

# THE EFFECTS OF HUMAN RIGHTS NORMS ON SOVEREIGNTY: THE NATIVE AMERICAN CONTEXT

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## INTRODUCTION

It is a pleasure to be here; thanks to the Michigan State University Journal of International Law for the opportunity. It is timely for me to participate in this Symposium panel on “The Effects of Human Rights Norms on Sovereignty,” since my book, *Radicals in Their Own Time: Four Hundred Years of Struggle for Liberty and Equal Justice*, was just published by Cambridge University Press.<sup>1</sup> *Radicals* looks at the lives of five individuals who exemplify 400 years of struggle for liberty and equal justice in America. These five individuals led the way in the struggle for human rights in America—for what is human rights if not liberty and equal justice, and individual autonomy and free will?

## I. RADICALS IN THEIR OWN TIME

The genesis for the book is epitomized by its epigraph, which quotes Albert Einstein in 1953: “In teaching history there should be extensive discussions of personalities who benefitted mankind through independence of character and judgment.” It was in this spirit that I undertook the project—that is, I wanted to look at some of the personalities throughout American history who *did* benefit mankind through their independence of character and judgment.

Reading from *Radicals*:

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1. MICHAEL LAWRENCE, *RADICALS IN THEIR OWN TIME: FOUR HUNDRED YEARS OF STRUGGLE FOR LIBERTY AND EQUAL JUSTICE* (2011).

In the spirit of Einstein's words in the epigraph, *Radicals in Their Own Time* discusses the personalities of five Americans who led the way in bursting some of America's most inglorious chains of injustice and oppression. Progress toward greater freedom in America has never been direct or easy. Democracy is messy, and the nation has had its share of despotic leaders and oppressive majorities.

But one constant throughout American history has been the recurring theme of individuals of superior character and judgment, who have courageously stood up to lead the fight for human rights, that is, freedom and justice, despite considerable hardships to themselves. Every generation has them, men and women who speak the truth to power, in the face of sometimes overwhelming official and unofficial resistance. People who rebel against stifling orthodoxy and demand governmental tolerance and equal treatment, even when it seems they alone are waging the fight. Individuals who crave freedom from arbitrary authority like the very air they breathe.

The five individuals the book looks at are, first, Roger Williams (for the proposition of religious freedom of conscience), who lived from 1603 to 1682. Williams, who founded the colony of Rhode Island and Providencetown, was ostracized and eventually banished from the Puritan communities of Massachusetts Bay Colony for his troublesome views on religious freedom.

It looks next at Thomas Paine (for the proposition of the natural "Rights of Man"), who lived from 1737 to 1809. Thomas Paine, of course, was the author of *Common Sense*, the bombshell pamphlet that predated by five months (and in part motivated) the Declaration of Independence and other massive works like *The Rights of Man* (which was instrumental in the French Revolution) and *The Age of Reason*.

Elizabeth Cady Stanton (for the proposition of women's rights), who lived during the nineteenth century from 1815 until 1902, is the next subject. Stanton was a fearless advocate for women's rights who wasn't content to settle for just the right to vote. She certainly did demand the vote and was the first to do so in the Seneca Falls Convention of 1848 in the Declaration of Rights and Sentiments that she and her colleagues put forth, but she wasn't willing to settle for the vote alone; rather, she demanded equality in all respects, long before that was a recognized and acceptable position to take.

Next is W.E.B. Du Bois (for the proposition of black rights), who lived from 1868 to 1963. Du Bois was a fearless advocate for African-American rights throughout the many decades of the late 19th century and the first half of the 20<sup>th</sup> century, consistently poking and prodding a mainstream culture that largely denigrated and dehumanized people of color.

And then, finally, the book profiles Vine Deloria Jr. (for the proposition of Native American rights and traditions), who is the character that I'd like to focus on today. Deloria was the intellectual voice for generations of

Native Americans past, present and future in calling the United States and state governments to task for their failures regarding Indian rights. Deloria burst on the scene in 1969 with his book, *Custer Died for Your Sins*, and many other publications in the following decades, until his death in 2005.

