

FORCED FEDERALISM

Contemporary Challenges to Indigenous Nationhood

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Contemporary Challenges to Indigenous Nationhood

They [indigenous governments] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they [indigenous peoples] are found are often their deadliest enemies.

United States v. Kagama, 1886

Articles of compact between the original States and the people and States in the said territory . . . forever remain unalterable, unless by common consent, to wit: . . . Article 3 . . . The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Ordinance of 1787

The Navajo Nation is the largest of the 562 federally recognized indigenous nations in the United States, but without the prominent white sign along the highway welcoming motorists to the Navajo (Diné) reservation, few people driving through northern Arizona would notice that they had crossed a nation's borders.¹ Fewer still might realize that they have entered another time zone. The Navajo Nation operates on Pacific standard time, not mountain standard, which is the time all other Arizona residents use.²

Control over the application of time zones is just one subtle form of governance that indigenous nations exercise within their own communities and homelands today. More substantively, indigenous nations have their own languages, cultural practices, sacred histories, citizenship requirements, judicial systems, and governmental bodies that provide the basis for indigenous nationhood. As nations that existed long before the formation of the United States, indigenous peoples of Turtle Island have historically transcended all state jurisdictional claims in matters pertaining to their homelands and communities.³ In fact, indigenous nations have always held a political status higher than that of state governments.

However, the “utmost good faith” has not been practiced by state policymakers, as they have repeatedly challenged the territorial and governance jurisdictions of indigenous nations since the passage of the Indian Gaming and Regulatory Act (IGRA) in 1988. Anthropologist Kate Spilde refers to the post-IGRA phenomenon as one of “rich Indian racism,” where false images related to indigenous gaming are created and propagated by governmental and media entities.⁴ These stereotypes motivate and enable state policymakers to deny indigenous nationhood and self-determination in two interrelated ways: (1) “by insisting tribes prove that they still need sovereign rights to be self-sufficient” and (2) “by invoking the notion that gaming tribes are less ‘authentically’ Indian, diminishing their claims to political independence.”⁵

Consequently, rich Indian racism places indigenous peoples in a precarious position, where they constantly have to justify their existence both in terms of the legitimacy of their self-determination powers and proof of the “authenticity” of their identities.⁶ First, policymakers invoking rich Indian racist attitudes contend that indigenous peoples do not *need* what they used to. According to this logic, gaming has magically provided indigenous nations with a surplus of economic wealth, which should be heavily regulated and taxed by state governments. It follows from this reasoning that treaty-based rights, such as hunting and fishing, and homeland claims are no longer considered necessary for the survival of these entrepreneurial indigenous nations.

Second, rich Indian racist attitudes invoked by state policymakers require indigenous peoples to demonstrate that they *deserve* self-determination and a distinct nationhood status. This assumption falsely claims that someone is a “real” indigenous person only if he

or she is considered a victim of failed policies, historical circumstances, and so on. During the post-IGRA era, rich Indian racism has led to increased regulation by state and local policymakers as they attempt to place limits on indigenous casinos and other forms of self-determination through the negotiation of indigenous-state compacts. It is evident from this new stereotype of indigenous peoples that the biggest challenges facing indigenous communities today are those of representation and governance. As former principal chief of the Cherokee Nation Wilma Mankiller argues, "Perception is as much of a threat as anti-sovereignty legislation. We have to regain control of our image."⁷

Managing the politics of perception is one of the major struggles for indigenous peoples today as they confront the realities of a new era in indigenous policy, which we refer to as forced federalism (1988–present). The forced federalism era differs markedly from the previous self-determination era, which entailed providing indigenous nations with greater administrative control over the contracting of education, health care, and other services on their homelands. As a result of IGRA in 1988 and the subsequent transfer of federal powers to state governments, indigenous nations have now been *forced* into dangerous political and legal relationships with state governments that challenge their cultures and nationhood status. This rapid devolution of federal powers to state governments in the area of indigenous policy undermines the once exclusive federal government–to–indigenous government relationship based on 379 prior treaties, direct consultation with Congress on indigenous affairs, federal statutory obligations, and court decisions.

Therefore, given the devolution of federal powers to states, indigenous nations have become more vulnerable to the jurisdictional claims of local governing bodies, such as state and municipal policymakers. Invoking rich Indian images, these local governing agencies are more likely to exercise their newly created jurisdictional claims to impose new regulatory policies targeting indigenous nations (i.e., taxation, revenue sharing, etc.) in ways that benefit them economically and politically.

Thus far, researchers examining indigenous-state interactions have predominantly relied on regional case studies, policy overviews, and legal analysis.⁸ This book is the only one of its kind to systematically investigate the effects of forced federalism on indigenous nations

using case studies of indigenous-state conflicts, interviews with indigenous leaders (Randy Noka of the Narragansett Nation, Chief Chad Smith of the Cherokee Nation, Brad Carson of the Cherokee Nation), findings from surveys of indigenous leaders between 1994 and 2000, opinion polls conducted with indigenous and non-indigenous people, and data from the National Governors' Association (NGA) annual meetings, the National Conference of State Legislatures (NCLS), and the Center for Responsive Politics.⁹ The purpose of this research is to examine the changing intergovernmental relationships between indigenous nations and local, state, and federal governments in the United States since 1988 and to uncover how socially constructed images of indigenous peoples have a major influence on policymaking both historically (discussed later in this chapter) and in this current era of intergovernmental relations.

