

# I

## A History of Federal Indian Policy

**M**ILLIONS OF PEOPLE AND HUNDREDS OF independent nations were prospering in what is now the United States when Europeans first arrived in North America.<sup>1</sup> They lived in communities spread all across the land. Each nation possessed its own government, culture, and language, and all of these people shared a deep religious faith centered in the sanctity of nature.<sup>2</sup>

Most of these people, later called Indians,\* lived along the coasts, the major rivers, and the Great Lakes, as people in the United States do today.<sup>3</sup> Commercial networks spanned the continent. Indian nations traded food, clothing, tools, and crafts.

Today, most Indians live west of the Mississippi River, but 25 percent live in the Northeast, and more than eighty thousand live in North Carolina, which has the sixth-largest Indian population of any state. The five states with the

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\*Considerable thought was given to using *Native American* rather than *Indian* in this book. *Indian* was chosen for several reasons. For one, many Indians use the terms *Indian* and *Native American* interchangeably, but there seems to be a preference for the word *Indian*. For instance, noted Indian author and scholar Vine Deloria, Jr., used the word *Indian* in all of his books rather than *Native American*. In addition, most Indian organizations and groups, including the National Congress of American Indians and the Society of American Indian Government Employees, use *Indian* in their titles. Moreover, virtually all federal Indian laws (such as the Indian Reorganization Act) and federal agencies (such as the Bureau of Indian Affairs) use *Indian*.

greatest number of Indians are California, Oklahoma, Arizona, New Mexico, and Washington, in that order. Alaska is the state with the highest percentage of Native people (nearly 20 percent), followed by Oklahoma and New Mexico with about 11 percent.<sup>4</sup> According to the 2010 Census, the total population of Indians and Alaska Natives is approximately 5.3 million, 1.7 percent of the nation's population. Most Indians (57 percent) live in metropolitan areas, while 40 percent live on or near Indian reservations. The city with the highest Native population is New York (more than one hundred thousand), followed by Los Angeles (more than sixty-five thousand).<sup>5</sup> Some 315 Indian reservations exist in the United States covering more than 55 million acres of land (about 2 percent of the country's land mass). Reservations range in size from the 15.4-million-acre Navajo Reservation (nearly as large as West Virginia) to some that are fewer than one hundred acres.

Currently, there are 565 federally recognized<sup>6</sup> Indian tribes (sometimes referred to as nations, bands, villages, pueblos, rancherias, and communities, depending on the tribe's preference) in the United States. Alaska is the home of 226 of these; the rest are located in thirty-four other states.

As a group, Indians are the most disadvantaged in our society. They have significantly lower life expectancy rates as compared with other Americans.<sup>7</sup> As President Barack Obama noted in November 2009, the unemployment rate on some Indian reservations is 80 percent, nearly a quarter of all Indians live in poverty, 14 percent of all reservation homes do not have electricity, and 12 percent of homes do not have access to a safe water supply.<sup>8</sup> Indians fall well below the national average in education. Half the adult Indian population lacks a high school diploma, with only 14 percent earning undergraduate or professional degrees compared with 24 percent for the nation as a whole.<sup>9</sup>

More than two hundred tribes during the past decade have constructed gambling casinos on their reservations. Some are highly profitable, and on those reservations, economic conditions have improved considerably. The vast majority of reservations, however, remain impoverished, and tribal members continue to suffer from health, housing, and unemployment problems; alcoholism; and lack of economic opportunities. "Notwithstanding the much publicized growth and success of the casino gaming enterprises owned by many tribal governments, . . . American Indians residing in Indian country remain the poorest group in America."<sup>10</sup> Many Indian reservations are located far from industrial centers and have no valuable natural resources that can be developed, and thus substantial improvements in their economic situation are not likely to occur anytime soon.

