7

Reservations and Federal Power

The Indian Removal Act forced eastern tribes onto reservations west of the Mississippi. On reservations, tribes were guaranteed the right to self-govern. The United States was supposed to be minimally involved in tribal government operation; indeed, President Jackson explicitly stated the United States would only be involved to the extent necessary to keep peace on the frontier.[1] Furthermore, treaties were the primary mechanism by which tribes were placed upon reservations, and treaties guaranteed tribal lands would be forever secured against white encroachment.[2] Treaties also contained provisions guaranteeing healthcare, education, annuities, and more. Tribal leaders fought for these provisions to ensure their citizens would be free and independent in perpetuity.[3] However, the United States failed to honor its obligations to tribes, and federal power over tribes drastically increased on reservations.

7.1 FADING TREATIES

Tribal issues became a lower national priority in the years following the Indian Removal Act. From 1846 to 1848, the United States was at war with Mexico. The United States prevailed and acquired territory that

[1] *Andrew Jackson, Dec. 8, 1829, First Annual Message to Congress*, Presidential Speeches, UVA, Miller Ctr., https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress [https://perma.cc/2CR8-877G].

[2] Francis Paul Prucha, The Great Father: The United States Government and the American Indians 45 (abr. ed. 1986).

[3] Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. Bus. Entrepreneurship & L. 413, 430–31 (2019).

would become several states, including California.[4] Coincidentally, gold was discovered in California just as Mexico ceded it, precipitating the gold rush of 1849.[5] Expansion into the newly acquired western lands required a railroad and political organization. Discussion over future railroad routes quickly turned into a debate about slavery. The eventual temporary fix was the Kansas–Nebraska Act of 1854, which allowed newly organized territories to answer the slavery question by popular vote.[6] The issues of slavery and American expansion placed Indian rights at the bottom of American priorities. In 1862, Secretary of War Edwin Stanton responded to a staffer about an Episcopalian bishop's concerns for Indians by stating, "What does the Bishop want? If he came here to tell us that our Indian system is a sink of inequity, tell him we all know it."[7] Indian issues remained a low priority until after the Civil War.

Following the Civil War, Indian policy underwent a drastic change. European nations and the United States had always conducted Indian relations through treaties – agreements between nations. The United States passed a statute forbidding further treaties between the United States and Indian tribes in 1871.[8] Perhaps the largest driver of this policy change was politics between the Senate and the House of Representatives. Treaties are the sole prerogative of the Senate and the president; however, the House of Representatives was in charge of levying funds to pay for treaty promises. Thus, the House was responsible for the cost though it had no say in the terms of treaties. The House solved this problem by tacking a rider prohibiting further treaties between the United States and Indian tribes onto a bill that eventually became law.

[4] *The Mexican-American War in a Nutshell*, Nat'l Constitution Ctr. (May 13, 2022), https://constitutioncenter.org/blog/the-mexican-american-war-in-a-nutshell [https://perma.cc/HJ8B-9ZWV].

[5] *Mexican-American War*, Hist. (updated Jan. 11, 2023), www.history.com/topics/mexican-american-war/mexican-american-war [https://perma.cc/V4C8-PFZG].

[6] *The Kansas-Nebraska Act*, U.S. Sen., www.senate.gov/artandhistory/history/minute/Kansas_Nebraska_Act.htm [https://perma.cc/RJF8-NYS9].

[7] H. B. Whipple wrote the preface to Helen Hunt Jackson's book on the conditions of Indians and in it recounted his visit to Washington that prompted this quote. See Helen Hunt Jackson, A Century of Dishonor: A Sketch of the United States Government's Dealings with Some of the Indian Tribes ix (1881). The quote has been repeated in the Congressional Record, see 74 Cong. Rec. 4774, 4803 (1931), and at least one congressional hearing. See *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affs.*, 74th Cong. 18353, 18571 (1939).

[8] Indian Appropriations Act of 1871, Pub. L. No. 41–120, ch.120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2024)).

