

# States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty, 1935–1954

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"What distinguishes the American Indians from other native groups is . . . the nature of their relationship with a government which, while protecting their welfare and their rights, is committed to the principles of tribal self-government and the legal equality of races."

*Felix S. Cohen, Chairman, Board of Appeals, United States  
Department of Interior (1942)*<sup>1</sup>

1. Felix S. Cohen, "The Spanish Origins of Indian Rights in the Law of the United States," *Georgetown Law Journal* 31 (1942): 21.

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"[T]he objective of Congress is to make the Indians self-supporting and into good individual American citizens . . . . You cannot have a good American citizen . . . unless you have a good citizen of the State."

*United States Representative Antonio M. Fernández (D., New Mexico) (1949)*<sup>2</sup>

"While all this red tape is being untangled, one in need dies without assistance."

*David A. Johnson, Sr., Governor and Chairman of the Gila River Pima-Maricopa Indian Community (1949)*<sup>3</sup>

These three quotations come from a period in modern American history often remembered for economic depression and war, but perhaps most remarkable for the accompanying changes in governance. Building on Progressive Era innovations, America's federal system became ever more "cooperative"—that is, marked by intricate federal-state personnel and revenue sharing. Meanwhile, Americans witnessed the steady expansion of central state authority. By the 1940s, neither the states nor the federal government enjoyed many areas of exclusive jurisdiction.<sup>4</sup> The federal and state governments' relationships with their subjects were similarly in flux, and the stakes were high. As a result of New Deal social welfare programs, as well as numerous war-related measures, the benefits of state and national citizenship had expanded by the late 1940s. The burdens of citizenship had expanded, too, in the form of higher and broader taxation, compulsory military service, and more government oversight.<sup>5</sup> The stage

2. House Committee on Public Lands, *Hearings before a Subcommittee on Indian Affairs of the Committee on Public Lands on H.R. 3476: A Bill to Promote the Rehabilitation of the Navajo and Hopi Indians under a Long-range Program*, 81st Cong., 1st sess., 1949, 202–4.

3. David A. Johnson, Sr., to Oliver La Farge, January 19, 1949, Box 120, Records of the National Congress of American Indians (National Museum of the American Indian Archive Center, Suitland) (hereafter NCAI).

4. States and localities maintained control of education, for example, and the federal government claimed control of national defense, but even these involved some degree of cooperation. On "cooperative" federalism, see note 9 (on "new federalism"); see also V. O. Key, Jr., *The Administration of Federal Grants to States* (Chicago: Public Administration Service, 1937); Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (1950): 1–24; and Daniel J. Elazar, *American Federalism: A View from the States* (New York: Harper and Row, 1984).

5. See Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Ithaca: Cornell University Press, 1998); Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2007); James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2011); and Molly C. Michelmore, *Tax and Spend: The Welfare State, Tax Politics, and the Limits of American Liberalism* (Philadelphia: University of Pennsylvania Press, 2012).

was set for fierce conflicts over the borders of the nation's political communities and the terms of belonging.

American Indians<sup>6</sup> entered these conflicts in a manner that historians have failed to appreciate, and that provides new insight into the legal and political landscape of the mid-twentieth century. Indians had long contested their position vis-à-vis the state and federal governments—which at various times had treated them as savages, sovereigns, citizens, and wards—but by the 1940s, they had new tools. Drawing on their intimate knowledge of bureaucracy, their allies in federal government, and the technical requirements of New Deal grants-in-aid, Indian activists provoked a standoff between state officials in the Southwest and high-level Washington administrators, and ultimately won legal recognition for an extraordinary form of belonging. Under the terms of this arrangement, reservation Indians were entitled to the benefits of state citizenship but remained outside the state's jurisdiction in other regards, thereby retaining a key marker of sovereignty. Thus, at the very same time that Southwestern boosters demanded federal government resources but rejected federal pronouncements about the treatment of workers, immigrants, and others within their borders—a hallmark of "sunbelt conservatism"—Indians in the region also asserted novel claims about their rights and responsibilities in the American federal system.<sup>7</sup>

6. Wherever possible, I refer to indigenous persons by the names of their specific indigenous communities. When referring to indigenous people as a collective, I use the terms "American Indian" and "Indian," which "remain the most common appellations used by indigenous and nonindigenous persons and institutions." David E. Wilkins and Heidi Kiiwetinepinesik Stark, *American Indian Politics and the American Political System*, 3d ed. (Plymouth, UK: Rowman & Littlefield Publishers, 2011), xvii. I prefer "American Indian" to the more generic but arguably more innocuous "Native American" because I do not wish to efface the complicated history of war, colonization, and intragovernmental agreements that many indigenous people consider central to their identities. See, for example, Russell Means, "I Am an American Indian, Not a Native American!" (T.R.E.A.T.Y. Productions, 1996) <http://compusci.com/indian/> (April 25, 2014); Christina Berry, "What's in a Name? Indians and Political Correctness," All Things Cherokee [http://www.allthings-cherokee.com/articles\\_culture\\_events\\_070101.html](http://www.allthings-cherokee.com/articles_culture_events_070101.html) (April 25, 2014).

7. On "Sunbelt conservatism," see Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton: Princeton University Press, 2006); Michelle Nickerson and Darren Dochuk, eds., *Sunbelt Rising: The Politics of Space, Place, and Region* (Philadelphia: University of Pennsylvania Press, 2011); and Elizabeth Tandy Shermer, *Sunbelt Capitalism: Phoenix and the Transformation of American Politics* (Philadelphia: University of Pennsylvania Press, 2013). Seeking federal dollars while rejecting federal control is a theme of Western regional history more generally. See Richard White, *"It's Your Misfortune and None of My Own": A New History of the American West* (Norman: University of Oklahoma Press, 1991); and Gerald D. Nash, *The American West Transformed: The Impact of the Second World War* (Lincoln: University of Nebraska Press, 1990).

This article documents and analyzes a 20 year struggle over American Indians “welfare rights”—that is, their claims to material assistance under the Social Security Act of 1935 and the United States Constitution. Best known for creating a national system of old-age insurance, the Social Security Act also subsidized state-run programs such as Old Age Assistance, Aid to Dependent Children, and Aid to the Blind, lifting some of the burden from local governments and charities.<sup>8</sup> In doing so, the Act also entrenched and expanded the era’s “new federalism,” a phrase that contemporary scholars coined to describe a significant change in the relationship between the federal government and the states.<sup>9</sup> States applied for federal grants and (in theory) used those grants to run modernized versions of traditional poor relief programs.<sup>10</sup> American Indians took advantage of both aspects of the law: its promise of income support and its “new federalism” logic. Using the federal Act’s language, and with the help of the federal bureaucracy it created, representatives of a handful of Indian political communities in Arizona and New Mexico demanded that these states provide them with the material benefits of citizenship—which they badly needed—while also respecting their rights as members of sovereign nations.

Initially hidden within the administrative state, these claims became visible in 1948, when Indian law expert and former federal government lawyer Felix S. Cohen filed suit on behalf of eight Hualapai and Pueblo Indians. The plaintiffs claimed that Arizona and New Mexico had denied them the equal protection of the law; they further alleged that high-ranking federal officials—the ones who funded the state welfare programs—had deliberately delayed remedying this discrimination, resulting in 82 deaths

8. See note 31.

9. Political scientist Jane Perry Clark inaugurated the term “new federalism” in 1938, in the midst of the New Deal and in the wake of decades of progressive reform. Jane Perry Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (New York: Columbia University Press, 1938). Legal scholars often use the term to describe the Rehnquist Court’s federalism jurisprudence, but historians and political scientists continue to associate it with “the uneasy period when the United States was precariously balanced between a continued dual federal system and a centralized modern state.” Kimberley S. Johnson, *Governing the American State: Congress and the New Federalism, 1877–1929* (Princeton: Princeton University Press, 2007), 4. For analytical purposes, Johnson distinguishes “New Federalism” from “New Deal federalism,” but she recognizes that the latter grew directly from the former. *Ibid*; see also Harry N. Scheiber, “American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives,” *Toledo Law Review* 9 (1978): 646 (describing the New Deal era in “new federalism” terms).

10. Michael E. Parrish, “The Great Depression, the New Deal, and the American Legal Order,” *Washington Law Review* 59 (1984): 727.

over the past 5 years.<sup>11</sup> State officials from Arizona and New Mexico pushed back; although they were aiding few Indians of any kind, they claimed that the real issue was reservation Indians, or as they saw it, "wards" of the federal government. The estimated cost to the states of including these "wards" was a mere \$200,000 per year in Arizona and \$112,000 in New Mexico, because of the federal government's generous system of matching grants. But the price to state autonomy—to the states' ability to define their own racially and culturally inflected "borders of belonging"<sup>12</sup>—felt much higher, so high that state officials were willing to risk the millions of dollars they received every year (approximately \$3,600,000 in Arizona and \$2,700,000 in New Mexico) in federal welfare subsidies.<sup>13</sup>

The plaintiffs' assertions bear a striking resemblance to those that civil rights organizations such as the National Association for the Advancement of Colored People (NAACP) were making in their challenges to segregated educational facilities and that "poverty lawyers" would make in the 1960s and 1970s, when they contested state welfare restrictions targeting poor black and Latino women.<sup>14</sup> But *Mapatis v. Ewing*, as the case was called,

11. Complaint, *Mapatis v. Ewing* (D.D.C. 1948), Box 332, Association on American Indian Affairs Records (Mudd Manuscript Library, Princeton University, Princeton) (hereafter AAIA). On termination, see Kenneth R. Philp, *Termination Revisited: American Indians on the Trail to Self-Determination, 1933–1953* (Lincoln: University of Nebraska Press, 1999).

12. I borrow this term, a conceptualization of citizenship, from Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010).

13. Federal officials derived these estimates from assumptions on which state officials agreed. Arthur Altmeyer to Murray A. Hintz, October 16, 1948, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, Office of the General Counsel, General Records of the Department of Health, Education, and Welfare, RG 235 (National Archives, College Park) (hereafter GC-DHEW); Arthur Altmeyer to Carl Hayden, September 3, 1948, Box 36, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and "Social Security and Other Income," *Social Security Bulletin* 11 (1948): 54. To put these figures in perspective, Arizona spent approximately \$60,000 of its own money on "general relief" (a catchall category for poor citizens who failed to qualify for one of the federally subsidized programs) in a single month in 1948; New Mexico spent roughly \$40,000. The cost of including reservation Indians was, therefore, not trivial, but it paled in comparison to the amount that the states were willing to spend on public welfare more generally (Council of State Governments, *Federal Grants-in-Aid* [Chicago: Council of State Governments, 1949]).

14. On contemporaneous NAACP lawsuits, see Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011). On the legal aspects of the welfare rights movement, see Martha F. Davis, *Brutal Need: Lawyers*

has eluded the attention of historians, as well as Native Studies scholars. It has missed their grasp for reasons that are central to the argument here: the episode fits uneasily into prevailing narratives of politics, law, and identity in the post-New Deal era.

For historians of the twentieth century United States, the *Mapatis* case might appear to lack conventional markers of importance. It had ties to an emergent Indian rights movement, but at the time of the case's filing, there was no crowd ready to march on Washington, no cadre of lawyers waiting in the wings with follow-on cases. The plaintiffs themselves were an unstable coalition: they hailed from the same region but from diverse tribes with complicated histories. Their poverty, although shared, placed them in different legal classes. Some were mothers of "dependent children" (a once sacred but increasingly vilified category), while others merited aid because of disability or old age. Perhaps most important, the plaintiffs appeared to have no ambition to create a constitutional right to welfare or a landmark legal precedent; they claimed only equal treatment under existing, and hardly generous, state statutes.<sup>15</sup> (Benefit levels across the South were notoriously low. In 1948, in acknowledgment of *white* citizens' interest in greater support, Arizona Governor Daniel Garvey referred to his own state's meager benefits as "mandatory starvation.")<sup>16</sup> The plaintiffs withdrew their case once federal officials extracted from the states the promise of equal treatment. For scholars looking for a "rights revolution," *Mapatis* would, therefore, appear to be a false start or an opportunity foregone. As I will argue, however, it perfectly demonstrated another twentieth-century phenomenon: the innovative legal and political maneuvering that the "new federalism" made possible.

For similar reasons, *Mapatis* and the broader contest it represented have largely eluded the attention of Native Studies scholars.<sup>17</sup> This conflict does

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and the Welfare Rights Movement, 1960–1973 (New Haven: Yale University Press, 1993); and Felicia Ann Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (Philadelphia: University of Pennsylvania Press, 2007).

