

INDIGENOUS GOVERNANCE AMIDST THE FORCED FEDERALISM ERA

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Whether the general public realizes it or not, Indigenous peoples in the United States today are living in a new policy era—one that I call “forced federalism” (1988 – present). As a result of the 1988 Indian Gaming and Regulatory Act (“IGRA”)¹ and the subsequent transfer of federal powers to state governments, Indigenous nations have been *forced* into dangerous political and legal relationships with state governments that challenge their cultures and nationhood. This rapid devolution of federal powers to state governments has undermined the once exclusive federal government-to-Indigenous government relationship, which was the result of 379 prior treaties, direct consultation with Congress on Indigenous affairs, federal statutory obligations, and court decisions.

One might argue that not all Indigenous-state relationships are forced and that the Indigenous-state compact system offers new avenues for negotiating mutually beneficial agreements in the areas of taxation (tobacco, motor fuels, etc.), gaming, hunting and fishing, criminal jurisdiction, and self-governance. However, Indigenous nations have no choice but to deal directly with state governments when negotiating compacts in those areas. The offloading of federal responsibilities coupled with pseudo-legal assertions of state regulatory oversight over Indigenous nations has undermined the self-determining authority of Indigenous leaders and confined Indigenous decision-making to the narrow, and often self-serving, agenda of state policymakers.

Some have even referred to Indigenous-state compacts as a new form of treaty-making. This is a problematic position for a number of reasons. While treaties are international, legally binding agreements between two or more self-determining entities, Indigenous-state compacts are business agreements that cede self-determining authority to state governments and are applicable only

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1. 25 U.S.C.A. § 2701 *et seq.* (West 2009).

for a specified length of time. Rather than achieving its original purpose of resolving disputes without litigation, the indigenous-state compact procedure under IGRA, “has resulted in more litigation than any other provision of the IGRA.”² According to Oren Lyons, Faithkeeper of the Onondaga Nation:

Yes, in the “compacts,” as they are called. You see, Indians have a funny way of thinking. They think any kind of agreement they sign is a treaty. Really, it is a business agreement, and you give up what they say they want in the process. You give up jurisdiction And their rationale is, “Well, we will make enough money to secure our future” But money is not your future. Look what is happening now: land and jurisdiction on that land, that’s your future.³

My research⁴ shows that the offloading of federal responsibilities beginning in 1988 placed Indigenous nations in the difficult position of having to reassert their jurisdictional authority and governance powers with state and municipal policymakers, who often view Indigenous peoples as stakeholders or service populations rather than self-determining first nations. With the devolution of federal powers to states, Indigenous nations have become more vulnerable to the jurisdictional claims of local governing bodies, such as state and municipal policymakers. Local governing agencies who invoke images of Indigenous peoples as “casino rich” or “wealthy,” often exercise their newly created jurisdictional claims to impose new regulatory policies targeting indigenous nations (i.e. taxation, revenue sharing, etc.) in ways that benefit them economically and politically. This is an era in which perception often trumps reality. In the words of former principal chief of the Cherokee Nation, Wilma Mankiller, “[p]erception is as much of a threat as anti-sovereignty legislation. We have to regain control of our image.”⁵

To illustrate the new realities of forced federalism, I have focused on the Narragansett Indian Tribe in Rhode Island and their ongoing struggles with Governor Donald Carcieri and other state policymakers over the tribe’s assertion of self-determining authority on its homelands. These struggles became violent in 2003 when Governor Carcieri chose to engage in armed confrontation rather than diplomacy by sending twenty-four state troopers with a search warrant to raid the Narragansett Smoke-Shop. The raid resulted in

2. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 52 (1997) (citing Anthony J. Marks, Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 LOY. L.A. ENT. L.J. 157, 169 (1996)).

3. TAIATAKE ALFRED, WASÁSE: INDIGENOUS PATHWAYS OF ACTION AND FREEDOM 242-43 (Betsy Struthers ed., Broadview Press 2005).

4. The research is presented in greater detail in my book: CORNTASSEL & WITMER, *infra* note 8.

5. *Mankiller Says Perception a Threat to Sovereignty*, INDIANZ.COM, June 16, 2005, <http://64.38.12.138/News/2005/008785.asp> (last visited Oct. 27, 2009).

eight injuries and numerous lawsuits, which have cost the Narragansetts more than \$300,000.⁶ More broadly, these ongoing disputes between the Narragansetts and Rhode Island illustrate the threat forced federalism poses to Indigenous peoples' nationhood and self-determining authority.

I. INVENTED IMAGES AND POLICY OUTCOMES

Indigenous gaming has fundamentally altered the way state and local policymakers interact with Indigenous nations and the way Indigenous peoples are portrayed to the general public. Most Indigenous nations operating casinos break even, but fewer than 20% of Indigenous nations operating casinos generate about 70% of the \$26.7 billion in Indigenous nations' casino revenues.⁷ Nonetheless, there are widespread public perceptions of Native peoples as wealthy and/or holding "special" privileges or rights.⁸ Images of "rich" Indigenous peoples are a widespread and recognizable feature of popular culture. Despite the fact that indigenous nations engage in several other forms of economic development, including eco-tourism, agriculture, motor fuels, and tobacco sales, state policymakers and the general public appear fixated on the existence and success of Indigenous gaming operations.

