will likely continue to be upheld by the courts, and fiscal disagreements do not activate the same level of judicial review as do constitutional issues — the special status or special rights might activate anti-casino and anti-Indian groups that Dudas has identified. This could intensify the pressure on state governments for greater concessions from tribal *gaming compacts* (agreements about gaming revenue sharing between tribal and state governments) and create a more hostile regulatory environment.

EVENTS, METHODS AND CHANGE IN INDIAN POLICY

One may wonder whether the financial crisis might set in motion a status shift in the relationship between tribes and outside government that could alter — to a degree yet unknown — the nearly half-century-old policy of *self-determination*. The complete abandonment of *self-determination* as the core principle in American Indian tribal status remains unlikely, but a change in the *status quo* — either by the alteration of agreements or by an increase in hostility — remains a reasonable possibility. Far smaller events have caused re-alignments in American Indian tribal status in the past. Typically such changes occur by either a court decision or a successful activation of social movements and public opinion.⁵⁶ A conclusive determination as to the role that "special rights" (in this case, *financial rights*) might play cannot be made at this point, but it should, nonetheless, be kept in mind that single events have shifted federal policy relating to tribes on multiple occasions.⁵⁷

The methods by which status might change are numerous enough that it is not possible to cover them categorically. However, a starting point worth considering is that the debate between *pluralism* and *liberalism* will frame the method or mechanism by which policy will shift. This framing connects with a significant discomfort in juxtaposing *ethnic/cultural diversity* against *liberalism's universal principles*. In the case of Native America, this tension might use alternative terms with the same meanings. For instance, when emphasizing race, it could pit *racial/ethnic particularism* against *color-blindness* or perhaps the *melting-pot* notion of American identity against *ethnic fractionalization*. If using a nomenclature specific to American Indian status, this would

55. DUDAS, *supra* note 16, at xi.

56. See *Ex parte Crow Dog*, 109 U.S. 556 (1883) (holding that a federal district court had no jurisdiction to try an Indian for murder committed against another Indian on reservation lands).

57. See *id.*

position the rights of *sovereignty* and *self-determination* against *universalism*.

Political and legal theories typically use a vernacular that differs from that used by contemporary media and social movements. Neither *liberalism* nor *pluralism* are terms that appear in popular accounts of the debate between the two commitments. Anti-sovereignty groups often use the two terms “special rights” and “treaty rights.” Cast even larger, outsiders may consider “special rights” to be, put plainly, “un-American” or against the value of “equality before the law” (i.e., that some possess more rights than others).⁵⁸ This resentment of American Indians for exercising their “special rights” sits well within the conservative social movement’s larger set of grievances against racial-based inclusionary policies. Most recognizable of these race-based policies is affirmative action in hiring and educational admissions. According to Dudas, affirmative action was central to mobilizing early conservative social movements.⁵⁹

It should be noted that these debt defaults seldom involve criminal activity. Rarely are there grounds for appealing judicial decisions based upon a violation of fundamental or constitutional rights in tribal casino defaults; therefore, this limits the judiciary’s role. Tribal defaults and limited redress, however, held as potential to activate and exacerbate public opinion regarding a perception of an unfair status or “special right.” The belief that courts maintain a rights disparity that leaves tribes with a distinct advantage over other business entities fits well into the “special rights” criticism. Within these perspectives, American Indians not only have the opportunity for casino monopolies unlike other ethnic groups, but also the ability to evade loan-repayment. If critics of sovereignty believe that some ethnic groups have advantages that others do not, the opportunity is open for anti-sovereignty groups with anti-*pluralism* and pro-*liberalism* commitments to draw attention to tribal debt defaults.

EVENTS, CASES AND PUBLIC OPINION

Since the end of the *treaty-making era*, the Supreme Court has often weighed in on the *liberalism* versus *pluralism* debate as it pertains to tribes.⁶⁰ A set of nineteenth and twentieth century Court decisions attempt to clarify the boundaries between tribal sovereignty and individual liberty. In the Court’s attempt to balance these two commitments, it set precedents supporting each side of the debate, which is not unusual in federal Indian law. Although both legislation and court decisions support Indian tribes’ ability to exert power, they also support the demand to protect individual rights against tribal power.

This tension spans a century of court decisions. In the *Ex parte Crow Dog*⁶¹ decision, one finds an often-cited, early case that exemplifies both a small event causing a significant re-alignment and the dual commitment to liberalism. Native legal scholar Vine Deloria summarizes this particular event’s background and policy shift:

58. DUDAS, *supra* note 16, at xii, 4.

59. *Id.* at 4.