Stereotypes of rich Indians are motivating state governors and other state decision makers to impose new regulation and jurisdictional claims on indigenous nations. In response, indigenous nations are mobilizing politically and economically to reframe the politics of perception on their own terms. Contemporary indigenous leaders are confronting rich Indian racism by utilizing new diplomatic strategies and forms of political mobilization, but widespread involvement in U.S. elections carries serious risks. As Oren Lyons, faithkeeper of the Onondaga Nation, states, "If a nation feels like a nation, acts like a nation, then you will be a nation."¹⁰ Amid threats to indigenous nationhood, Lyons's words challenge indigenous communities and leaders to act like nations, not like interest groups, stakeholders, or smaller versions of U.S. bureaucracies.

The findings of this book provide an in-depth look at indigenous political mobilization strategies and the increasing regulatory oversight of state actors, such as governors and legislators, in indigenous policy during the 1990s and into the twenty-first century. However, the question remains whether indigenous nations are seeking political and economic solutions at the state government level at the expense of local, community-based solutions. Ultimately, this book contends, the long-term solutions to confronting rich Indian racism do not arise from emulating the political behavior of other U.S. citizens; rather, the strength of indigenous nations comes from protecting indigenous homelands and regenerating their cultural and political forms of governance. There is an urgent need to confront rich

Indian racism and regain control of indigenous images as indigenous peoples face new kinds of challenges in this turbulent policy era.

As a result of the reshaping of indigenous-state relations, several state officials have begun to treat indigenous peoples as “merely part of the service population or as local interest group[s]” rather than as nations.¹¹ For example, in 2001 Texas attorney general John Cornyn waged a legal battle against the Tigua (Ysleta del Sur Pueblo) and Alabama-Coushatta nations to stop their gaming operations. Cornyn ultimately succeeded in shutting down both Tigua and Alabama-Coushatta gaming operations in 2002 and even persuaded U.S. district judge John Hannah to reduce indigenous nations’ political status to the equivalent of “voluntary associations” such as sororities or fraternities.¹²

Shortly after the Tigua and Alabama-Coushatta casino closures, the Tiguas then paid \$4.2 million to lobbyists to try to get Congress to intervene to reopen their casino. However, the lobbyists that the Tiguas hired, Jack Abramoff and Michael Scanlon, were the same ones previously hired by religious activist Ralph Reed to help the state of Texas conduct a massive media campaign to shut the Tigua casino down in 2002.¹³ In an e-mail to Reed on February 11, 2002, Abramoff wrote, “I wish those moronic Tiguas were smarter in their political contributions. I’d love us to get our mitts on that moolah!! Oh well, stupid folks get wiped out.”¹⁴

Ten days after the Tigua casino closure, Abramoff wrote to a Tigua government official stating that he would get Republican leaders in Congress to rectify the “gross indignity perpetuated by the Texas state authorities.”¹⁵ Abramoff and Scanlon opportunistically (and illegally) worked both sides of the Tigua closure to their financial advantage but ultimately failed to get the Tigua casino reopened. In the meantime, Abramoff and Scanlon still collected the \$4.2 million paid to them by the Tigua Nation. The Tiguas also contributed over \$250,000 to congressional campaigns between 2002 and 2004 based on Abramoff’s recommendations.

As the Tigua Nation example demonstrates, indigenous peoples are confronting a new era of rich Indian racism that has led to unprecedented attacks on their nationhood. The campaign to close the Tigua casino and the reduction of indigenous nations’ political status in Texas to voluntary associations illustrate how the self-determining authority of the Tiguas and other indigenous nations has

been challenged by state policymakers invoking rich Indian images. However, conflicts over how indigenous peoples are represented and treated by policymakers and the general public have been prevalent throughout indigenous historical contacts with the United States.¹⁶

HISTORICAL IMAGES AND POLICY OUTCOMES

In his seminal work *The White Man's Indian*, historian Robert Berkhofer documents how invented images of indigenous peoples have influenced policymaking from the colonial era to the present: "Whether one looks to the history of the relationships between White claims and native lands, between White political sovereignty and Indian governments, between White commerce and native economics, or between White philanthropy and Red welfare, one finds the same fundamental imagery serving both as moral and intellectual justification for White policies and as explanation for their failure or successes. The primary premise of that imagery is the deficiency of the Indian as compared to the White."¹⁷

Among these images and social constructions of indigenous peoples, the legal fiction of the "Doctrine of Discovery" is probably the most notorious example of a colonial stereotype used to establish official policy. This fifteenth-century legal and theological doctrine asserted that if a European country encountered a territory occupied by indigenous people, the original title of the land rightfully belonged to the newly arriving, "civilized" European settlers by way of "discovery." According to this colonial construct, Native people were deemed "infidels" or "heathens" and "presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonizing law."¹⁸ The legal fiction of Doctrine of Discovery eventually found its way to the U.S. Supreme Court in 1823, when Chief Justice John Marshall delivered the opinion of the court in the *Johnson v. McIntosh* case:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in

it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.¹⁹

In this unanimous opinion, Marshall basically argued that even if a faulty logic was applied to Native peoples during the initial “discovery,” the mere fact that this practice was sustained and later led to the formation of the United States makes it the unquestioned “law of the land.” Invented images of indigenous peoples as “uncivilized” or “occupants” are not the least bit benign when considering the long-term policy implications. Such legal fictions and myths quickly become embedded in political institutions and have been perpetuated by successive generations.