The public's fascination with Indigenous gaming has led to the creation of new stereotypes of Indigenous peoples as "pit bosses" and "casino dwellers," which have even made their way into high school history textbooks. According to researcher Jeffrey Hawkins' systematic review of widely used high school U.S. history textbooks, contemporary portrayals of Indigenous peoples in these textbooks tend to be "in association with casino gaming or gambling, and appear[] to replace or reinforce previously determined stereotypes."⁹ Such stereotypes run counter to the realities of Indigenous peoples as self-determining, treaty-based nations in existence long before the formation of the United States.

Anthropologist Katherine Spilde refers to the post-IGRA phenomenon as one of "rich Indian" racism," where false images related to indigenous gaming are created and propagated by the government and media entities.¹⁰ These

6. Katie Mulvaney, *State and Narragansett Tribe Estimate Cost of Smoke-Shop Trial*, R.I. NEWS, Apr. 19, 2008, http://www.projo.com/news/content/SMOKESHOP_COSTS_04-19-08_529Q2L1_v21.3661f56.html (last visited Oct. 27, 2009); Katie Mulvaney, *Retrial of Civil Case Stemming from Smoke-Shop Raid Begins*, R.I. NEWS, July 23, 2008, http://www.projo.com/news/courts/content/TROOPER_JONES_TRIAL23_07-23-08_R4AV0KQ_v10.3da796e.html (last visited Oct. 27, 2009).

7. Press Release, National Indian Gaming Commission, NIGC Announces 2008 Revenues (June 3, 2009), <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR113062009/tabid/918/Default.aspx>.

8. See JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 33 (Univ. of Okla. Press 2008).

9. Jeffrey Hawkins, *Smoke Signals, Sitting Bulls, and Slot Machines: A New Stereotype of Native Americans?*, 7 MULTICULTURAL PERSP. 51, 53 (2005).

10. Katherine Ann Spilde, *Acts of Sovereignty, Acts of Identity: Negotiating Interdependence Through Tribal Government Gaming on the White Earth Indian Reservation*,

stereotypes motivate and enable state policymakers to deny indigenous self-determination in two interrelated ways: (1) by insisting that Indigenous nations prove that they still need self-determining authority/sovereignty in order to be self-sufficient, and (2) by challenging the “authenticity” of Indigenous nations who operate casinos, thus undermining their claims of political independence.

Consequently, rich Indian racism places Indigenous peoples in a precarious position, where they constantly have to justify their existence both in terms of the legitimacy of their self-determination powers and the “authenticity” of their identities. Communications professor Michael Niman describes this process in his examination of the contemporary “enlightened racist.”¹¹ According to Niman, “[r]acism is less about skin color or any other physical marker than about the power of the dominant group. It constructs and supports privilege, or political and economic, advantage.”¹²

Arguably, the most notorious and egregious example of rich Indian racism to date is the scheme perpetrated by lobbyists Jack Abramoff and Michael Scanlon to defraud six Indigenous nations in Mississippi, Louisiana, Texas, and Michigan out of millions of dollars. Abramoff, who was sentenced in 2006 to four years in prison for corrupting public officials, evading taxes, and defrauding native nations for over \$66 million, ran a kickback scheme where he encouraged Indigenous nations to hire Michael Scanlon’s public relations firm at inflated prices and then secretly split the profits with Scanlon.¹³ In 2002, Abramoff worked both sides of an Indigenous gaming scandal when he collaborated with Christian activist Ralph Reed to close the Tigua nation’s casino in Texas. Abramoff’s racist mentality was evident in an e-mail to Reed on February 11, 2002: “I wish those moronic Tiguas were smarter in their political contributions. I’d love us to get our mitts on that moolah!! Oh well, stupid folks get wiped out.”¹⁴

Just ten days after the Tigua casino closure, Abramoff wrote to a Tigua government official stating that he would get Republican leaders in Congress to rectify the “gross indignity perpetuated by the Texas state authorities.”¹⁵ After the Tigua hired them, Abramoff and Scanlon charged the Tiguas more than \$4.2 million for their lobbying “services” even though they were never able to reopen the casino that they had helped shut down.¹⁶ The Tiguas also contributed \$300,000 to congressional campaigns based on Abramoff’s

129 (June 1998) (unpublished Ph.D. dissertation, University of California, Santa Cruz) (on file with ProQuest/UMI Dissertations Publishing).

11. Michael I. Niman, *The Enlightened Racist and the Anti-Gaming Movement*, in SHOOT THE INDIAN: MEDIA, MISPERCEPTION AND NATIVE TRUTH 123, 124 (Kara Briggs, Ronald D. Smith & José Barreiro eds., Am. Indian Policy and Media Initiative 2007).

12. *Id.* at 123-34.