One of the things that all of these characters argued for, and the crucial point they made, was that every government must recognize, or must tolerate, individual liberty, equal justice, and human rights. That is worth saying again: Government must *tolerate*. And so it becomes a matter of the government not interfering with individual free will, which thereby allows diverse viewpoints and practices the necessary breathing space that they require in a free, pluralistic society. *Radicals* explains:

Roger Williams believed government should stay separate from, that it should *tolerate*, all religious practices. Paine was committed to the common-sense principle that government must not abridge, that it must *tolerate* the individual rights of all people. Stanton demanded that government replace a legal regime imposing separate, inferior status on women with one that recognizes, that *tolerates*, the equal legal status of women. Du Bois tirelessly challenged government to repudiate laws and practices that institutionalized white supremacist principles, and thereby to accept, to *tolerate* black people as equals under the law. And Deloria spent his lifetime exposing the practices of the U.S. government that systematically reneged on its solemn promises to leave alone, or *tolerate*, Indian tribes with their native lands and traditions, and pointed the way forward for how that government should make amends for its egregious breaches of faith.

## II. VINE DELORIA JR. AND INDIAN SOVEREIGNTY

My take on this panel—the effects of human rights norms on sovereignty—is the Native American context, because Native American communities are sovereign. They were here first. These sovereign rights, however, have not been adequately recognized or respected over time by the United States government.

As noted above, Vine Deloria Jr. has been instrumental in discussing, among many other things, the topic of Indian sovereignty. Like the other four individuals profiled in *Radicals in Their Own Time*, Deloria detested oppressive authority, and he spoke up passionately for broad governmental recognition and tolerance of Indian sovereignty, self-determination, and traditions. He demanded, “what we [Indians] need is a cultural leave-us-alone agreement, in spirit and in fact.”

Deloria sought to educate people that, under the terms of their historically unique political arrangement with the United States, Indian states are entirely separate (albeit dependent) sovereigns. As such they are entitled, under well-established principles of international law, to the respect given any other sovereign state. Early on, the U.S. Supreme Court (if not the

President and Congress) recognized these principles. Chief Justice John Marshall said in *Worcester v. Georgia* in the early 1830s:

The settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection . . . . A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government and ceasing to be a state.

Marshall continued, quoting the Swiss scholar Emmerich de Vattel, perhaps the leading international law scholar of the day: “Tributary and feudatory states do not thereby cease to be sovereign and independent states.” In short, Deloria explains, the dominant society is duty-bound to leave the tribes alone to exercise their sovereign rights of government.

Moreover, Deloria adds, “Indians stand apart (not more or less favored—just apart) from other minority groups in America.” When a federal or state court, as opposed to a tribal court, asserts jurisdiction over people, whether Indian or non-Indian, on reservation land, for example, Deloria and other Indian law experts view the issue as involving tribal political rights as opposed to civil rights or racial justice. David Getches writes, for example, “The larger issue at stake in nearly all Indian law cases is the relationship of the tribe to the United States, a matter rooted in centuries-old policy created as part of the nation’s constitutional framework.”

Despite the self-serving Discovery Doctrine rationale regarding property rights in the earlier *Johnson v. MacIntosh* case (familiar to all first-year Property students), John Marshall and the early Supreme Court in *Worcester v. Georgia* and other cases nonetheless still did believe that broad-based tribal sovereignty was mandated under the nation’s constitutional structure. In *Worcester*, Marshall emphatically announced that Indian communities are “distinct political communities, having territorial boundaries within which their authority is exclusive . . . . Because the Constitution exclusively reserves the power to interact with sovereign tribes to the federal government, it follows that it is entirely inappropriate for states to engage in Indian affairs.” Marshall explained that international law principles apply to the United States’ tribal relations because Indian tribes are sovereign nations that existed before the founding of the United States. And because they did not participate in the framing of the Constitution, they are outside the Constitution’s scope. As with any other nation, the primary means to engage in nation-to-nation relations is through the treaty-making process.

Following from the contemporaneous *Cherokee Nation v. Georgia* case, which recognized Indian tribes as “domestic dependent nations,” *Worcester* described the relationship between the federal government and tribes as a form as trust arrangement, analogous in some ways to that of a guardian to its ward. Deloria explains that the recognition of a degree of independence by the stronger to the weaker is implicit in the trust relationship.

Even during that first third of the 19<sup>th</sup> century, when Chief Justice Marshall was elucidating the Supreme Court's deferential tribal sovereignty posture in *Worcester*, the other branches of the federal government took a radically different approach. In the executive branch, President Andrew Jackson was an unmitigated disaster for the tribes, with his views that Indians' choices were either to assimilate and be subjected to state authority or to move west beyond the Mississippi River. What resulted, among other travesties, was the Trail of Tears where over 5,000 Cherokees died on the way west, with endless suffering along the way.

In response to *Worcester*, Jackson reportedly said, "John Marshall made his decision, now let him enforce it." Jackson disagreed with President George Washington's early assertion that the proper manner of dealing with tribes was through the treaty process, stating instead that "the proper guardian is the legislature of the Union." In this declaration were the seeds of the doctrine that survives to this day; that is, that Congress has plenary power over tribes.