The House was able to end treaty making because the federal government had grown much stronger and the political dynamics had changed. As President Washington noted, treaties were a more efficient means of acquiring tribal lands than war because tribes were on a similar military level to the United States. However, the United States' military capacity was significantly greater than the tribes following the Civil War. The United States now possessed vast numerical superiority over tribes, a standing army equipped with Gatling guns and better small arms, plus improved supply lines thanks to railroads. Consequently, the cost of war with the tribes fell significantly, so negotiating treaties with tribes was no longer necessary.[9] In addition to military capacity, the Civil War was also about unifying the United States under a single sovereign – Abraham Lincoln's famous "A house divided against itself cannot stand."[10] Tribes' existence as governments capable of entering treaties with the United States conflicted with this principle.

While Northerners and Southerners retained many differences after the Civil War, one thing they agreed on was Manifest Destiny – the inevitable westward expansion of the United States.[11] Americans knew numerous sovereign Indian nations stood in the way. The United States' solution was to force all tribes onto reservations, destroy their culture and governance institutions, then open their lands to white settlement.

7.2 THE LAST OF THE INDIAN WARS

Seizing lands west of the Mississippi would be no easy feat. Many tribes on the Great Plains possessed warrior cultures. Thanks to their newly evolved horse cultures, they were elite equestrians. Their skill on horseback made them among the finest cavalry forces to ever grace the earth. Man for man, most tribes' warriors were superior to United States troops. However, a vastly larger population and better technology ultimately gave the United States the military advantage. Even still, the United States struggled to subdue the Plains tribes. The United

[9] Adam Crepelle, *Making Red Lives Matter: Public Choice Theory and Indian Country Crime*, 27 LEWIS & CLARK L. REV. 769, 786 (2023).

[10] *Abraham Lincoln, Address at the Illinois State Republican Convention in Springfield, Ill., June 17, 1858*, AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/documents/address-the-illinois-state-republican-convention-springfield-illinois [https://perma.cc/T5VP-MWKL].

[11] Erin Blakemore, *Native Americans Have General Sherman to Thank for Their Exile to Reservations*, HIST. (updated Oct. 28, 2018), www.history.com/news/shermans-war-on-native-americans [https://perma.cc/SFX6-GQNW] ("Northerners and Southerners agreed on little at the time except that the Army should pacify Western tribes.").

States may have been able to prevail by direct military assault but doing so would have been costly. Thus, the United States' preferred tactic against tribes was the same tactic it used during the Revolutionary War – destroy their food. As Secretary of the Interior Columbus Delano noted, "The civilization of the Indian is impossible while the buffalo remains on the plains."[12] Removing the buffalo became the United States' primary task, and General William Tecumseh Sherman was the man for the job.

During the Civil War, General Sherman's famed march to the sea ransacked Confederate towns in hopes of demoralizing the population.[13] General Sherman had no qualms about employing this strategy against Indian tribes, but American troops were not the primary source of buffalo slaughter. Instead, General Sherman used the army to protect private hunters[14] and supply them with bullets.[15] Hunters were happy to pursue buffalo because demand for their hides soared when a new method of tanning was developed in 1871.[16] Moreover, advances in firearm technology enabled hunters to drop a buffalo from nearly a mile away.[17] Not comprehending the sudden collapse of their fellow buffalo, the herd would remain in place while the marksman fired away.[18] This meant a single hunter could slay 100 buffalo without even having to reposition his rifle.[19] Hunters usually removed the hide and left the meat to rot

[12] Motion for Preliminary Injunction, Exhibit A, at 22, Neighbors Against Bison Slaughter v. Nat'l Park Serv, No. 1:19-cv-00128-SPW, 2019 U.S. Dist. Ct. Motions Lexis 128150 (D. Mont. Nov. 15, 2019); Peter Dykstra, *The Other Destructive Columbus*, Daily Climate (Oct. 16, 2021), www.dailyclimate.org/american-bison-26553090 20.html [https://perma.cc/QU3Q-NE3L].

[13] *Sherman's March to the Sea*, Hist. (updated Oct. 4, 2018), www.history.com/topics/american-civil-war/shermans-march [https://perma.cc/3EXM-CKWL].