Some stereotypes, such as the “noble savage,” came into prominence during first contact with colonial powers, and others, such as the “child-like Native” and the “rich Indian” are more recent inventions.²⁰ Table 1.1 illustrates the distinct U.S. policy shifts since the 1770s and dominant images and social constructions of indigenous peoples during each period. For example, during the push for assimilation during the 1870s, the political status of Native peoples was predominantly as wards in need of protection. Stereotypical images of indigenous peoples as “childlike” and “vanishing” are common in newspaper accounts and policy dictates of the time.²¹

Amid an accelerated push for Native assimilation, Congress passed the General Allotment Act, also known as the Dawes Act, in 1887. Despite extensive efforts by the “Five Civilized Tribes” to lobby members of Congress to reverse the allotment policy, the Allotment Act was eventually amended in 1891, 1906, and 1910, until it applied to almost every indigenous nation in the country.²² Believing that collectively held land was an obstacle to the “civilization” of Native peoples, the act broke up reservations and distributed plots of land to individual indigenous people. As described by the commissioner of Indian affairs in 1886, “The common field is the seat of barbarism, the separate farm [is] the door to civilization.”²³ According to the allotment policy, Native “heads of households” were to receive 160 acres of land, while those under eighteen received 40 acres. After

TABLE 1.1
Historical Phases and Images of Indigenous Policy, 1770s–Present

	Policy	Major laws	Political status/image
1770s–1820s	International sovereign diplomacy	1787 Northwest Ordinance	Noble savages
1830s–1850s	Removal	1830 Indian Removal Act treaties	Domestic dependent nations, blood-thirsty savages, warlike
1850s–1870s	Reservation	Reservation treaties	Wards in need of protection, blood-thirsty savages, childlike
1870s–1930s	Assimilation	1871 End of treaty making 1885 Major crimes act 1887 Allotment Act (Dawes Act)	Wards in need of protection, vanishing, childlike
1930s–1950s	Indigenous self-rule	1934 Indian Reorganization Act (Wheeler-Howard Act)	Quasi-sovereigns, noble savages
1950s–1960s	Termination (assimilation)	1953 Resolution 108 1953 Public Law 280	Termination of quasi-sovereign status, noble savages, patriots
1960s–1988	Self-determination	1968 Indian Civil Rights Act 1975 Indian Self-Determination Act 1978 Indian Child Welfare Act 1978 Indian Religious Freedom Act	Domestic dependent nations, quasi-sovereigns, militant protestors, spirit guides, environmental stewards
1988–present	Forced federalism	1988 Indian Gaming Regulatory Act 1988 Tribal Self-Governance Act 2000 Indian Economic Development and Contract Encouragement Act	Domestic dependent nations, quasi-sovereigns, rich Indians, interest groups

SOURCES: Modified from Cornell, *Return of the Native*, 14; Coward, *Newspaper Indian*; O'Brien, *American Indian Tribal Governments*, 258; Weston, *Native Americans in the News*; Wilkins, *American Indian Politics*, 105, 231–35.

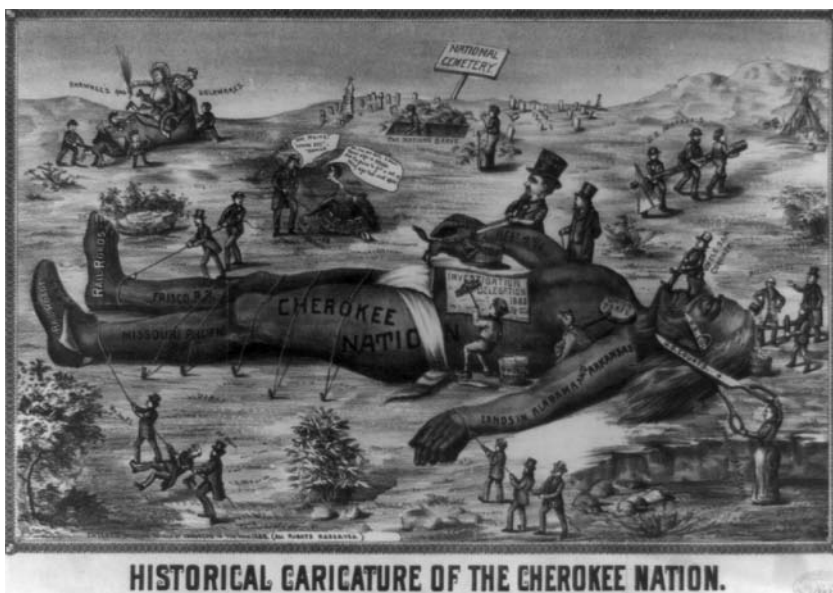


Figure 1.1. Historical Caricature of the Cherokee Nation, 1886. Courtesy of the Library of Congress.

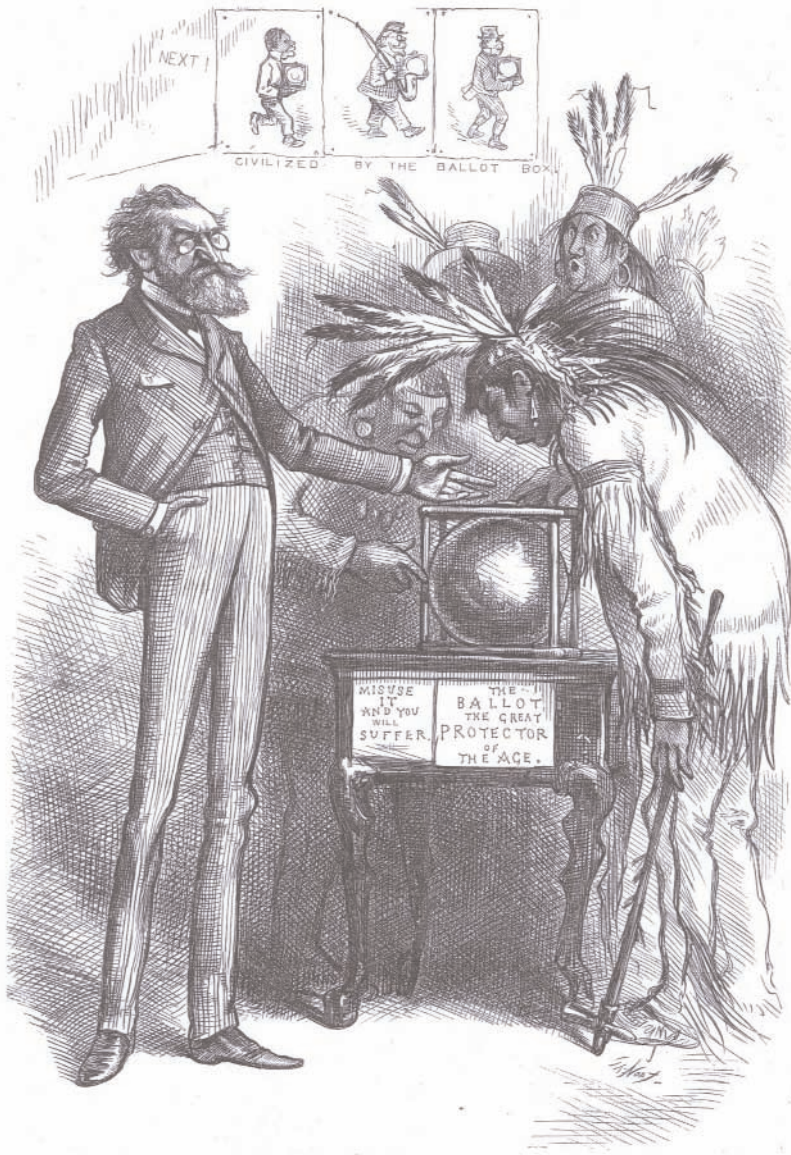
the individual allotments were parceled out, the leftover, or “surplus,” Native homelands were sold to the highest bidder. By 1934 Native land holdings were reduced by 90 million acres, down from 138 million in 1887 to 48 million in 1934 because of rampant land speculation and fraud.²⁴

