CHAPTER 5

A History of Federal Indian Policy

> The Indians must conform to "the white man's way," peaceably if they will, forceably if they must. They must adjust themselves to their environment, and conform their mode of living substantially to our civilization. This civilization may not be the best possible, but it is the best the Indians can get. They cannot escape it, and must either conform to it or be crushed by it.
>
> —Commissioner Thomas J. Morgan, 1889[1]

> History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between federal officials and tribal officials has greatly improved federal policy toward Indian tribes.
>
> —President Barack Obama, 2009[2]

A Federal Indian Policy Overview

The indigenous nations' struggle to retain and exercise a measure of their original political independence in the face of persistent and, at times, oppressive federal policies aimed at the forced Americanization and coercive assimilation of tribal citizens forms the bulk of the story in this book. But there is more to it. The federal government's policies, most of which were aimed at the absorption of Indians, have had a discernible if variable impact on tribal nations, variable in part because these policies themselves were ambivalent—created at different times, by different individuals and administrations, for different purposes, and for varied tribal nations. And as a result of the undulating and unpredictable nature of history, combined with the interaction between the force of federal policies and the responses of indigenous nations to those policies, Native America is, not surprisingly, vastly different today than it was in 1900, 1800, or 1700.

Table 5.1 provides a general overview of the major policies and laws, and indigenous responses to those directives, from the early American period to the present. Of course, such linear charts, as useful as they are, are inherently flawed in that policies do not simply terminate at particular dates. For example, Indian removal, the forced relocation of Indians from their homelands to lands west of the Mississippi, did not begin and certainly did not end in the so-called Indian removal period of the 1830s–1850s. Many tribes, in fact, had already been forced out of their homes prior to the 1830 Indian Removal Act, and many thousands of Indians were required to relocate or remove long after the official policy ceased in the 1840s. These later removals were the result of land conflicts (e.g., the Navajo-Hopi land dispute from the 1860s to the present) or the construction of dams that required Indians to abandon their homes (e.g., Seneca Indians being forced to relocate because of the construction of the Kinzua Dam in the Northeast).

As another example, reservations were still being established after the 1890s, and they may still be established today. The secretary of the interior is authorized under the Indian Reorganization Act (IRA) of 1934 to create new Indian reservations at his discretion. Nevertheless, table 5.1 provides an accurate, if overgeneralized, way to assess the historical unfolding of the indigenous-federal relationship.

Students and interested readers seeking details of these policies and tribes' reactions to them can find this information in a number of texts, including Francis Paul Prucha, *The Great Father: The United States Government and the American Indians,* 2 vols. (1984); Angie Debo, *A History of the Indians of the United States,* (1970); Wilcomb E. Washburn, ed., *The American Indian and the United States: A Documentary History,* 4 vols. (1973); Peter Nabokov, ed., *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492–1992* (1992); Philip J. Deloria and Neal Salisbury, eds., *A Companion to American Indian History* (2002); and Colin G. Calloway, *First Peoples: A Documentary Survey of American Indian History,* 3rd ed. (2008).[3] While it is not possible to provide a detailed policy history here, a synopsis of the major eras provides some needed historical context.[4]

The Formative Years (1775–1820s)

Within the first decade of the federal government's existence the fledgling democracy's inexorable need to expand led to increased conflict between indigenous and nonindigenous peoples.[5] This expansion was overseen by a Congress and president intent on exerting their authority in Indian affairs by following certain policies: the promotion of civilization and education of Indians, the regulation of trade and commerce with tribes, the establishment of territorial boundaries between the two peoples, the use of treaties to maintain peace with tribes and to purchase Indian lands, and letting states know that they lacked any constitutional authority in the field of Indian policy.[6]

The U.S. Supreme Court during these crucial embryonic years signaled it was a part of the ruling alliance when it handed down an important decision, *Johnson v. McIntosh* (1823), that set a new tone in federal Indian policy. Chief Justice John Marshall declared that, based on the doctrine of "discovery," the European states, and the United States as their successor, secured a superior legal title to Indian lands. Indian land rights were not entirely disregarded, but were necessarily reduced even though native peoples were not direct parties in this lawsuit and were in fact separate nations.