15. I do not mean to imply that the *Mapatis* litigation was novel in this regard. Historians have begun to recognize that many civil rights litigants were primarily interested in enforcing, as opposed to reforming, existing laws. See, for example, Kris Shepard, *Rationing Justice: Poverty Lawyers and Poor People in the Deep South* (Baton Rouge: Louisiana State University Press, 2007); and Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (New York: Russell Sage Foundation, 2006).

16. "Garvey Asks State Refuse Indian Relief," *Tucson Daily Citizen*, September 13, 1948 p. 1.

17. To my knowledge, the only scholar to have discussed the dispute in some depth is Deanna Lyter. Her dissertation in sociology places the case in the context of "how . . . the dominant society's construction of race, class, and gender shape[d] the exclusion of White Mountain Apache women as they encountered Arizona's Aid to Dependent Children program." Deanna M. Lyter, "Domination, Regulation, and Resistance: The

not, on its face, implicate paradigmatic Indian law issues, nor does it fit the dominant narrative of the post-World War II period, namely, the fight to retain distinct cultural and political identities in the face of a federal government policy of "termination" (shorthand for discontinuing American Indians' special privileges and disabilities) and broader assimilatory pressures.<sup>18</sup> These Indian plaintiffs appeared to ask for inclusion in the very political communities that the Supreme Court famously dubbed their "deadliest enemies."<sup>19</sup> It is possible to view this struggle against "red tape" as an early form of "Red Power," but not without reconceptualizing the latter. What we should reconsider instead, I will argue, is our understanding of Indians' contribution to "mainstream" debates about the meaning of citizenship at mid-century.

Scholars have similarly neglected the next phase of the contest. In 1950, Congress amended the Social Security Act to authorize matching grants for state-run programs of Aid to the Permanently and Totally Disabled. Arizona officials crafted a test case by applying for a grant but insisting on excluding reservation Indians from their new program; in their subsequent lawsuit, *Arizona v. Hobby*, they demanded that the federal Department of Health, Education, and Welfare reverse its refusal to subsidize their plan. A federal appellate court ultimately dismissed the case, citing the United States government's sovereign immunity. But this *non*-adjudication mattered greatly: it implied that states seeking federal dollars for their welfare programs would simply have to accept the strings that federal administrators attached, or forego funds that they and their citizens had come to depend upon, a deeply dissatisfying answer.<sup>20</sup>

These legal cases, and the political and administrative skirmishes that underlay them, illustrate the complex and divisive citizenship claims that emerged alongside the "new federalism." American Indians claimed "welfare rights" for diverse and conflicting reasons, including both a desire for equal treatment with white citizens and a drive to create strong, self-

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Impact of Aid to Dependent Children and Tribal Law on White Mountain Apache Women, 1934–1960" (PhD diss., American University, 2002), 2, 91–114. For briefer Native Studies discussions of the case, see Thomas W. Cowger, *The National Congress of American Indians: The Founding Years* (Lincoln: University of Nebraska Press, 1999), 67; Philip, *Termination Revisited*, 59–60.

18. See, for example, Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W.W. Norton & Co., 2009).

19. "Deadliest enemies" is from *United States v. Kagama*, 118 U.S. 375, 384 (1886). That some American Indians in the Southwest fought for inclusion in the termination era, bucking the broader trend, is perhaps unsurprising. It is in the Southwest that states most determinedly resisted extending the right to vote and other markers of belonging. See note 69.

20. *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954).

sufficient political communities. But the mere act of claiming tribal sovereignty—tied, importantly, to physical territory—and federal and state citizenship was powerfully disruptive. State politicians had long used state citizenship to facilitate removal and coerce assimilation; they promised that Indians who gave up their tribal lands and agreed to live as individuals would be protected by state law and welcomed into the political community. Out of these disingenuous bargains, states gained access to valuable property, and, if they convinced enough Indians, freedom from the federal oversight that accompanied active treaty obligations. Citizenship became the prize that states offered to Indians for *surrendering* their tribal affiliations.<sup>21</sup> By demanding that the federal government both vindicate Indians' rights as state citizens and protect them from state incursions on tribal sovereignty, Indian activists attempted to use the categories and machinery of American federalism for their own ends.

The responses from state officials are equally revealing. Extrapolating from research on the "old poor law" and the preferences of Southern politicians, historians have assumed that state and local governments preferred to control social welfare provision and that they continued to do so under the "new federalism." In doling out benefits, the argument goes, local officials controlled a valuable and potentially disruptive low-wage labor supply, while further legitimizing the existing power structure.<sup>22</sup> In Arizona and New Mexico in the 1940s, state and local governments sought to *evade* responsibility for a subordinated group, one that, on the surface, bears similarities to black Americans in the Deep South in the same period. Why? Tradition and money mattered: the federal government had long accepted responsibility for its poor "wards." But most important, this article shows, was the potential mismatch between the civic identities that state officials imagined for Indians—long characterized as a racial and cultural "other"—and their own regulatory powers. Because of federal court pronouncements about the limited reach of state law on Indian reservations,

21. Frederick E. Hoxie, "What Was Taney Thinking? American Indian Citizenship in the Era of Dred Scott," *Chicago-Kent Law Review* 82 (2007): 329–59. These bargains, it should be noted, depended upon a historically specific understanding of state sovereignty. Starting in approximately 1820, Lisa Ford has argued, sovereignty came to depend on the ability to "order[] . . . indigenous people in space"—to assert territorial jurisdiction over their property and bodies. Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010), 1–4.

22. See, for example, Frances Fox Piven and Richard Cloward's influential *Regulating the Poor: The Functions of Public Welfare* (New York: Pantheon Books, 1971); see also Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* (New York: Basic Books, 1986); and Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, MA: Harvard University Press, 1998).



state and local officials faced the prospect of issuing benefits, a symbolic recognition of citizenship (even if now massively subsidized by the federal government), while remaining legally constrained from proscribing and punishing behavior, defining legitimate families, and extracting resources from reservation lands.<sup>23</sup> They would grudgingly accept this new arrangement, but only when the price was right, and even then, with an eye toward subversion.

Citizenship, they felt, was not supposed to work that way: polities that granted rights to their members were entitled to impose obligations; polities that gave support were entitled to command loyalty and tribute. But New Deal reforms, grafted onto a scheme of layered sovereignty, made the "impossible" possible.<sup>24</sup> This insight helps explain why such a broad swath of policy makers urged the termination of American Indians' special status in the late 1940s and 1950s, which in turn inspired a new generation of Indian activism.<sup>25</sup> More broadly, it suggests why many state officials grew to resent a federal grant-in-aid program that, according to generations of historians, left so much control in their hands.<sup>26</sup> In the wake of Arizona and New Mexico's dispute with federal welfare administrators, state officials from around the country talked openly about the ways that New Deal welfare programs constrained them, by reimagining the status of their poor citizens and connecting those citizens, however tenuously, to Washington, D.C., and federal law. Their collective resistance in the late 1950s and 1960s is one manifestation of the "uncooperative" or

23. On the limited reach of state law on Indian reservations, see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Note, however, that for much of United States history, states succeeded in subjecting Indians to their laws, especially in the Southeast. Ford, *Settler Sovereignty*; Deborah Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880* (Lincoln: University of Nebraska Press, 2007).

24. On the disruptive power of people who are legal "impossibilities," see Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004). On "layered sovereignty," a term most often used in histories of empire, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (New York: Cambridge University Press, 2010), 31–32.

25. On termination, see Philp, *Termination Revisited*; and Donald Lee Fixico, *Termination and Relocation: Federal Indian Policy, 1945–1960* (Albuquerque: University of New Mexico Press, 1986). On American Indian activism in the 1960s, see Bradley G. Shreve, *Red Power Rising: The National Indian Youth Council and the Origins of Native Activism* (Norman: University of Oklahoma Press, 2011).

26. On the emergence in the late 1940s and 1950s of intense state-level concern about New Deal public assistance programs, see Ellen Reese, *Backlash against Welfare Mothers: Past and Present* (Los Angeles and Berkeley: University of California Press, 2005); Michelsmore, *Tax and Spend*. For the commonly voiced view that states controlled New Deal public assistance, see, for example, Mettler, *Dividing Citizens*; and Lieberman, *Shifting the Color Line*.

“opportunistic” federalism that emerged so powerfully in the second half of the twentieth century.<sup>27</sup>

In short, federal-state grants-in-aid—which policy makers once imagined as an innocuous tool of shared governance—both made possible the set of policies, coalitions, and public commitments that we know as the “New Deal order” and also invited the conflicts and strategies that would undermine it.<sup>28</sup> That Indian reservations were the site of the first such conflicts and strategies is no coincidence, but rather speaks to Indians’ continued centrality, well into the twentieth century, to the complex and contested process of adopting America’s federal system to new realities.

### **New Federalism, New Deal Welfare Reform, and the New “Indian Problem”**

Federalism in the United States is both the foundation of government and an unstable concept. Ideas about the proper relationship of the federal government and the states have changed over time, as have the practical bounds of federal and state power. Change came fast in the opening decades of the twentieth century, so much so that observers announced a “new federalism.” The main innovation was cooperation: states found

27. On “uncooperative” and “opportunistic” federalism, see Jessica Bulman-Pozen and Heather K. Gerken, “Uncooperative Federalism,” *Yale Law Journal* 118 (2009): 1256–1310; and Tim Conlon, “From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations,” *Public Administration Review* 66 (2006): 663–76.

28. On the “New Deal order” and its collapse by the 1980s, see Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order* (Princeton: Princeton University Press, 1989). Political scientist Margaret Weir has recently questioned the use of the term “New Deal order” because it “implies a relatively coherent political configuration” and privileges “the development of national political processes and political forms,” it hinders scholars from recognizing the United States as having “a layered polity in which federal initiatives were overlaid on state political systems that operated with different administrative capacities and political logics.” Margaret Weir, “States, Race, and the Decline of New Deal Liberalism,” *American Political Development* 19 (2005): 157–58. Like Fraser and Gerstle, I employ the term “New Deal order” to refer to a particularly influential set of “ideas, public policies, and political alliances.” In Jennifer Klein’s apt summary, “the New Deal Order . . . encompasses or designates particular political coalitions brought under a dominant Democratic Party, expanded citizenship rights, Keynesian economic policymaking, rising standards of living through collective bargaining and public investment, checks on the prerogatives of business, and working-class enfranchisement.” Fraser and Gerstle, *The Rise and Fall of the New Deal Order*, ix; and Jennifer Klein, “A New Deal Restoration: Individuals, Communities, and the Long Struggle for the Collective Good,” *International Labor and Working-Class History* 74 (2008): 42. I join Weir’s efforts, however, to uncover the neglected role of the states in shaping the trajectory of New Deal reforms.

themselves sharing with the federal government areas of governance that once had seemed to fall squarely within states' exclusive jurisdiction.<sup>29</sup> Grants-in-aid were the preferred vehicle. Between 1900 and 1930, the combined amount of federal-to-state grants rose from \$2,800,00 annually to more than \$100,000,000; by fiscal year 1946–47, the estimated annual total exceeded \$1 billion. This grant money became a significant part of state budgets. In the early years of the Depression, federal grants covered less than 2 percent of state and local expenditures; by 1950, that figure was closer to 9 percent.<sup>30</sup>

Poor relief became a significant area of shared jurisdiction. Historically, poor relief was a local function, much like education. Toward the end of the nineteenth century, states had begun to play stronger oversight and standard-setting roles, but in most parts of the country, local officials continued to control day-to-day administration. The Great Depression encouraged reconsideration of this arrangement. Under great financial stress and facing problems that could not be solved locally, cities and towns ceded much of their authority over poor relief to the state and federal governments. Under the terms of temporary Federal Emergency Relief Administration grants (1933–35) and, later, the renewable grants authorized by the Social Security Act of 1935, local officials continued to evaluate the needs of the poor, but under the watchful eye of state supervisors, federal auditors, and professional social workers, imported into local communities at the insistence of these more remote levels of government.<sup>31</sup>

Nothing about this new arrangement was simple. One difficulty was fiscal: states received public assistance grants on a matching basis, giving state legislators an incentive to fund poverty programs but also a keen awareness of the federal government's influence on their spending choices.

