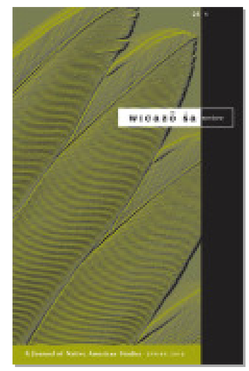
The State of Indigenous America Series: Federalism, Indian Policy, and the Patterns of History



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Stephen Wall

Those who are familiar with the history of federal Indian policy are aware that there have been several "eras" of policy, each characterized by a particular approach to the relationship between the United States and the Indigenous tribes and nations. There have been a number of commentators who have analyzed these various eras and their impact, but all seem to agree on the basic structure of the history of Indian policy. The U.S. Indian policy has followed a schizophrenic pattern with policies that are contradictory and mystify the relationship among the tribes, the U.S. government, and the individual states of the Union. The purpose of this essay is not so much to specifically address the impact of those policies on Indigenous America, including sovereignty and land issues, but to explore how and why these policy changes came about.

Initially, U.S. Indian policy was one of trade and dealings based on the relative equality of political and military force. The young United States was in a very vulnerable position. It had a small army and high war debt, and it was not in a position to fight a protracted war with the Indian tribes. In addition, the tribes had a history of allying themselves with the English and French based on historical relationships. The last thing the young United States needed was a strong military alliance between the tribes and either the French or English. Thus, the policy was one of appeasement, at least as much as the increasing U.S. population and hunger for land would allow. This policy lasted from the birth of the nation until after the War of 1812, when the French and English were no longer threats to the emerging United States.

After the Louisiana Purchase and the War of 1812, both of which limited French and English influence in the tribal communities and enlarged the United States' role in the West, the United States began to seriously consider the policy of removing tribes from the South, the Ohio Basin, and the "Old Northwest" to Indian Territory, an area west of the Mississippi River. Once the United States was strong enough militarily and had garnered sufficient political support, Removal became the official Indian policy. Removal consisted of the wholesale transfer of tribes or their remnants to Indian Territory. Isolated pockets of tribal people remaining in their homeland testify to the incompleteness of the policy, but the purpose of the policy, which was to open up millions of acres of land for development, was seen as successful by the United States.

The Civil War essentially ended the Removal policy. After the Civil War, there were some attempts to remove the tribes to Indian Territory; however, the number of Indians and the level of their resistance increased the economic costs and reduced the political will to fully relocate the tribes. This was the beginning of the Reservation era, in which the tribes were "removed" to a small portion of their original territories. It was more cost efficient and politically expedient to convince the tribes to stay in a limited part of their territory rather than force them to move lock, stock, and barrel to Indian Territory.

As the last of the western tribes were reduced to their reservations, it became apparent that the general policy of the previous eighty years, that of war and subjugation, was no longer politically appropriate and the general federal Indian policy focus changed to assimilating the Indian into the white man's world. Education, individual land ownership, and the expungement of tribal institutions were the main fronts from which the assault of assimilation was launched. The Allotment Act was the main tool of the assimilation policy, so much so that this era is often referred to as the Allotment era, and through the Allotment act, Indian reservations were broken up and land was given to individual Indians, resulting in the loss of 100 million acres, or two-thirds of the Indian land base.

In 1928, the United States commissioned Lewis Meriam and the Institute for Government Research to conduct a survey of the conditions on the Indian reservations across the United States. The Meriam Report identified a great disparity in health care, education, nutrition, and economic opportunity between Indians and mainstream Americans. The report helped direct massive change in federal policy in the 1930s, which became known as the Indian Reorganization era. This policy included the creation of tribal constitutional governments and the establishment of Indian preference, as well as funding for various educational and economic development programs in Indian Country.

However, again there were changes in Indian policy. After World War II, "termination" became the watchword and legislation and governmental policies were designed to end the relationship Indian tribes and nations had with the United States. The relocation program was established to move Indian people off the reservations. House Resolution 108, the termination bill, was passed to direct governmental policy toward termination and there was actual termination of a number of tribes. Public Law 280 was passed in an effort to restrict the authority of tribal governments in a number of states.