Table 5.1
Historical Development of the Federal–Tribal Relationship

Dates	*Policy*		*Major Laws*	*Relationship*	*Tribes' Status*	*Tribal Responses*
1770s-1820s	International sovereign to international soverign	1787 1790	Northwest Ordinance Trade & Intercourse Act Treaties	Protectorate	International sovereigns	Diplomacy; some armed resistance
1830s-1850s	Removal	1830	Indian Removal Act Treaties	Government-government and trust relationship	Domestic dependent nations	Armed resistance; negotiation under duress
1850s-1890s	Reservation		Reservation Treaties	Guardianship	Wards in need of protection	Waning resistance; accommodation
1870s-1930s	Assimilation	1871 1885 1887	End of treaty making Major Crimes Act Allotment Act (Dawes Act)	Guardianship	Wards in need of projection	Accommodation; foot dragging; religious movements
1930s-1950s	Indian self-rule	1934	Indian Reorganization Act (Wheeler-Howard Act)	Renewal of government-government and trust relationship	Quasi-sovereigns	Increased political participation; growing inter-tribal activity
1950s-1960s	Termination (assimilation)	1953 1953	Resolution 108 Public Law 280 Urban Relocation Program	Termination of trust relationship	Termination of quasi-sovereign status	Growth of inter-tribal politics; beginnings of modern resistance

(*Continued*)

Table 5.1
Historical Development of the Federal–Tribal Relationship (*Continued*)

1960s-1988	Self-determination	1968	Indian Civil Rights Act	Renewal of government-government and trust relationship	Domestic dependent nation/ quasi-soverigns	Continued spread of political activity; radical activism until 1970s; interest group activity
		1975	Indian Self-Determination Act			
		1978	Indian Child Welfare Act			
		1978	Indian Religious Freedom Act			
1988-Present	Self-determination	1988	Indian Gaming Regulation Act	Government-government trust relationship	Domestic dependent nation/ quasi-sovereigns	Interest group activity; increase of international activity
	Self-governance	1988	Tribal Self-Governance Act			
		1990	Native American Graves Protection and Repatriation Act			
		1994	Indian Self-Determination Act Amendments			
		1996	Native American Housing Assistance Act			
		2000	Indian Tribal Economic Development and Contract Encouragement Act			
		2004	American Indian Probate Reform Act			
		2006	Esther Martinez Native American Languages Preservation Act (PL 109-394)			
		2010	Tribal Law and Order Act			

Sources: Modified from Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1989): 258; and Stephen Cornell, *The Return of the Native* (New York: Oxford University Press, 1988): 14.

Indian Removals, Relocations, and Reservations (1830s–1880s)

Despite laws like the Trade and Intercourse Acts (1790, 1802, and 1834), which placed severe restrictions on whites who had aspirations of entering Indian lands to trade or settle, and the Civilization Fund Act of 1819, which established the U.S. goal to "civilize" the Indians as an act of humanity, friction continued to mount between the ever-increasing and land-hungry non-Indian population and the tribal nations. As a result, the eastern tribes, particularly those in Georgia, faced mounting pressure from state and local authorities to surrender their lands and political status. The proposed "solution" to the conflict was the removal of Indians to country west of the Mississippi River, where it was thought the tribes would be able to live in isolation, apart from the corrupting influence of whites.

The idea for Indian removal was first proposed by Thomas Jefferson and was also supported by Presidents Monroe and Adams. However, it was President Andrew Jackson who would see to it that a removal policy was implemented by Congress via a congressional law in 1830.[7] Tribes were compelled to sign a number of removal treaties in which they ceded virtually all their aboriginal territory in the east in exchange for new lands west of the Mississippi.[8]

The 1830s and 1840s witnessed the coerced migration of thousands of Indians from the southeast, to the Ohio and beyond the Mississippi valley, under a program "that was voluntary in name and coerced in fact."[9] The harshness of removal was most vividly seen in the brutal experiences of the Five Civilized Tribes. The Cherokee Nation, who termed their trip to Indian Territory the "Trail of Tears," lost four thousand of their citizens during the march from their homelands in the Southeast to present-day Oklahoma.