29. On the history of federalism, see, for example, Harry N. Scheiber, "Federalism and Legal Process: Historical and Contemporary Analysis of the American System," *Law and Society Review* 14 (1979): 633–722; William H. Riker, *The Development of American Federalism* (Boston: Springer, 1987); and William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996). On "new federalism" and "cooperative federalism," see notes 4 and 9.

30. Cecile Goldberg, "Development of Federal Grant Allocations," *Social Security Bulletin* 10 (1947): 3–4; and George E. Bigge, "Federal Grants-in-Aid: A Bulwark of State Government," *Social Security Bulletin* 13 (1950): 3.

31. Public Law 271, 74th Cong., 1st sess. (August 14, 1935). On the administration of the Act, see Robert T. Lansdale, Elizabeth Long, Agnes Leisy, and Byron T. Hipple, *The Administration of Old Age Assistance* (Chicago: Public Administration Service, 1939); Martha Derthick, *The Influence of Federal Grants: Public Assistance in Massachusetts* (Cambridge, MA: Harvard University Press, 1970); and Blanche D. Coll, *Safety Net: Welfare and Social Security, 1929–1979* (New Brunswick: Rutgers University Press, 1995).

This influence loomed larger over time as the value of federal public assistance grants increased, from approximately \$28,400,000 in 1936 to \$732,000,000 by 1948. The federal government also attached “strings” to its grants. State officials retained vast discretion, much of which they passed on to local authorities, but there were firm rules about how the assistance programs were to operate (uniformly throughout the state), who ought to control them (a central state agency, staffed by civil servants), and how the states would assure the federal government of their compliance (regular reporting, audits). More important, federal administrators were committed to monitoring state behavior. Through detailed regulations, roving field agents, and standing offers to train and educate local welfare workers, federal administrators tied state welfare programs to Washington. In short, New Deal welfare reform enabled states to care for their citizens and preserve many aspects of traditional, localized poor relief, but at a price. Some officials found themselves running social programs that they considered unnecessary and helping people who, in their view, did not deserve help. They were also prevented from doing things they *did* want to do, such as issuing relief in kind (rather than cash) and aggressively monitoring recipients.<sup>32</sup> To control poor relief is to define and police a crucial “border of belonging,” a jurisdiction not easily shared.

Further complicating matters, this “new federalism” in poor relief affected questions that had long plagued the “old federalism”: What rights did Indians have, and against whom? Who was responsible for enforcing those rights? The nation’s founding documents provided incomplete and contestable answers. Interactions with Eastern tribes informed the content of the United States Constitution, but the document itself did not purport to govern them, much less the tribes West of the Mississippi (who were not even arguably within the territorial jurisdiction of the nation at the time).<sup>33</sup> Indians’ relationship to the federal and state governments was continually negotiated and became more complex still as the legal space of “Indian Country” came into being. Federal courts developed relatively simple doctrines to govern disputes, but their rulings were difficult to enforce, and their judgments rested on characterizations (“alien nation,” “ward,” “dependent domestic nation”) that were themselves contradictory and

32. Bigge, “Federal Grants-in-Aid”; Council of State Governments, *Federal Grants-in-Aid*, 152; Coll, *Safety Net*; James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton: Princeton University Press, 1969); Karen M. Tani, “Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1935–1965” (PhD diss., University of Pennsylvania, 2011).

33. Gregory Ablavsky, “The Savage Constitution,” *Duke Law Journal* 63 (2014): 999–1089.

unstable.<sup>34</sup> The legal status of Indians in the Southwest was particularly complex: under the terms of the Treaty of Guadalupe Hidalgo (1848), Mexican citizens in the ceded territory—including Pueblo Indians—became United States citizens; the same history created uncertainty as to whether the Pueblos were "Indians" for purposes of federal protection and regulation.<sup>35</sup>

The Indian Citizenship Act of 1924 (declaring "all noncitizen Indians born within the territorial limits of the United States" to be United States citizens) purported to settle the question, but met immediate resistance from the Iroquois, who rejected Congress's unilateral actions.<sup>36</sup> The Act also left many smaller questions unresolved, so much so that in 1930, when asked "what the Indians want from the government," W. David Owl, a Cherokee Indian and a minister to the Seneca Nation, answered thus: "The Indian . . . wants to know where he legally belongs," "where his duties and rights begin and end."<sup>37</sup> Owl's claim to speak for "the Indian" was tenuous, but he accurately diagnosed jurisdictional confusion. Lewis Meriam, head of the Institute for Government Affairs and author of the influential Meriam Report, pointed to one family, living on the grandfather's allotment of tribal land, in which some members were "exclusively wards of the nation," others were "free and independent citizens of the state and county," and others—including a "little child of mixed Indian and white blood"—were the subject of fierce intergovernmental disputes. Invoking a phrase that had become shorthand for Indians' challenge to white designs, Meriam dubbed this "the Indian Problem."<sup>38</sup>

Administrators of the Social Security Act used the phrase, too, when they discovered that the Act left ambiguous whether states must include

34. Sidney Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994).

35. Laura E. Gómez, *Manifest Destinies: The Making of the Mexican American Race* (New York: New York University Press, 2007), 90–98; and *United States v. Sandoval*, 231 U.S. 28 (1913).

36. An Act to Grant Citizenship to Indians, Public Law 175, 68th Cong., 1st sess. (June 2, 1924); and Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1984), 18.

37. W. David Owl, "What the Indians Want from the Government," in *Proceedings of the National Conference on Social Welfare* (Chicago: University of Chicago Press [1930], 625, 630).

38. Lewis Meriam, "State and Local Cooperation with the National Government in Social and Educational Work for Indians: Statement of the Problem," in *Proceedings of the National Conference on Social Welfare*, University of Chicago Press, Chicago, 1931, 609–11; and Lewis Meriam, *The Problem of Indian Administration* (Baltimore: Johns Hopkins Press, 1928). For earlier invocations of the "Indian problem," see, for example, Robert G. Hayes, *A Race at Bay: New York Times Editorials on "the Indian Problem," 1860–1900* (Carbondale and Edwardsville: Southern Illinois University Press, 1997).

Indians in their federally subsidized public assistance programs or whether responsibility remained with tribal governments and the federal Bureau of Indian Affairs (BIA). This was not a trivial question. Although Indians comprised less than half a percent of the nation's population in 1930, making for modest fiscal stakes, they had long been entangled (and had purposely entangled themselves) in power struggles between the state and federal governments.<sup>39</sup> For the newly created Social Security Board, faced with administering a monumental New Deal policy at a moment of grave concern about the power of agencies, the pressure was great.<sup>40</sup>

The "Indian Problem" only deepened as administrators turned to the Social Security Act's legislative history and found "ominous silence."<sup>41</sup> The word "ominous" was apt—grave difficulties were indeed in the Board's future—but silence befitted a transitional era in federal Indian policy. Since the 1880s, Indian policy had encouraged private land ownership and assimilation, ostensibly to foster self-sufficiency. Under the Dawes Act (1887), the federal government carved reservations into parcels and "allotted" them to individual Indians, in exchange for national citizenship. The Compulsory Education Act, passed the same year, sought to eradicate the markers of indigenous identity. These policies remained in place for decades, despite indications of inefficacy and abuse. Then, in 1934, the

39. For an overview of the historical literature on American Indians' entanglement in federal-state power struggles, see Christian McMillen, "Native Americans," in *A Companion to American Legal History*, ed. Sally E. Hadden and Alfred L. Brophy (West Sussex, UK: Wiley-Blackwell, 2013), 127–51. I use the term "Bureau of Indian Affairs" (BIA) to refer to the agency that has at other times been known as the Indian Service, the Indian Department, and the Office of Indian Affairs. Originally part of the War Department, the BIA was transferred in 1824 to the Department of the Interior, where it has remained.

40. The Social Security Board, originally an independent agency, later became the Social Security Administration and was placed under the "umbrella" of the Federal Security Agency. In 1953, the social welfare agencies under this umbrella were reorganized as the Department of Health, Education, and Welfare. I use the term "Social Security Board" throughout. On the precarious and controversial position of federal agencies in American governance in the 1930s, see Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (New York: Oxford University Press, 2012).

41. A. Delafield Smith to Geoffrey May, December 20, 1939, Box 92, Office of the Commissioner, Chairman's Files, Records of the Social Security Board, RG 47 (National Archives, College Park) (hereafter SSB). Labor Secretary Frances Perkins, chair of the committee that drafted the law, reportedly told BIA officials that it was unnecessary to insert language specifically including Indians. However, at least one Senator, Peter Norbeck (R., South Dakota), contended that the draft legislation "entirely overlooked" Indians; he suggested adding an "Indian Pensions" title. Norbeck's proposal disappeared from the record without comment. William Zimmerman, Jr., to Frank Bane, January 1, 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; *Congressional Record*, 74th Cong., 1st sess. (June 17, 1935): 9437; and *Congressional Record*, 74th Cong., 1st sess. (June 18, 1935): 9540–41.

Roosevelt Administration dramatically changed course. At the urging of progressive reformer John Collier, Commissioner of Indian Affairs, Congress enacted the Indian Reorganization Act. Tribal autonomy and self-rule became the new watchwords of federal policy. Dissent was apparent from the outset, however, and assimilatory approaches remained in play.<sup>42</sup>

Given this complexity, the Social Security Board would have happily left the "Indian problem" unresolved, but almost immediately, administrators heard from county and state officials anxious to free themselves of what they saw as an unfair burden. In recent years, those officials had eagerly accepted funds from the Federal Emergency Relief Administration (FERA), the Roosevelt administration's short-term solution to nationwide impoverishment, but were alarmed when FERA administrator Harry Hopkins required them to apply those funds also to "ward" Indians within state borders. Some protests were ideological: why give Indians direct relief after years of encouraging self-support? Others stemmed from local administrators' unfamiliarity with indigenous languages, customs, and needs. Whatever the source, these persistent objections required an answer.<sup>43</sup>

In theory, the response was obvious, at least to federal lawyers: if the Social Security Act was vague, the Equal Protection clause of the Fourteenth Amendment was not. States must treat Indian applicants the same as all others. Such was the conclusion of federal attorney (and renowned suffragist) Sue White in an internal memorandum in early 1936.<sup>44</sup> Very quickly, however, White recognized the Board's delicate

42. Janet A. McDonnell, *Dispossession of the American Indian, 1887-1934* (Bloomington: Indiana University Press, 1991); Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Lincoln: University of Nebraska Press, 2001); Lawrence C. Kelly, *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform* (Albuquerque: University of New Mexico Press, 1983); Kenneth R. Philp, *John Collier's Crusade for Indian Reform, 1920-1954* (Tucson: University of Arizona Press, 1977); Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45* (Lincoln: University of Nebraska Press, 1980); and Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1986), 333-36.

43. Samuel Gerson, "Federal and State Relations in Indian Relief," in *Proceedings of the National Conference on Social Welfare*, (Chicago: University of Chicago Press, 1935), 589, 591-92; Sue S. White, memorandum, April 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and Arthur Altmeyer to Sue White, March 24, 1936, Box 92, Office of the Commissioner, Chairman's Files, SSB.

44. Sue White to Thomas H. Eliot, February 2, 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. White cited no legal authority for her position, and her confidence on this point is curious. In 1936, the Supreme Court had yet to adopt strict scrutiny for classifications based on immutable traits, and existing precedents treated racial segregation as consistent with the Fourteenth Amendment. On White and

political situation. She urged the Board to say little; dissatisfied claimants could initiate administrative hearings or test the matter in court.<sup>45</sup>

In practice, then, the Board responded to state inquiries with shadow and implication, and for the most part, that sufficed. Federal administrators conveyed that the Board would frown upon discrimination against Indians ("serious questions might arise"), but avoided firm statements. States that approached the BIA received a similar, if more forceful, response. Interior Department Solicitor and former NAACP legal strategist Nathan Margold insisted that the Social Security Act offered no legal shelter to states contemplating exclusion, a message that his agency conveyed to North Dakota and Montana.<sup>46</sup> These states and others (for example, California, Idaho, Oklahoma, Utah, Washington, Wisconsin, and Wyoming) ultimately did not attempt to exclude Indians, "ward" or otherwise, from their programs.<sup>47</sup>

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her path to the Social Security Board, see Karen M. Tani, "Portia's Deal," *Chicago-Kent Law Review* 87 (2012): 549–70. On the status of equal protection doctrine at this moment, see Victoria F. Nourse and Sarah McGuire, "The Lost History of Governance and Equal Protection," *Duke Law Journal* 58 (2009): 955–1012.