An 1886 “Historical Caricature of the Cherokee Nation” demonstrates the multiple pressures and interests acting to partition indigenous nations during this time (see figure 1.1). One can readily see the symbolism of the Cherokee Nation tied to the ground, which was allegorical to the Lilliputian lands of *Gulliver’s Travels*. In this caricature, the U.S. courts are cutting the hair of the Native in their efforts to “civilize,” as missionaries bore into the skull of the Cherokee to proselytize. The “body” of the Cherokee Nation is partitioned by railroads at the feet, while the arms, which represent lands in Alabama and Arkansas, are being sawed off by state policymakers. “Uncle Sam” sits on the bridge of the Cherokee Nation’s nose with the title of “Coroner” to make this depiction of the “vanishing Native” complete. Such a vivid image of an indigenous nation being divided by multiple loyalties and interests is just as relevant today as it was in 1886.

Another caricature drawn by Thomas Nast in 1880 demonstrates a prevailing image of indigenous peoples as childlike during this period (see figure 1.2). According to the caption, granting the right to vote to indigenous people is deemed “the cheapest and quickest way of civilizing them.” As Natives appear awestruck and mystified by the ballot box, the secretary of the interior casually introduces them to “the Ballot, the Great Protector of the Age.” At the top of the cartoon, caricatures of African Americans, Scots, and Irish are depicted with the caption “Civilized by the ballot box.” Clearly, these images of indigenous peoples reflect the stereotypical childlike Native of the allotment era and depict the urgency on the part of Congress, missionaries, land speculators, and other interested parties to assimilate Native peoples into the U.S. system.

The appointment of long-time indigenous advocate John Collier as commissioner of Indian affairs in 1933 signaled a new policy shift toward reinstating indigenous governments. Collier’s vision of a “Red Atlantis” and perceptions of indigenous peoples as noble savages replaced previous images of indigenous peoples as childlike and vanishing. Consequently, after several consultations with indigenous nations around the country, the Indian Reorganization Act (IRA, also known as the Wheeler-Howard bill) was passed by Congress in 1934 to counter the previous allotment policies.²⁵ Serving as further justification for Collier’s vision of a “Red Atlantis,” the press during this time often used “idealized imagery of Native Americans as possessing characteristics superior to those of whites.”²⁶

Public perceptions of indigenous peoples shifted quickly with the impending threat of World War II. The federal government’s attention and resources were quickly being diverted away from Native communities. Indigenous people also volunteered to serve in World War II at a high rate, which left communities without key personnel and leadership. By 1945 Collier had resigned, and President Harry Truman’s administration rejected many of Collier’s indigenous policies and programs. The dominant image of the 1940s and 1950s was the patriotic warrior, another variation of the noble savage. As journalism professor Mary Ann Weston points out, “In World War II, Indians were portrayed as patriotic warriors who were eager to fight to defend the country that had brought them to the brink of physical and cultural extinction. Article after article repeated and embellished the image of innate warriors and scouts who were instinctively superior fighters.”²⁷



GIVE THE NATIVES A CHANCE, MR. CARL.
THE CHEAPEST AND QUICKEST WAY OF CIVILIZING THEM.*

Figure 1.2. Cartoon of Indigenous Voters, by Thomas Nast, 1880

Invented images of Native peoples as super-patriotic and loyal motivated Congress to abandon its trust relationship with indigenous nations in an effort to promote assimilation. Beginning with House Concurrent Resolution 108 in 1953, federal services to over 109 indigenous nations and bands were effectively terminated by legislation that eliminated special Native programs and, in most cases, resulted in the sale of reservation lands.²⁸

A clear break from the termination era occurred when President Lyndon B. Johnson articulated a new direction for federal policy in his March 6, 1968, speech titled "Special Message to the Congress on the Problems of the American Indian: The Forgotten American." He proposed a new goal for Native programs "that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help." Invoking images of indigenous peoples as victims of previous U.S. policies, Johnson spoke of indigenous peoples as being a "a symbol of the drama and excitement of the earliest America. But for two centuries, he has been an alien in his own land." While President Richard Nixon is often credited with the new federal emphasis on indigenous self-determination, this policy shift was really initiated by his predecessor, President Johnson. When Nixon took office in 1969, he quickly established indigenous peoples as a central part of his policy agenda for self-determination.