Federalism was another factor that complicated relations between Indian nations and whites during this period, since there was intense conflict between the federal and state governments over which sovereign was ultimately in charge of Indian policy. The tension peaked in the so-called Cherokee cases: *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). In *Cherokee Nation*, the Supreme Court declared that Indian peoples constituted "domestic dependent nations" whose citizens were nonetheless "in a state of pupilage and subject to the guardianship protection of the federal government."

In Worcester, however, Chief Justice Marshall stated that tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive." Tribal nations, said Marshall, retained enough sovereignty to exclude the states from exercising any power over Indian peoples or their territories. Why the seemingly different conclusions by the same court? In large part because Marshall and the Court had been asked to decide different questions. In *Cherokee Nation,* Marshall provided a definition of the relationship between tribes and the federal government. In *Worcester,* the chief justice and the Court were called on to articulate the tribal-state relationship. Hence, Deloria and Lytle assert that "The *Cherokee Nation* Cases should be considered as one fundamental statement having two basic thrusts on the status of Indian tribes."[10] Furthermore, two related aspects of tribal sovereignty emerge from these cases: "Tribes are under the protection of the federal government and in this condition lack sufficient sovereignty to claim political independence; tribes possess, however, sufficient powers of sovereignty to shield themselves from any intrusion by the States and it is the federal government's responsibility to ensure that this sovereignty is preserved."[11]

In the wake of Indian removal, the federal government implemented the reservation policy by the mid-1850s. The new policy was administered by the Bureau of Indian Affairs (BIA), which was moved from the War Department, where it had been since its inception in 1824, to the newly formed Department of the Interior. From the federal government's perspective, reservations had become necessary because of the discovery of gold in the 1830s, new land acquisitions by the United States (e.g., Texas in 1846 and much of the Southwest in 1848 under the Treaty of Guadalupe Hidalgo), and the construction of railroads that linked both coasts and expedited westward travel.

Gradually, however, expansionist forces largely out of the government's control precluded keeping the Indians and whites apart, and slowly reservations came to be viewed as social laboratories for "civilizing" the Indians.[12] As Commissioner of Indian Affairs Francis A. Walker explained in 1872:

> The reservation system affords the place for thus dealing with tribes and bands, without the access of influences inimical to peace and virtue. It is only necessary that Federal laws, judiciously framed to meet all the facts of the case, and enacted in season, before the Indians begin to scatter, shall place all the members of this race under strict reformatory control by the agents of the Government. Especially it is essential that the right of the Government to keep the Indians upon the reservations signed to them, and to arrest and return them whenever they wander away, should be placed beyond dispute.[13]

Indians on reservations, in other words, were not merely fodder for social experimentation but were also, in effect, prisoners on their own lands.

Indian agents, BIA administrative personnel who historically had served as diplomatic liaisons between tribal nations and the United States, eventually became the key figures in charge of acculturating and fostering the assimilation of Indians. They had virtually unlimited power over the Indians under their care on reservations and often abused that power. As Senator Henry Teller of Colorado, a staunch opponent of Indian allotment and agents' autocratic rule in the 1870s and 1880s, said in testimony before Congress of many Indian agents:

> They are a class of men that, as a general thing, are sent out [to reservations] because they cannot make a living in the East. They are picked up as broken-down politicians, or one-horse preachers that have been unable to supply themselves with a congregation. They go to an Indian agency at a salary that will not employ, in the West in most cases, an ordinary clerk, and hardly a porter. They take these positions; they desire to keep them, whether it is for the salary or whether it is for the perquisites I leave to others to say, but they desire to keep them, and it is their interest that they make these statements that little by little these [Indian] men are progressing; and yet when a new and honest agent goes he frankly says, "these people [Indian tribes] can have made no progress at all."[14]

Christian churches, by the late 1860s, were also assuming a dominant role in Indian lives, a clear indication that the separation of church and state outlined in the First Amendment was irrelevant insofar as tribal nations were concerned. In fact, when President Ulysses S. Grant initiated his peace policy in 1869 as a way to quell the interracial

violence on the frontier, involving Christian missionaries directly in the administration of Indians on reservations, this was probably the first explicit example of the federal government crossing the boundaries of constitutional prohibition by seeking to establish a religion among Indian tribes.[15] As part of their authority, church leaders were given the right to nominate Indian agents and to direct Indian educational activities.