60. See 25 U.S.C. § 71 (2006). Treaty-making between tribes and outside government existed right after contact with Europeans until 1871.

61. *Ex parte Crow Dog*, 109 U.S. at 556.

In 1882 the Brule Sioux medicine man Crow Dog killed Spotted Tail, leader of the band and a chief who had counseled accommodation with the United States. Under traditional Sioux customs the relatives of the two men arranged for compensation for the death of Spotted Tail. Presents were exchanged, and the families believed they had solved the problems created by the killing. The federal attorney for Dakota Territory was aghast at the seemingly casual manner in which the Sioux dealt with this killing, and he soon charged Crow Dog with murder. The case reached the Supreme Court in 1883, and the conviction of Crow Dog by the territorial court was reversed on the grounds that the 1868 treaty had preserved for the Sioux the right to punish tribal members who had committed serious crimes. A great public outcry followed the decision, and in 1885 Congress passed the *Seven Major Crimes Act*, which took away major criminal jurisdiction from Indian tribes.⁶²

The Court's decision upheld treaty rights (and, to a certain extent, the rights of communities to govern themselves pluralistically, although that commitment of pluralism was not even a deeply held value in the nineteenth century and the decision was a function of treaty right, not belief in cultural diversity as a value). However, the political pushback from Congress resulting from an unpopular Supreme Court decision in *Ex parte Crow Dog* altered jurisdictional boundaries in Indian Country in a manner that remains today.

Whether the dispute between Crow Dog and Spotted Tail originated in a political gambit designed to undermine the power of chiefs or over a female interest,⁶³ the murder of one Sioux by another held the potential to alter jurisdiction in Indian Country. In *Ex parte Crow Dog* (1883), by overturning the lower court's conviction of Crow Dog, the Supreme Court set off a public outcry strong enough to motivate Congress to pass the Major Crimes Act in 1885.⁶⁴ In general, the Court has treated American Indian law with a remarkable sense of agency for itself.⁶⁵ Singular events, either through court cases or in response to court cases, as in the case of the Crow Dog murder of Spotted Tail, call for rearrangement of the jurisdictional boundaries in Indian Country thereafter; as such, they profoundly alter the relationship between nations. Perhaps even more surprising, the murder spurred new policy even from an event wherein only white consciousness, not white material interest, was harmed.

The Crow Dog case proved immensely important in establishing the rules of jurisdiction on reservations and regulating the legitimate use of violence in these spaces.

62. VINE DELORIA, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 4 (1998).

63. DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 420 (1970) (suggesting that there are two theories behind Crow Dog's motivations. The first, and most accepted at that period, was a dispute over a 'love interest.' The other interpretation is that Crow Dog believed the principal chiefs had taken too much power, in addition to accommodating the United States government beyond what it should have).

64. Major Crimes Act, ch. 341, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)). The crimes include murder, manslaughter, rape, assault with intent to commit murder, arson, burglary, and larceny.

65. DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT* 3-5 (1997).

First, the *Crow Dog* decision recognizes Sioux jurisdiction and that the Treaty of Laramie established it.⁶⁶ Interpreting this treaty, the Supreme Court left reservation justice to tribal authorities. Along with other tribes with similar treaty provisions, *Crow Dog* was not subject to the jurisdiction of non-Native governments. At first, the treaty provision granting tribes criminal jurisdiction over their own lands in the Treaty of Laramie began as a concession to the relative power of plains nations during the mid-nineteenth century. Later, however, the rights afforded the Sioux in the treaty began to threaten the *monopoly of violence* necessary for political legitimacy.⁶⁷ As the military threat of plains tribes diminished from that of earlier periods, having territory outside of the federal government's jurisdiction became less desirable, and it became significantly easier for a centralizing government to assert its power. Public opinion further aided the desires for a monopoly on legitimate violence in the West, while at the same time the public found Siouxan jurisprudence unpalatable.