People often ask why so many Indians choose to continue living on reservations. The answer is complex, but much of it has to do with the determination

of Indians to preserve their ancestral lands and their culture, religion, and traditions, many of which are tied to those lands. While millions of people migrated to this country in order to assimilate into it, Indian tribes have resisted assimilation, have a strong desire to maintain their unique culture, and have fought for autonomy and independence.<sup>11</sup>

An overarching problem that reservation Indians face today is the confusing pattern of federal laws that regulate so many of their activities. No other ethnic group is so heavily regulated. The goal of this book is to help clarify federal Indian law—the federal laws, regulations, court decisions, and policies that influence and regulate so much of Indian life—so that Indians and tribes can better understand it and use it to their benefit.

Some observers believe, as one noted Indian activist has asserted, that “American policy toward the Indians has always revolved around the same central theme: how can ‘we,’ the superior, enlightened, Christian people, help/destroy ‘them,’ the inferior, uncivilized, pagan people; in such a way as to eliminate . . . Indian people as members of distinct societies.”<sup>12</sup> Other observers liken the federal-Indian relationship to a pendulum that has swung back and forth between attempts to annihilate tribes during certain periods of time and attempts to support tribal self-government and autonomy at others.<sup>13</sup>

In fact, federal Indian policies can best be understood when placed in historical perspective. Many of these policies, as one court recently noted, are “better explained by history than by logic.”<sup>14</sup> A brief chronological summary of these policies will help place the current status of Indian law in proper context.

## A. 1492–1787: TRIBAL INDEPENDENCE

Hundreds of sovereign nations existed in what is now the United States when Christopher Columbus “discovered” this continent in 1492. (If Indians had sailed to Spain in 1492, would they be credited with having discovered Europe?) Beginning with Jamestown, Virginia, in 1607, people from England, France, Spain, and the Netherlands began settling on the eastern seaboard. At first, Indian tribes in the area openly welcomed, assisted, and traded with them, allowing the newcomers to live in their territory. Indeed, as the story of the first Thanksgiving reflects, many European settlers would have perished were it not for the help that Indians generously extended to their new neighbors.

Unfortunately for the Indians, they were too trusting, and they misunderstood the intent of the Europeans. When Europeans told the Indians that they came in peace and would respect Indian sovereignty and Indian lands,

the Indians took them at their word. Many Europeans, however, viewed the Indians as heathens and savages and felt that Christians had the right to take their land.<sup>15</sup> The settlers remained on peaceful terms with the Indians only when it served the newcomers' interests.

Relations between the Indians and the settlers increasingly turned violent. In the Pequot War of 1634-38, the English joined forces with several eastern tribes to oust the Pequot from Massachusetts and Connecticut. From 1643 to 1645, Dutch settlers in New York fought a fierce and bloody war (Kieft's War) with the Delaware Indians in which hundreds died. The most deadly conflict occurred in 1675-76, when English settlers, allied with a few local tribes, went to war against the powerful Wampanoag Confederacy. The conflict is known as King Philip's War. (King Philip was the English name for Metacom, the leader of the Wampanoag Tribe.) It involved thousands of fighters on both sides and resulted in the destruction of entire colonial and Indian towns. Although the English ultimately prevailed, the war claimed nearly four thousand lives—a higher fatality rate than even the Civil War—and heightened tensions between the colonists and the Indians throughout the Northeast.<sup>16</sup>

Indian tribes remained extremely powerful throughout the 1700s. However, toward the end of that century (around the time of the American Revolutionary War), the balance of power in North America shifted away from the Indians. For one thing, diseases introduced to the continent by Europeans decimated the Indian population. One colonist reported in 1701 that smallpox had killed more than half the Indians of the Carolinas.<sup>17</sup> Later in the century, as whites moved west, they brought smallpox with them, inflicting horrific losses on the Indians; the Arikara and the Omaha, two tribes on the Plains, lost more than 60 percent of their people to disease.<sup>18</sup>

At the same time that Indian tribes were losing members to disease, Europeans were pouring into North America. The population of the colonies "doubled every twenty-five years and increased 400 percent between 1700 and 1750. The population of North Carolina shot from 45,000 in 1750 to 275,000 in 1775"; by 1775, as many as fifty thousand whites had already moved west of the Appalachian Mountains.<sup>19</sup>

