



AMERICAN INDIANS AND STATE LAW

Sovereignty, Race, and Citizenship, 1790–1880



DEBORAH A. ROSEN



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PREFACE



During the century following the end of the Revolutionary War, the states governed American Indians in a variety of ways, belying the common assumption that Indian policy and regulation in the United States was exclusively within the federal government's domain. With support from judges who accepted justifications based on state sovereignty, state legislatures extended their authority over Indians in two stages. During the early national period, states began regulating Indians, as well as whites' interactions with Indians. After the Civil War a number of states took the next step and bestowed citizenship rights on Indians. Some states simply imposed citizenship on all resident Indians; others offered political rights on a basis that was both selective and elective, that is, available only to certain Indians deemed suited to citizenship and granted only upon the request of the individual Indian. In parallel fashion—though necessarily relying on different constitutional arguments—western territories also took on local management of Indians and determined the extent to which Indians would be made part of the political community. These state and territorial actions constituted significant advances toward incorporating Indians into American society and imposing direct rule over them.¹

Thus, local governments took the lead in addressing key questions arising from the presence of Indians in territory over which whites claimed domination: Should Indians be permitted to remain in white settlement areas, and if so, should their autonomy be respected? Should Indians be subjected to obligations and laws defined by the white community? Should they have the privileges of membership in that community? Once admitted as members of the community, how should they be classified in the existing racial hierarchy? The states' answers to these questions between 1790 and 1880 set important precedents for American Indian policy. How state and territorial officials approached these issues, and how they justified their resolution, is the focus of this book.

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The one-sided manner in which the states posed these questions brushed aside the crucial underlying jurisdictional question and imagined the possibility of only one answer: The European discourse of conquest provided the foundation for whites' continuing presumption that they held legitimate authority over Indians and their land. The belief was so entrenched that white Americans rarely questioned it. Thus, when states sought access to Indian territory and resources or wanted to exert control over Indians, they represented the federal government as the main barrier, ignoring the possibility that tribal sovereignty might reasonably present any legal or moral obstacle. Repeatedly, state officials injected the language of states' rights into debates about the status of Indians within state boundaries. They placed questions of their authority over Indians within the framework of federalism. This approach not only provided them with considerable constitutional leverage in matters relating to Indians but also had the potential to reinforce state sovereignty arguments made in closely related contexts, such as defending against federal interference with slavery, asserting the right to grant or withhold state citizenship rights, and resisting federal civil rights legislation.

State officials assumed not only that American legislatures had inherent authority to enact laws governing Indians but also that American courts were the sole appropriate judicial forums for discussing matters involving whites and Indians, and that Indian voices and opinions were not necessary or relevant to consider as part of the decision-making process. A state's course of action was determined by its particular economic and political interests, and questions of how Indians should be treated were often shaped by whites' racial and cultural prejudices. State lawmakers and judges had little incentive to weigh Indian perspectives or inherent rights when they made their case for authority over Indians. But that did not mean they did not take into account the reality of the Indian presence and Indian resistance; they had to consider such factors in practice, even if they did not always speak openly about them. Because the subject of this book is state and territorial policies, laws, and judicial decisions pertaining to Indians, most of the primary sources were written and produced by white government officials. However, it is important not to treat government policy as a unilateral matter in which Indian voices played no part, nor as merely an abstract topic that excludes the relevance of Native American experiences. During the period under study, Indians spoke out vehemently on such issues as Indian status and land rights. Indians expressed themselves in courtroom proceedings, public speeches, and printed publications, as

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evidenced in the criminal cases at the heart of the book's discussion of the issue of tribal sovereignty and state jurisdiction in chapter 1. Indian perspectives were also voiced during legislative hearings, as shown in the later analysis of nineteenth-century debates over whether states should grant citizenship to Indians.

The two main themes of this book—the decentralized nature of much of American Indian policy, and the gradual local assertion of direct rule over Indians—necessitate a focus on state and territorial law. Because of that focus, federal legislation, treaties, and judicial opinions receive little attention here. Since federal government policy provided a broader context in which state officials acted, brief discussion of a few federal cases and statutes relating to the issue of state authority is unavoidable. An attempt has been made, however, to minimize discussion of U.S. government policies and decisions—even if they were important to the development of U.S.–Indian relations—in order to retain a primary focus on what was happening at the local level.