Another example of the domestication of indigenous peoples occurred in 1871, when Congress, by way of an appropriations rider, enacted a provision that no tribe thereafter was to be recognized as an independent nation with whom the United States could make treaties. As mentioned, however, previously ratified treaties were not abrogated, and the Congress continued to negotiate many agreements with tribes. While it is constitutionally problematic whether the Congress had the right to terminate the Indian treaty-making power of the president, the fact is that this action signaled a significant shift in indigenous-federal relations, as an emboldened Congress now frequently acted unilaterally to suspend or curtail Indian rights, including treaty rights, when it suited the government's purpose.

Allotment, Americanization, and Acculturation (1880s–1920s)

By the 1880s the federal government's efforts to assimilate Indians had become quite coercive. Beginning in this era, a U.S. assimilation policy, as Wilmer shows, developed in several stages. These included "replacing the traditional communal economic base with a system of private property; intensified education, primarily through boarding schools; the regulation of every aspect of Indian social life, including marriage, dispute settlement, and religious practice; the granting of citizenship; . . . and finally allowing the Indian tribes to become self-governing by adopting constitutions ultimately subject to the approval of the U.S. government."[16]

Each of these laws and policies played a critical role in undermining the confidence, hopes, and self-respect of indigenous communities. But most observers suggest that the single most devastating federal policy adopted during this period was the land allotment system, under the General Allotment Act of 1887[17] and its multiple amendments, and the individual allotting agreements negotiated between various tribal nations and the United States. Most white philanthropists agreed that the Indians' tribal social structure, generally founded on common stewardship of land, was the major obstacle to their "progress" toward civilization. These individuals, and the organizations they often formed, firmly believed in the need to break up the reservations, distribute small individual plots of land to individual Indians (heads of households received 160 acres, single persons over eighteen received 80 acres, those under eighteen received 40 acres), and then require the allotted Indian to adopt a Euro-American farming existence.

The allotments, however, were to be held in trust—they could not be sold without express permission of the secretary of the interior—for twenty-five years. This was deemed a sufficient period for the individual Indian to learn the art of being a civilized yeoman farmer. U.S. citizenship accompanied receipt of the allotment. Tribal land not allotted to members was declared "surplus," and this "extra" land was sold to non-Indians, whose settlement among the Indians, it was believed, would expedite their acquisition of white attitudes and behavior.[18]

Tribal land estates were diminished very quickly by these policies. For example, the Iowa Tribe's members after their allotment went into effect retained only 8,658 acres;

the federal government purchased over 200,000 acres of the tribe's "surplus" land, a loss of over 90 percent of tribal territory. In Oklahoma, the Cheyenne and Arapaho Indians kept 529,682 acres after allotment, but were required to sell over three million acres that had been declared "surplus," a loss of over 80 percent of their lands.[19]

The allotment policy was, in the words of President Theodore Roosevelt, "a mighty pulverizing engine to break up the tribal mass." By 1934, when it was finally stopped, 118 out of 213 reservations had been allotted, resulting in the loss of nearly ninety million acres of tribal lands.[20] The accompanying program that ensued included removal of allotments from trust-protected status by forced-fee patent, sale by both Indian landowners and the United States, probate proceedings under state inheritance laws, foreclosure, and surplus sale of tribal lands. This program had disastrous economic and cultural consequences that still adversely affect allotted tribes and individual Indians today.