In response to what one could conceptualize as a violation of individual liberty by a tribal government by today's standards, the *Major Crimes Act* sought to apply some uniformity to tribal responses to serious affronts to rights. Note that, at this time, Spotted Tail may not have been a United States citizen, which could jeopardize the demand for *liberalism* in this case. Even the Fourteenth Amendment, which made persons born within the territory of the United States citizens, had a caveat that exempted American Indians.⁶⁸ Not until the American Indian Citizenship Act did Congress explicitly enfranchise American Indians.⁶⁹ The *Crow Dog* case is unlike defaults of gaming debt, since gaming defaults do not predispose to due process challenges. Though less regulated than rights restrained by jurisprudence, public opinion has the potential to elicit a congressional response, as the *Crow Dog* case and surrounding events illustrate. In these situations, a court victory for treaty rights could quickly initiate a legislatively-driven unraveling of those rights.

The tension between tribal sovereignty and individual liberty continued unabated into the latter twentieth century. Slightly more than eighty years after *Crow Dog* and the *Major Crimes Act*, Congress passed the Indian Civil Rights Act ("the Act") in 1968.⁷⁰ In a series of Congressional hearings, tales of multiple abuses carried out by tribal authority against the individual liberties of American Indians filled the testimony. This hearing occurred at the apogee of the civil rights period, with ambiguity about whether the Bill of Rights applied to Indian reservations. In the late nineteenth century, the Supreme Court in *Talton v. Mayes*, a case surrounding the murder of one Cherokee by another, concluded that tribes fell within the authority of Congress but fell outside certain

66. *Ex parte Crow Dog*, 109 U.S. at 559; *see generally* Treaty of Fort Laramie, U.S.-Sioux or Dah-co-tahs, Cheyennes, Arapohoes, Crows, Assinaboins, Gros-ventres, Mandans, & Arrickeras, Sept. 17, 1851, 11 Stat. 749.

67. *See* Charles Tilly, *War Making and State Making as Organized Crime*, in BRINGING THE STATE BACK IN 169 (Peter Evans et al. eds., 1985).

68. *See* U.S. CONST. amend. XIV § 2 (excluding self-governing Indian tribes from citizenship enfranchisement).

69. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

70. *See generally* Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1968).

constitutional provisions including the Bill of Rights.⁷¹

In passing this legislation, Congress hoped to ensure equal protection and due process on reservations.⁷² The Act expanded federal jurisdiction over intra-tribal disputes. It listed ten rights that a tribal authority could not legally violate, specifying:

No Indian tribe in exercising powers of self-government shall – (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of a counsel for his defense (except as provided in subsection (b)); (7)(A) require excessive bail, impose excessive fines, inflict cruel and unusual punishments; (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both; (C) subject to subsection (B), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years; (8) 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; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.⁷³

Scholars tend to understand these ten protections as an attempt to extend similar protections found in the *Bill of Rights* to reservation politics. This did not completely cede sovereignty and cultural distinctness to the liberal demand of universal protection. C.L. Stetson describes the “purpose of the Act as twofold: to protect individual Indian citizens from infringement of their rights by tribal governments, but also to promote

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

72. C.L. Stetson, *Tribal Sovereignty: Santa Clara Pueblo v. Martinez: Tribal Sovereignty 146 Years Later*, 8 AM. INDIAN L. REV. 139, 140-41, 159 (1980).

73. Indian Civil Rights Act § 1302(a).

Indian *self-determination*.”⁷⁴ The Act’s attempt to promote *sovereignty* and *cultural diversity* does not readily appear, for the bill does not spell it out — it becomes apparent only upon judicial review. Stetson might have overstated the case for sovereignty in the Act; nonetheless, the Act acknowledged the *distinctness* of tribes in terms of the standard United States governing paradigm. The Act recognizes that there are “unique, political, cultural and economic needs of tribal governments,”⁷⁵ that should be taken into account when interpreting the constitutionality of tribal actions.

Not long after the Act’s enactment in 1968, *Santa Clara v. Martinez* used it as grounds to sue a tribal nation for gender discrimination.⁷⁶ The *Martinez* Court handed down the most significant decision about the relationship between tribal sovereignty and individual liberty in the wake of the Indian Civil Rights Act. Julia Martinez, an enrolled Santa Clara Pueblo woman, married a Navajo man and their marriage produced children.⁷⁷ The Santa Clara Pueblo refused to extend membership to Martinez’s children. Tribal membership criteria allowed only the children of male tribal members who married non-tribal members to be eligible for tribal membership. After attempting to have her children enrolled, then petitioning the tribal authorities to alter the membership criteria, Martinez sued, claiming Santa Clara’s rules violated her rights under the equal protection entitlements extended less than a decade earlier to her by the Act.