Despite the pervasiveness of state regulation of Indians, there are few publications focusing on state Indian policies, laws, and court cases in the period from 1790 to 1880 (or, for that matter, the period from 1880 to the present). In fact, in a recent review essay, Donald Fixico concluded that “[t]he question of state-tribal relations has been seriously understudied.”²² Likewise, few scholars have examined local regulation of Indians in U.S. territories during that era. Studies of white-Indian government relations have concentrated overwhelmingly on the Indians' relations with the federal government. It is understandable that scholarly studies have focused on federal law and policy, since relations with Indian tribes is officially a matter delegated to the federal government. As Vine Deloria and Clifford Lytle point out, “[t]here is no inherent power in any of the fifty states to deal with Indians at all.”²³ Nevertheless, the states have extensively regulated Indians throughout American history.

Where the topic of state Indian law between 1790 and 1880 is mentioned in scholarly publications, it tends to be peripheral to the author's main focus. However, books and articles on some related subjects, either in the same time period or in a different one, can provide useful information and context. In particular, scholarship on the following topics can be relevant: nineteenth-century federal law, Indian dispossession, and the historical roots of present-day Indian land claims. Examples of prominent publications in each field are discussed in turn.

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Some broad studies of nineteenth-century federal law pertaining to Indians indirectly touch on the role of the states. Although such scholarship rarely addresses issues of state law explicitly, historical themes and patterns identified by scholars of federal law are also evident in the history of state law. Moreover, some principles of U.S. law have implications for the authority of the states in Indian matters. Thus the scholarship on federal law is pertinent to this book on the states. For example, in a powerful book entitled *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, David Wilkins explains how the Supreme Court's decisions pertaining to Indians have been "characterized by self-interest, political expediency, and cultural arrogance." Those are qualities that also typify state court opinions. Also evident in state government approaches to Indians is the European-derived colonizing legal discourse that historically has shaped and justified federal Indian law, as described by Robert Williams in *The American Indian in Western Legal Thought: The Discourses of Conquest*. This mythic intellectual framework, which subordinates and ignores contrary Indian visions of justice, has affected legislative and judicial decision making at both the state and the federal level. Other scholarly publications focus on the contractual nature of tribes' historical relationship with the United States, which logically should preclude unilateral state and federal regulation of Indians. For example, David Wilkins's discussion of the "reserved rights doctrine"—the principle that Native peoples reserve and retain all rights that they have not expressly relinquished—should apply equally to their interactions with individual states as it does to their interactions with the United States (see "From Time Immemorial: The Origin and Import of the Reserved Rights Doctrine"). Works that emphasize the treaty process as the only appropriate manner in which to work out the terms of the relationship between the United States and Indians, such as David Wilkins and Vine Deloria's *Tribes, Treaties, and Constitutional Tribulations*, have even stronger negative implications for state authority over Indians. Since only the federal government has constitutional power to make treaties, adherence to Wilkins and Deloria's principles would presumably go a long way toward protecting tribal sovereignty, lodging American negotiating authority exclusively with the federal government and preventing the states from meddling in Indian affairs.⁴ Although state law is not the main focus of these important studies, the studies do make points that are relevant to analysis of the states' statutes and judicial decisions.

Two major studies that have federal law as their main focus do directly address important issues relating to state jurisdiction over Indians. First,

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in *American Indians, American Justice*, Vine Deloria and Clifford Lytle point out the federal government's acknowledged obligation to serve as a shield against states' attempts to apply their laws within Indian territory; they also discuss Indians' rights and benefits that states must offer equally to Indians as to others. When Indians have taken their disputes to court, the authors find, they tend to gain more supportive decisions from federal forums than in the states, though federal courts have not been entirely consistent or successful in protecting Indians from state intrusions. Deloria and Lytle conclude that cultural differences, racial prejudice, and economic competition have often resulted in tense Indian-state relationships over the course of American history. Second, David Wilkins and Tsianina Lomawaima's book *Uneven Ground: American Indian Sovereignty and Federal Law* devotes a chapter to analyzing the clauses in late-nineteenth-century western state constitutions, state enabling acts, and territorial acts that explicitly precluded state or territorial authority over Indians and Indian lands. Of the eleven state constitutional disclaimer clauses, only one (Kansas, 1861) was enacted during the period under study in this book, but Wilkins and Lomawaima's discussion of the broader historical and current problems in state-tribe relationships is highly pertinent. They conclude that state attempts to regulate Indians often violate disclaimer clauses, and there needs to be more vigorous enforcement of those state constitutional provisions. The authors also make the more general point that, absent Indian consent, states have no constitutional justification for imposing their jurisdiction on Indian tribes, and even in the absence of disclaimer clauses, such imposition conflicts with tribal sovereignty, treaty provisions, and federal authority under the Constitution.⁵