Well, how *does* Congress assert its power over Indian tribes? Congress asserts its power under the reasoning that the Commerce Clause allows Congress to exercise its authority. The Commerce Clause says Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." So Congress has the power to regulate commerce *with* the Indian tribes. Note the implicit recognition in the Commerce Clause by the Constitution's framers that Indian tribes are themselves separate, sovereign nations: Congress has the power to regulate commerce not only among the states, but also with other separate sovereign entities, specifically foreign states and Indian tribes.

What happened over time, however, is that the U.S. Supreme Court (and Congress itself) broadly interpreted the Commerce Clause to dramatically expand Congress's power to not only control commerce *with* the Indian tribes but to control the commerce *of* the tribes. This effectively gave Congress the power to dominate and to control Indian tribes, not just merely to regulate commerce of the United States, as the text would suggest, but rather to control outright all aspects of the Indian tribes. This approach was reflected in the Court's 1886 *United States v. Kagama* decision, in which the Court endorsed the idea that Congress's Commerce Clause power gives it virtually unlimited plenary guardianship authority over Indian people and tribes. Ignoring Marshall's earlier international law analysis regarding the sovereignty of domestic dependent nations, the Court reasoned, "Indian tribes are the wards of the nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights." It follows, the Court reasoned, that "[f]rom their very weakness and helplessness, largely due to the course of dealings of the federal government with them, and the treaties in which it had been promised, there arises the duty of protection and with it the power of Congress."

Congress's power was then held to extend to renegeing on promises that had been made in earlier treaty obligations. In *Lone Wolf v. Hitchcock* in 1903, the Court held that Congress had always had the unilateral power to abrogate treaty obligations, an assertion Deloria characterizes as "fraudulent on its face." Phrasing the holding as necessary for Indians' own care and protection, the Court reasoned that to require Congress always to obtain Indians' consent to take land, for example, would deprive it, "in a possible emergency when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained."

Congress's guiding principles, Deloria explains, were "considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race . . . . It was not only a shock but a breach of common decency when Congress decided it had absolute power over the once-powerful tribes," Deloria fumes. "When the Supreme Court also decided that such should be the policy in *Lone Wolf*, the silent conquest of unsuspecting tribes was complete. That decision slammed the door on the question of morality and justice. It was like appointing a fox to guard the chicken coop."

*Lone Wolf's* outrageous effect was that "Indians had no chance whatsoever to acquire title or rights to land which had been theirs for centuries." Deloria further argues that Indian tribes never would have so willingly sacrificed their sovereignty, at least not without a struggle. He says,

[f]ew tribes would have signed treaties with the United States had they felt that the U.S. would violate them. The promises of self-government found in a multitude of treaties, the promises of protection by the U.S. from wrongs committed by its citizens, the promises that the tribes would be respected as nations on whose behalf the U.S. acted as trustee before the eyes of the world, were all vital parts of the treaty rights which Indians believe they have received from the U.S.

Under longstanding international law principles, Deloria further explains, the fact that Indian tribes elected to become dependent upon the U.S. for some purposes in no way diminishes their sovereignty and rights of self-determination. "Indian tribes still have the right to be recognized among the nations of earth, even with domestic legal doctrines of the U.S. guaranteeing the validity of their titles as held under protected status by the U.S. against European nations."

### III. INDIAN SOVEREIGNTY AND HUMAN RIGHTS

So how does the issue of Indian Sovereignty play out in terms of human rights? Asked another way, to the extent that the Indian nations are part of the polity in the United States, does the Constitution—which protects

certain human rights—apply to Indian nations? This is an open question that Congress tried to settle in 1968. As Matthew Fletcher writes, “Congress codified the unsettled tension between American civil rights law and American Indian tribal law, customs, and traditions in the American Indian communities, by enacting the Indian Civil Rights Act, the ICRA.” ICRA, in which “Congress chose to *impose* a modified form of the Bill of Rights on Indian governments in order to *protect* those under tribal jurisdiction,” was enacted out of the concern that Indian “individual rights were receiving short shrift in tribal courts and by tribal governments.” As it had done previously in other statutes (such as the Indian Reorganization Act), Congress “affirmatively sought to displace tribal law and all the attendant customs and traditions, as well as Indian values, with American law. Ironically, after the Supreme Court interpreted ICRA in 1978, this law could only be interpreted and enforced by tribal courts.” This, at least, is acknowledgement of tribal sovereignty in the sense that courts and Congress were recognizing the authority of tribal courts to decide cases.