[14] Erin Blakemore, *Native Americans Have General Sherman to Thank for Their Exile to Reservations*, Hist. (updated July 11, 2023), www.history.com/news/shermans-war-on-native-americans? [https://perma.cc/Q4Q3-FAM2].

[15] David Malakoff, *American Buffalo: Spirit of a Nation*, Nature PBS (Nov. 10, 1998), www.pbs.org/wnet/nature/american-buffalo-spirit-of-a-nation-introduction/2183/ [https://perma.cc/97NY-ZUUD]; J. Weston Phippen, *"Kill Every Buffalo You Can! Every Buffalo Dead Is an Indian Gone,"* Atlantic (May 13, 2016), www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349/ [https://perma.cc/GP4G-9EVN].

[16] Chris Smallbone, *1872–3 The Slaughter of the Buffalo*, nativeamerican.co.uk (Mar. 2006), www.nativeamerican.co.uk/1872-3buffalo.html [https://perma.cc/RDA6-GABU].

[17] *Id.*

[18] *Id.*

[19] *Id.*

because transportation costs were prohibitive.[20] In addition to hunters, train passengers were encouraged to shoot buffalo from their seats for recreation.[21] An estimated 60 million buffalo roamed the plains in 1860.[22] By 1893, fewer than 400 buffalo remained.[23] American military leaders claimed buffalo hunters "did more to defeat the Indian nations in a few years than soldiers did in 50."[24]

The unmitigated slaughter of buffalo troubled many Americans. The Texas legislature attempted to protect buffalo, but General Philip Sheridan staunchly opposed the legislation. He asserted:

> These men have done more in the last two years and will do more in the next year to settle the vexed Indian question than the entire regular army has done in the last forty years. They are destroying the Indians' commissary. And it is a well-known fact that an army losing its base of supplies is placed at a great disadvantage. Send them powder and lead, if you will, but for lasting peace, let them kill, skin, and sell until the buffaloes are exterminated. Then your prairies can be covered with speckled cattle.[25]

Similarly, when federal legislation to protect the buffalo reached the desk of President Ulysses S. Grant – a former army general – he vetoed the bill.[26]

Buffalo were not the only animal the United States exterminated to quell tribal resistance. Colonel Kit Carson's 1863 campaign against the Navajo consisted less of armed conflict and more of sabotaging the Navajo food supplies.[27] Carson had his men burn Navajo peach orchards, uproot melon patches,[28] ravage their cornfields, and poison

[20] *How the Destruction of the Buffalo (tatanka) Impacted Native Americans*, Native Hope (Nov. 5, 2021), https://blog.nativehope.org/how-the-destruction-of-the-buffalo-impacted-native-americans [https://perma.cc/4C4Q-YZR5].

[21] Malakoff, *supra* note 15.

[22] Adrian Jawort, *Genocide by Other Means: U.S. Army Slaughtered Buffalo in Plains Indian Wars*, Indian Country Today (updated Sept. 13, 2018), https://indiancountrytoday.com/archive/genocide-by-other-means-us-army-slaughtered-buffalo-in-plains-indian-wars [https://perma.cc/FP4G-B3V2].

[23] Jawort, *supra* note 22.

[24] Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 Wash. & Lee J. Civ. Rts. & Soc. Just. 315, 321 (2017).

[25] Kathy Weiser, *Buffalo Hunters*, Legends of Am. (updated June 2021), www.legendsofamerica.com/we-buffalohunters/ [https://perma.cc/5LAV-53LQ].

[26] Jawort, *supra* note 22.

[27] *Kit Carson*, Mojave Desert, http://mojavedesert.net/people/carson.html [https://perma.cc/6KPP-RBGK].