But Indian policy was to change 180 degrees again. In 1970, President Nixon returned land to Taos Pueblo and articulated a policy of "self-determination" for Indian tribes. Simultaneously, tribes were winning major Supreme Court cases that further defined the relationship between the tribes and the federal and state governments. Federal legislation, such as the Indian Self-Determination and Education Act, and other efforts provided the tribes with finance, access to services, and a legal status that encouraged local decision making and nation building. This policy has gone onward and has been articulated as the "government to government" relationship by all of the U.S. presidents since 1988.

When we look at the history of Indian policy, it seems to be a series of flip-flops, missteps, and contradictions. If we look at each era in isolation, each looks reasonable from an expansionist, imperial perspective, and we see that the policy goals and methods of each era do not seem to be related to the policy goals of the previous or succeeding era. Within this seemingly chaotic, inconsistent approach, a pattern of behavior through which the United States has dealt with Indians emerges. This pattern of political and economic expansion and selective recognition of the rights of Indian people is perfectly consistent with the basic philosophy and principles upon which the United States was founded. However, that pattern is inconsistent with the rights and prerogatives of Indian nations existing within the United States.

THE ENDLESS AMERICAN POLITICAL STRUGGLE

In order to appreciate the pattern of the United States' relationship with Indian tribes, we have to step outside of the realm of Indian affairs and look at the basic political structure of the United States. The basic political structure of the United States was defined in the Constitution, but it is more eloquently and vehemently articulated in the various attempts of the British colonies to create a unified national government as exemplified by the Albany Plan and the Articles of Confederation.

When the British colonies began to articulate the notion of unification at the Albany Convention in 1754, the delegates immediately confronted the endless American political struggle—the degree of power to be granted to the national government and the degree of power to be retained by the various colonies. The Albany talks broke down when it became apparent that none of the colonies were willing to grant sufficient concessions to a national government to even get to the point of discussing the structure of a functional national government. It was twenty years before serious discussions about a national government could be continued.

The endless political struggle raised its head again during the short-lived Articles of Confederation, 1781–1788. As with the Albany Convention, each of the states came to the Articles of Confederation with its own agenda as to how much of its sovereignty it would be willing to give up. As could be expected, little genuine authority was delegated to the national government by any of the states, resulting in a weak national government, which was unable to conduct essential governmental functions on a scale necessary to maintain the integrity of a nation-state. The Articles of Confederation crumbled. A constitutional convention was convened, resulting in a Constitution that provided for a stronger national government, and while respecting the sovereignty of the individual states, nothing was done to structure that government in a manner that specifically identified its powers and authorities vis-à-vis the states and national government. As an afterthought, the Tenth Amendment was added to provide that "powers not expressly granted to the federal government are reserved to the states" in an attempt to appease the states' rights factions and ensure the acceptance of the Constitution.

While not providing sufficient direction to resolve the issue, the Constitution provided sufficient structure to control the political struggle and provide a mechanism for resolving individual circumstances in which the interplay of state and federal power was in question. For instance, one of the first cases in the U.S. Supreme Court was *McCullough v. Maryland* (1819). This case dealt with the establishment of a national bank. Those in favor of "states' rights" felt that the national government was overstepping its bounds by chartering a national bank; the "federalists" felt that state regulation of a national bank was an infringement on the national powers of government. Since then, almost every major political question facing the United States has been articulated as 1) supporting states' rights or a strong national government, or, 2) is an interpretation of how those governmental powers are exercised within that framework.

But the endless American political struggle is not simply the interaction between the federal and state governments: its most volatile expression is made through the political views and attitudes of those who serve or seek to serve in those governments and promote the interests of either the state or the national government. Indian policy serves as a good example of this phenomenon. During the late 1820s, the state of Georgia passed a number of laws that contravened treaties between the Cherokee and the United States and infringed upon the rights of the Cherokee. The implication, which remains today under the states' rights doctrine, is that Indigenous sovereignty exists at the will of the dominant power and is bestowed in certain circumstances. The Cherokee cases, *Cherokee Nation v. Georgia* (1831) and *Worchester v. Georgia* (1832), of the 1830s were decided by a federalist-dominated Supreme Court, which found in favor of the Cherokee, but President Jackson, the first president elected on a states' rights platform, refused to enforce the Court's decisions.