The Oglala Sioux of the Pine Ridge Reservation in South Dakota, after their military struggles with the United States in the late nineteenth century, slowly began to rebuild their economic life on the basis of a tribal livestock operation. With the able assistance of a committed and honest Indian agent, they built a herd of some forty thousand by 1912. But, required to sign an allotment agreement with the United States, by 1916 their 2.5-million-acre reservation had been completely subdivided. In 1917 a new agent encouraged the Oglala to sell their herd and grow wheat as part of the war effort. Because the tribe had neither the capital nor the experience for arable farming, most of their lands were leased to whites. James Wilson writes,

> By 1930, about 26% of the allotted land had been sold by individual owners, 36% had passed into heirship status and been rented out on a virtually permanent basis to non-Indians, and the reservation had become so fragmented and checkerboarded that the kind of cooperative enterprise for which the tribe's land and traditions fitted them had become almost impossible.[21]

Reservations that were allotted have a number of problems that continue to bedevil the efforts of tribal governments at economic development. The major problem is the fractionation of allotted lands. The sale of surplus land and the loss of many of the fee allotments by Indians left large areas of formerly consolidated lands in a checkerboard pattern, with areas of Indian, non-Indian, state, and federal ownership existing side by side. Efforts to consolidate allotted lands are complicated because allotments, whether held in trust or not, are subject to state inheritance laws if an Indian allottee dies without a will. It is virtually impossible in these circumstances to put together economic grazing or farming units on allotted reservations, because generally there are not enough allotments or fragments of allotments adjacent to one another to form an economically viable block of land for leasing or other forms of economic development.[22] Their highly fractionated ownership has thus left the Indian allotted lands largely undeveloped.

By the 1920s, however, it was clear that coercive assimilation and allotment were not having the desired results, since Indian allottees had experienced fraud and many Indians had actually become landless as a result. This, along with a general mood of progressivism in American political and popular thought, convinced federal policymakers to rethink federal Indian policy.

The Revival of Limited Tribal Self-Rule (1920s–1940s)

In 1926, Secretary of the Interior Hubert Work authorized Lewis Meriam and the staff of the Institute of Government Research in Washington, D.C., to conduct an investigation of socioeconomic conditions among Indian people. Their two-year study resulted in a major publication, *The Problem of Indian Administration,* the first fairly comprehensive description and analysis of what had happened to indigenous peoples since the end of the last of the Indian wars. The report's authors detailed the plethora of disastrous conditions affecting Indians at that time: high infant death rates and high mortality rates in general, poverty, horrendous health conditions, inadequate education, poor housing, and the problem of migrated Indians (Indians forced to leave the reservation because of land loss). The policy of forced assimilation, Meriam stated, "has resulted in much loss of land and an enormous increase in the details of administration without a compensating advance in the economic ability of the Indians."[23]

Although most commentators suggest that the Meriam Report was the basis for the IRA and other reforms instituted during the New Deal era, "there is not much evidence to support this contention."[24] In fact, the underlying tone and direction of the report's many recommendations "continued to assume that Indians had to be led benignly, if not driven, to certain preconceived goals, which were assimilation or a mutually imposed isolation within small Indian enclaves."[25]

In actuality, there were a number of other equally important, if little known, federal studies and a major and long-term congressional investigation conducted during this period that also played key roles in setting the stage for Indian reform. These studies were the Preston-Engle Report on Indian irrigation, a report on "Law and Order on Indian Reservations of the Northwest," a study of Indian agricultural lands, "An Economic Survey of the Range Resources and Grazing Activities on Indian Reservations," and a multiyear investigation conducted by a subcommittee of the Senate Indian Committee, which gave senators personal experience with the depth of Indian poverty caused by their own government's policies and under the BIA's mismanagement.[26]

The combination of evidence from all these reports led to important changes in federal Indian policy, changes that favored restoration of some measure of tribal self-rule. Of course, the federal strategy was to employ tribal culture and institutions as transitional devices for the gradual assimilation of Indians into American society. The vehicle for this transition was the IRA of 1934, which represented a legitimate but inadequate effort on the part of Congress to protect, preserve, and support tribal art, culture, and public and social organization.[27]

For those nations who voted to adopt the measure, the IRA succeeded in ending the infamous allotment policy, provided measures whereby Indian land could be restored or new reservations created, established a $10 million revolving credit fund to promote economic development, permitted tribes to hire attorneys, and authorized tribal governing bodies to negotiate with non-Indian governments. Also included were provisions for the regulation of resources, for establishment of an affirmative action policy for Indians within the BIA, and, importantly, for writing charters of incorporation and chartering and reorganizing tribal governments.