13. S. REP. NO. 109-325, at 7 (2006).

14. Susan Schmidt, *Insiders Worked Both Sides of Gaming Issue*, WASH. POST, Sept. 26, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A50258-2004Sep25.html>.

15. *Id.*

16. *Id.*

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recommendations.¹⁷ Although Abramoff was ordered to pay about \$23 million in restitution to the Indigenous nations he defrauded,¹⁸ those nations have yet to see any money from him.

The imagery of the rich native is also pervasive in contemporary political campaigns and anti-Indigenous movements. Arnold Schwarzenegger's 2003 gubernatorial campaign in California is a notable example. One of Schwarzenegger's television advertisements stressed that "[i]t's time for [Indigenous nations] to pay their fair share."¹⁹ A script from one of Schwarzenegger's 2003 television advertisements said:

A slot machine labeled "California Indian Casinos" appears on-screen, then the camera pans down as the slots stop on "\$120,000,000" and the words "Paid for by Californians for Schwarzenegger" appear. Schwarzenegger's voice is heard saying: "Indian casino tribes play money politics in Sacramento: \$120 million in the last five years." Then Schwarzenegger, in a beige sport coat and white shirt with no tie, appears on-screen and speaks directly into the camera: "Their casinos make billions, yet they pay no taxes and virtually nothing to the state. Other states require revenue from Indian gaming, but not us. It's time for them to pay their fair share. All the other major candidates take their money and pander to them. I don't play that game. Give me your vote and I guarantee you things will change."²⁰

The advertisement falsely indicates that all Indigenous peoples appear to be getting rich at the expense of California taxpayers. Consistent with a rich Indian racism model, the message from the advertisement was loud and clear: the "unfair" activities of rich indigenous nations that own and operate casinos needed to be heavily taxed and regulated by state government officials. This message resonated with California voters as Governor Schwarzenegger won the 2003 recall election with 48% of the vote.²¹

The rich Indian images invoked during the campaign were instrumental in Schwarzenegger's policy agenda as governor. "Shortly after taking office, Governor Schwarzenegger renegotiated five indigenous nation-state compacts, forcing these indigenous nations to collectively contribute to an unprecedented \$1 billion to a bond fund for the state and pay approximately \$150 million a year in taxes until the compacts expire in 2030."²²

17. *Id.*

18. Peter H. Stone, *Why Did Abramoff Get A Tax Refund?*, NAT'L J., May 22, 2009, <http://undertheinfluence.nationaljournal.com/2009/05/why-did-abramoff-get-a-tax-ref.php> (last visited Oct. 27, 2009).

19. Joe Mathews, *Arnold Schwarzenegger Ad Watch*, L.A. TIMES, Sept. 24, 2003, <http://www.bluecorncomics.com/stype39j.htm> (last visited Oct. 26, 2009).

20. *Id.*

21. CORNTASSEL & WITMER, *supra* note 8, at 33.

22. *Id.*

So what theories or frameworks can help explain the actions of policymakers who invoke certain stereotypes of native peoples in order to benefit themselves politically? In my research, I have drawn on a social constructions framework developed by political scientists Anne Schneider and Helen Ingram, which provides insights regarding how and why socially constructed images (i.e., militant, emerging contender, dependent) are applied to indigenous peoples during the policymaking process.²³ Additionally, a social constructions perspective adds theoretical depth to the rich Indian racism model by exposing existing power relationships between policymaking elites and indigenous communities.

I altered Ingram and Schneider's model to include three dominant stereotypes of indigenous peoples:

1. Dependents (e.g., non-federally recognized Indigenous nations, Indigenous peoples living in urban areas, etc.);
2. Militants²⁴ (e.g., most forms of Indigenous protest and mobilization against state policies, etc.);
3. Emerging contenders, or the rich (e.g., indigenous nations running casinos or viewed as desiring casinos, "special" rights as self-determining nations, etc.).

Basically when an individual is stereotyped by policymakers as either a dependent, a militant, or an emerging contender, the policy outcomes are fairly predictable. For example, if an individual is designated as an "emerging contender," he or she might be viewed as a threat to the state's financial regime, state revenue funding base, etc. In such cases the state's response is increased regulation, increased oversight, and sometimes even taxation, based on perceived wealth that is viewed as unjustified and unfairly gained at the expense of other taxpayers. As Schwarzenegger's campaign tagline suggested: "[i]t's time for [Indigenous nations] to pay their fair share."

Not surprisingly, if an individual is portrayed as a "militant" by state policymakers, the predictable outcome is that he or she will go to jail or be penalized in a harsh way. Finally, if an individual is cast as a "dependent," he or she will be targeted for hollow, symbolic policies in order to raise his or her capacity as a part of a service population. However, these policies are short on substance and do not achieve the long-term goal of regenerating nationhood. Policymakers pick and choose from these three categories and often play one stereotype against another in a contemporary version of "divide and conquer." These socially constructed images play out most dramatically with the

23. See ANNE LARASON SCHNEIDER & HELEN INGRAM, *POLICY DESIGN FOR DEMOCRACY* 106-07 (Univ. of Kan. Press 1997); Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 335-36 (1993).