45. Sue S. White to Thomas H. Eliot, February 11, 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. White feared that critics might accuse the Board of overstepping its bounds, by assuming the judiciary's role. On the prevalence of this critique, see G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), 96–103.

46. For Board statements, see John Winant to Benjamin Ross, April 3, 1936, Box 92, Office of the Commissioner, Chairman's Files, SSB; John Winant to William Zimmerman, Jr., April 11, 1936, Box 92, Office of the Commissioner, Chairman's Files, SSB; and Frank Bane to Carl Hayden, November 21, 1936, Box 92, Office of the Commissioner, Chairman's Files, SSB. On the BIA's interpretation, see Nathan R. Margold, memorandum, April 22, 1938, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; William Zimmerman, Jr., to H. A. Willson, June 23, 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and John Collier to Royal L. Mann, May 8, 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. Unsuccessful lawsuits in two states, Montana and Minnesota, supported the Board's position. A. Delafield Smith to Alice P. Stanton, February 3, 1944, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and Jack Tate to Paul McNutt, January 14, 1941, Box 12, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

47. Frank Bane to Carl Hayden, November 24, 1936, Box 92, Office of the Commissioner, Chairman's Files, SSB; and Sue S. White to Thomas H. Eliot, February 27, 1936, Box 10, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. This is not to say that Indian applicants were always treated equally. Federal administrators documented inequities in grant amounts, as well as resistance from some county-level officials. Jane Hoey to Oscar M. Powell, June 1, 1940, Box 92, Office of the Commissioner, Chairman's Files, SSB.



Arizona and New Mexico, however, would not submit so easily. State officials continually excluded Indians from their programs and ignored Board threats. These states had distinct histories and demographics, and, for a time, their relationship was more competitive than collaborative. In the late nineteenth century, as both lobbied for statehood, Euro-Americans in Arizona contrasted their purportedly white, civilized territory with their unas-similable, darker neighbor (a reference to New Mexico's larger Mexican and Indian populations).<sup>48</sup> By 1935, however, the two states shared several important characteristics. In both states, the federal government was a major land-owner, and its agencies were a regular and not entirely welcome presence. Both also had relatively large American Indian populations. Indians comprised 13.2 percent of Arizona's population and 8.7 percent of New Mexico's in 1930, giving the states 10 and 7 percent, respectively, of the nation's total Indian population. Moreover, the major Indian communities there—the Navajo (Diné), Apache, and Hopi—had remained on reservation land rather than dispersing into non-Indian communities (in contrast to the indigenous peoples in Oklahoma, then home to the nation's largest Indian population). In the words of one government observer, Arizona and New Mexico were "full blood country."<sup>49</sup> The Navajo people, whose reservation spanned the two states, comprised the largest tribe in the United States—approximately 50,000 members strong—and carried a deep and well-founded distrust of American government.<sup>50</sup> The Pueblo Indians, meanwhile, had attracted national attention in recent decades for fierce defenses of their land and culture.<sup>51</sup>

Arizona officials were especially forthright. Senator Carl Hayden, generally a supporter of the New Deal, demanded to know why Arizona citizens should care for people who, as he put it, did not pay taxes and chose

48. Eric V. Meeks, *Border Citizens: The Making of Indians, Mexicans, and Anglos in Arizona* (Austin: University of Texas Press, 2007), 36–42; and Pablo Mitchell, *Coyote Nation: Sexuality, Race, and Conquest in Modernizing New Mexico, 1880–1920* (Chicago: University of Chicago Press, 2005), 16–18.

49. United States Department of Commerce, *The Indian Population of the United States and Alaska 1930*, Volume I (Washington, D.C.: Government Printing Office, 1937), 3–5; W. David Baird, "Are the Five Tribes of Oklahoma 'Real' Indians?" *Western Historical Quarterly* 21 (1990): 5–18; and Lewis Meriam, "The Indian Problem: A Challenge to American Capacity for Social Service," in *Proceedings of the National Conference on Social Welfare* (Chicago: Chicago University Press, 1929), 550.

50. The Navajos' painful experience with the federal livestock reduction program has been well documented, as has the tribe's subsequent rejection of the Indian Reorganization Act. See Marsha Weisiger, *Dreaming of Sheep in Navajo Country* (Seattle: University of Washington Press, 2009); and Peter Iverson, *Diné: A History of the Navajos* (Albuquerque: University of New Mexico Press, 2002), 137–60.

51. See, for example, Tisa Wenger, "Land, Culture, and Sovereignty in the Pueblo Dance Controversy," *Journal of the Southwest* 46 (2004): 381–412.

to reside in “primitive conditions” on federal reservations.<sup>52</sup> On the strength of this conviction, the Arizona legislature chose to forego federal funding in 1936 rather than authorize a public assistance program that covered Indians. Legislators appeared to “swallow[] their prejudices” a year later, when, knowing the Board’s position, they enacted an old-age assistance law and applied for a federal grant.<sup>53</sup> But this did not represent closure, as subsequent events would show.

### **“Make No Inquiries of Any Kind”**

For the next decade, the Social Security Board, the BIA, and state officials engaged in elaborate and ever less collegial negotiations. In early 1937, some actors supported amending the Social Security Act to provide complete federal financing: that is, states would accept applications from reservation Indians, but the federal government would reimburse them for all costs. Senator Hayden spearheaded the initiative in Congress as he would do, unsuccessfully, many times hence. Within months, however, one group in the BIA defected, out of concern that a special provision for Indians would hinder assimilation. In 1939, an amendment again seemed likely, but died at the hands of Secretary of the Interior Harold Ickes. Indian leaders were excluded from the conversation, but demonstrated awareness of the “problem” they posed. In July, 1937, for example, the Navajo Tribal Council recognized the benefits that Navajos might derive from the Social Security Act and formally resolved to pay a “just share of the cost.”<sup>54</sup>

Nevertheless, welfare workers in Arizona and New Mexico treated most American Indians as ineligible for benefits. In November, 1938, none of New Mexico’s 28,941 Indians received public assistance; in Arizona, home to 43,726 Indians, a mere 15 were on the rolls and all lived on the Colorado River reservation, which straddled the Arizona–California border. A year later, according to Social Security Board records, New Mexico continued to deny assistance to reservation Indians and was aiding at most two

52. Carl Hayden to Frank Bane, November 20, 1936, Box 92, Office of the Commissioner, Chairman’s Files, SSB.

53. William S. Collins, *The New Deal in Arizona* (Phoenix: Arizona State Parks Board, 1999), 381–82.

54. Edward J. Rourke to Elizabeth H. Doyle, July 19, 1944, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Jane Hoey to George E. Bigge, February 14, 1939, Box 273, Office of the Commissioner, Chairman’s Files, SSB; Harold L. Ickes to Pat Harrison, April 13, 1939, Box 699, Carl T. Hayden Papers (Arizona State University Libraries, Arizona Collection, Tempe) (hereafter Hayden Papers); and *Navajo Tribal Council Resolutions, 1922–1951* (Washington, D.C.: Government Printing Office, 1952), 474.

dozen nonreservation Indians; Arizona had no Indians of any kind on the rolls.<sup>55</sup> By all accounts, however, Indians in these states lived in extreme poverty. In 1940, the average per capita annual income among the Navajos, for example, was a mere \$82 (compared to a national average of a \$575 and a regional average of \$399).<sup>56</sup>

Fortunately for state officials, Senator Hayden was already a dozen years into his long stint on the powerful Senate Appropriations Committee and readily wielded his influence. Despite mounting evidence, the Social Security Board's leadership had agreed "to let sleeping dogs lie," Hayden told his state's anxious Commissioner of Social Security and Welfare in October 1939. "Make no inquiries of any kind," Hayden instructed, and "there will be nothing for us to worry about." Hayden also personally attempted to remove the "Indian Problem" from the Board's sightlines. For example, in May 1940, when entrepreneurial BIA field agents urged Navajos to apply for state public assistance—with hopes, Arizona officials suspected, of making "test cases"—Hayden colluded with Indian Affairs Commissioner John Collier to make the matter disappear.<sup>57</sup>

These maneuvers became increasingly difficult as American Indians, much like African Americans, Latino Americans, and women, seized on the rhetoric and demands of wartime to claim their rights as citizens. In early 1941, an attorney contacted the BIA on behalf of several tribes, and demanded to know whether Indians in Arizona were entitled to public assistance benefits. That same year, representatives of eight Indian communities—the Mojave, Chemehuevi, Hualapai, Maricopa, Pima, Cocopah, Papago, and Supai—paid a visit to Arizona Governor Sidney Osborn and claimed that if they were citizens enough to be drafted, they were citizens enough to vote and receive old age assistance. "If these old people cannot get pensions," explained Mojave spokesperson R. K. Booth, "they want the government to send their sons and grandsons back to them." San Carlos Apache H. E. Nabekage took a similar tack in his

55. Department of the Interior, Office of Indian Affairs, *Statistical Report of Public Assistance to Indians, under the Social Security Act* (1939); Jane Hoey to Oscar M. Powell, June 1, 1940, Box 92, Office of the Commissioner, Chairman's Files, SSB; and Alanson W. Willcox to Murray A. Hintz, February 21, 1949, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

56. Ruth Falkenburg Kirk, "Indian Welfare: The Navaho," *Public Welfare News* 4 (1946): 83; and Charles F. Schwartz and Robert E. Graham, Jr., "State Income Payments in 1948," *Survey of Current Business* (1949): 15.

57. Carl Hayden to Harry W. Hill, October 23, 1939, Box 699, Hayden Papers; Harry W. Hill to Carl Hayden, May 31, 1940, enclosing letter from H. R. Fryer to Leland D. Carnack, May 22, 1940, Box 699, Hayden Papers; Harry W. Hill to Carl Hayden, May 31, 1940, Box 699, Hayden Papers; John Collier to Carl Hayden, June 1, 1940, Box 699, Hayden Papers; and Carl Hayden to Harry W. Hill, June 1, 1940, Box 699, Hayden Papers.

individual petition to Senator Hayden. In inquiring about "an old age pension," he emphasized both his dire need and his service to the country 42 years ago, when he "played some marches for President McKinley." (Illustrating the complexity of Indians' relationship with the United States government, his letter also asked "to have our old reservation's line mark[ed] out again.") "Even our naturalized Mexican people all receive old age assistance," one local BIA superintendent gently reminded Hayden. Arizona officials feared these conversations. Hayden had for years persuaded federal administrators to overlook what he privately described as "direct and flagrant violation" of federal law. That arrangement would end, he knew, "the moment there is any wide-spread discussion."<sup>58</sup>

By the spring of 1943, the pressure became too great for Hayden's allies at the BIA. (In the face of severe wartime cutbacks and the agency's physical exile to Chicago, they had grave problems of their own.) Nearly forty Indians on the Gila River Reservation, home to the Pima and Maricopa communities, had by then filed old age assistance applications with their county public welfare board. According to the state social welfare commissioner, they appeared "determined to have the matter brought to a head." Predictably, the county board sought to shift responsibility to the BIA, but this time, the BIA refused to cooperate. To the county's pestering letters, Commissioner Collier responded coldly: "The Pima Indians are citizens and the social security law applies to all citizens," he declared, with carbon copies to his previous coconspirators in the Social Security Board and the Arizona congressional delegation. The stage was set for a confrontation between the Social Security Board and the two recalcitrant states.<sup>59</sup>

### ***Mapatis v. Ewing: Federal Bureaucracy and the Borders of Belonging***

Slowly, the wheels of bureaucratic justice began to turn. In the mid-1940s, it was Arizona's policy to take applications from reservation Indians, but

58. William Zimmerman, Jr., to Carl Hayden, February 24, 1941, Box 36, Hayden Papers; Carl Hayden to Harry W. Hill, April 21, 1941, Box 36, Hayden Papers; "Indians Ask Osborn for Aid to the Aged or Return of Sons," *Arizona Republic*, April 17, 1941, Box 36, Hayden Papers; Sidney Osborn to Carl Hayden, April 29, 1941, Box 36, Hayden Papers; A. E. Robinson to Carl Hayden, May 21, 1941, Box 36, Hayden Papers; H. E. Nabekage to Carl Hayden, April 29, 1941, Box 36, Hayden Papers; and Carl Hayden to Sidney Osborn, May 6, 1941, Box 36, Hayden Papers.

59. Philp, *John Collier's Crusade*, 205–10; J. R. McDougall to Carl Hayden, April 30, 1943, Box 36, Hayden Papers; and John Collier to Floyd G. Brown, June 7, 1943, Box 36, Hayden Papers.