This final provision, the establishment of tribal governing and economic institutions, specifically authorized tribes to organize and adopt constitutions, bylaws, and incorporation charters subject to ratification by vote of tribal members. But

problematically, these constitutions and bylaws were also subject to the approval of the secretary of the interior, as were any proposed future amendments to these organic documents. This is ironic in a sense, because one of the goals of John Collier, as commissioner of Indian affairs and principal sponsor of this broad measure, was to "minimize the enormous discretion and power exercised by the Department of the Interior and the Office of Indian Affairs."[28]

The act produced a mixed bag of results whose legacy continues today. On one hand, the act was effective in stopping the rapid loss of indigenous land and provided the institutional groundwork for tribal governments, whose powers have increased considerably since this period. One of the strengths of this act was that while it did not provide tribes with new governing powers, it "did recognize these powers as inherent in their status and resurrected them in a form in which they could be used at the discretion of the tribe."[29]

On the other hand, the act's goal of reestablishing Indian self-rule was less successfully achieved. For example, the tribal constitutions adopted only rarely coincided with tribes' traditional understandings of how political authority should be exercised. Furthermore, for those tribes who had been able to retain some semblance of traditional government, the IRA sometimes supplanted those institutions, thus intensifying internal tribal conflicts.[30]

Tribal Termination and Relocation (1940s–1960s)

The ending of World War II and the cost-cutting measures that ensued in Washington, D.C., John Collier's resignation in 1945, the Indian Claims Commission Act of 1946 (which allowed Indians to sue for monetary compensation from the United States), a sense among conservatives in Congress and the BIA that the IRA period's policies were "retarding" the Indians' progress as American citizens, and a sense among liberals that Indians were still experiencing racial discrimination in the BIA's still overly colonial relationship with tribes all fueled a drive to abandon tribal reorganization goals and terminate federal benefits and support services for tribes.[31]

The Committee on Indian Affairs (CIA) developed criteria to identify those indigenous groups thought prepared for termination. Federal lawmakers and BIA personnel believed that some tribes—the Menominee of Wisconsin and the Klamath of Oregon—were already sufficiently acculturated and no longer needed the federal government to act as their trustee. These tribes faced immediate termination. Other tribes, those in the Southwest, for example, were to be given more time to acculturate before they too would be legally terminated.

The definitive statement of the termination policy was House Concurrent Resolution 108, adopted by Congress in 1953. This resolution declared that "at the earliest possible time" the Indians should "be freed from all Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[32] Between 1945 and 1960 the government processed 109 cases of termination "affecting a minimum of 1,362,155 acres and 11,466 individuals."[33]

Along with the termination resolution, Congress, just a few days later, also enacted Public Law 280, which conferred upon five states (California, Minnesota, Nebraska, Oregon, and Wisconsin) full criminal and some civil jurisdiction over Indian reservations (with certain reservations being exempted) and consented to the assumption of such jurisdiction by any other state.

The final part of the termination policy trilogy was relocation, a federal policy aimed at the relocation of Indians from rural and reservation areas to designated urban "relocation centers." In 1956 alone, the federal government spent $1 million to relocate more than 12,500 Indians to cities. The relocation policy was a coercive attempt to destroy tribal communalism.

The two largest terminated tribes were the Menominee of Wisconsin and the Klamath of Oregon. Prior to termination, both nations were comparatively well off, with sizable reservations and more than sufficient natural resources. But after termination, several harsh consequences resulted: tribal lands were usually concentrated into private ownership and, in most cases, sold; the trust relationship was ended; federal taxes were imposed; the tribes and their members were subject to state law; programs and services designed for federally recognized tribes were stopped; and the tribes' legal sovereignty was effectively ended.[34]

Indigenous Self-Determination (1960s–1980s)

The period from the end of termination in the 1960s to the 1980s was a crucial time in indigenous-federal relations. It was, according to most knowledgeable commentators, an era when tribal nations and Indians in general—led by concerted indigenous activism—won a series of important political, legal, and cultural victories in their epic struggle to terminate the termination policy and regain a measure of real self-determination.