As a reflection of Nixon's new emphasis on indigenous policy, Senate Bill 1017 (PL 93-638), titled "The Indian Self-Determination and Educational Assistance Act," passed on January 4, 1975. The act itself was vaguely worded and sought to "provide for the full participation of Indian tribes in programs and services conducted by the Federal government." Essentially the legislation facilitated the direct contracting of indigenous nations with the federal government, under the auspices of the Department of the Interior, for health and educational services. Native peoples who were still wary of yet another government termination policy, referred to it as the "Self-Termination Act." By 1988 the Self-Governance Act, which was a derivation of the 1975 Self-Determination Act, allowed twenty-two participating indigenous governments to bypass the bureaucratically challenged Bureau of Indian Affairs (BIA) and contract directly with the federal government for health care and education services.

Prevalent media images of indigenous peoples as militants during this time provide some context for the policy shift. Direct confrontations between Native peoples and the U.S. government over treaty rights and self-determination became increasingly common during the 1960s and 1970s, beginning with the fish-ins in the 1960s and culminating with the seventy-one-day occupation of Wounded Knee by the American Indian Movement (AIM) in 1973. During this time, U.S. newspapers frequently used terms such as “militants” and “insurgents” to describe the protest actions of indigenous peoples. Timothy Baylor studied NBC’s news coverage of AIM from 1968 to 1979 and found that the network depicted AIM’s goals as militant or as another indigenous stereotype 98 percent of the time. Key motivations for AIM’s actions, such as promoting treaty rights or civil rights, were rarely discussed in the NBC coverage. The most common image in the network’s coverage of AIM was that of the militant with a focus on “violence and the breakdown of law and order.”²⁹

Besides the angry militant image, public perceptions of Natives as environmentalists were also widespread. Indigenous peoples were often portrayed as “the unspoiled children of nature who held the key to salvation of decadent white society by their closeness to the natural world and communal institutions.”³⁰ Coupled with social constructions of Native peoples as environmental stewards was the imagery of the spiritual Native person holding ancient and exotic powers. Policy reflected these well-known perceptions and stereotypes, and the American Indian Religious Freedom Act was passed in 1978.

Juxtaposed with the rhetoric of self-determination under Nixon, emphasis shifted in the 1980s to economic development. Perceptions of indigenous peoples as potential entrepreneurs were widespread under President Ronald Reagan’s administration, which emphasized “trickle-down” economic theory: “Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress.”³¹

Signaling another change in U.S. policy, in a 1983 speech President Reagan referred to indigenous nations and states as equal partners in obtaining funding through block grants and building local autonomy. This was a cornerstone of Reagan’s “new federalism,” which was his attempt to return policy power to the states and local

governments, reversing the accumulation of power at the federal level since the New Deal in the 1930s. However, this policy shift had unforeseen layers of complexity, as it compelled indigenous nations to negotiate with states as equals and therefore undermined their once exclusive relationship with the federal government during eras of removal in the 1830s and termination in the 1950s. Self-determination policies of the 1970s and 1980s now gave way to forced federalism and increased indigenous-state interactions during the 1990s driven by contemporary images of indigenous peoples as rich Indians and interest groups.

THE FORCED FEDERALISM ERA, 1988–PRESENT

Historical patterns suggest that every twenty years or so a new U.S. policy shift emerges that attempts to eliminate indigenous nations altogether or to assimilate Native peoples into the U.S. system. The latest U.S. policy shift is no different. Over the past twenty years, the relationship between indigenous governments and the U.S. government has undergone a fundamental transformation. The 1970s and 1980s were regarded as the self-determination era in which the approximately 562 indigenous nations were given greater control over the administration of education, health care, and other services. The forced federalism era began in 1988 with the passage of IGRA and the further institutionalization of an indigenous-state compact system, which is designed to enable states and indigenous governments to draw up and ratify agreements that “provide for the application of civil, criminal, and regulatory laws of either entity over Indians and non-Indians as the parties may see fit to agree.”³²

In compact negotiations since 1988, states have largely ignored historic, treaty-based relationships that indigenous nations have had with the federal government. As Kate Spilde explains, “Federal policy, as well as public opinion, is often deliberately ahistorical.”³³ For example, when originally seeking statehood, territories with indigenous nations situated inside their borders formally recognized the elevated status of indigenous nations. Twelve western territories hosting more than 80 percent of Native peoples in the United States were required by the federal government to include “Indian disclaimer clauses” in their constitutions, legally precluding them from asserting

jurisdictional control on indigenous nation homelands.³⁴ Since that time, states have actively violated these Indian disclaimer clauses and have disregarded the federal trust relationship. As with previous policy eras, such as removal in the 1830s and termination during the 1950s, the federal government has once again off-loaded its trust responsibilities to state governments.

The once exclusive federal trust relationship, which comprises 379 ratified treaties as well as executive agreements, direct consultation with Congress on Indian affairs, federal statutory obligations, and court decisions, guarantees direct indigenous government-to-federal government relations. This historic trust relationship now appears to be fundamentally challenged again by state governments as they have received more jurisdictional powers from the federal government, including the institutionalization of an indigenous-state compact system. The passage of IGRA in 1988 emphasized indigenous-state compacts as the way to formalize gaming agreements with state policymakers, and, consequently, state governors and officials are asserting more dominance over indigenous nations within their state boundaries.