European settlements began fighting wars among themselves, sometimes with Indian allies. The English ultimately prevailed, first by defeating the Dutch in 1664 and capturing New York, and then a century later by riding the Northeast of the French in the French and Indian War (or Seven Years' War), which ended in 1763. During that war, the most powerful group of Indians in the region, the Iroquois Confederacy,<sup>20</sup> sided with the British. Had the Iroquois chosen differently, people in the United States might speak French today.<sup>21</sup>

Soon after the British victory over the French in 1763, the English king, George III, appreciative of the Iroquois' allegiance, issued a Royal Proclamation designed to sharply limit the taking of additional Indian land by the colonists. The Proclamation declared that no purchase of Indian land would be permitted without the consent of the British government. The colonists largely ignored the king's prohibition, however, and continued to do what they had been doing for nearly a century: invading Indian territory and stealing Indian land.<sup>22</sup>

When the American Revolutionary War erupted between the colonists and the British in 1775, few tribes were initially drawn into the fray. "Most Indian people seem to have regarded it as a family quarrel in which they had no business meddling,"<sup>23</sup> and remaining neutral seemed the prudent course. The colonists knew that many tribes sympathized with the British, with whom they had been trading and whose king had promised to protect their lands. Fearing that the tribes would ultimately support the British, the colonists developed a strategy "to carry the war into Indian country, destroy Indian villages, and burn Indian crops" so as to discourage or prevent Indians from giving assistance to the British.<sup>24</sup> These preemptive strikes caused most of the eastern tribes to openly support and aid the British, although others, including the Oneida and Tuscarora in New York and the Mohegan and Pequot in Connecticut, sided with their American neighbors.<sup>25</sup> Much of the war was fought on Indian land: Indian towns were burned, Indian homes and crops plundered and destroyed, and Indian people were killed. For example, roughly half of the Pequots who joined the American forces were killed in battle.<sup>26</sup> "The American Revolution was a disaster for most Indian Americans, and the turmoil it generated in Indian country continued long after 1783," when the Americans gained their independence from Great Britain.<sup>27</sup>

After the colonists defeated the British, there was no stopping them in their quest for land. Indians tried desperately to hold onto their homelands, but the tide of migration was against them. "The new nation, born of a bloody revolution and committed to expansion, could not tolerate America as Indian country. Increasingly, Americans viewed the future as one without Indians."<sup>28</sup>

## B. 1787-1828: AGREEMENTS BETWEEN EQUALS

The Founders of the United States regarded Indian tribes as having both the right and the ability to govern their people as sovereign nations, to make treaties, and to declare war.<sup>29</sup> The Constitution did not extend citizenship to any Indians. Indeed, most Indians lived outside of the thirteen original states, and thus politically as well as geographically they were outsiders. Indian tribes were viewed as

separate nations, and all formal negotiations with them were accomplished through the usual method of international relations: treaties.<sup>30</sup> In fact, the first treaty signed by the United States following the adoption of the Constitution was with the Delaware Indians.<sup>31</sup>

In the years immediately following the Revolutionary War, the U.S. government tried to maintain good relations with the Indian tribes. As the Supreme Court noted in 1832, "[t]he early journals of Congress exhibit the most anxious desire to conciliate the Indian nations. . . . The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided."<sup>32</sup> The United States, weakened after years of war with England, needed to avoid further hostilities. "The Indian nations were militarily powerful and still a threat to the young United States,"<sup>33</sup> and therefore negotiated with the federal government "from a position of strength."<sup>34</sup>

Indian tribes were deeply concerned with protecting their independence and their land, and Congress promptly passed laws to assure them that they had nothing to fear from the United States in those regards. One of the first acts of Congress was passage of the Northwest Ordinance of 1789, which declared: "The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent."<sup>35</sup> A year later, Congress passed laws protecting Indians from unscrupulous whites by prohibiting non-Indians from obtaining Indian lands except with the consent of the federal government, prohibiting non-Indians from trading with Indians except in compliance with strict federal standards, and authorizing the prosecution of non-Indians who committed crimes against Indians.<sup>36</sup> In 1793, Congress prohibited non-Indians from settling on Indian lands, prohibited federal employees from trading with Indians, and exempted Indians from complying with state trade regulations.<sup>37</sup> No laws were passed limiting the ability of Indians to govern themselves; Congress continued to respect tribal sovereignty.