24. While Schneider and Ingram's social constructions model includes "deviant" as one of the categories, I use "militant" in its place to more accurately reflect the socially constructed images prevalent for native peoples.

Narragansett Nation and the utilization of “militant” and “emerging contender/rich” imagery to benefit state and local policymakers.

II. NARRAGANSETTS PORTRAYED AS MILITANTS

The Narragansett people have lived on their original homelands in what is now the eastern United States for more than 30,000 years. The Narragansetts narrowly survived King Philip’s War in 1675, only to have to continue fighting off settlers who encroached upon their homelands. In 1880, after decades of resistance, the Narragansetts sold all but two acres of their ancestral homelands for the paltry sum of \$5,000.²⁵ Since then, the Narragansett people have fought to reclaim their original territory. Given that their original title to the land had never been extinguished, in 1975, the Narragansetts filed a land claim suit against the state of Rhode Island and several private landowners for the return of approximately 3,200 acres of undeveloped reservation lands.²⁶

The suit eventually concluded in 1978 with the issuance of a Joint Memorandum of Understanding (“JMOU”), which specified that the Narragansetts would receive 1,800 acres of land in exchange for dropping their lawsuits against the state of Rhode Island.²⁷ Congress then passed the Rhode Island Indian Land Claims Settlement Act, which codified the JMOU into law.²⁸ However, the Narragansetts were not federally recognized at this time, so a state-chartered corporation was created to hold the settlement lands for them. In 1983, Congress federally recognized the Narragansett Indian Tribe and the state-chartered corporation was dissolved. Today about 2,400 citizens of the Narragansett nation live on their territories in Charlestown, Rhode Island.²⁹ When the Narragansetts opened a smoke shop on their territory on July 12, 2003, they reasserted their self-determining authority as an Indigenous nation. The Narragansetts contended that the 1978 Rhode Island Indian Land Claims Settlement Act did not apply to them, and the state of Rhode Island did not have the legal authority to force them to comply with the state’s cigarette tax scheme.

When the Narragansetts opened the smoke shop, Governor Carcieri, could have pursued several options to deal with the situation. He could have renegotiated a new agreement, assessed other stores for not having stamped cigarettes, or even acted to stop cigarettes from crossing into Narragansett territory. Despite those options, Governor Carcieri chose to invade Narragansett territory. On July 14, 2003, twenty-four state troopers were dispatched to serve a search warrant at the Narragansett Smoke-Shop. What

25. Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 18-19 (1st Cir. 2006).

26. *Id.* at 19.

27. Narragansett Indian Tribe v. Rhode Island, 296 F. Supp. 2d 153, 161 (D. R.I. 2003); H.R. REP. NO. 95-1453, at 6 (1978), *as reprinted in* 1978 U.S.C.A.N. 1948, 1950.

28. *See generally* H.R. REP. NO. 95-1453; 25 U.S.C.A. § 1701 *et seq.* (West 2009).

29. Narragansett Indian Tribe, Historical Perspective of the Narragansett Indian Tribe, <http://www.narragansett-tribe.org/history.html> (last visited Oct. 7, 2009).

followed was a clear case of framing Indigenous issues of self-determination as militant.

The state troopers encroaching on Narragansett territory were met with determined resistance, and some were wrestled to the ground by Narragansetts protecting their shop and homelands. When the dust cleared, eight people were taken to the hospital with injuries and police arrested eight Narragansetts, including Chief Sachem Matthew Thomas.³⁰ Newspaper accounts of the police raid on the Narragansett Smoke-Shop “alternated between describing it as a ‘scuffle,’ ‘protest,’ ‘resistance’ or a ‘melee.’”³¹ While standard “militant” imagery was not prominent in the write-ups, it was evident in newspaper photographs of the incident. *The New York Times* ran a picture showing two Narragansetts shoving a police officer. (The photo shows Chief Sachem Thomas and Hiawatha Brown pushing a state trooper).³² In contrast, the coverage from Indianz.com showed a different scene: pictures of troopers pinning Narragansett men and women on the ground. In one picture, a Narragansett man was handcuffed face down on the ground with a police dog lunging at him.³³

After the raid, the state maintained that the opening of the Narragansett Smoke-Shop violated the Rhode Island Claims Settlement of 1978, which specifies that indigenous lands are subject to state jurisdiction. Federal District Court Judge William Smith later ruled that the July 14, 2003 raid “did not violate federal law or the tribe’s sovereign rights.”³⁴ On May 24, 2006, the First Circuit Court of Appeals affirmed the district court’s ruling, holding that the “state officers were authorized to execute the warrant against the Tribe and to arrest tribal members incident to the enforcement of the State’s civil and criminal laws.”³⁵ The majority’s opinion further asserted that “the Tribe abandoned any right to an autonomous enclave, submitting itself to state law as a quid pro quo for obtaining the land that it cherished.”³⁶

As legal scholar Erik Laakkonen points out, “Rhode Island’s ‘means’ of enforcement violated the Narragansett Indian Tribe’s firmly established sovereign immunity from state criminal process and blatantly ignored all the various alternative remedies available to collect its cigarette taxes.”³⁷ Echoing Laakkonen’s analysis, Circuit Judge Torruella wrote in his dissenting opinion,

30. Paul Davis, *A Modern Chief*, PROVIDENCE J., Aug. 1, 2004, at A17–19, available at <http://www.projo.com/extra/2004/tribe/day1>; Mulvaney, *supra* note 6.