Many of these victories arose out of activities and events like the fishing rights struggles of the Pacific Northwest in the 1950s–1970s; the American Indian Chicago Conference in 1961; the birth of the American Indian Movement in 1968; the Alcatraz occupation in 1969; the Trail of Broken Treaties in 1973; the 1973 occupation of Wounded Knee in South Dakota; and untold marches, demonstrations, and boycotts.

The federal government responded to this activism by enacting several laws and initiating policies that recognized the distinctive group and individual rights of indigenous peoples. In some cases the laws supported tribal sovereignty; in other cases they acted to erase or diminish tribal sovereignty. For example, in 1968 Congress enacted the Indian Civil Rights Act (ICRA), the first piece of legislation to impose many of the provisions of the U.S. Bill of Rights on the actions of tribal governments vis-à-vis reservation residents.[35] Until this time, tribes, because of their extraconstitutional status, had not been subject to such constitutional restraints in their governmental actions. The ICRA was a major intrusion of U.S. constitutional law upon the independence of tribes, and it is important to remember that the Indian bill of rights also does not protect tribes or their members from federal plenary power aimed at reducing tribal sovereignty, treaty rights, or aboriginal lands.

Two years later, by contrast, President Nixon explicitly called on Congress to repudiate the termination policy and declared that tribal self-determination would be the goal of his administration.[36] Congress responded by enacting a series of laws designed to improve the lot of tribal nations and Indians generally in virtually every sphere: the return of Blue Lake to the Taos Pueblo people, the Indian Education Act of 1972, the restoration of the Menominee Nation to "recognized" status in 1973, the establishment of the American Indian Policy Review Commission in 1975, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare

Act of 1978, the American Indian Religious Freedom Act of 1978, and the Maine Land Claims Settlement Act of 1980.

However, by the late 1970s, these Indian political victories (and a number of judicial victories as well) had provoked a backlash among disaffected non-Indians. The backlash was spearheaded by a number of non-Indian organizations, western state officials, and congressional members from states where tribes had gained political and legal victories. Subsequently, bills were introduced that threatened to abrogate Indian treaties, there was renewed discussion of abolishing the BIA, and some lawmakers argued that Indians should be completely subject to state jurisdiction. While tribes and their supporters repelled most of these anti-Indian efforts, they could not prevent the Supreme Court from handing down a series of decisions, beginning in 1978, that dramatically limited the law enforcement powers of tribes over non-Indians (*Oliphant v. Suquamish,* 1978), weakened tribal jurisdiction over hunting and fishing by non-Indians on non-Indian land within reservations (*Montana v. United States,* 1981), and reduced the water rights of tribes (*Nevada v. United States,* 1983).

The Reagan administration (1981–1989) was a time of much less certainty for indigenous self-determination. Although Reagan acknowledged that there existed a "government-to-government" relationship between the United States and recognized tribal nations, his budget cuts devastated the federally dependent tribes. In part to offset these financial losses, Reagan's administration encouraged tribes to consider establishing gaming operations. Indian gaming would have a profound economic impact on a number of tribes and would affect their political relationship with the states and federal government as well.

Tribal Self-Governance in an Era of New Federalism (1980s–Present)

By the late 1980s, federal policy was a bizarre and inconsistent blend of actions that, on one hand, affirmed tribal sovereignty and, on the other, aimed at severely reducing tribal sovereign powers, especially in relation to state governments. For example, in 1988, Congress enacted the Indian Gaming Regulatory Act, which affirmed the tribes' right to engage in certain forms of gaming if states engaged in comparable gaming.

Also in 1988, and at the behest of several tribes, Congress adopted an experimental tribal self-governance project aimed at providing self-determined tribes a much greater degree of political and economic autonomy. As leaders of the tribes put it:

> Self-Governance is fundamentally designed to provide Tribal governments with control and decision-making authority over the Federal financial resources provided for the benefit of Indian people. More importantly, Self-Governance fosters the shaping of a "new partnership" between Indian Tribes and the United States in their government-to-government relationships. . . . Self-Governance returns decision-making authority and management responsibilities to Tribes. Self-Governance is about change through the transfer of Federal funding available for programs, services, functions, and activities to Tribal control. Tribes are accountable to their own people for resource management, service delivery, and development.[37]

This originally experimental policy, which has been fairly successful for those tribes who chose to enter into a compacting relationship with the federal government (thirty in 1995), was made permanent in 1994 with the passage of Public Law 103-413.