Few of these protective laws were actively enforced by the federal government, however, particularly those that might discourage settlers from moving west. "A flood of backcountry settlers invaded Indian country. . . . With the Peace of Paris [which ended the Revolutionary War in 1783] under their belts, Americans now set about taking over Indian lands as the spoils of victory."<sup>38</sup> The federal government usually overlooked the illegal taking of Indian land by settlers.<sup>39</sup> Indeed, Thomas Jefferson, president from 1801 to 1809, although he befriended many Indian people, actively encouraged westward expansion and the removal of tribes, by force if necessary, from land coveted by white settlers.<sup>40</sup>

### C. 1828-1887: RELOCATION OF THE INDIANS

When Andrew Jackson became president in 1828, what previously had been an unspoken policy now became a publicly stated goal: removal of the eastern Indian tribes to the West. This removal policy, which Jackson commenced, became "the dominant federal Indian policy of the nineteenth century."<sup>41</sup>

The rapid growth in the population of the United States increased the desire of whites to obtain Indian lands in the East, and fueled westward expansion. The United States was now stronger, both economically and militarily, and it no longer needed to avoid hostility with the Indians. In 1830, with the encouragement of President Jackson, Congress passed the Indian Removal Act,<sup>42</sup> which authorized the president to "negotiate" with eastern tribes for their relocation west of the Mississippi River. Between 1832 and 1843, most eastern tribes, including those from the Ohio and Mississippi valleys, were removed to the West, or were placed on smaller reservations in the East.<sup>43</sup> (One example—the "Trail of Tears," the forced march to the Oklahoma Indian Territory during which fifteen thousand Cherokees died—is discussed in Chapter XV.)

Scores of treaties were written during this period of time in which Indians were forced to relinquish their ancestral homelands. Most of these tribes were promised that their new homes in Arkansas, Kansas, Iowa, Illinois, Missouri, or Wisconsin would be theirs permanently. The United States broke almost every one of these treaties, however, often soon after they were signed, and some tribes moved several times to "permanent" homes farther west.

The discovery of gold in California in 1848, and in the Black Hills of South Dakota in 1874, brought tens of thousands of settlers to the West and increased the desire for Indian land. The U.S. Cavalry accompanied them, not to enforce the treaties under which tribes were guaranteed permanent homes, but to protect the non-Indian trespassers.<sup>44</sup> Confrontations became commonplace, including many such as the Sand Creek Massacre in 1864 that were designed to eradicate the Indians from the area.<sup>45</sup> Weakened by military campaigns, more and more tribes were forced to accept reservation life. One insidious, brutal, and inhumane tactic adopted by the army to defeat the Indians was to slaughter the bison on which most of the Plains Indians depended. An estimated 30 to 40 million bison populated the West in the mid-1800s. By the time the slaughter ended in 1893, less than four hundred wild bison were left.<sup>46</sup>

Particular emphasis during this period was placed on "educating" and "civilizing" Indian youth. By 1887, more than two hundred schools had been established under federal supervision, with an enrollment of over fourteen thousand Indian children, most of whom were forcibly removed from their families. The authoritarian rule of these boarding schools is notorious. Children were

severely punished, even whipped, if they spoke their native language or practiced their traditions. They were forbidden from wearing their tribal clothing or engaging in their traditional religious practices, and were allowed only minimal contact with their families.<sup>47</sup>

Congress passed several laws during the mid-nineteenth century designed to increase federal control over Indians on the reservation. For instance, Congress authorized federal courts to prosecute Indians who committed certain crimes on the reservation, thus imposing "white man's law" on Indian reservations.<sup>48</sup> In addition, Congress placed federal agents on reservations to supervise tribal activities more closely.