The Supreme Court decided against Martinez’s claim that her Pueblo was discriminating unconstitutionally against her and her children based on her gender. The Supreme Court grounded the opinion in their understanding of Congressional intent in the Act regarding tribal abuses of power against individuals.⁷⁸ According to the Court, Congress designed the Act to “fit the unique political, cultural, and economic needs of tribal governments.”⁷⁹ Certain provisions within the Bill of Rights do not appear in the Indian Civil Rights Act. For instance, the Act, according to the *Martinez* decision, “does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases.”⁸⁰ The distinctness found in *pluralism* (tribal rights) overshadowed the commitments to universal *liberalism* (equal protection under the law) in the *Martinez* case, reinforcing that religious tradition formed an essential core of this *distinctness*. The Supreme Court decision against *Martinez* was not without controversy. The lack of protection and the leeway given to disregard individual tribal member’s civil rights outraged feminist and civil rights groups.⁸¹ Despite this, in the *Martinez* case, the pressure from outside interest groups was not great enough to prompt Congress to intervene with a bill expanding protection.

Whereas *Crow Dog* and *Martinez*, among other cases, evoke conflict over concepts

74. Stetson, *supra* note 72, at 144 (emphasis added).

75. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978).

76. *Id.* at 51.

77. N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* 30 (2008).

78. *Id.* at 31.

79. *Martinez*, 436 U.S. at 62.

80. *Id.* at 63.

81. See CATHERINE A. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo* (1983), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 63, 65-66; Carla Christofferson, *Tribal Courts’ Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 *YALE L.J.* 169, 177-80 (1991).

of crime, civil rights, and liberties, today's financial defaults, may seem to lack the same dramatic effect. Financial default is a central issue of the day in to public opinion in the same way that violence in the American West was in the nineteenth century and disenfranchisement of women was in the later twentieth century. Court battles over resources and ethnicity tend to draw the public's opinion. And cases over resources involving one form of arbitration or another along the lines of ethnicity have garnered attention as far back as the 1960s. The ruling in *United States v. Washington* (usually referred to as the "Boldt decision" in American Indian law after a judge in the case) sparked one of the earliest "anti-treaty" and "anti-special rights" movements. At issue was a treaty that granted a portion of Washington State's salmon and trout catch to the state's tribes participating in the treaty. The Court determined that fifty percent of the allotted fish would be allocated to those Washington State tribes that had participated in earlier treaties speculating on fishing rights. The Boldt decision mobilized anti-Indian fishing protests for years afterward — including street marches, hanging Boldt in effigy, and paid newspaper advertisements equating Indian fishing rights with other violations of equal protection under the Fourteenth Amendment.⁸² In a similar vein, Native Nations' growing debt defaults, and in particular those of reservations that might have reaped tremendous profit in previous years are likely to garner similar and significant resentment. The conditions are comparable to those that spawned these earlier anti-sovereignty or anti-special rights movements.

CONCLUSION

Protests involving the Boldt decision failed to reverse court decisions favoring tribal fishing treaty rights. The decision did galvanize an angry population that went on to challenge treaty rights and American Indian interests in other ways. Protesters hung effigies of Judge Boldt and sent letters to the editors of newspapers.⁸³ Beyond this, the change to the regulatory framework that Boldt precipitated holds more significance for the fortunes of American Indians in Washington State. Municipal prosecutors in the fishing areas declined to file charges against non-Natives who poached, and state-level agencies enacted regulations designed to be burdensome to tribes.⁸⁴ The larger political environment of increased hostility toward Natives and the accompanying social movements against tribes developed networks that persisted.⁸⁵

It certainly remains possible the issue of tribal debt defaults will continue largely unnoticed. The national political climate in the United States after the global financial crisis might be interested in issues more pressing than the twenty billion dollars owed by those tribes with favorable default statuses. If that occurs, tribal defaults should activate neither courts nor public opinion. Given that situation, the tension between *liberalism* and *pluralism* at the center of the modern relationship between tribes and outside governments will not be re-examined. However, it remains difficult to speculate, in one sense, because of the newness of the phenomenon of the current fiscal intertwining

82. DUDAS, *supra* note 16, at 66-70.

83. *Id.* at 66-67.

84. *Id.* at 70-71, 84.

85. *Id.* at 93.

between banks and tribes. In Native America's complicated history, never before has Indian Country received such large private investment. Previously only the federal government made significant loans to tribes. This is in striking contrast to more recent patterns of investment and degrees of debt. As a result, not only is tribal legal status unique in the American system, as Marshall so declared, so is the current status of its debt.