Conversely, the U.S. Supreme Court, also in 1988, handed down two important decisions involving Indian religious rights. In *Lyng v. Northwest Indian Cemetery Protective Association,* the Court ruled that the Constitution's free exercise clause did not prevent governmental destruction of the most sacred sites of three small tribes in northern California.[38] And in *Employment Division, Department of Human Resources v. Smith,* the Court granted certiorari and remanded back to the Oregon Supreme Court a case involving whether an Oregon statute criminalizing peyote provided an exception for Indian religious use.[39]

President Clinton issued several executive orders and memorandums during his two terms (1993–2001) that provided Indians a measure of recognition and protected certain Indian rights. "Together," said Clinton, "we can open the greatest era of cooperative understanding and respect among our people ever . . . and when we do, the judgment of history will be that the President of the United States and the leaders of the sovereign Indian nations met . . . and together lifted our great nations to a new and better place."[40] Clinton issued executive orders in the following areas: consultation and coordination with Indian tribal governments, Indian sacred sites, tribal colleges and universities, American Indian and Alaska Native education, and the distribution of eagle feathers for Native American religious purposes.

Although Clinton generally maintained cordial relations with the tribes, Congress, especially after the Republicans gained control of both houses in 1994, and the Supreme Court continued to act in ways that threatened to unravel the political and economic improvements tribal governments had made in the first part of the self-determination era. In particular, a majority of the Supreme Court's decisions involving conflicts between tribes and states have supported state sovereignty over tribal sovereignty, a dramatic departure from historical and constitutional precedent.[41] The issue of Indian gaming seems to be at the vortex of much of this conflict, which has led to a redefinition of federalism that threatens to destabilize tribal status just at a time when the doctrines of tribal self-determination and self-governance are evolving into a permanent presence after a century of direct federal assaults.

The Bush administration's two terms continued this troublesome period, with Bush paying scant policy attention to tribal nations, except in the area of education where his office issued two executive orders. One of the orders (EO 13,270) expressed support for tribal colleges and universities; the other (EO 13,336) sought to assist Indian students in meeting the academic standards of the No Child Left Behind Act. Congress enacted the Esther Martinez Native American Languages Preservation Act of 2006 (PL 109-394) to ensure the survival and continuing vitality of Native American languages through Native language immersion programs and other purposes supporting language preservation.

Indian Country responded enthusiastically to President Obama's campaign for change. The National Congress of American Indians identified a number of key issues where transformation was needed in the way that the federal government interacted with native nations, including trust reform and tribal natural resource management, treaty rights and consultation, funding of tribal government services, law enforcement,

and taxation. The Obama administration has begun to address some of these critical concerns. The first decade of the twenty-first century was dominated by trust accounting litigation. On December 7, 2009, the government reached a tentative $3.4 billion settlement in *Cobell v. Salazar* (as outlined in the introduction). However, implementation of the settlement of one of the largest class-action lawsuits against the United States has not gone according to schedule. Needing congressional approval, lawmakers had until December 31, 2009, to complete the legislation. As of March 2010, that deadline has twice been extended and has yet to be finalized as this edition went to press.

Recent national legislation has also included key provisions for American Indians and Alaska Natives. The American Recovery and Reinvestment Act of 2009 contained provisions for Indian health care, BIA programs, public safety and justice, tribal roads and bridges, Indian housing, education, energy and water programs, and food distribution programs. And on March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, which included the permanent reauthorization of the Indian Health Care Improvement Act, aiding in efforts to improve Indian Health Services.

Conclusion

The policy ambivalence evident in the conflicting goals of sometimes recognizing tribal self-determination and sometimes seeking to terminate that governing status has lessened only slightly over time. Tribal nations and their citizens find that their efforts to exercise inherent sovereignty are rarely unchallenged, despite their treaty relationship with the United States and despite periodic pledges of support in various federal laws, policies, and court cases.