Almost a century after Congress passed the Northwest Ordinance in 1789—which acknowledged the independence of Indian tribes—a new law was passed that reflected how the status of Indian tribes had depreciated since then in the eyes of the federal government. In 1871, Congress passed a law that prohibited federal officials from making any additional treaties with Indian tribes.<sup>49</sup> The passage of this statute had both a symbolic and practical effect. Symbolically, its passage meant that Congress no longer considered tribes as independent nations capable of signing a treaty; as a practical matter, it meant that Congress could limit tribal powers and take Indian land anytime it wanted, simply by passing a law to that effect. Congress immediately began exercising that power.

#### D. 1887–1934: ALLOTMENT AND ASSIMILATION

By 1887, the federal government's policy of removal and separation—that is, the removal of Indians from land coveted by whites and the placement of Indians on remote reservations—was no longer a viable strategy because white settlers wanted to live on or trespass across almost all the land in the United States. The government needed a new Indian policy.

The government decided that instead of separating Indians *from* white society, Indians should be assimilated *into* white society. Two very different social forces helped shaped this new policy of assimilation. One was greed: many white settlers clamored for additional land from the Indians. The other was humanitarianism: many non-Indian social reformers, aware that Indians were suffering unmercifully under the government's existing policies, began to believe that the best way to help Indians overcome their plight and their poverty was by encouraging assimilation.<sup>50</sup> Although their motives differed, both groups joined in compelling Congress in 1887 into passing the General Allotment Act (GAA),<sup>51</sup> also known as the Dawes Act. The objectives of the GAA



"were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."<sup>52</sup> This drastic shift in policy was "carried out without so much as the pretense of tribal consent."<sup>53</sup>

To accomplish these goals, the GAA authorized the president to divide communally held tribal lands into separate parcels ("allotments"). Each tribal member was assigned an allotment and, after a twenty-five-year "trust" period, was to be issued a deed to it, allowing the owner to sell it at any time. All remaining tribal land (the "surplus" land) was then to be sold to non-Indian farmers and ranchers. Congress hoped that by allowing non-Indians to live on the reservation, the goals of the settlers and those of the humanitarian social reformers could both be satisfied: land would become available for non-Indian settlement *within* Indian reservations, and Indian poverty would be eliminated once Indians accepted the Anglo-American concept of private ownership and saw and emulated the farming and ranching habits of their new neighbors. "Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers."<sup>54</sup>

The first goal—opening large portions of Indian reservations to white settlement—was a huge success. The second goal, however, failed miserably. Rather than assist Indians in improving their lives and overcoming poverty, "the Allotment Act actually made their condition worse."<sup>55</sup> In the first place, many allotments were unsuitable for small-scale agriculture, and even those that were suitable required money for the purchase of equipment, cattle, or seeds that few Indians possessed or could borrow. Moreover, many Indians did not want to abandon their communal society to become farmers and ranchers, and viewed such a lifestyle as distasteful.<sup>56</sup> It simply was naïve and unrealistic—if not callous and genocidal—to think that Indian life would be improved by a method that caused substantial disruption to their society, forcibly confiscated tribal land, and allowed outsiders to live on Indian reservations.<sup>57</sup>

As a result of the GAA, thousands of impoverished Indians sold their allotments to white settlers or lost their land in foreclosures when they were unable to pay the state the real estate taxes that became due after they were issued deeds to their property.<sup>58</sup> Of the nearly 150 million acres of land that tribes owned in 1887, fewer than 50 million remained in 1934 when the GAA was repealed.

To further regulate the Indians, Congress passed a series of laws during this period that authorized the Secretary of the Interior to lease Indian lands to non-Indians, to control all funds received from those leases, and to determine when to distribute those funds to tribes and tribal members.<sup>59</sup>