Scholarship examining Indian dispossession during the period under study also often contains material that is relevant to the study of state law, even though such studies sometimes concentrate more on federal policy-making than on the states and usually do not focus specifically on legal matters. Particularly fine examples of monographs in that category are David Wishart's *An Unspeakable Sadness: The Dispossession of the Nebraska Indians*, and Craig Miner and William Unrau's *The End of Indian Kansas: A Study in Cultural Revolution, 1854–1871*. These books describe the roles of federal Indian agents, missionaries, fur traders, railroad and timber company employees, land speculators, and Natives themselves in the dispossession of Indians during the nineteenth century; they also comment on the function of state and territorial officials in the process, though that is

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not their main focus. A book that concentrates more on the state government's policies relating to Indian removal, while also providing insights on the role of private interests, is Laurence Hauptman's outstanding study of Indian policy in New York, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State*.⁶

Studies of Indian dispossession can be relevant even if they focus on a time period that precedes the focus of this book. An important example of pertinent colonial American history is Jean O'Brien's *Dispossession by Degrees: Indian Land and Identity in Natick, Massachusetts, 1650–1790*, which describes how Massachusetts dislodged Indians from their land in a way that set relevant precedents for the early national and antebellum eras. As O'Brien points out, "much of what occurred in relations between Indians and English colonizers prefigured later developments in U.S. Indian policy. . . . Reservations, removal, and allotment . . . , and at least the semblance of the notion of a trust relationship all can be found in one form or another in colonial Massachusetts."⁷ Studies of tribes that have retained their territory, or at least a portion of it, during and after the colonial period are just as relevant. For example, James Merrell's *The Indians' New World: Catawbas and Their Neighbors from European Contact through the Era of Removal* examines how the Catawbas adapted to the presence of English colonists and survived on their South Carolina land into the nineteenth century.⁸

In addition, studies of present-day land claims incorporate some relevant history from the early national and antebellum periods. Studies of Massachusetts Indians' claims are particularly notable, such as Jack Campisi, *The Mashpee Indians: Tribe on Trial*; Paul Brodeur, *Restitution: The Land Claims of the Mashpee, Pasamaquoddy, and Penobscot Indians of New England*; Robert N. Clinton and Margaret Tobey Hotopp's article "Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims"; and essays about the Mashpees by James Clifford, Francis G. Hutchins, Jack Campisi, and Jo Carrillo in *Readings in American Indian Law: Recalling the Rhythm of Survival*. Similar publications examine ongoing New York Indians' land claims, such as *Iroquois Land Claims*, a collection of essays edited by Christopher Vecsey and William A. Starna that contains significant historical content pertaining to New York state policy during the early national period. Articles examining other present-day challenges to state law—most notably Robert B. Porter's "Legalizing, Decolonizing, and Modernizing New York State's Indian Law"—also provide highly relevant context.⁹

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Although the publications in these three areas—federal policy, Indian dispossession, and land claims—provide some useful material, they do not focus on state and territorial Indian regulation, leaving much of the terrain unexplored. However, there are some notable exceptions, books and articles that are beginning to fill this critical gap in the literature on state and territorial law pertaining to Indians between 1790 and 1880. Tim Alan Garrison broke important ground by devoting a book to state court decisions relating to Indians, a subject that has received almost no scholarly attention. His 2002 monograph, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations*, is a superb in-depth analysis of three key southern court cases (accompanied also by discussion of the two famous federal cases) relating to Cherokee and Creek status under Georgia, Alabama, and Tennessee law in the 1830s. The book is a vital corrective to the dominant scholarly focus on U.S. Supreme Court cases. For the Cherokees in the 1830s, it was actually the state court decisions, rather than the Supreme Court's opinions, that were more influential and had greater impact in practice.¹⁰