During this time, another seminal case, *Johnson v. M'Intosh* (1823), was decided. When viewed together, these cases indicate the degree to which the United States held an allegiance to principles that came into being during the Crusades. These principles view non-Western peoples and their lands as chattels, in which the land and peoples were for sale and subjugation under the terms defined by the West. These principles were defined by the papacy during the Crusades, in which all non-Western peoples (non-Christians) held no rights under the laws of the Church.

These cases also show the deep divisions within the U.S. political system as to how these principles would be exercised. The Cherokee cases were the first blood of the battle for states' rights or federalist hegemony within the realm of Indian affairs. In fact, when we look at all of the eras of federal Indian policy, we see that each policy era strengthens either one or the other: states' rights or federalism.

Simply stated, states' rights is the political position of placing more governmental authority in the states and less in the federal government. Federalism is the political position of placing more authority in the federal government than in the states. When politicians talk about "big government," reducing the size of the federal government, local decision making, and too many federal rules and regulations, they are essentially talking about states' rights. When they talk about federal responsibility, regulation of interstate issues, and increased funding for services and programs, they are essentially talking about federalism.

Sadly, because this never-ending political struggle exists between the proponents of states' rights and federalism, Indian tribes and nations are not a part of this dialogue, although we do play an important role in the implementation of the nation's states' rights or federalist policy. States' rights policies have often opened Indian capital for non-Indian exploitation and have increased state authority over Indian land. Federalist policies have enhanced services to tribes and Indian individuals and have strengthened tribal authority and the correlative expansion of federal authority. It appears that often Indians are the pawns in a political game, pawns whose capital is valued more than human lives and whose inherent authority is manipulated by the players of the game to achieve ends that may or may not be in the best interests of the tribe or nation but, rather, serve the political and economic interests of the politically powerful.

TRIGGERING POLICY CHANGE

Change in national policy from states' rights to federalism or from federalism to states' rights is not simply the result of electing people with specific political views to positions in government. Making changes in governmental policy is a huge project: it involves large expenditures of money, acquiescence by career bureaucrats, and resolution of political infighting. It needs to have support from the general public as well as from ideologues operating within the government. It takes more than a political majority to make major policy changes. President Reagan was a states' rights president and promoted such policies as privatization of the national forests, reduced federal spending and deregulation, and other programs designed to strengthen the states' power. However, he was not fully successful in implementing his desired policies. There are a number of political issues, including the makeup of Congress, legislative committee structure, and the role of the judiciary, that prevented the full implementation of his plans. We can see that dramatic shifts in policy are dependent on more than political will or short-term strategies.

When we look back at the various eras of Indian policy, we can see that each policy supports either states' rights or federalism. We can also see that each era of Indian policy was a 180-degree change from the previous policy. Knowing that change in governmental policy is a major undertaking, what was the basis for these regular and dramatic policy changes?

It appears that those changes in policies were in response to some form of national trauma, most often economic crises. While not universally true, almost all changes in U.S. Indian policy have coincided with a response to a major economic crisis and an immediate need to stimulate the national economy using Indian capital.

The earliest Indian policy was a federalist policy based on the need to keep the United States intact. Early treaties were aimed at ensuring that the tribes and nations did not create alliances with England or France, since the incipient nation could not afford a war with England or France, with whom the Indians may be allied. The Trade and Intercourse Acts were passed from 1790 to 1834 to control trade, foster dependence upon the United States, and further economically intertwine the tribes with the United States, thus reducing the possibility of the tribes' acting in concert with European nations or with each other. These acts strengthened the hand of the federal government against the fledgling states.