“Tribal law and American civil rights law have been at odds in many tribal communities ever since,” Fletcher concludes, “as tribal voters, legislatures and courts have struggled with how and whether to apply American civil rights law in Indian country.” Deloria suggests ICRA is a mixed bag: “In practice, ICRA radically changed the substance of tribal courts,” forcing them to decide disputes in ways that newly “restricted the powers of Indian tribes with respect to their own membership.” On the positive side, “it more clearly defined appeal procedures from tribal court to federal court,” and it lessened the problem of other laws which had ceded tremendous authority to states to regulate Indian affairs. *Cohen’s Handbook*, which is the authoritative source on federal Indian law, observes that ICRA has been an equal-opportunity target of criticism from both those “who believe it went too far, and those who believe it did not go far enough in constraining tribal actions.”

“Although ICRA was understood by most people as a major step toward the fulfillment of Indian self-government,” Deloria wondered whether it “was . . . what Indians really wanted.” Especially after such events as the Indian takeover of Alcatraz and Wounded Knee in the 1970s, “when we compare a sacred pipe, traditional, and tribal court, modern, as two competing means of reconciliation and problem-solving, the two sides in the conflict become readily apparent.”

Again, first principles beg the question of whether Congress even has the authority to enact such legislation as ICRA over sovereign, albeit dependent, Indian nations. Deloria notes the irony of a statute that would “confer upon the American Indians the fundamental Constitutional rights which belong by right to all Americans, when by its express terms, the Constitution does not apply to the American Indians and their tribal relations and does not protect Indian tribes.”

So, in terms of resisting Congress (again from Matthew Fletcher):

A key unanswered question is whether tribal decision-makers must comply with the Indian Civil Rights Act at all. As a normative matter, perhaps Indian nations should comply with the Congressional mandate, and most tribes have agreed to do so. However, at least one tribal court has explicitly kept the question open, and it is a valid question, given the American Constitution's ambiguous grant of authority to Congress over Indian affairs. Moreover, the fact that ICRA now means that—at least in civil cases—only tribal forums are available to interpret and enforce the substantive provisions in the statute.

What if the tribal court, or tribal legislature, actively resists applying, interpreting and enforcing ICRA? What if the tribal court holds that Congress had no real authority to enact ICRA?

Currently these questions are more or less irrelevant for two reasons. First, few if any tribes overtly resist the substantive rules that ICRA requires. Additionally, ICRA largely is redundant in many tribal communities. Tribal constitutional and statutory law, not to forget tribal common law, already mirror and even expand upon ICRA's due process and equal protection rules, generating rules equivalent to the protections offered in federal and state courts. Many tribal courts invoke "fundamental fairness" in deciding claims. And just as in federal and state courts the rules may be the same, but the protections offered individuals case by case may differ.

Second, since tribal decision makers can interpret rules required by ICRA and the courts with tribal law, customs and traditions [after 1978], ICRA itself borders on irrelevance as a substantive matter, while still retaining important symbolic meaning. As free speech cases demonstrate, tribal decision makers are free to directly apply federal and state law, apply modified versions of federal and state law, or even disregard federal and state law in favor of tribal common law.

That said, there are certain flashpoints where tribal law and ICRA may collide . . . . Assuming that ICRA protections could not be massaged by a tribal court to avoid serious conflict, the tribal decision maker (likely a tribal court) may simply assert that Congress had no authority to impose federal constitutional rules on internal tribal matters and utterly reject ICRA. There are claims perhaps not yet considered that may pit tribal law even more directly against ICRA and federal and state civil rights norms, potentially placing a tribal court in this position.

#### IV. COMMUNITY

One of the big differences in tribal and Native American culture and white culture, or dominant culture if you will, is the emphasis on community. A very important point to understand in discussing human rights in a native context is that there is an all-encompassing emphasis on community in native traditions. The Indian, Harvey Cox suggested in the book *Secular City*, "does not so much live in a tribe; the tribe lives in him.

He is the tribe's subjective expressions." It follows that "it is virtually impossible to 'join' a tribal religion by agreeing to its doctrines. People couldn't care less whether an outsider believes in anything."

Deloria explains that

[n]o separate religious standard of behavior is imposed on followers of the religious tradition outside of the requirements for the ceremony: who should do what, who is excluded, who is needed for other parts of the ceremony. The customs of the tribe and the religious responsibilities to the group, are practically identical.