"reject[] them wherever possible." New Mexico's state welfare agency, although more progressive than Arizona's in all other respects, rejected applications outright, citing the federal government's superior responsibility as well as language barriers, insufficient resources, and jurisdictional deficiencies. In correspondence with the Social Security Board, however, the states vehemently denied pursuing such policies, leaving it to federal field agents to compile evidence. Finally, in the spring of 1946, the Board warned the two states that their discriminatory practices must end. Via their power over grants-in-aid, federal administrators were prepared to enforce a new understanding of Indian citizenship.<sup>60</sup>

Indian activists and wartime politics forced the Board's hand (in ways that some Board insiders welcomed and, in fact, encouraged). As the country rallied around notions of equal treatment and opportunity, Indian veterans such as Ira Hayes (made famous when photographer Joe Rosenthal captured him and five comrades raising the United States flag during the Battle of Iwo Jima) returned home to the Southwest. They called attention to the social and economic inequalities they encountered there. Navajos were particularly vocal, both because of their distinguished military service and the appalling conditions on their reservation. In 1946, more than one third of Navajo families had incomes under a BIA-determined "subsistence level." Only a fraction of those families received BIA relief payments, however, and these fell far short of need: the average per person relief grant on the reservation was a mere \$5.04 per month (\$60.48 per year). The effects of this extreme poverty were discernible in shockingly high rates of infant mortality and compounded by meager social services and public infrastructure.<sup>61</sup>

At the urging of the National Congress of American Indians (NCAI), a recently formed pan-Indian organization, reservation Indians in Arizona and New Mexico decided to expose the states' discriminatory practices: they applied for public assistance and closely tracked the applications:

60. Meeting Minutes, April 25, 1946, Arizona Board of Public Welfare Records (Arizona State Library, Archives and Public Records, Phoenix, AZ) (hereafter ABPW); Ruth F. Kirk to Margaretta Dietrich, November 17, 1945, Box 9691, Papers of the Southwestern Association of Indian Affairs (New Mexico Records Center and Archives, Santa Fe) (hereafter SAIA); Jane Hoey to Oscar Powell, July 12, 1943, Box 32, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Harry W. Hill to Carl Hayden, May 15, 1946, Box 36, Hayden Papers; and Jane Hoey to Arthur Altmeyer, September 17, 1947, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

61. United States Department of the Interior, Office of Indian Affairs, The Navajo Welfare Situation, as of October 1, 1947, Box 1, Office of Indian Services Division of Social Services, Records of the Bureau of Indian Affairs, RG 75 (National Archives, Washington, D.C.); Philp, *Termination Revisited*, 51–53; Iverson, *Diné*, 188–90.

Using insiders' knowledge of government bureaucracy—most of the NCAI's founding members had ties to the BIA—the NCAI then forwarded evidence of inaction to allies in the Social Security Board.<sup>62</sup>

The effort reflected diverse and divergent goals. Oklahoma Cherokee Ruth Muskrat Bronson, the NCAI's first executive director and the coordinator of the campaign, was interested in freeing Indians from federal paternalism by forcing the states to assume their rightful obligation. In 1931, as a Guidance Officer for the U.S. Indian Service in Kansas City, Bronson boasted of "not ask[ing] for federal help" for poor "ward" Indians, but instead directing them to local social agencies. Tending to these citizens was "the city's job," she felt, just as it was to provide for "the Mexican family . . . or the Polish family, or any other family needing aid." Sixteen years later, she pursued a similar strategy, this time, shrewdly, with the aid of a federal agency. In contrast, John Mills Baltazar, chairman of the Jicarilla Apache Tribal Council, emphasized tribal self-help: state payments to needy Indians would take pressure off tribal relief funds, leaving more money for reservation improvements. Sam Ahkeah, chairman of the Navajo Tribal Council, suggested an even simpler goal: survival. Even a single day's delay in getting public assistance benefits to his people, he wrote Bronson, was to deny them "life" itself.<sup>63</sup>

State officials had similarly diverse interests, but their response was uniform: they characterized reservation Indians as only nominal citizens, fundamentally different from poor whites because of their refusal to subject themselves to state law and their embrace of federal government protection.

62. Cowger, *National Congress of American Indians*, 37, 41; and Arthur Altmeyer to Harry W. Hill, November 7, 1947, Box 40, Papers of Governors Sidney Preston Osborn and Daniel E. Garvey (Arizona State Library, Archives and Public Records, Phoenix) (hereafter Osborn and Garvey Papers). For other evidence of federal administrators' complicity, albeit for their own reasons, see Jane Hoey to Arthur Altmeyer, September 17, 1947, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW (reporting that in September, 1947, attorney Royal Marks approached the Bureau of Public Assistance to inquire about the eligibility of his clients, members of the Hualapai tribe, and was advised "to have the Indians make application and to insist upon a fair hearing if application was not taken"); and Sara H. James (assistant chief, Field Section, Bureau of Public Assistance, Social Security Administration), "Public Responsibility for the American Indian," in *Proceedings of the National Conference on Social Welfare* (New York: Columbia University Press, 1947), 182–84 (urging welfare administrators to "make known to the Indian his rights" so as to "help him resolve his conflict between wanting to be treated like other people, and yet wanting to hold on to the security of government control").

63. Ruth Muskrat Bronson, "The Indians' Attitude toward Cooperation," in *Proceedings of the National Conference on Social Welfare* (Chicago: University of Chicago Press, 1931), 644; John Mills Baltazar to Ruth Muskrat Bronson, August 31, 1948, Box 94, NCAI; and Sam Ahkeah to Ruth Muskrat Bronson, August 27, 1948, Box 113, NCAI.

The federal government and the Indians *wanted* Indians to be treated differently, state officials insisted. As a condition of joining the Union, Western states explicitly disclaimed jurisdiction over Indian lands, and Indians and the federal government had continually thwarted attempts to renegotiate this arrangement.<sup>64</sup> "[T]he Indian reservation might as well be Canada," Arizona Governor Daniel Garvey explained to a local newspaper, "because they do not permit the officers of the state to go there in carrying out their duties." Indians' true status was "wards" of the federal government, or as New Mexico Governor Thomas J. Mabry suggested, "neglected 'prisoners of war.'" "The plight of these people is not of the state's doing," insisted Arizona Senator Ernest McFarland.<sup>65</sup>

In the face of the states' resolve and ongoing media exposés of Navajo poverty, the Social Security Board had no choice but to summon representatives from both states to Washington, D.C. (Indeed, some federal administrators actively courted the opportunity.) As of late 1947, however, it appeared that the states might escape judgment. On the advice of their congressional delegations, the state agencies refused to admit liability, but offered to "process" Indian applications, that is, to accept applications and certify them to the BIA for payment, out of BIA reserve funds. With luck, this would table the "Indian Problem" until President Truman made good on his December 1947 pledge of a Marshall-Plan-type "rehabilitation" program for the Navajos, the states' neediest Indian population.<sup>66</sup>

Luck was not with them. In March of 1948, before any such plan could alleviate the states' burden, the BIA claimed to have run out of funds, leaving the states with Indian applications on their books but without the expected reimbursements. State officials stalled, shuttling papers from one office to another and holding applications for "further study." Eventually, the BIA came up with some money, by shamelessly diverting funds earmarked for care of delinquent children, but by then, Arizona and

64. David E. Wilkins, "Tribal-State Affairs: American States as 'Disclaiming' Sovereigns," *Publius* 28 (1998): 55–81; and Wenger, "Land, Culture, and Sovereignty."

65. "State Drafts Indian Plan," n.d., Box 36, Hayden Papers; Memorandum summarizing conference held at the State Department of Social Security and Welfare, November 6, 1947, Box 40, Osborn and Garvey Papers; Ben Avery, "Indian Refusal Cuts U.S. Funds," *Arizona Republic*, n.d., Box 43, Osborn and Garvey Papers; "Shameful," *Arizona Times*, October 31, 1947, Box 36, Hayden Papers; and Ben Avery, "Navajo Ponder Fate of Hunger, Disease," *Arizona Republic*, November 5, 1947, Box 113, NCAI.

66. Alanson W. Willcox to Oscar Ewing, December 10, 1947, Box 11, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Meeting Minutes, January 29, 1948, ABPW; New Mexico Department of Public Welfare, Annual Report, Year Ending June 30, 1950; and Harry Hill to Carl Hayden, February 13, 1948, Box 36, Hayden Papers.

New Mexico had a new enemy to contend with: Felix S. Cohen, the nation's pre-eminent authority on Indian law and the architect of the Indian New Deal.<sup>67</sup>

Cohen had recently left the Interior Department and was spoiling for a fight. That he chose this one—over inclusion in state welfare programs—is, at first glance, unusual. Unlike many of his contemporaries, Cohen resisted the notion that Indians must assimilate into non-Indian political communities; he treated tribal legal claims as legitimate and important. But he also believed in Indians' individual rights as citizens of their respective states and the United States.<sup>68</sup> In 1948, Cohen joined the legal campaign to vindicate Indian voting rights in Arizona and New Mexico, which continued to deny Indians the franchise—in the former, because they were “wards,” and in the latter, because they were “not taxed.”<sup>69</sup> For the same reason, Cohen threw his considerable energy into the public assistance battle. (Cohen's writings suggest that he was aware of the problem as early as February of 1948, when he bitterly denounced his former agency before a meeting of the Indian Rights Association, but it is unclear how he learned of it. One likely source is his former Interior Department colleague James Curry, then general counsel to the NCAI.) In the words of Cherokee politician and celebrity Will Rogers, Jr., an NCAI ally, the Indians in the Southwest were suffering “Starvation without Representation,” a condition that ought to offend all Americans.<sup>70</sup>

67. William E. Warne to Carl Hayden, March 2, 1948, Box 36, Hayden Papers; Harry Hill to Carl Hayden, March 29, 1948, Box 36, Hayden Papers; Meeting Minutes, June 17, 1948, ABPW; Felix S. Cohen, “Our Country's Shame,” *Progressive*, May 1949, Box 67, Felix S. Cohen Papers (Beinecke Rare Book and Manuscript Library, Yale University, New Haven) (hereafter Cohen Papers); and William Zimmerman, Jr., to Julius Krug, September 3, 1948, Box 67, Julius A. Krug Papers (Library of Congress, Washington, D.C.).

68. On Cohen's departure from government service, see Landon R. Y. Storrs, *The Second Red Scare and the Unmaking of the New Deal Left* (Princeton: Princeton University Press, 2013): 223. On Cohen's battles for tribal rights and Indian self-determination, see Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven: Yale University Press, 2009); and Alice Beck Kehoe, *A Passion for the True and Just: Felix and Lucy Kramer Cohen and the Indian New Deal* (Tucson: University of Arizona Press, 2014). On Cohen's approach to Indian rights and his understanding of Indians' legal status, see Cohen, “The Spanish Origins of Indian Rights”; Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca: Cornell University Press, 2007).

69. Willard Hughes Rolling, “Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965,” *Nevada Law Journal* 5 (2004): 126–40. Only two other states, Utah and Maine, denied Indians the franchise at this time. *Ibid.*, 138.

70. Felix S. Cohen, “Breaking Faith with Our First Americans,” *Indian Truth* 4 (1948): 4; and Will Rogers, Jr., “Starvation without Representation,” *Look Magazine*, February 3, 1948, 36.