Like *The Legal Ideology of Removal*, Brad Asher's *Beyond the Reservation: Indians, Settlers, and the Law in Washington Territory, 1853–1889* focuses on local courts' role in managing relations with Indians. However, while Garrison analyzes the resolution of legal issues in appellate courts, Asher concentrates on actual stories of individual Indians in trial courts. He makes an important contribution in explaining the ways in which Indians came to fall under the local jurisdiction of whites. Asher makes it clear that even though America's western territories were formally subject to rules and regulations of Congress, and even though most Indians there were formally confined to reservations and under federal administration, in practice the boundaries between Indians and whites were porous, there was considerable interaction between the two groups, and local bodies exercised significant regulatory and adjudicatory jurisdiction over Indians. His book substantiates the principle that territorial legislatures and territorial courts were both local institutions, and they exercised functions that paralleled those of their counterparts in the states.¹¹

Several shorter scholarly works also address the issue of law in the states. The importance of looking at local actors when studying Indian law and policy is demonstrated in an article by Cynthia Cumfer. Writing about Indian policy in Tennessee, Cumfer analyzes the evolution of frontier settler and Cherokee perspectives on Indian-white relations and Native sovereignty during the early national period and examines how the intel-

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lectual developments affected state policymaking. Focusing on a later period, Ann Marie Plane and Gregory Button also examine policymaking in a single jurisdiction. On the weighty issue of Indians' citizenship status in the states, their article on ethnicity issues underlying the Massachusetts Indians Enfranchisement Act makes a rare contribution. Finally, although the issue of Indians' position under state civil and criminal laws in early United States history has not yet received any comprehensive scholarly treatment, Sidney Haring has made a significant contribution in the background chapter in his study of the 1883 case *Ex parte Crow Dog*. The second chapter of that book begins with the 1830 Cherokee case *Georgia v. Tassels* and then proceeds to survey the extent of state criminal jurisdiction over Indians in the nineteenth century.¹²

These books on federal policy, Indian dispossession, land claims, removal cases in the southeast, and trials in Washington Territory, as well as the articles relating to Indian policy, provide useful information and models for the study of state and territorial law in early American history.

This book examines the law pertaining to the status and rights of Native Americans in the states and territories from 1790 to 1880, analyzing policymaking and judicial decision making at the local level. The introduction provides a foundation by describing Spanish and English approaches to Indian policy during the colonial period and explaining how the United States relied on similar theories after the American Revolution. Following that introduction, the central portion of the book is organized around three topics: part 1 focuses on "Sovereignty," part 2 on "Race," and part 3 on "Citizenship." In the first part, chapters 1 and 2 address how Indians and whites in New York and Georgia viewed the issue of tribal sovereignty, describe the manner in which state legislatures regulated Indians, and consider the way judges throughout the country relied heavily on state sovereignty arguments to justify such regulation. In part 2, chapters 3, 4, and 5 assess how the issue of race was handled in courtrooms, legislative chambers, and constitutional conventions. The first two chapters in this part of the book evaluate the ways in which state legislatures treated Indians as a distinct racial group and explore racial issues arising in Louisiana and other state courts, especially disputes over racial classification, suits for freedom based on maternal Indian ancestry, and disagreements over how the Civil Rights Act of 1866 and the Fourteenth Amendment affected laws that discriminated against Indians on the basis of race. Chapter 5 then analyzes shifts in the rhetoric of race, culture, and political status

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during the debate over Indian political rights in Michigan and Minnesota constitutional conventions spanning from 1835 to 1867. The third part of the book studies the politics of Indian citizenship rights in one eastern and one western jurisdiction. Specifically, chapter 6 appraises the process by which Indians were declared citizens by the Massachusetts legislature, including the perspectives of whites and Indians in the commonwealth, while chapter 7 examines battles in the executive and judicial branch over Pueblo Indian citizenship in the Territory of New Mexico. Finally, the conclusion brings together the themes of the book and analyzes some of the larger patterns evidenced by the material discussed in chapters 1 through 7, focusing particularly on the important role of the states and territories in extending direct rule over Indians.

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