Since 1988 the federal government has compelled or coerced indigenous nations to negotiate away their powers of governance and jurisdiction of their homelands relating to taxation, gaming, hunting and fishing rights, homeland security, and so on vis-à-vis indigenous-state compacts with state governments that have historically shown animosity toward them. This contemporary devolution process, which transfers federal powers to state and local governments, has been labeled “new federalism” but is just the latest attempt by the federal government to off-load their trust responsibilities to indigenous peoples onto state and local governments. Tensions over the division of federal and state powers surfaced in the 1830s with two Supreme Court cases filed by the Cherokee Nation. In an 1831 case, *Cherokee Nation v. Georgia*, Chief Justice Marshall referred to Native people as “domestic dependent nations” whose relationship to the United States was “that of a ward to a guardian.” While not considered international sovereigns under this case holding, indigenous people were found to possess some degree of self-determination in governing themselves. Marshall further expounded on indigenous-state relationships in *Worcester v. Georgia* (1832): “The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries

accurately described, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is by our constitution and laws, vested in the government of the United States.”

In response to Marshall’s *Worcester* ruling, President Andrew Jackson is alleged to have said, “John Marshall has made his decision: now let him enforce it,” setting the stage for the forced removal of indigenous peoples from their homelands.³⁵ Beginning with the 1830s removal era, which privileged states’ rights over those of indigenous nations, over fifty indigenous nations were forcibly relocated from their homelands.

By the 1950s another federal relocation program was enacted through termination legislation, which denied recognition and federal services for over 109 indigenous nations and bands, often resulting in the transfer of federal responsibilities and services to state governments. Through the withdrawal of federal services and enactment of urban training programs, the ultimate goal of termination policies was to destroy indigenous nations through the desegregation of Indian communities and the integration of Indians with the rest of society.³⁶ In legislation that laid the groundwork for the forced federalism era, Public Law 280, which was passed in 1953, gave five states (California, Minnesota, Nebraska, Oregon, and Wisconsin) full criminal and some civil jurisdiction over indigenous nations and provided the legal basis for other states to assert this same jurisdictional power. Consequently, states were granted rights that the federal government previously reserved on a government-to-government basis with indigenous nations.

The transfer of federal powers to state governments accelerated with the passage of IGRA in 1988. Since 1988 state and local governments have begun to assert jurisdictional claims over indigenous nations in seven distinct areas relating to indigenous governance

1. *Criminal jurisdiction and policing*: States are attempting to extend their jurisdiction for criminal matters under Public Law 280.³⁷ Natives and state and local governments are engaged in ongoing disputes regarding law enforcement and punishment for indigenous and non-indigenous persons committing crimes on indigenous homelands.

2. *Hunting and fishing rights*: Despite guarantee of hunting and fishing rights by prior treaties and constructive agreements, indigenous peoples are being challenged by states in the name of conservation and environmental protection. Additionally, some state governments, such as Montana and South Dakota, are asserting that indigenous peoples are subject to the same hunting and fishing regulations as non-indigenous people despite the existence of indigenous treaties that guarantee their hunting and fishing rights.

3. *Self governance*: State legislators and members of state executive branches increasingly claim jurisdictional control over issues of indigenous governance, such as water rights and policy decisions, such as the Yakima ban on alcohol in Washington. State intrusion into areas once reserved exclusively for the indigenous governments has been growing.

4. *Taxation and economic development*: Efforts are being made by state and local governments to raise revenue by taxing transactions—namely, gaming—on indigenous land. This has been especially problematic regarding alleged state rights to tax indigenous-owned businesses selling motor fuels and tobacco products and has led to highly publicized indigenous nation-state disputes in New York and Rhode Island.

5. *Child-protection and welfare*: States have initiated efforts to amend the Indian Child Welfare Act (ICWA) of 1978, which provides indigenous nations with authority to determine the indigenous citizenship of their children. State efforts to reform ICWA undermine indigenous nationhood by imposing state governmental standards of “Indianness” and by proposing to adopt “objective” measures of cultural ties.³⁸

6. *Gaming*: Indigenous gaming is a growing and controversial area in which indigenous-state compacts provide state governments with opportunities to limit and tax indigenous casino profits.³⁹ Intractable disputes over the renewal of gaming compacts have occurred between state governors and indigenous nations in California, Arizona, and New Mexico.

7. *Homeland security*: The Homeland Security Act of 2002, passed in response to the attacks of September 11, 2001, channels all funding assistance through state governments and places indigenous nations in the same classification as cities when

determining funding priorities and violates the exclusive federal government-to-indigenous government relationship.

While federalism scholars tend to agree that the Nixon administration initiated the devolution of federal policymaking power to states and local governments (a process intensified under the Reagan administration), researchers to date have failed to determine specifically how forced federalism affects indigenous nations.⁴⁰ Policy scholars from the Harvard Project on American Indian Economic Development, such as Stephen Cornell and Jonathan Taylor, contend that delegation of powers to state governments alone is not dangerous to indigenous sovereignty and actually has the potential to “significantly boost tribal self-rule.”⁴¹ At the same time, a 1998 report published by the American Indian Policy Center, a nonprofit indigenous think-tank in Minnesota, concludes that “states are leading the attack on tribal sovereignty” in the areas of taxation, criminal jurisdiction, and diminished reservation boundaries.⁴² While research undertaken by the American Indian Policy Center seems to confirm some of the new challenges to indigenous self-determination since 1988, subsequent research by Cornell and Taylor reflects how theory has not kept pace with reality regarding contemporary indigenous policymaking and political mobilization.