While Rogers and other Indian advocates attempted to arouse public sympathy, Cohen worked the back channels of the federal bureaucracy. On July 7, 1948, he took the unusual step of inserting himself into the ongoing negotiations between the Social Security Board and the states. On behalf of the NCAI, the All-Pueblo Council, the Jicarilla Apache Tribe, and the San Carlos Apache Tribe, Cohen and NCAI General Counsel James Curry petitioned the Board for a hearing to determine whether Arizona and New Mexico were in conformity with the Social Security Act. (The Navajo Tribal Council, despite assisting the NCAI in its investigation, was notably absent from the petition, perhaps because the tribe had recently hired its own attorney, former Assistant Attorney General Norman Littell.) Formal hearings themselves were rare, a last step before the Board applied the harsh sanction of complete defunding. More rare still was an attempt by an outside party—Cohen and Curry styled themselves as *amici curiae*—to influence the Board's decision making.<sup>71</sup>

Cohen's next step was his most novel: when the hearing mysteriously disappeared from the Board's calendar (soon after the "Dixiecrat" revolt within the Democratic Party, and mere months, Cohen noted, before the contentious 1948 elections), Cohen went from "friend" of the agency to adversary. On September 21, 1948, Cohen, Curry, and Arizona attorney Royal D. Marks filed *Mapatis v. Ewing* in federal court, alleging that federal officials had deprived eight Pueblo and Hualapai plaintiffs and others like them of their civil rights. One of the plaintiffs was blind; another was the mother of six children; the rest were elderly. All were in need. They claimed that through "misrepresentations, misappropriations . . . of public funds, and interference with the normal administrative procedures" of the Social Security Board, high-ranking officials had conspired with Arizona and New Mexico to deprive reservation Indians of the equal protection of the law. The object of the alleged conspiracy was political power: By preventing the Board from taking action against the states, the defendants hoped to assure a Democratic victory that fall.<sup>72</sup>

71. Felix S. Cohen and James E. Curry, Petition to the Social Security Board, July 7, 1948, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and Sam Ahkeah to Ruth Muskrat Bronson, August 27, 1948, Box 113, NCAI. In support of their novel request, the lawyers cleverly cited the new Administrative Procedure Act, legislation designed to demonstrate agencies' adherence to the rule of law. Public Law 404, 79th Cong., 2d. Sess. (June 11, 1946).

72. Complaint, *Mapatis* (D.D.C. 1948). "Subordinate officers" in the Social Security Board reportedly supported the plaintiffs, as did other Southwestern tribes. James E. Curry to the Convention of the National Congress of American Indians, December 12, 1948, Box 457, NCAI; Meeting Minutes, October 22, 1948, APBW.

Poor Indians paid the price, according to the complaint. An estimated 802 Indians in New Mexico and 922 in Arizona were eligible for public assistance, but “no known Indian” in New Mexico and only 3 in Arizona had ever received benefits; the Arizona payments were terminated upon discovery of the recipients’ Indian blood. As a result, more than 82 Indians in New Mexico and Arizona had died of starvation or malnutrition over the past 5 years. The plaintiffs themselves were “in dire distress;” however, state officials either denied or refused to act upon their applications. The plaintiffs asked the court to stop the defendants from obstructing the Board’s promised conformity hearing. In short, they recognized that in this era of “new federalism,” grant-making federal agencies held the real power and must be forced to wield it.<sup>73</sup>

The complaint foreshadowed some of the arguments that “poverty lawyers” would raise before federal courts in the 1960s and 1970s, when they sought to expose the discriminatory nature and calamitous consequences of restrictive state welfare policies. The legal arguments also mirrored those that Social Security Board lawyers had long asserted in internal correspondence. Ironically, these same lawyers were now charged with making the lawsuit disappear.<sup>74</sup>

Disappear it did, but not for lack of merit. In early 1949, as the Navajos endured a winter of unprecedented severity and the Red Cross airlifted supplies onto the reservation, the Board failed in its efforts to get the suit dismissed. At approximately the same time, the Board finally held formal hearings to determine whether it could legally issue federal funds to the two states that continued to deny public assistance payments to Indians.<sup>75</sup>

73. Complaint, *Mapatis* (D.D.C. 1948).

74. On the Board’s earlier legal interpretations, see Smith to May, December 20, 1939, Box 92, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and A. Delafield Smith to Jane Hoey, November 21, 1947, Box 7, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. On the Board’s response to the complaint, see Joseph Meyers to Alanson W. Willcox, October 13, 1948, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and Felix S. Cohen and James E. Curry, “Washington Report to Indians of New Mexico & Arizona on Social Security,” October 29, 1948, Box 401, Harold L. Ickes Papers (Library of Congress, Washington, D.C.). On the connection between the Board’s interpretation of the Equal Protection Clause and the arguments advanced by poverty lawyers in the 1960s, see Karen M. Tani, “Administrative Equal Protection: Cooperative Federalism in the Shadow of the Fourteenth Amendment,” *Cornell Law Review* 100 (forthcoming 2015).

75. Philp, *Termination Revisited*, 62; and Alanson W. Willcox to Oscar Ewing, March 10, 1949, Box 11, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. Board officials denied that this setback influenced the timing of the hearings. Felix Cohen disagreed. Some evidence suggests that the Board scheduled the hearing at the behest of New Mexico officials. Alanson W. Willcox to Roger Baldwin, October 19,

Cohen and Curry were by then in a bitter interpersonal feud, but managed to file the amicus briefs that the Board invited them to submit. The invitation in itself was unprecedented: it suggested federal administrators' sympathies, but even more important, it illustrated the spaces that grant-administering federal agencies opened up to enterprising activists. Citing the Supreme Court's recent civil rights decisions, the lawyers argued that the states had no more right to deny Indians' welfare claims than to deny them the vote. (Arizona and New Mexico had retreated from their opposition to Indian suffrage only a year earlier, by order of state courts.) The plaintiffs resided on reservations, but they were also "full citizens and residents" of their states, with all the corresponding entitlements.<sup>76</sup>

At this point, cracks in the states' united front became apparent. During the hearings, New Mexico officials defended their actions but also acknowledged "social and humanitarian" concerns. The chair of New Mexico's Department of Welfare, Ruth Falkenburg Kirk, had personally publicized the Navajos' plight and, in private correspondence, suggested that she would have supported the NCAI campaign had the Governor not "told [her] to lay off." Outside the hearing, New Mexico officials assured the Board that they "want[ed] to do the right thing for Indians"; the "problem" was simply "too big for [the] state."<sup>77</sup>

Arizona officials conceded nothing and fought fiercely, an outgrowth, perhaps, of the racism that continued to organize everyday life in the state, or perhaps a reprise of the state's recent battle with federal authority

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1949, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Felix S. Cohen to Roger Baldwin, October 26, 1949, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Arthur Altmeyer to Carl Hayden, February 4, 1949, Box 36, Hayden Papers; Meeting Minutes, February 3, 1949, ABPW; and Murray A. Hintz to Jane Hoey, telegram, January 18, 1949, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

76. Arthur Altmeyer to Felix Cohen and James Curry, January 28, 1949, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Brief for All-Pueblo Council, et al., as Amici Curiae, *in re Arizona* (hearing before the Federal Security Agency), Box 332, AAIA; Brief for the San Carlos Apache Tribe, et al., as Amici Curiae, *in re New Mexico* (hearing before the Federal Security Agency), Box 332, AAIA. On the Cohen/Curry feud, see Philp, *Termination Revisited*, 109–10; and Kehoe, *A Passion for the True and Just*, 147–50. On the Indian voting rights cases, see Felix S. Cohen, "The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy," *Yale Law Journal* 62 (1953): 350.

77. Murray A. Hintz to Arthur Altmeyer, September 9, 1948, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Ruth Kirk to Margaretta Dietrich, May 21, 1947, Box 9691, SAIA; and Bob Ward to Jane Hoey, telegram, November 22, 1948, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

over the Colorado River. (In 1934, outraged by the unfavorable terms of the Colorado River Compact, state officials had forcibly obstructed the construction of the Parker Dam.)<sup>78</sup> Before the Social Security Board, Arizona's Commissioner of Public Welfare, Harry Hill, characterized Indians as undeserving, and the federal government as overbearing. Arizonans' generosity could hardly be expected to extend to "a class of people who have contributed nothing . . . to the welfare of the state or its progress," Hill insisted. The state's resistance to the Board's questionable legal interpretation was also entirely natural, Hill explained. Time and again, the federal government "dangl[ed]" money before the state, exploiting its "helplessness" to usurp state power. If the federal agency won Indians' inclusion, "further encroachments" were "only a matter of time." Back home, Arizona officials primed the public for a fight, and made explicit the racial undercurrents of their argument, warning that federal government sanctions would halve the funds available to "white residents."<sup>79</sup>

### **The Santa Fe Agreement and States' Grab for Jurisdiction**

For all their bluster, by February 1949, Arizona and New Mexico were prepared to compromise. Three developments impelled their retreat. First, the Social Security Board had disclosed its lack of sympathy for the states' position. As Hill complained to a local newspaper, federal administrators functioned as "judge, jury and prosecution" in this proceeding.<sup>80</sup> Second, the showdown with the Board had attracted broader attention to the two states' complete avoidance, over the past dozen years, of fiscal obligations that other states had shouldered. Senators Arthur Watkins (R., Utah) and John Chandler Gurney (R., South Dakota), both members of the powerful Senate Appropriations Committee, specifically noted this discrepancy in the public record.<sup>81</sup> Third, Congress had honored President Truman's promise and taken up the Navajo-Hopi Rehabilitation Act, a

78. Thomas E. Sheridan, *Arizona: A History* (Tucson: University of Arizona Press, 2012), 226–33, 269–73, 292–99.

79. Harry Hill, "Brief on Reservation Indians," February 23, 1949, ABPW; and Avery, "Indian Refusal," Box 43, Osborn and Garvey Papers.

80. Alanson W. Willcox to Murray A. Hintz, February 21, 1949, Box 37, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; and Avery, "Indian Refusal," Box 43, Osborn and Garvey Papers.

81. Senate Committee on Appropriations, *Hearings before a Subcommittee of the Committee on Appropriations on H.R. 2632: An Act Making Appropriations to Supply Deficiencies in Certain Appropriations for the Fiscal Year Ending June 30, 1949, and for Other Purposes*, 81st Cong., 1st sess., 1949, 419, 441–42.

bill devoted to raising standards of living and building "self-reliant communities" on the Navajo and Hopi reservations. The Act would funnel \$90,000,000 toward the states' poorest tribes, and presumably alleviate the need for state-administered public assistance.<sup>82</sup>

In late April, as the Navajo-Hopi Rehabilitation legislation moved through Congress, state officials met with representatives from the Social Security Board in Santa Fe. There, they formally agreed to treat Indian public assistance applications the same as all others and to spend their own funds on Indian claims. The BIA, with money from a special Congressional appropriation, agreed to pay two thirds of every Indian's determined need; the remaining third would be paid like any other claim, through a combination of state funds and federal "matching" funds. In total, nonstate sources would provide 90 percent.<sup>83</sup>

The "Santa Fe Agreement," as it became known, did not satisfy some Indians. Just months earlier, David Johnson, Sr. had informed the NCAI that his people, the Pima-Maricopa Indians, did "not want to be handled separately or even set apart in [a] separate class." Remembering, perhaps, decades of struggles over federal treaty agreements, he invoked the original Social Security Act, and insisted that his people receive equal treatment under the existing law. But Felix Cohen (and, presumably, his clients) saw the agreement as a victory. As soon as the states began to cut benefit checks, he asked the court to dismiss the *Mapatis* case. As he explained to Roger Baldwin, Director of the American Civil Liberties Union (ACLU) and an ally in the voting rights cases, the litigation had achieved its goals: it forced politicians to cease interfering in the federal agency's enforcement work and thereby promoted Indian civil rights.<sup>84</sup>

This settlement merits historians' attention. State and local officials have traditionally been eager to control welfare programs, especially when racial hierarchies and related economic interests were at stake. Arizona and New Mexico diverged from this pattern, in ways that provoke fresh insights into the relationship between welfare, sovereignty, and citizenship in American history. Local labor needs, of course, offer a possible explanation: if employers were not hungry for Indian labor, the appetite for welfare administration—that is, for controlling

82. *A Bill to Promote the Rehabilitation of the Navajo and Hopi Tribes of Indians*, S 1407, 81st Cong., 1st sess. (March 25, 1949).

83. Alanson Willcox to Oscar Ewing, May 13, 1949, Box 11, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

84. David A. Johnson, Sr., to Ruth M. Bronson, February 5, 1949, Box 120, NCAI; Felix S. Cohen to unnamed recipients, June 17, 1949, Box 88, Cohen Papers; and Cohen to Baldwin, October 26, 1949, Box 53, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW.

an obvious alternative to wage work—might have been similarly diminished. However, when the economy rebounded during and after World War II, local employers did look toward reservations for low-wage workers and would have appreciated the ability to attract this labor pool. (This was especially true after the discovery of uranium on the Navajo reservation.)<sup>85</sup> Money is a second obvious factor, and clearly it mattered, but in light of pre-existing federal subsidies, the amount of state money at stake was relatively small. Even without the generous Santa Fe Agreement, the annual cost to each state of paying public assistance to reservation Indians would have been less than \$200,000, whereas the cost of losing their federal grants would have been several million.<sup>86</sup>

The main concern, this episode suggests, resulted from a combination of demographics (the relatively large Indian populations in these two states), land ownership, political theory, and long-standing assumptions about cultural and racial difference. Specifically, it was about the terms of Indians' inclusion in the political community. Although state officials were happy to count reservation Indians as "theirs" for purposes of legislative apportionment, they found it difficult to imagine giving Indians the benefits of citizenship while lacking the power to enforce its burdens on Indian bodies and reservation land.<sup>87</sup> This logic is clear from state officials' arguments before the Social Security Board. It is also apparent from the timing of a proposed amendment to the Navajo-Hopi rehabilitation legislation that was then working its way through Congress.