31. CORNTASSEL & WITMER, *supra* note 8, at 37.

32. Pam Belluck, *Tribe Loses Suit on Tax-Free Tobacco*, N. Y. TIMES, Dec. 23, 2003, at A14, available at <http://www.nytimes.com/2003/12/30/us/tribe-loses-suit-on-tax-free-tobacco.html> (photo on file with author).

33. *R.I. Escalates Fight Over Tribal Smoke Shop*, INDIANZ.COM, July 15, 2003, <http://64.38.12.138/News/printme.asp?ID=2003/07/15/raid> (last visited Oct. 26, 2009).

34. *Narragansett Indian Tribe*, 296 F. Supp. 2d at 157.

35. *Narragansett Indian Tribe*, 449 F.3d at 18–19.

36. *Id.* at 22.

37. Erik S. Laakkonen, *Up in Smoke? Narragansett, Hicks, and the Erosion of Tribal Sovereign Immunity*, 11 J. GENDER RACE & JUST. 453, 457 (2008).

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“there should be no question but that the State’s actions directed against the Tribe constituted a clear and egregious violation of its tribal sovereignty.”³⁸

This ruling is a dangerous legal finding that privileges states rights over those of Indigenous nations. But the case of the tobacco shop raid wasn’t over. A criminal trial ensued against seven Narragansetts who resisted the encroachment of troopers on their territory. The criminal trial concluded on April 4, 2008. Four people were cleared of misdemeanor charges, while Chief Sachem Thomas, Hiawatha Brown, and Randy Noka were found guilty of charges ranging from assault to disorderly conduct.³⁹ Governor Carcieri’s office was quick to issue a statement after the verdicts were read; “[w]ith the conclusion of this trial, Governor Carcieri hopes that the Narragansett Indian Tribe and the State of Rhode Island can put the smoke shop incident behind us and move forward into a more cooperative future.”⁴⁰

Bella Noka was acquitted of all charges, but Noka was pregnant during the raid and lost her baby shortly afterwards due to hemorrhaging.⁴¹ After her husband Randy was found guilty of disorderly conduct, Noka responded to the verdict by explaining that “[t]hey took our land, another life and now they want more.”⁴²

Given the imagery of militant Narragansetts that was propagated by the media and Governor Carcieri, the resulting legal outcomes, which were punitive in nature, are not surprising. As of this writing, subsequent attempts to challenge the verdict on the grounds of racism, have been thrown out of court.

III. NARRAGANSETTS PORTRAYED AS EMERGING CONTENDERS

The militant image was not the only one invoked by Governor Carcieri during this same time period to achieve his policy goals. When the policy discussion shifted to a proposed Narragansett casino in Rhode Island, Governor Carcieri tended to portray Narragansetts as emerging contenders with “special rights” that were undeserved and needed to be curtailed.⁴³ Similar to the tobacco smoke shop case, Carcieri’s adversarial position toward the Narragansett nation eventually led to another legal showdown between the state of Rhode Island and the Narragansetts.

In 1991, the Narragansetts purchased thirty-one acres of land adjacent to

38. *Narragansett Indian Tribe*, 449 F.3d at 86 (Torruella, J., dissenting).

39. Michael P. McKinney, *Verdict Mixed in Narragansett Indian Smoke-Shop Raid Case*, PROVIDENCE J., Apr. 5, 2008, http://www.projo.com/extra/2003/smokeshop/content/projo_20080404_smokeshop_verdict.302f9f22.html (last visited Oct. 27, 2009).

40. *Id.*

41. Katie Mulvaney & Edward Fitzpatrick, *The Smoke-Shop Trial: A Split Decision*, PROVIDENCE J., Apr. 5, 2008, http://www.projo.com/extra/2003/smokeshop/content/SMOKESHOP5_04-05-08_KP9LG00_v23.3746b52.html (last visited Oct. 27, 2009).

42. *Id.*

43. CORNTASSEL & WITMER, *supra* note 8, at 34-35.

their pre-existing trust lands in Charlestown, Rhode Island, in order to build a housing complex for the elderly. Acting on the Narragansett's request, the U.S. Department of Interior ("DOI") took steps to place the land in a federal trust so that the Narragansetts could regain control over their territory. Placing the land into trust would have freed it from state and local laws. However, Governor Carcieri stepped in and claimed that the Narragansetts were going to either establish a tax-free zone or put a casino on the thirty-one acre lot.⁴⁴ Rhode Island Attorney General Patrick Lynch claimed that "allowing the federal government to place the Narragansett's land into trust would free it from state criminal laws and from safety and zoning rules, and allow operation of tax-free shops that undercut a financially struggling state's revenue collection."⁴⁵ Lynch further stated that "[c]riminals theoretically could go, commit crimes in the rest of Rhode Island and hide on that land, and we'd be unable to go get them."⁴⁶