How, then, are indigenous nations responding to state challenges to their nationhood in an era of forced federalism? In a 1989 examination of the effects of federal policy on indigenous nations, Native political researcher Emma Gross outlined two possible scenarios for indigenous nations in the United States: either the BIA and other federal agencies will control Indian tribal activities or indigenous peoples will make the most of educational and entrepreneurial activities and devote their resources to developing their economies and to extending their influence in the local and national political arenas.⁴³

Based on the survey responses and the case studies discussed in chapter 4, it is clear that the latter situation is now coming into effect. However, Gross did not account for the domination of indigenous affairs by state and local governments in her model. Given the changing relationships between indigenous nations and states, other scholars contend that “tribes and the states essentially have two choices: they can litigate or they can cooperate.”⁴⁴ But such a

narrow perspective overlooks other forms of indigenous cultural and political self-determination. Based on the research in this book, indigenous nations have pursued far more than just two available options. Various forms of economic development (including, but not limited to, gaming) on indigenous homelands have expanded opportunities for indigenous political mobilization since 1988, and a number of political strategies have been used by indigenous nations during the 1990s and into the twenty-first century to counter increased state encroachment on indigenous governance and homeland autonomy.

While general analyses of indigenous responses to the challenges of forced federalism are insightful, it is also useful to examine how specific indigenous communities have responded to the increased interactions with state governments. One such example of contemporary indigenous nation–state conflicts is the Narragansett Nation (Rhode Island), who saw their plans to open a casino blocked by U.S. senator John Chaffee’s rider to a 1996 Omnibus Appropriations Act. According to the Chaffee provision passed by Congress, the eighteen-hundred-acre Narragansett reservation lands were subject to state and *not* federal law as specified under the terms of the 1978 Rhode Island Indian Claims Settlement Act. While this bill seemed to contradict federal oversight of indigenous gaming outlined by IGRA, the U.S. Court of Appeals decided against the Narragansett claims by upholding the legality of the 1996 Omnibus Appropriations Act. Randy Noka, first councilmember for the twenty-eight-hundred-member Narragansett Nation, points out that the court’s ruling singled out the Narragansetts as “the only tribe out of this whole nation of 562 tribes, the only tribe, that has had their rights taken away like that.”⁴⁵

As a result of the Court of Appeals ruling, the Narragansett Nation was subjected to Rhode Island state jurisdiction regarding any future casino gaming proposals on reservation lands. When they attempted to put a casino referendum before the voters both locally and statewide, the Rhode Island House Finance Committee voted down legislation that would have put a Narragansett casino referendum on the 2000 ballot.⁴⁶ Furthermore, Governor Don Carcieri of Rhode Island has refused to approve continued funding for a Narragansett housing project on federal lands, citing fears that the Narragansett Nation might build a casino on this land if the financing were

approved.⁴⁷ As Noka points out, “It’s not just gaming, certainly. We’re at war about our self-determination, about exercising the rights of a nation that we have under federal law.”⁴⁸

Despite Governor Carcieri’s continued opposition to a Narragansett casino in Rhode Island, the Narragansett Nation has sought backing from Harrah’s Entertainment for a proposed \$1 billion casino in West Warwick, Rhode Island. After several years of lobbying to get a referendum to the voters on casino gaming, the Narragansetts have been prevented from putting forward a statewide ballot during the 2004 and 2005 election cycles. However, this changed in 2006 when a ballot measure (listed as “Question 1” on the ballot) was put forward to voters that would amend the Rhode Island constitution to permit a privately owned and privately operated resort casino to be regulated and taxed by the state.

In their advertising campaigns leading up to the November 7, 2006, election, Harrah’s Entertainment spent \$5 million on public relations efforts (polls, consultants, donations to community groups, etc.) to gain Rhode Island voter approval, while the Narragansetts stressed the need for gaming to provide housing and jobs for their nation. Opponents to the gaming initiative also led high-profile campaigns. A Rhode Island organization called Save Our State (SOS) spent over \$2 million on ad campaigns against the proposed casino and played on voter fears of casino corruption, increased traffic, and decreased profits for local businesses. On its website, SOS even questioned the Narragansett role in the casino operation by claiming that “Harrah’s says it will ‘partner’ with the Narragansett Indians to operate a casino in West Warwick. But 95% of the profits will go to Las Vegas and the Narragansett Tribe will have no management or operational role in the casino.”⁴⁹ The two other casinos in Rhode Island, Lincoln Park and Newport Grand, also campaigned strongly against the proposed gaming facility along with Governor Carcieri. The governor continued to oppose a Harrah’s/Narragansett casino on the grounds that nothing would prevent Harrah’s and the Narragansetts from paying a “substantially lower tax rate” to the state of Rhode Island.⁵⁰ Such thinking exemplifies a rich Indian racism mentality that was evident throughout the campaign.

On November 7, 2006, Question 1 was defeated by a wide margin, with of 63 percent of Rhode Islanders voting against the casino and only 37 percent voting for the measure.⁵¹ Immediately following the

2006 election, Narragansett chief sachem Matthew Thomas vowed to continue lobbying Congress to remove the 1996 Chafee amendment, which prevents the Narragansetts from operating a casino on their own homelands under IGRA.⁵²

As the Narragansett casino example shows, indigenous nations today face a high risk when putting their powers of governance and self-determination up for a popular vote. While such a referendum strategy has been successfully used by indigenous nations in Arizona (1996) and California (1998 and 2000), this strategy failed in Maine when the Passamaquoddy and Penobscot nations lost a 2003 referendum by a nearly two-to-one margin to run casinos—even with the condition that part of the revenue would be used for state education and municipal revenue sharing.⁵³

The Narragansett example also demonstrates that the transition to the forced federalism era represents a fundamental shift in government-to-government relations for indigenous nations. During the forced federalism era, relationships between indigenous nations and state and local governments are decidedly more contentious when economic development issues such as gaming are being negotiated. Policymakers invoking rich Indian images are increasingly likely to set strategies that regulate indigenous nations and diminish indigenous self-determination and governance capacities.