[28] Caitlin Johnson, *Kit Carson: Hero or Villain?*, CBS News (Jan. 7, 2007), www.cbsnews.com/news/kit-carson-hero-or-villain/ [https://perma.cc/8NMY-UQY2].

their water.[29] Carson's troops slaughtered thousands of Navajo domestic sheep and left the meat to rot.[30] He also destroyed Navajo horses, cattle, and mules.[31] Without food, Navajo were forced to surrender and endure a death march to Bosque Redondo – a reservation that was little better than an internment camp.[32]

Similarly, the Red River War between the allied Kiowa, Comanche, Apache, Cheyenne, and Arapaho and the United States was not decided by human casualties. In fact, the final battle at Palo Duro Canyon resulted in the death of only three Indians, but the United States was able to destroy the tribes' winter food supply. More importantly, the United States captured more than 1,400 Indian horses – it killed 1,000 in a single day.[33] The tons of decaying horse flesh supposedly emitted a stench so putrid that it could be smelled miles away for more than a month after the massacre.[34]

7.3 RESERVATION LIFE

Reservation-bound Indians were subject to the unfettered authority of white Indian agents and superintendents. Reservation agents were paid less than $2,000 per year during the middle of the nineteenth century, a very low wage; in fact, a store clerk was paid more.[35] Charles Posten, governor of the Arizona territory and ex officio superintendent of the Indian service, wrote in 1864, "It is impossible to secure the services of a faithful and competent superintendent for the sum of two thousand dollars per annum in currency; that amount will not support a superintendent

[29] Andrew Gulliford, *A Search for Truth: Albert Pfeiffer, Kit Carson and the Long Walk*, J. (updated June 15, 2017), www.the-journal.com/articles/a-search-for-truth-albert-pfeiffer-kit-carson-and-the-long-walk/ [https://perma.cc/ZF2E-78PQ]; *Navajo-Churro History*, Navajo Sheep Project, www.navajosheepproject.org/navajo-churro-history [https://perma.cc/7CMN-LUV9].

[30] Navajo Sheep Project, *supra* note 29.

[31] Raymond E. Lindgren ed., *A Diary of Kit Carson's Navaho Campaign, 1863–1864*, 21 N.M. Hist. Rev. 226, 226 (1946).

[32] *Bosque Redondo*, Nat'l Museum of the Am. Indian (2019), https://americanindian.si.edu/nk360/navajo/bosque-redondo/bosque-redondo.cshtml [https://perma.cc/WE8C-2MPX].

[33] Thomas F. Schilz, *Battle of Paulo Duro Canyon*, Tex. St. Hist. Ass'n (updated Aug. 4, 2020), www.tshaonline.org/handbook/entries/palo-duro-canyon-battle-of [https://perma.cc/D6FJ-XVBA].

[34] *Bad Hand at Dead Horse*, Bones of Tex., https://bonesoftexas.com/bad-hand [https://perma.cc/TW45-5HGU].

[35] Edmund Danziger, Indians and Bureaucrats: Administering the Reservation Policy During the Civil War 16 n.37 (1974).

in any respectable manner in the Territory, and he must needs resort to some other means of support, to the derogation of the government service."[36] Because salaries were low, Indian agents engaged in graft. Indian agents had sole authority to issue licenses to the non-Indians wishing to do business with the agent's Indian wards. Thus, white merchants bribed Indian agents to acquire monopolies over the captive reservation Indians. Exacerbating the problems caused by monopoly, a white merchant merely had to allege an Indian owed them money and the merchant was paid from tribal treaty funds – no questions asked.[37] Indians were essentially robbed of their treaty annuity funds through this corrupt federal system.[38]

In addition to control of Indian access to annuities, Indian agents controlled access to food. The ability to determine whether Indians ate granted Indian agents de facto dictatorial power over their Indian wards.[39] For example, the 1850 Annual Report of the Commissioner of Indian Affairs stated, "[I]t is indispensably necessary that they be placed in positions where they can be controlled, and finally compelled by stern necessity to resort to agricultural labor or starve."[40] Indians desperate for sustenance were in no position to resist demands to cede more of their lands to the United States.[41] For example, the Indian Appropriations Act of 1876 required the reservation-bound Sioux to "sell" the Black Hills to the United States or be denied the rations guaranteed them in the 1868 Treaty of Fort Laramie.[42] The threat of starvation was common on reservations – a quarter of the Blackfeet Reservation died of hunger in 1884.[43] Conditions were so dire that Indian women would barter sex to feed their starving children.[44] The federal government's de facto power over reservation Indians was soon granted a legal basis by the Supreme Court.