Lynch's statements go to the heart of this dispute: the lack of state jurisdictional authority over the Narragansetts and a perceived inability to regulate the revenues being generated on Indigenous homelands. A 2007 brief in support of Rhode Island's position expresses similar concerns:

Land taken into trust is removed from state authority in several respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the State's ability to exercise its police powers to protect the public both on the trust land and in the surrounding communities. Thus, the result of taking land into trust is the creation of an area largely controlled by a competing sovereign within a State's borders without its consent.⁴⁷

The use of the term "competing sovereigns" is troubling. Indigenous nations have inherent sovereignty that predates the formation of the United States. Consequently, the state of Rhode Island challenged the DOI decision to place the land into trust in 1998. The state claimed that because the Narragansetts were not recognized until fifty years after the 1934 Indian Reorganization Act ("IRA")⁴⁸ took effect, the IRA did not apply to the Narragansett nation. The state argued that the DOI thus lacked the proper authority to negotiate a land into trust on behalf of the Narragansett nation.

44. Ray Henry, *Court to Hear Indian Land Case*, WASH. TIMES, Nov. 3, 2008, <http://www.washingtontimes.com/news/2008/nov/03/court-to-hear-indian-land-case/> (last visited Oct. 27, 2009).

45. *Id.*

46. *Id.*

47. Brief of the States of Alabama et al. as Amici Curiae in Support of the Petitioners at 1, *Carcieri v. Kempthorne*, 129 S. Ct. 1058 (2009) (No. 07-526) (states supporting Rhode Island: Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah) (citing 25 C.F.R. § 1.4(a)).

48. 25 U.S.C.A. § 461 *et seq.* (West 2009). The IRA is also called the Wheeler-Howard Act.

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The main issue in the case was how to construe the following phrase from the IRA: “any recognized Indian tribe *now* under Federal jurisdiction.”⁴⁹ Thus, the epic case of *Carciere v. Kempthorne* was born, eventually making its way to the U.S. Supreme Court.

While Rhode Island was legally challenging the transfer of Narragansett trust land, Governor Carciere was also voicing his opposition to a proposed Narragansett casino in Rhode Island. Things heated up when U.S. Senator John Chaffee attached a rider to a 1996 Omnibus Appropriations Act, which provided that Narragansett reservation lands were subject to state and *not* federal law. While this bill contradicted federal oversight of indigenous gaming outlined by IGRA, the First Circuit Court of Appeals decided against the Narragansetts, upholding the legality of the 1996 Omnibus Appropriations Act.⁵⁰ As Randy Noka, first councilmember for the Narragansett Nation noted, the court’s ruling singled out the Narragansetts as “the only tribe out of this whole nation of 562 tribes . . . that has had their rights taken away like that.”⁵¹

Because of the First Circuit’s ruling, the Narragansett nation was subjected to Rhode Island state jurisdiction regarding any future casino gaming proposals on reservation lands. In 2000, the Rhode Island House Finance Committee voted down legislation that would have put a Narragansett casino referendum on the ballot. Subsequent Narragansett efforts to put a gaming measure on a statewide ballot were unsuccessful in both 2004 and 2005. According to Noka, “[i]t’s not just gaming, certainly. We’re at war about our self-determination, about exercising the rights of a nation that we have under federal law.”⁵²

The debate over gaming changed course in 2006 when the state legislature put forward “Question 1” to Rhode Island voters. The measure would have amended the Rhode Island constitution to permit a privately owned and privately operated resort casino (Harrah’s Entertainment in alliance with the Narragansett nation) to be regulated and taxed by the state.

In its advertising campaign leading up to election day, Harrah’s Entertainment spent \$5 million on public relations efforts aimed at gaining Rhode Island voters’ approval, “while the Narragansetts stressed the need for gaming to provide housing and jobs for their nation.”⁵³

The gaming initiative’s opponents also led high-profile campaigns. A Rhode Island organization called Save Our State (“SOS”) spent more than \$2 million on advertising campaigns against the proposed casino and played on voter fears of casino corruption, increased traffic, and decreased profits for local businesses. On its website, SOS even questioned the Narragansett role in

49. *Id.* (quoting 25 U.S.C. § 479 (emphasis added)).

50. CORNTASSEL & WITMER, *supra* note 8, at 21 (citations omitted).

51. Interview with Randy Noka, First Councilmember, Narragansett Nation, in Misquamicut, R.I. (Aug. 10, 2001).

52. *Id.*

53. CORNTASSEL & WITMER, *supra* note 8, at 22.

the casino operation by claiming that “Harrah’s says it will ‘partner’ with the Narragansett Indians to operate a casino in West Warwick. But 95% of the profits will go to Las Vegas and the Narragansett Tribe will have no management or operational role in the casino.”⁵⁴ The two other casinos in Rhode Island, Lincoln Park and Newport Grand, also campaigned strongly against the proposed gaming facility. Governor Carcieri also continued to oppose a Harrah’s/Narragansett casino on the grounds that nothing would prevent Harrah’s and the Narragansetts from paying a “substantially lower tax rate” to the state of Rhode Island.⁵⁵ Such thinking exemplifies the rich Indian racist mentality that was evident throughout the campaign.