In their comprehensive analysis of indigenous sovereignty and federal law, Lumbee scholar David Wilkins and Creek/Cherokee scholar K. Tsianina Lomawaima highlight the potential for conflict as federalism has been redefined: “The current reshaping of federalism to strengthen the states, and weaken the federal government and tribes, is occurring despite the fact that tribal sovereignty does not derive from state or federal constitutions, and despite the fact that tribal sovereignty is inherent and originates from within the collective will of each Indian community.”⁵⁴ With every addition of political actors and complexity to the policymaking process, the ability of indigenous nations to represent themselves on their own terms is being compromised.

Yet not all indigenous-state interactions during the contemporary era have been conflictual. Although increased interaction between indigenous nations and states has led to conflict in some areas, such as gaming and taxation, where indigenous nations tend to be viewed by states as competitors for jobs and income, it has led to

cooperation in other areas where indigenous nations and states seemingly have mutual interests, such as natural resource management. In Oregon, for example, under the governor's direction, state agency officials meet regularly with indigenous nations throughout the year to discuss areas of potential conflict as well as hold annual summits between federal, indigenous and state governments to discuss potential policies.⁵⁵ Other cooperative efforts include the Commission on State-Tribal Relations (CSTR), which was founded in 1977 to "stabilize state-tribal relations and de-escalate conflicts."⁵⁶

CONFRONTING RICH INDIAN RACISM AND THE POLITICS OF PERCEPTION

Rich Indian stereotypes serve to undermine indigenous identities and self-determination claims, and managing the politics of perception becomes a never-ending task for indigenous nations. It can often distract leaders from focusing on the real roots of their power: protection of homelands, revitalizing indigenous languages, engaging in ceremonial life, and reminding others of their sacred histories. As an alternative to bureaucratic structures and decision making institutions, indigenous governance is an ongoing process of honoring and renewing individual and community relationships and responsibilities. These principles of indigenous nationhood are best exemplified by the Tsalagi (Cherokee) concept of *Gadugi* (other nations have their own indigenous words for similar values), which entails "a built-in spirit of community camaraderie. This means that whatever issues or concerns arising in collective living have to be addressed in a unitary way and that no one is left alone to climb out of a life endeavor; it reflects a collective community base."⁵⁷ Policies driven by rich Indian racism directly challenge the unity of indigenous nations and the community principles of *Gadugi*.

The politics of perception have played out in a number of ways, ranging from media stereotypes of indigenous peoples to systemic racism in policymaking institutions. According to an *Indian Country Today* poll of 450 indigenous community leaders and scholars in the United States, 76 percent of the respondents claimed that there is a "growing anti-Indian sentiment in the country."⁵⁸ When asked "What do you believe is the primary cause of anti-Indian sentiment?" those

responding overwhelmingly cited that at the root of the current anti-indigenous backlash were “media stereotypes” (45 percent), followed by “U.S. government” (33 percent) and “systemic racism” (22 percent). As the polls results demonstrate, contemporary challenges to indigenous nationhood originate from a number of sources. Survey respondent Suze L’fox (Delaware) explains further: “There are several things I hear repeatedly: Indians don’t pay taxes (then take my tax bill please!), I bet you wish you were (enter name of tribe with a casino), and Indians don’t have to work or worry about anything because . . . (enter federal handouts, casinos, oil—how about Native American art?) . . . Therefore, I think anti-Indian sentiment basically comes from lack of education, publicity about tribes with casinos, and just plain stupidity.”⁵⁹

Rich Indian racism is not just confined to policymakers. Citizen groups such as SOS in Rhode Island have formed to oppose and question the identities of indigenous peoples and their self-determining authority as First Nations. Evoking the memories of the states’ rights debates during President Andrew Jackson’s administration, which ultimately led to the forced removal of some fifty indigenous nations from their ancestral homelands in the 1830s, an anti-indigenous backlash is gaining momentum among non-indigenous reservation landholders and businesspersons across the United States. Claiming to be victims of taxation without representation, these “new terminators” are the latest version of an older movement portraying indigenous nations as “separatist, discriminatory, and even racist.”⁶⁰ Groups such as One Nation (Oklahoma) and the Upstate Citizens for Equality (New York) advocate the complete abrogation of indigenous treaty rights and termination of the federal trust relationship under the guise of equality: “Federal policy is driving Americans apart by fueling divisiveness between tribal governments and their neighbors. It has become obvious that tax and regulatory inequities favor the tribes and threaten to thwart economic development efforts across our nation.”⁶¹

While challenges to indigenous governance have become more commonplace by groups invoking rich Indian images as well as the federal courts during the 1990s, state governments also draw on this form of public support to justify their expanded jurisdictional oversight of indigenous nations. Alliances of convenience between citizen groups promoting an anti-indigenous agenda, and state policymakers seeking

to capitalize politically on rich Indian images pose formidable new challenges to indigenous nations and peoples.

When responding to rich Indian racism, indigenous nations run the risk of seeking only political or economic solutions to challenges that also require the strong cultural and spiritual foundations of *Gadugi*. Casinos and other forms of economic development being promoted on indigenous homelands tend to have a strong gravitational pull that, despite the best of intentions, can distract leaders from the true powers of indigenous nations. Lobbying activities of indigenous nations reflect the changing community priorities as tax exemptions and compact negotiations slowly displace education, language programs, and health care as priorities.

In response to increasing threats of state and local jurisdictional encroachment within their homelands, indigenous nations are mobilizing politically to meet challenges to their governance capabilities and are rearticulating their self-determination in local, regional, and global forums. Is the prophetic warning issued by the U.S. Supreme Court in the case *United States v. Kagama* (1886) regarding states as the “deadliest enemies” of indigenous nations as relevant today as it was in the late nineteenth century? Or are indigenous and state governments today partners in the “utmost good faith,” as the Northwest Ordinance mandated in 1787? The following chapters discuss how and why indigenous peoples have mobilized to meet contemporary challenges to their nationhood and self-determination.