In May 1949, not 2 weeks after the Santa Fe Agreement, New Mexico Congressmen Antonio M. Fernández appeared before the House Subcommittee on Indian Affairs. He suggested adding a final section declaring that Navajo and Hopi Indians were subject to "all of the laws" in the state in which they resided. He alluded to crime control and informal marriage customs on the Navajo reservation, but he emphasized Congress's desire "to make the Indians self-supporting and into good individual American citizens." "I do not think that we are going to get very far," he warned, "unless they are sooner or later made subject to the laws of the State." The proposal may have derived from Fernández's

85. Colleen O'Neill, "The 'Making' of the Navajo Worker: Navajo Households, the Bureau of Indian Affairs, and Off-Reservation Wage Work, 1948–1960," *New Mexico Historical Review* 74 (1999): 375–405; Meeks, *Border Citizens*, 162–65; Andrew Needham, "Sunbelt Imperialism: Boosters, Navajos, and Energy Development in the Metropolitan Southwest," in *Sunbelt Rising*, ed. Nickerson and Dochuk, 255–56.

86. See note 13.

87. Joseph H. Meyer to Edwin Yourman, December 15, 1947, Box 36, Correspondence on Public Assistance Programs and the Social Security Act, GC–DHEW.

own, immigrant-oriented conception of citizenship: prior to running for Congress, he had served as president of the famously assimilatory League of United Latin American Citizens (LULAC).<sup>88</sup> But the proposal also fit with Western politicians' long history of using jurisdiction to capture reservation resources, human and otherwise. In this case, one local newspaper reported, the chief concerns were "protect[ing] ballot boxes, supervis[ing] elections, and . . . guard[ing] the State Social Security checks from forgery and altering"—in other words, constraining the exercise of Indians' new citizenship rights. As passed by the House, the Fernández amendment also included a provision requiring that reservation schools follow state curricula.<sup>89</sup>

The final bill, sent to the President in October, included Fernández's amendment—now Section 9 of the bill—and one other revealing addition. The House and Senate conferees added to Section 9 a rider that memorialized the Santa Fe Agreement, but named the Social Security Board, rather than the unreliable BIA, as the source of the additional federal funds: When Arizona or New Mexico processed a claim from a reservation Indian, the rider provided, the Board would "match" the state payments at a higher than usual rate. (The formula was complicated, but in one example the Board would pay \$46 of a \$50 welfare payment, or 92 percent). Therefore, in the final version of the proposed law, the extension of state jurisdiction and the states' acceptance of public welfare obligations were rolled together into an implicit quid pro quo, with ironclad assurances of federal financial support.<sup>90</sup>

Ultimately, Section 9's jurisdictional grab doomed the Act. Although the Navajo Tribal Council voted to support it, tribal leaders quickly changed their minds. In the press, former Commissioner of Indian Affairs John Collier loudly denounced the "sinister riders." The ACLU, NCAI, and others joined him in urging President Truman to veto the bill. Truman obliged. He agreed that state jurisdiction was the "logical consequence of our policy" (that is, the policy of termination and assimilation), but that such jurisdiction must be accepted voluntarily, and "in the orderly course of social and economic integration."<sup>91</sup>

88. On LULAC, see David G. Gutierrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* (Berkeley and Los Angeles: University of California Press, 1995), 74–87.

89. House Committee on Public Lands, *Hearings before a Subcommittee on Indian Affairs of the Committee on Public Lands on H.R. 3476*, 202–04; "Citizen Navajo Today Builds Future," *Farmington Daily Times*, August 20, 1949, 2.

90. House of Representatives, *Conference Report to Accompany S. 1407*, 81st Cong., 1st Sess., H.R. Rep. 1338, 4, 6–8.

91. Bethany R. Berger, "Williams v. Lee and the Debate over Indian Equality," *Michigan Law Review* 109 (2011): 1488–94; "Indian Bill Is Opposed," *New York Times*, October 9,

By the end of 1949, then, a combination of Indian activism, creative and ambitious lawyering, and federal agency sympathy had forced Arizona and New Mexico to give reservation Indians a crucial marker of citizenship: state-administered public assistance. In return, these states demanded that the federal government assume the vast majority of the cost (giving them a better deal, effectively, than their peers). State politicians fell short, however, in their efforts to obtain the legal powers—the jurisdiction—that normally accompanied such responsibility.

### *Arizona v. Hobby: States' Rights and Sovereign Immunity*

Even with these disappointments, Arizona and New Mexico fared better in 1949 than they might have. Liberal enthusiasm for Indian rights was high. Senator Hubert Humphrey, NAACP director Walter White, labor leader Walter Reuther, and former First Lady Eleanor Roosevelt all spoke up for equal treatment of Indians. Roosevelt specifically mentioned the issue in *Mapatis*, adding that she was “ashamed” by the lack of “decency and justice” afforded to “the first citizens of this country.” State officials did well by protecting their coffers and living to fight another day.<sup>92</sup>

They did not have to wait long. In 1950, Congress amended the Social Security Act to include a new category of public assistance: Aid to the Permanently and Totally Disabled (APTD). As with the Act’s original programs, states that wanted the generous federal subsidy submitted “plans” to the federal agency, which the agency checked against federal requirements and, if appropriate, approved.<sup>93</sup>

New Mexico had by this point accepted its responsibility for reservation Indians, perhaps because in the most recent fiscal year, 1950–51, it had spent a mere \$41,335 in state funds on Indian public assistance payments. But some Arizona officials, especially members of the state’s upstart Republican Party, were eager to reopen the “Indian question.” Following the 1948 confrontation with the Social Security Board, Arizona had almost immediately encountered similar pressure from the United States

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1949, 38; Paul C. Rosier, *Serving Their Country: American Indian Politics and Patriotism in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2009), 136–38; President Harry Truman, *Rehabilitation of the Navajo and Hopi Tribes of Indians—Veto Message*, 81st Cong., 1st sess., 1949, S. Doc. 119, 3.

92. Dean J. Kotlowski, “Burying Sergeant Rice: Racial Justice and Native American Rights in the Truman Era,” *Journal of American Studies* 38 (2004): 204; Fixico, *Termination and Relocation*, 47.

93. Social Security Act Amendments of 1950, Public Law 734, 81st Cong., 2d. sess., (August 28, 1950), § 351.



Children's Bureau over discrimination against Indians in its federally subsidized program for crippled children. State officials had also skirmished with federal administrators over the terms of the Santa Fe Agreement. (Arizona had attempted to back out the following year, when Congress finally enacted a Navajo and Hopi Rehabilitation Act.) "We are shocked," declared Arizona Governor Howard Pyle in 1951, after receiving another defunding threat from the Social Security Board, by "how completely we are subject to the whims of the Federal Government." To Pyle, at least, prevailing on the "Indian question" had become inextricably linked to the health and sovereignty of his state. (Rumblings from other Governors suggested that many agreed: Ohio Governor Frank J. Lausche made "[t]he dangers inherent in grants-in-aid" a theme of his opening address to that year's Governors' Conference.")<sup>94</sup>

Submitting an APTD plan that blatantly excluded Indians was an easy way to bring the matter to a head. In the spring of 1952, following the Arizona legislature's lead, the state agency sought federal participation in a plan that denied assistance "to any person of Indian blood while living on a federal Indian reservation." Federal administrators promptly disapproved, and Arizona filed suit in federal court (*Arizona v. Hobby*). Finally, Arizona officials hoped that a court of law would curb the federal agency's authority. (For the NCAI, meanwhile, the case was a "godsend"; an opportunity for a court to declare Indians "first class citizens . . . entitled to equal rights.")<sup>95</sup>

Appearing before the District Court to argue against the federal government's motion to dismiss the case, Arizona lawyer Kent Blake emphasized the state's solicitude for Indians living in "regular communities." Its problem was with reservation Indians, not because of race, but because they "enjoyed" a "peculiar and privileged status." The federal government maintained them on lands held in trust, provided them hospitals and schools, and shielded them from the reach of state law. The Supreme Court itself had characterized them as "wards" of the federal government. Reservation Indians could be federal wards or state citizens, Blake implied,

94. New Mexico Department of Public Welfare, *Annual Report, Year Ending June 30, 1952*; "Arizona Loses Federal Funds for Child Aid," *Arizona Republic*, December 30, 1949, Box 36, Hayden Papers; Herb Nelson, "State Indian Welfare Pact Abrogated," *Phoenix Gazette*, June 8, 1950, Box 36, Hayden Papers; James F. Cooper, "Governor Calls for Release of State from Federal Bonds," [1951], Box 90, Hayden Papers; Frank J. Lausche, "Progress and Problems of the States," *State Government* 24 (1951): 268.

95. Meeting Minutes, February 9, 1952, ABPW; Alanson W. Willcox to Oscar Ewing, August 14, 1951, Box 11, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW; Arizona Code § 70-607 (Cum. Supp. 1952); and James E. Curry to Frank George, July 1, 1952, Box 457, NCAI.

but not both. More to the point, federal administrators had no right to disapprove Arizona's plan. Once a plan satisfied the terms of the law—which Blake insisted Arizona's had—their only function was to open the cash drawer.<sup>96</sup>

Assistant United States Attorney Ross O'Donoghue, joined by two long-time Social Security Board lawyers, maintained that Arizona's plan did *not* meet the statutory requirements. Invoking (at long last) the agency lawyers' earliest response to the "Indian Question," O'Donoghue also raised the issue of the Fourteenth Amendment. The state's plan favored Arizonans without Indian blood and Arizonans not living on reservations, O'Donoghue noted; neither grouping had a "proper" relationship to the goal of meeting the needs of the disabled.<sup>97</sup>

Felix Cohen appeared last, on behalf of amici curiae the Hualapai Tribe, the San Carlos Apache Tribe, and the Association on American Indian Affairs (a liberal, New York-based group of philanthropists and anthropologists). Cohen remained a thorn in Arizona's side, but much else had changed in the intervening years. For one, he had been the target of a hard-fought campaign by the new Indian Affairs Commissioner (and former director of the Japanese American internment camps), Dillon S. Myer. Shortly after taking office, Myer announced new regulations on tribes' choice of legal counsel. The stated concern was self-dealing by lawyers such as Cohen and Curry, but critics perceived a desire to quash civil rights activism and control tribes' use of the Indian Claims Commission. (Critics also hinted at the influence of certain Democratic congressmen, "annoyed" at Cohen and Curry over the Republican gains that their Indian voting cases produced.) With help from the American Bar Association, the NCAI, and other allies, the accused attorneys defeated these regulations, but the fight was long and bitter.<sup>98</sup>

A second and related development since Cohen's earlier skirmish with Arizona was the Truman Administration's increasingly aggressive campaign to encourage Indian assimilation by terminating the services and

96. Transcript of Oral Argument, *Arizona v. Hobby*, No. 2008-52 (D.D.C. Feb. 20, 1953), Box 238, AAIA.

97. Ibid. O'Donoghue's arguments borrowed directly from agency lawyers. Alanson W. Willcox to Oscar Ewing, May 22, 1952, Box 11, Correspondence on Public Assistance Programs and the Social Security Act, GC-DHEW. The constitutional argument also bears the stamp of Joseph Tussman and Jacobus tenBroek's influential article, "The Equal Protection of the Laws," *California Law Review* 37 (1949): 341–81, which was informed by the authors' observations of the Japanese American internment and tenBroek's personal experience with public welfare law and administration. Felicia Kornbluh, "Disability, Antiprofessionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s," *Journal of American History* 97 (2011): 1023–47.