[36] U.S. Dep't of the Interior, Rep. of the Comm'r of Indian Affs. for the Year 1864, at 158 (1864), https://digitalcommons.csumb.edu/cgi/viewcontent.cgi?article=1042&context=hornbeck_usa_2_e [https://perma.cc/L7AZ-CJ39].

[37] U.S. Dep't of the Interior, Ann. Rep. of the Comm'r of Indian Affs., Transmitted with the Message of the President at the Opening of the Second Session of the Thirty-Second Congress 17 (1850).

[38] Danziger, *supra* note 35, at 7.

[39] *Id.* at 8.

[40] Ann. Rep. 1850, *supra* note 37, at 3–4.

[41] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 346–47 (1998).

[42] Indian Appropriations Act of 1876, ch. 289, 19 Stat. 176, 192; Michael McLean, *The Lakota and the Contingency of History*, We're Hist. (Dec. 29, 2016), http://werehistory.org/contingency/ [https://perma.cc/KHJ5-7ALP].

[43] Crepelle, *Decolonizing*, *supra* note 3, at 433.

[44] *Id.*

7.4 INDIAN BLOOD AND TRIBAL CITIZENSHIP

Within months of their forced relocation, the Cherokee Nation had ratified a new constitution and was rebuilding its institutions. Pursuant to their traditional ways, the Cherokee did not view being Cherokee as a matter of blood. Instead, the Cherokee saw themselves as a nation. This meant people with no Cherokee ancestry could acquire Cherokee citizenship through adopting Cherokee ways. For example, Sam Houston was a citizen of the Cherokee Nation. Though he lacked Indian blood, he moved into the Cherokee territory, learned the language, and accepted Cherokee laws. Hence, the Cherokee granted Houston citizenship.[45] Many other tribes had similar naturalization processes.[46]

One of the white men to acquire Cherokee Nation citizenship was William Rogers. Rogers married a Cherokee woman and walked the Trail of Tears alongside his wife.[47] Even after his wife's death in 1843, Rogers remained in the Cherokee Nation.[48] For unknown reasons, Rogers murdered Jacob Nicholson, another white man who acquired Cherokee citizenship, in 1844.[49] Rogers fled the Cherokee Nation and managed to elude the tribal authorities for seven months.[50] Eventually, he was arrested by the Cherokee Nation's sheriff. Although the Cherokee Nation had its own court system and prosecuted criminals, it did not have a jail. Hence, the sheriff transferred Rogers to Fort Gibson.[51] The Cherokee Nation expected Rogers to be returned for trial, but the federal government decided to commence prosecution because Rogers and his victim were white men.[52]

Rogers had an interesting defense to the federal prosecution. Although he was white, Rogers was a Cherokee. Nicholson, the victim, was also a naturalized Cherokee. This meant the crime involved only Cherokee,

[45] Christopher Klein, *7 Things You May Not Know About Sam Houston*, HIST. (updated Dec. 22, 2020), www.history.com/news/7-things-you-may-not-know-about-sam-houston [https://perma.cc/6R5X-PH3V].

[46] Maya Harmon, *Blood Quantum and the White Gatekeeping of Native American Identity*, CALIF. L. REV. ONLINE (Apr. 2021), www.californialawreview.org/blood-quantum-and-the-white-gatekeeping-of-native-american-identity/ [https://perma.cc/DX6H-27LA].

[47] Bethany R. Berger, "*Power Over This Unfortunate Race*": *Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV 1957, 1983 (2004).

[48] *Id.* at 1983.

[49] *Id.* at 1984.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1985.

and the Cherokee are Indians. Federal law did not authorize the United States to e–prosecute crimes between reservation Indians.[53] Thus, Rogers argued the United States lacked jurisdiction over the case.[54] Rogers' claim confounded the circuit court, so it sought guidance from the Supreme Court.[55]

In 1846, the Supreme Court issued a unanimous opinion, *United States*. v. *Rogers*, in favor of the United States. But before addressing the merits of the case, the Court first noted tribes lost their full sovereignty when the first Europeans set foot on the continent, and it was too late to question the Doctrine of Discovery. The Court noted the United States embraced the Doctrine of Discovery but claimed:

> [F]rom the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavoured by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices .... It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.[56]

According to the Court, it did not matter what the Cherokee Nation thought of Rogers because his skin was white. The Court believed when Congress wrote "Indians" in 1834 "[i]t does not speak of members of a tribe, but of the race generally, – of the family of Indians."[57] In support of this interpretation, the Court proffered the whites who acquire tribal citizenship "will generally be found the most mischievous and dangerous inhabitants of the Indian country."[58]

The opinion's emphasis on race over tribal citizenship should not be surprising. The case was authored by Chief Justice Roger Taney. Chief Justice Taney is infamous in the annals of Supreme Court history for writing the Court's opinion in *Dred Scott* v. *Sandford*,[59] which declared:

[53] *Id.* at 1965 n.31.
[54] *Id.* at 1989.
[55] United States v. Rogers, 45 U.S. (4 How.) 567, 571 (1846).
[56] *Id.* at 572.
[57] *Id.* at 573.
[58] *Id.*
[59] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[60]

Interestingly, in *Dred Scott*, Chief Justice Taney distinguished the legal status of Indians and Blacks. Chief Justice Taney described Indians as "free and independent people, associated together in nations or tribes, and governed by their own laws."[61] But in *Rogers*, Chief Justice Taney reduced Indians to a racial group.

The outcome of his case did not impact Rogers because he died while the case was pending. His death should have ended proceeding; however, the Court continued the case because it knew something more was at stake. *Rogers* – for the first time – enabled the federal government to meddle in intra-tribal affairs. Now, the Cherokee Nation could no longer independently govern its citizens, on its lands, by its laws. For example, a few years after *Rogers*, the Cherokee Nation complained to the United States about federal prosecutions of its Black and white citizens as "unjust, it is an incompatible power – it is harassment – it is oppressive – and in its process it is abolishing the Cherokee government."[62] Thus, *Rogers* empowered the federal government to usurp tribal self-government. Following *Rogers*, the federal government began to interfere more aggressively in tribal affairs, including forcing Indian children into "white" schools and criminalizing tribal religion.[63]

By the 1880s, the United States amplified its efforts to undermine tribal law. The Department of Interior unsuccessfully lobbied Congress to extend federal criminal law over reservation crimes involving only Indians. The Interior Department believed Indians would never become civilized so long as their Indigenous justice systems remained intact. It, along with many members of Congress and the general public, thought tribes were lawless and tribal justice was purely a matter of revenge; that is, an aggrieved individual or their family was responsible for getting even with the wrongdoer. While an eye for an eye was custom in some tribes, many tribes preferred restorative justice to retribution.[64] But individual

[60] *Id.* at 407.
[61] *Id.* at 403.
[62] Berger, *Unfortunate Race*, *supra* note 47, at 1993.
[63] *Id.* at 2004.
[64] Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. Rev. L. & Soc. Change 529, 550–51 (2021).

tribal distinctions did not prevent the United States from wielding stereotypes to expand federal power over all tribes. A murder on the Great Sioux Reservation in 1881[65] provided the Department of Interior with an opportunity to accomplish its goal.

7.5 SPOTTED TAIL, CROW DOG, AND TRIBAL LAW

The Sioux valiantly resisted United States' colonization for decades; in fact, the Sioux defeated the United States in multiple military engagements, including the Battle of Little Bighorn. Federally sanctioned buffalo slaughter eventually forced the Sioux to accept reservation life. Reservation life brought cultural turmoil. The Sioux were a free and self-reliant people since time immemorial. On the reservation, their sustenance was whatever paltry rations the federal government supplied. Moreover, their governance structure was built around the buffalo hunt which was no longer feasible. They were now forced to farm and adopt Christianity. Political factions emerged among the Sioux. Spotted Tail, a Brûlé Sioux, adroitly navigated the situation and was appointed chief of the Sioux by the United States.[66]

Spotted Tail was a complex figure. His family was not among the Sioux elite,[67] and he was orphaned at an early age.[68] But by his early twenties, merit in combat earned Spotted Tail a tribal leadership position.[69] Spotted Tail led numerous successful raids against the Americans crossing Sioux lands. Spotted Tail's raids were so devastating that the United States appealed to the Sioux to cease the raids. The Sioux government summoned Spotted Tail to address the matter. To prevent further conflict between the Sioux and the United States, Spotted Tail freely turned himself over to the American military.[70] He expected to be executed.[71]

[65] *Spotted Tail*, BRITANNICA (updated Aug. 1, 2022), www.britannica.com/biography/Spotted-Tail [https://perma.cc/9M7L-RJ3L].