The fact that tribal focus is on community is not to say that the individual is completely subsumed. "The fears that some express," Deloria says,

as to the lack of personal self among tribal people is unwarranted. For example, one of the most notable features of Indian tribal cultures is the custom of naming individuals. Indian names stand for certain qualities, for exploits, for unusual abilities, unique physical characteristics, and for the individual's unusual religious experiences. Every person has a name, given in religious ceremonies, in which his uniqueness is recognized;

in contrast to the largely generic names given in dominant culture.

"Individual worth was also recognized in other ways in tribal religions," Deloria continues.

The keepers of the sacred medicine bundles, for example, were people who had been carefully watched for their personal characteristics, and were chosen to share some of the tribal mysteries and responsibilities in a religious sense. The priesthoods of some of the tribes were filled with people who had been carefully trained after they had demonstrated their personal integrity. In almost every way, tribal religions supported the individual in his or her community context.

Tribal traditions of spirituality inform customary tribal approaches in the area of governance and law as well. Deloria says that "laws as such did not exist in tribal societies. Law was rejected as being force imposed from without, whereas peoplehood required fulfillment from within the individual. Insofar as there were external controls, Indians accepted only the traditions and customs which were rooted in the tribe's distant past." Most tribes had never defined power in authoritarian terms. Deloria explains:

A man consistently successful at war or hunting was likely to attract a following in direct proportion to his continuing successes. Eventually, the man with the greatest followings composed an informal council which made important decisions for the group. Anyone was free to follow or not, depending upon his own best judgment. The people only followed a course of action if they were convinced it was best for them. This was as close as most tribes ever got to a formal government.

Further on the point of individual versus group rights, Fletcher adds,

Tribal law prior to the Indian Civil Rights Act, generally speaking, was much more oriented towards the rights of the group, over the rights of the individual . . . . The kind of coercive, arbitrary and violent government actions generated by Euro-American governments—that is, imprisonment, execution, police brutality, denial of governmental benefits and services, eminent domain, interrogation, entrapment, surveillance, quartering of soldiers and so on—were rarely if ever perpetuated by Indian communities. A classic Supreme Court case analyzing the dark side of Anglo-American law is *Miranda v. Arizona*, in which the Court concluded that the long history and custom of police abuses of suspected criminals required a Constitution-based prophylactic rule prohibiting the interrogation of suspects, unless they were aware of their rights to silence and counsel. As the Navajo nation's Supreme Court recently noted, there is no such tradition of law enforcement at Navajo, and likely no such tradition in the vast majority of American Indian communities.

One area that we can look at in terms of how ICRA may differ among Indian tribes, and the protection of human rights as such, is the protection of speech. The Indian Bill of Rights incorporates aspects of the First Amendment, prohibiting Indian tribes that exercise powers of self-government from making or enforcing any law preventing the free exercise of religion, or abridging the freedom of speech or the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. So “the freedom of speech (and of the press) is uniquely linked to participation of individuals in government and politics,” Fletcher explains.

In the American constitutional structure, these political rights help to form the core of American governance and liberty . . . . In American Indian politics the right to speak also is a core aspect of government, but in ways that sometimes differ from American politics. In general, tribal communities have always presumed the right to speech, whereas speech in American politics is a new creature, subject to continued and varied restrictions, in spite of the First Amendment. “Leaders are inherently powerless to deprive any family of its means of subsistence. As long as each family stays within its ancestral lands, and retains its economic autonomy, the right to dissent is a practical reality.”

We may conclude, as Fletcher asserts, that “tribal law develops daily, and since federal courts generally, since 1978, no longer hear civil rights claims being brought under the ICRA, it is appropriate to focus on modern tribal law relating to free speech.” Regarding speech, many tribal constitutions give free speech rights, some do not. And indeed, some of the tribal constitutions give *more* rights, in the sense that they are not limited only to “state action” (i.e., government action), but also prohibit abridgement of free speech rights by private individuals. And, “where no tribal custom or tradition has been argued or implicated, [tribal courts] will

look to general U.S. constitutional principles, as articulated by federal and [state] courts, for guidance.”

Fletcher concludes:

Tribal courts have no obligation to apply federal and state constitutional law as it relates to free speech. Sometime tribal courts will apply strict, intermediate or rational basis scrutiny to analyze government restrictions on speech in relevant contexts, while others do not. Some courts rely heavily on tribal customary or traditional law, while others rely less. However, depending on the strength or intensity of the customary or traditional interest in free speech restriction, tribal courts are more likely to invoke tribal, customary, or traditional law. If a legal dispute involving a uniquely tribal practice, tradition, art or custom arises, it is far more likely (and reasonable, if not desirable) for a tribal court to apply traditional or customary law.