By the late 1820s, the economic growth of the United States had been hampered by a deep, extended recession. Andrew Jackson was elected president on a states' rights platform. Among other things, this platform promised increased autonomy for state governments. Indian tribes held the land to the west, and that land was the key to the economic growth necessary to move the United States out of recession. Removal of the tribes in the Southeast and Midwest was seen as an economic and political necessity to expand the economy and end the recession. Removal became a policy that addressed both increasing state autonomy and the need to access capital to spur economic growth. Confrontation between the tribes of the South and the states of Georgia and Alabama exemplified the realities for the buildup to the passage of the Removal acts. Both Georgia and Alabama passed laws extending their jurisdiction over the Cherokee and other tribes in the region, nullifying the authority of the tribal governments and opening up Indian land for settlement, all in violation of federal law. The Cherokee and sympathetic non-Indians sued and the Supreme Court generally upheld the relationship between the United States and the Cherokee as primary, thus limiting the states' actions. President Jackson refused to intervene to enforce the Court's decision. Soon thereafter, the Removal Act was passed and Removal treaties signed, opening land for settlement and exploitation.

The Removal era came to an end with the national trauma of a civil war. It appears that the "War between the States" was the logical conclusion of the unbridled exercise of states' rights and the lack of constitutional principles to resolve interstate political and economic conflicts that emerged as the states grew in power. Post–Civil War America was characterized by a strong national government. One would expect a strong national government would be necessary to provide for the reconstruction of the nation after the Civil War. Civil rights legislation and constitutional amendments limiting state power were passed during this time. But that government had economic problems: recession, war debt, and the cost of continual war on the frontier. For Indian people, this resulted in the Reservation era. Attempts to relocate all tribes to Indian Territory were frustrated by the cost and the citizens' war weariness. The development of reservations was a compromise for opening the West for settlement—a limited Removal to a small portion of the tribes' original territory.

The Allotment era came about in response to the depression of the late 1880s and early 1890s. During this time, there was a crash in the precious metal market, labor riots occurred, and immigration increased from eastern and southern Europe. Clearly, there was pressure to deal with the issues of increasing numbers of people in urban areas and the lack of resources to provide for them. This was at a time when agriculture and mining were still the primary national industries. Again, Indian capital was seen as the resource necessary to end the economic malaise. The various Railroad and Homestead Acts along with the Allotment Act and Surplus Lands Act opened up 100 million acres of Indian land for settlement and development. During this time, tribes were not recognized as having governmental authority and Indian people were at the mercy of the states and federal agents. The change from federalism to states' rights is best represented by *Plessy v. Ferguson* (1896). In that case, the U.S. Supreme Court affirmed the rights of the states to interpret and apply the Civil Rights Acts and restricted the power of the Fourteenth Amendment to limit states' actions, thus limiting the authority of the federal government in the most volatile of issues, the status of freed slaves. For Indian people, the United States took a three-pronged attack on tribal existence: change tribal ideals of property ownership (Allotment Act), change tribal notions of jurisprudence (Major Crimes Act), and change tribal notions of society (boarding schools); and the federal government was trying to "get out of the Indian business." Since there was no recognized tribal organization, the federal government was trying to get the individual Indians to join white society and no longer have tribal ties and thus no federal ties.

The most dramatic example of economic crisis and the change in Indian policy is the transition from the Allotment era to the Indian Reorganization era. This policy change was in response to the Great Depression, and it was the first economic trauma that did not involve accessing Indian capital to raise the country out of the crisis. The Indian Reorganization Act (IRA) was the Indian affairs aspect of a broad national program to consolidate federal power and increase the authority of the national government. President Roosevelt used the power of the federal government to lift the country out of the depression. Social Security, the Civilian Conservation Corps, and the Works Progress Administration were examples of the use of federal power to create programs and jobs to address the economic crisis, while the IRA provided for tribal constitutions, corporate charters, and funds for education and economic development. The Indian New Deal did more to assimilate Indians into the American economic and political life than any previous program. That level of assimilation brought the reality that the exercise of tribal governmental authority is designed to promote development on the terms established by the United States.

After World War II, there was a serious economic recession that lasted from the end of the war into the early 1950s. At the same time, there was a huge need for housing and jobs for returning soldiers who wanted to start families. This was the time of a states' rights era in which there was a frontal attack on federal control over resources in the western United States. Jurisdiction to determine federal (and tribal) water rights was given to the states, the Indian Claims Commission was created to clear title to Indian land in the West, and there were moves to eliminate the national forests and other forms of federal control over land in the West. It was also the time of termination of Indian tribes and relocation of Indian individuals into urban areas. Timber was an important resource to address the housing issue and therefore the recession. It must be noted that two terminated tribes, the Klamath and Menominee, had the most accessible timber resources. Thus, again, Indian capital was used to help lift the United States out of economic crisis.