On November 7, 2006, voters defeated Question 1 by a wide margin, with of 63% of Rhode Islanders voting against the casino. Chief Sachem Thomas’ and other Narragansett efforts to remove the 1996 Chaffee amendment have also been unsuccessful.

With the defeat of the Narragansett casino referendum, focus shifted to the legal court battle over Narragansett use of federal trust land. In *Carcieri v. Kempthorne* the U.S. District Court for the District of Rhode Island upheld the Secretary of the Interior’s actions, stating that Rhode Island was taking an unnecessarily narrow view of the law.⁵⁶ The First Circuit upheld the district court’s decision.⁵⁷ Undeterred, the state of Rhode Island, supported by twenty-one other states, sought Supreme Court’ review.⁵⁸ On February 25, 2008, the Supreme Court granted certiorari.

A question posted by Chief Justice Roberts during oral arguments was telling in terms of what the justices were thinking about the case. Roberts asked: “The use of the land would not be limited to the housing, right? They would engage in other activities that Indian tribes can engage in, correct?”⁵⁹ This was basically a coded way of asking whether the Narragansetts were going to open up a casino on the trust land. An attorney for the Narragansetts quickly corrected the Chief Justice, explaining that, “[a]ccording to the administrative record, there are some HUD restrictions on the land. If what you’re concerned with is the specter of gaming, our interpretation of the Indian Gaming Regulatory Act is that the tribe could not unilaterally decide to game on this property were it taken into trust.”⁶⁰ However, in this case, the “specter

54. *Id.* (quoting Save Our State, Here are Just a Few of the Many Reasons to Vote No on Question 1, <http://www.saveourstate.com/thefacts.html> (last visited Nov. 16, 2006)).

55. Ray Henry, *West Warwick Casino Cast as Rhode Island’s Budget Savior, Villain*, INDIAN COUNTRY TODAY, Aug. 25, 2006, <http://www.indiancountrytoday.com/archive/28155664.html> (last visited Oct. 27, 2009).

56. At this stage the case was titled *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D. R.I. 2003).

57. *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007).

58. Brief of the States of Alabama et al. as Amici Curiae in Support of the Petitioners, *supra* note 47 (states supporting Rhode Island: Alabama, Alaska, Arkansas, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas and Utah).

59. Transcript of Oral Argument at 37, *Carcieri*, 129 S. Ct. 1058 (No. 07-526).

60. *Id.* at 37–38.

of gaming” was far more powerful than the realities of IGRA.

Justice Thomas, joined by the Chief Justice and Justices Scalia, Kennedy, Breyer, and Alito, wrote the majority opinion for *Carcieri v. Kempthorne* (which the Court referred to as *Carcieri v. Salazar* to reflect the name of the current Secretary of the Interior). The majority held that:

[F]or purposes of § 479, the phrase “now under Federal jurisdiction” refers to a tribe that was under federal jurisdiction at the time of the statute’s enactment . . . [b]ecause the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust. We reverse the judgment of the Court of Appeals.⁶¹

Chief Sachem Thomas responded to the Supreme Court decision by vowing to continue the fight in Congress, the White House, and even the United Nations in order to reverse the court’s ruling. According to Thomas, “[t]he decision ignored the Narragansetts’ history, namely that state leaders had illegally disbanded the tribe in 1880 and seized its lands. It’s that history the federal government relied on in settling the tribe’s land claims in 1978 and in granting it federal recognition in 1983.”⁶² Other Indigenous nations also responded by calling on Congress to amend the wording of the 1934 Indian Reorganization Act in order to facilitate the future transfer of lands into trust for Indigenous nations. The specter of Indigenous gaming and emerging contender images continue to influence the policy outcomes of decision-makers at both the state and municipal level. In the words of Wilma Mankiller, “[i]f we don’t frame the issues, someone else will frame the issues for us.”⁶³

IV. STRATEGIES FOR FUTURE GENERATIONS

Given the rich Indian and militant images being promoted by contemporary state and federal policymakers, the need to reframe policy issues on their own terms is critical to the future of indigenous nations seeking to avoid the pitfalls of ceding jurisdiction and control to state governments. Ultimately it will be up to each community to determine its own strategy to enhance its self-determining authority. The following are four strategies that offer promising pathways to self-determination during the Forced Federalism era.

61. *Carcieri*, 129 S. Ct. at 1061.

62. Katie Mulvaney, *Chief Sachem Matthew Thomas Says Tribes Will Fight Court Ruling*, PROVIDENCE J., Feb. 26, 2009, http://www.projo.com/news/content/NARRAGANSETT_FOLO_02-26-09_VPDF5JB_v10.393f076.html (last visited Oct. 27, 2009).