98. Philp, *Termination Revisited*, 108–24; Anthony Leviero, "Indian War Whoop Marks Hearings," *New York Times*, January 4, 1952, 9.

legal arrangements that ostensibly stood in their way. Termination policies, Kenneth Philp has shown, had broad appeal: they "reflected the conservative and nationalist mood of the Cold War era" and "resonated with the ideologies of individualism and capitalism." But in the early 1950s, termination took a turn that disturbed many Indians and their advocates. As Myer tightened the BIA's grip on tribes, Congress considered proposals to give states civil and criminal jurisdiction in Indian Country without tribal consent. This inflamed Cohen: some tribes had reason to welcome state jurisdiction, but he had witnessed the prejudices that Indians encountered at the state and local level. In Arizona, he predicted, Indians could anticipate "raids" on their property, businesses, hospitals, and schools should the federal government withdraw its protection.<sup>99</sup>

Cohen's argument in *Arizona v. Hobby* was, therefore, all the more striking, for in that case he argued passionately for Indians' ability to participate in state-run programs. Again, he invoked the constitutional principle of equal protection. Appearing before the District Court on February 20, 1953, he painted a picture of Indian and white citizens living side by side, as did some residents of the Hualapai reservation. Could one receive public aid and the other be denied? If the case involved "Negroes," Cohen noted, invoking recent NAACP victories (and inviting an analogy that has long troubled federal Indian law), the answer would surely be "no." As for Indians' unique relationship with the federal government—which he vigorously defended elsewhere—Cohen denied its relevance. This case was about whether Arizona could establish a program "excluding from its scope, say, Republicans, Catholics, or Jews, or Democrats," and then demand that the federal government fund the lion's share of the cost.<sup>100</sup>

The Indian perspective fit less neatly into legal boxes. For one thing, even though Indians in the Southwest regularly contrasted themselves with "white people," it was not clear that they wanted to be portrayed as just another racial minority, or a Western analog to black Americans in the Deep South. As scholars have since observed, the racialization of the Indian has gone hand in hand with the legal evisceration of sovereignty.<sup>101</sup>

99. Philp, *Termination Revisited*, xii; Cohen, "Erosion of Indian Rights," 376; and Paul C. Rosier, "The Association on American Indian Affairs and the Struggle for Native American Rights, 1948–1955," *Princeton University Library Chronicle* 62 (2006): 378.

100. Transcript of Oral Argument, *Hobby*, No. 2008-52 (D.D.C. Feb. 20, 1953). Not until 1974 did the Supreme Court address whether laws classifying Indians were necessarily racial classifications. See *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding federal hiring preferences for Indians as a legitimate effort to promote Indian self-government rather than an unconstitutional form of racial discrimination).

101. Bethany R. Berger, "Red: Racism and the American Indian," *UCLA Law Review* 56 (2009): 599; and Audra Simpson, "Subjects of Sovereignty: Indigeneity, the Revenue Rule,

But Cohen accurately represented some Indian concerns. In late 1951, when tribal leaders publicly addressed their exclusion from the state's APTD program, they explained that they prized their hard-won state citizenship and its benefits, even as they feared the anti-Indian sentiment of some Arizona officials. Hopi Samuel Shing put it this way: "We don't want to change from the wardship of the federal government to become wards of the state. We want the same rights as other citizens of Arizona." To state officials' demands that in exchange for these rights, Indians give up their "peculiar and privileged status," such as exemption from state laws and levies, Indians responded with their own understandings of citizenship. Clarence Wesley, chairman of the San Carlos Apache Tribal Council, submitted this retort to the *Arizona Republic*: "We paid taxes for 2,000 years in advance. . . . When we are paid a fair price for that land that was taken, we will be happy to consider paying taxes just like our white fellow-citizens."<sup>102</sup>

Judge Henry Schweinhaut never heard these Indian voices, but he nonetheless rejected Arizona's position. Cohen failed to persuade Schweinhaut, the former head of the Department of Justice's Civil Rights Section, that Arizona intended to discriminate on the basis of race. However, Schweinhaut found the Social Security Board justified in disapproving the state's plan. Arizona had assumed, perhaps understandably, that the federal government owed the Indians more than Arizona did, but Arizona had also accepted a federal grant, and as Judge Schweinhaut saw it, that federal "gratuity" depended upon the state granting a similar "gratuity" to its own citizens, including Indians. In his view, the Social Security Board "could not, constitutionally, or under the terms of the statute, itself" approve a plan such as Arizona's.<sup>103</sup>

Had Arizona not appealed this unfavorable decision, it might have preserved a small victory for those who shared its interests. The trial court accepted without question its right to adjudicate the dispute, thereby creating a precedent for other states to challenge federal agency decisions. Arizona was hardly alone in resenting the federal welfare bureaucracy, but Arizona refused to let Judge Schweinhaut have the last word, and ultimately an appellate court vacated his decision on grounds that were decidedly

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and Juridics of Failed Consent," *Law and Contemporary Problems* 71 (2008): 208. I thank Leti Volpp for this citation.

102. Ben Avery, "Arizona Indians Urge End To Discrimination," *Arizona Republic*, September 25, 1951, Box 3, Commissioner Dillon Myer Files, Records of the Office of the Commission of Indian Affairs, Records of the Bureau of Indian Affairs, RG 75 (National Archives, Washington, D.C.); and Clarence Wesley to Ben Avery, November 8, 1950, Box 94, NCAI.

103. Transcript of Oral Argument, *Hobby*, No. 2008-52 (D.D.C. February 20, 1953).

unfavorable to the state. "[T]he purpose of this suit," D.C. Circuit Judge David Bazelon explained, "is 'to reach money which the government owns,'" and as the federal government—the "sovereign" in this context—had not consented to being sued, the case must be dismissed.<sup>104</sup> For a suit intended to vindicate *state* sovereignty, it was a disappointing end. On paper at least, Arizona was now formally required to give Indians the material benefits of citizenship (i.e., not only political rights, but also affirmative rights to government support), whereas its coercive and regulatory powers on Indian land remained tightly constrained.<sup>105</sup>

### Conclusion

Amidst the New Deal and on the heels of dozens of major federal-state grant-in-aid programs, scholars of American governance announced the arrival of a "new federalism," a significant rearrangement of power and responsibility among the federal government and the states. This article is about the downstream effects of the "new federalism." It is about how historical actors wielded the new tools available to them—including, especially, bureaucracy—and how other actors responded, with lasting political consequences.<sup>106</sup> In this example, American Indians in the Southwest claimed the expansive benefits of post-New Deal federal and state citizenship *and* the prerogatives of sovereigns. And on paper, at least, they won.

The story does not end there, however. A brief glance at the administration of public welfare in the next decades reveals state officials, in the South and elsewhere, resisting federal authority with ever-greater determination and verve. Indians were not the only ones who learned how to manipulate bureaucracy and leverage their position in the "new federalism." A welfare rights movement and its lawyers would eventually convince the federal courts to intervene, securing important constitutional guarantees of due process and equal protection, but by the end of the twentieth century,

104. *Hobby*, 221 F.2d 498.

105. Arizona officials continued to complain about the difficulty and unfairness of administering benefits to reservation Indians. Paul R. West, "Problems in Administration of Public Assistance on Arizona Indian Reservation," *Public Welfare* 17 (January 1959). When Congress finally amended the Social Security Act to explicitly authorize states to challenge federal agency decisions in court, Arizona took advantage at the earliest opportunity. Social Security Amendments of 1965, Public Law 97, 89th Cong., 1st sess. (July 30, 1965), § 404 (a); and *Arizona State Department of Public Welfare v. Department of Health, Education and Welfare*, 449 F.2d 456 (9th Cir. 1971).

106. Another example of this phenomenon, although not explicitly framed that way, is Jill Quadagno, "Promoting Civil Rights through the Welfare State: How Medicare Integrated Southern Hospitals," *Social Problems* 47 (2000): 68–89.

states had won greater control over policy making (while retaining federal subsidies), as well as firm statements from Congress and the Supreme Court that a minimum income was not a fundamental right of citizenship in the modern American state.<sup>107</sup>

Indians' legal victories, in the welfare context and elsewhere, proved similarly fragile. It is no coincidence that in 1953, Congress enacted Public Law 280, which gave a handful of states civil and criminal jurisdiction over almost all the tribes within their boundaries and invited other states to request the same. Americans Indians' determination to access the benefits of state citizenship went hand in hand with efforts to narrow the scope of tribal sovereignty.<sup>108</sup>

These continuing clashes tempt scholars to cast American Indians as perpetually embattled and often victims. Cohen himself adopted this stance in his influential 1953 *Yale Law Journal* article: "[T]he Indian plays much the same role in our American society that the Jews played in Germany," Cohen famously wrote. "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." The danger that particularly concerned him was the steady encroachment of "administrative experts" such as Dillon Myer: bureaucrats who enlarged their power and discretion even as they purported to extend freedom and independence to their Indian charges.<sup>109</sup>

Cohen had good reasons for presenting Indians in this light, and subsequent developments vindicated his fears yet Indians had a more complicated relationship with American bureaucracy than Cohen suggested. In general, Christian McMillen has observed, Indians were "subject to a

107. See, generally, Tani, "Securing a Right to Welfare"; Davis, *Brutal Need*; R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, DC: Brookings Institution, 1994); and Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* (Philadelphia: University of Pennsylvania Press, 2008).

108. Public Law 280, 83d Cong., 1st sess. (August 15, 1953); Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles: University of California American Indian Studies Center, 1997); Robert T. Anderson, "Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280," *Washington Law Review* 87 (2012): 915–64; Berger, "*Williams v. Lee*"; Clifford M. Lytle, "The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country," *American Indian Law Review* 8 (1980): 65–77; David E. Wilkins and Keith Richotte, "The Rehnquist Court and Indigenous Rights: The Expedited Diminution of Native Powers of Governance," *Publius* 33 (2003): 83–110; and Joe D. Dillsaver, "Indian Rights: Eligibility of Indians for State Assistance," *American Indian Law Review* 4 (1976): 289–94.

109. Cohen, "Erosion of Indian Rights," 390.

degree of regulation unknown among other American people."<sup>110</sup> By the mid-twentieth century, that experience translated into shrewd politics. As other Americans struggled to make sense of the growth of central-state power and its often intrusive administrative agencies, some Indians used their vast experience with federal regulatory tools to further their own goals. Drawing on insiders' knowledge of the BIA, allies within other parts of the federal bureaucracy, and a sophisticated, historically informed understanding of intergovernmental relations, they pursued their own vision of citizenship: one in which they were treated equally with other state citizens, but in their day-to-day lives were governed by the laws of their sovereign nations.<sup>111</sup>

Historians of American governance would do well to reflect on these Indians' struggles and tactics, even if their gains appear ephemeral. In recent years, scholars have called attention to the important work occurring within the bureaucratic apparatuses of the modern American state. Margot Canaday, for example, has documented how government officials in one corner of the state appeared to learn from the "puzzling" (over homosexual subjects) that occurred in another. Lucy Salyer, Mae Ngai, and others have shown how administrative decisions at the nation's imagined borders helped construct and support a regime of governance for the "internal" political community. Other recent scholarship shows how federal public welfare administrators shored up a more centralized, expert-driven state by snipping the strings connecting the poor to local authority and attaching them instead to federally regulated programs. As these histories implicitly recognize and as others should explore, the modern American state wielded and consolidated power through regulation, and it regulated unequally. New regimes of governance were built on the backs of Indians, immigrants, criminals, and the poor.<sup>112</sup> These very same groups, however,

110. McMillen, "Native Americans," 128. Jeff Pasley makes a similar point in "Midget on Horseback," *Common-Place* 9 (2008) <http://www.common-place.org/vol-09/no-01/pasley/> (accessed November 14, 2014).

111. For more recent examples of Indians' savvy use of their knowledge of bureaucracy and federalism, see Laura E. Evans, *Power from Powerlessness: Tribal Governments, Institutional Niches, and American Federalism* (New York: Oxford University Press, 2011).

112. Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2011); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Ngai, *Impossible Subjects*; Karen M. Tani, "Welfare and Rights before the Movement: Rights as a Language of the State," *Yale Law Journal* 122 (2012): 314–83; and see also Rebecca McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941* (New York: Cambridge University Press, 2008); Kristin Collins, "Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the

were uniquely positioned to exploit fractures within the state. When they did so, this article suggests, they could provoke crises for the state that were deeply destabilizing and exceptionally costly to resolve.

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Family,” *Vanderbilt Law Review* 62 (2009): 1085–1167; Ablavsky, “The Savage Constitution,” 1083–84; and Wendy A. Bach, “The Hyperregulatory State: Women, Race, Poverty and Support,” *Yale Journal of Law and Feminism* 25 (2014): 319.