In the 1960s, the decolonization movement was sweeping the world, with French, German, and English colonies seeking their independence. Membership in the United Nations almost tripled. All over the world, people were demanding their right to determine their own destinies. This movement fueled a new national trauma: the struggle to secure civil rights. The civil rights era was beset with civil disobedience, riots, and assassinations. Simultaneously, the United States was involved in the Vietnam War. There were economic problems in U.S. President Johnson's "guns and butter" policies of expanding social programs, while fighting the Vietnam War was creating a problem of inflation. President Nixon initiated price controls and then the cost of energy skyrocketed as the Organization of Petroleum Exporting States took control over international oil production. In this environment, American Indian self-determination took its first steps. With the passage of the Indian Self-Determination Act, the Indian Finance Act, and a number of other landmark pieces of legislation, tribes had the opportunity to develop their resources and economies in a manner that created the illusion of tribal control, but within a set of limitations set by American business and industry. At the same time, a number of Court decisions reinforced tribal governmental authority.

The Self-Determination era was limited, but not eliminated, by the election of Ronald Reagan as president. States' rights advocates returned to government and immediately began trying to dismantle the gains made by Indian people in the administrations of Presidents Johnson, Nixon, Ford, and Carter. The return to states' rights was in response to the seemingly ineffectual leadership of President Jimmy Carter, an economic malaise called "stagflation," which resulted in high interest rates. Reagan's cure for the economic problems was a dramatic cut in federal spending, a reduction of taxes, and the incorporation of "supply-side" economics, which came to be known as Reaganomics. Although President Reagan surrounded himself with anti-Indian cabinet members and staffers, the legislation and court decisions of the 1970s prevented a complete dismantling of Indian self-determination. However, the impacts of Reaganomics limited the funds available to tribes and effectively limited the tribes' options for the exercise of self-determination. The states' rights movement grew through Presidents Reagan, George Herbert Walker Bush, Bill Clinton, and George W. Bush. Throughout this era, tribes enjoyed a government-to-government relationship with the United States and with many of the states but were unable to make necessary gains to address many social, educational, and development issues on the reservations.

CONCLUSION: WHAT THE FUTURE MAY HOLD

Economic Issues

In the last six months of 2008, the United States and the rest of the world fell into a recession that threatened to deepen into a full-blown depression. Since then, infusions of capital into the financial markets have had a negligible effect, as hundreds of thousands of jobs have been lost. Congress, torn by political ideologies, has been largely ineffective in developing a plan to stimulate the economy. The inability to access credit has limited the ability of businesses to maintain their bottom line, property values have dropped, and consumer spending is at a standstill. This is the kind of economic crisis that triggers major policy change.

Political Issues

In November 2008, the United States elected its first president of color. For the first time in sixteen years, Democrats control both houses of Congress. The political mantra in the 2008 election season was "change." The federal government is now seen as the only entity that can infuse the capital, policies, and programs to jumpstart the economy. Thus, the foundation is laid for a policy shift from a states' rights to a strong national government. This means that we can expect more federal programs, more federal oversight, more federal spending on a variety of programs, and more direct federal control over the economy. However, this transition will be brought about only through intense political fights because, as the federalists take over, the economic interests of the states' rights advocates will be negatively impacted.

Tribal Issues

In order to judge the impact of a policy change on Indian communities, we need to look back at some of the salient points in each policy era.

Under states' rights policies, there has been a tendency to use Indian capital to pull the economy out of recession. This was true in the Removal, Allotment, and Termination eras. In each of these instances, the tribes were forced to participate in these policies.