63. *Tribal Leader Urges Students to Tell Their Stories*, TRIB.COM, June 16, 2005, http://www.trib.com/news/state-and-regional/article_414e9b75-05cb-5c7d-93e6-80270f2d24a5.html (last visited Oct. 26, 2009).

A. *Act Like a Nation*

Assert self-determining authority, do not ask for it or negotiate it away. Oren Lyons, Faithkeeper of the Onondaga Nation, once said, “[i]f a nation feels like a nation, acts like a nation, then you will be a nation.”⁶⁴ Lyons put this statement to the test by traveling to Geneva with a Six Nations’ passport in 1977 and, consequently, Swiss authorities now recognize Six Nations passports. “Acting like a nation” was certainly the mantra of Indigenous communities of the northwest as they asserted treaty-based fishing rights beginning with fish-in’s during the 1970’s. As treaty-based nations, Indigenous communities have several diplomatic strategies to draw on, such as including requiring passports for those U.S. citizens who travel onto indigenous homelands, demanding U.S. accountability within global forums, and re-instituting inter-indigenous treaty-making.

B. *Regenerate Gadugi Governance and Leadership*

The Tsalagi notion of Gadugi entails “a built-in spirit of community camaraderie. This means that whatever issues or concerns arising in collective living have to be addressed in a unitary way and that no one is left alone to climb out of a life endeavor; it reflects a collective community base”.⁶⁵ It is about renewing those roles and responsibilities people have in Indigenous communities. This kind of leadership by example usually starts with the individual. An individual has a dream or a vision and then starts living it by incorporating whatever it is that he or she has envisioned into his or her daily life. Then the individual makes it relatable to other people. Only after making these teachings relatable to others can one start organizing people and mobilizing them for change. It is different than a Western kind of model that structures the hierarchical leadership process by organizing everyone at the beginning. The Narragansetts offer a good example of leadership here by refusing to compromise their self-determining authority in the face of continued pressure from state and federal policymakers.

C. *Practice Insurgent Education*

Settlers have become way too comfortable on Indigenous lands. There is a certain pedagogy of discomfort that can be used to remind them that they are on Indigenous homelands. A pedagogy of discomfort strategy usually takes place outside the classroom. One example is honoring the 1677 Treaty of Middle Plantation between Mattaponi, Pamunkey, and the Commonwealth of Virginia.⁶⁶ The Pamunkey and Mattaponi have been upholding the terms of that treaty for the past 300 years. Every year they go to the governor’s

64. CORNTASSEL & WITMER, *supra* note 8, at 6 (citation omitted).

65. Telephone Interview with Benny Smith, Elder, Cherokee Nation (June 15, 2006).

66. See Virginia’s First People—Past and Present, Virginia Indians Today: Treaty of 1677, http://virginiaindians.pwnet.org/today/treaty_1677.php (last visited Oct. 7, 2009).

mansion and bring a tribute (usually deer or geese) right to the foot of the stairs.⁶⁷ This is insurgent education; they are demonstrating that the terms of the treaty are still being upheld. The Governor does not understand what he is engaging in, but it is important to inspire and remind people that the agreements we make are sacred and we uphold them. Insurgent education localizes Indigenous struggles, and therefore makes others more aware of the contemporary colonialism that is still being practiced on native nations.

D. Renew Inter-Indigenous Treaty Making

One way to promote indigenous unity and regeneration is to encourage renewed treaty making between indigenous families and communities. Such a revitalized treaty process would follow the protocols of pipe ceremonies, not the paper diplomacy of states/global forums. Because states have not honored indigenous treaties for the most part, indigenous peoples need to lead by example and demonstrate once again their communities' approaches to principles of respect and diplomacy. Treaties of peace and friendship entail making sacred compacts that should be renewed ceremonially on an annual basis with all participating indigenous peoples. New inter-indigenous treaties might include those that affirm alliances, promoting protection for crossing borders and trade arrangements, further illustrating the wide spectrum of indigenous powers of Gadugi. These can be alliances that Indigenous nations can use to regenerate their old trade networks that go beyond the colonial state borders. Innovative ideas, like the United League of Indigenous Nations, which was created by eleven Indigenous nations in 2007,⁶⁸ can take Indigenous nations even further in terms of promoting the self-determining authority of Indigenous nations in the areas of trade and alliance-building beyond borders.

V. CONCLUSION

As this case study of the Narragansett nation has demonstrated, the long-term solutions to confronting rich Indian racism do not arise from emulating the lobbying and political behavior of other U.S. citizens. The strength of indigenous nations comes from protecting indigenous homelands and regenerating our cultural and political forms of governance. In an era of forced federalism, Indigenous nations are not just confronting hostile legislation and policymakers, but also the politics of perception. It is time Indigenous nations take back their futures and represent themselves on their own terms.

67. Joanne Kimberlin, *Tribes Pay Rent to Virginia for Three Centuries*, VIRGINIAN-PILOT, June 10, 2009, <http://hamptonroads.com/2009/06/tribes-pay-rent-va-3-centuries> (last visited Oct. 27, 2009).

68. United League of Indigenous Nations, <http://www.indigenousnationtreaty.org/home.html> (last visited Aug. 26, 2009).