Under the federalist policies, with the exception of the Reservation era, there has been a more voluntary assimilation and incorporation of tribes into the mainstream. Tribes accepted western-style constitutions under the IRA; adopted American finance, human resources, and property management standards with the Self-Determination Act; and have voluntarily participated in federal domestic assistance programming that is not Indian-specific. This has created a more seamless connection with the American economy and political processes, which ultimately limits the choices available to the tribes.

For Indian people, two factors seem to determine the degree of impact that policy change based on national trauma has on tribal communities. The first factor is whether tribes have capital that can be used to offset the impact of an economic recession. Unfortunately, the United States has a limited number of options to expand the economy, and the Obama administration is looking at energy as the spur for the economy. Thus, this recession will rely on Indian capital (energy and water) as a resource for national economic recovery. Indian oil, natural gas, uranium, and sites for wind, solar, and geothermal energy will make tribal lands very attractive to development interests, and the national economic crisis will limit the tribes' ability to absolutely control such development. Water is quickly becoming one of the most important issues facing the United States. Water is necessary for economic growth through energy and technology production. Tribal communities will be in a position of having to justify their water rights (especially of unused water) and the way their rights are being used (or not used). As protectors of specific places and environments, tribal people will face major battles for the sustainability of those places and those who live there.

It should also be noted that, in 1803, Thomas Jefferson in a letter to William Henry Harrison recommended that Indians be placed in debt through dependence and trade. Then the tribes would be willing to continue the flow of goods and the resolution of their debt through the sale of land. Today it is not dependency and trade that has created the debt. For many tribes, there has been a continual revamping and reconstructing of casinos in order to maintain a marketing edge in a shrinking market share that created the debt. Will a tribe facing millions of dollars of casino capital outlay debt be able to resist the pressure to resolve the debt through locating a nuclear power plant on the reservation or a quick water settlement?

The second factor is how the federalists view tribal governments and reservation populations and their degree of need. Popular media and culture now have every Indian reservation sporting a prosperous casino. This popular image can be used against the tribes in their attempt to gain equity in any distribution of federal economic stimulus funds to state and local governments. This also raises the question of whether tribal immunities will provide a sufficient economic base for tribes to continue development and yet not be used against the tribes for purposes of federal economic recovery allocations. Intergovernmental agreements have become the basis for increased cooperation between the tribes and states and have integrated service delivery, regional planning, and a myriad of other aspects of tribal/state relations. While we cannot deny the success of this process, have we created a process that has so integrated our communities that, for federal recovery economic purposes, tribal communities are seen as being the same as the local or state governments and stimulus dollars going to the state are seen to include the tribe's allocation as well?

Changing economic conditions, especially when the change is a downward spiral, has the ability to create political change of unplanned proportions. Faced with the threat of organized revolution, President Roosevelt, during the Great Depression, had to come up with a radical plan—the New Deal. Ideologically, the plan was not accepted by everybody and the debate remains today if it was the right course of action. Indian people seem to have come out ahead in that plan, but we cannot assume that the same result will come about in this round of policy change. During the Depression, Indian capital was not seen as the kind of resources that would stimulate the economy. Such is not true today.

Today challenges to Indigenous sovereignty have been complicated by the economic situation. In the previous economic crises, especially during the transition to a states' rights agenda, tribes were forced into compliance with legislation, court decisions, and administrative actions that took tribal capital and used that capital as a resource for economic recovery. Traditionally, the federalists have taken a less confrontational, but equally devastating, approach. While they may not have forced compliance with legislation that took land, they have structured development in a way to take land, and the tribes, exercising their authority, have gone along with the development plans, often to the detriment of the tribal citizenry. However, we must keep in mind that neither camp recognizes Indigenous sovereignty as existing fully without sanction by the United States. For the states' rights advocates, this means that, if the federal protections are not in place, the tribe, its people, and its resources are subject to the rule of the state in which they are located. For the federalists, it means that the exercise of tribal authority is based in economic and development policies that are subject to conditions established by Congress, the president, or the Supreme Court. We should also remember that, while these two forces, the states' rights advocates and the federalists, are competitors and rivals fighting over very real differences, they are still cut from the same cloth and share far more than they differ. Thus, we are approaching very challenging times for Indian tribes, their leaders, and those who support the tribes' ability to exercise their Indigenous sovereignty.