[66] David J. Wishart, ed., *Spotted Tail (1823–1881)*, ENCYC. OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.na.111 [https://perma.cc/2WXQ-TCCT].

[67] *Spotted Tail*, *supra* note 65.

[68] Charles Eastman, *Spotted Tail – Warrior, Chief & Negotiator* (Kathy Alexander ed.), LEGENDS OF AM. (updated June 2022), www.legendsofamerica.com/na-spottedtail/ [https://perma.cc/SE9H-9XE4].

[69] *Id.*; *Spotted Tail*, *supra* note 65.

[70] Eastman, *supra* note 68.

[71] *Biographies of Plains Indians: Spotted Tail – 1823–1881*, N. PLAINS RESERVATION AID, www.nativepartnership.org/site/PageServer?pagename=airc_bio_spottedtail [https://perma.cc/6MLH-T3YB].

However, he was not. In prison, Spotted Tail learned to speak and write English.[72] Being trapped in a military prison also provided Spotted Tail with the opportunity to study the United States. His observations led him to believe resisting the United States was futile due to its immense numerical and weapons advantages over the Sioux. Accordingly, he saw diplomacy as his people's best chance for survival.[73] This realization led him to ingratiate himself with the Americans. For example, he helped the United States track down horse thieves from rival tribes.[74] When Spotted Tail was released, he received a hero's welcome from the Sioux.[75]

Spotted Tail assumed a leadership position upon his return but was between two worlds.[76] He wanted the best for the Sioux, but his perception of what was best did not match that of his contemporaries.[77] Spotted Tail regularly communicated with whites. He even turned over two Sioux to the United States to be hanged. Sioux as well as other Indians grew suspicious of Spotted Tail and began calling him "the white man's friend."[78] Spotted Tail negotiated a treaty with the United States while the great Sioux warrior and medicine man, Sitting Bull, refused to enter discussion with the United States.[79] After signing the 1868 Treaty of Fort Laramie, Spotted Tail urged the young men in his band to join the United States Army.[80]

Spotted Tail's efforts were responsible for the United States naming him chief of the Sioux.[81] This title gave Spotted Tail tremendous power over the reservation for he was in charge of rations; that is, Spotted Tail determined whether a person ate.[82] Spotted Tail performed noble acts as chief, such as fighting to prevent the Sioux from being removed to Oklahoma.[83] Nevertheless, Spotted Tail was having an affair with

[72] *Id.*
[73] John D. McDermot, *Brûlé Sioux Chief Spotted Tail*, HISTORYNET (June 12, 2006), www.historynet.com/brule-sioux-chief-spotted-tail/ [https://perma.cc/2RWP-Y6XY].
[74] Eastman, *supra* note 68.
[75] McDermot, *supra* note 73.
[76] Eastman, *supra* note 68.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Wishart, *supra* note 66.
[82] *Ex Parte Crow Dog*, ENCYCLOPEDIA.COM (updated June 11, 2018), www.encyclopedia.com/history/united-states-and-canada/us-history/ex-parte-crow-dog [https://perma.cc/KRD2-KMH3].
[83] *Biographies of Plains Indians*, *supra* note 71.

another Sioux man's wife.[84] The more traditional Sioux were not pleased with Spotted Tail's behavior. These tensions ultimately led Crow Dog, a traditional Sioux, to kill Spotted Tail.

The murder was resolved pursuant to Sioux law: The family of the deceased and the perpetrator met to negotiate a settlement. It was agreed that $600, eight horses, and a blanket would compensate Spotted Tail's family.[85] Significantly, the payment was not "blood money."[86] Rather, the compensation was a peace offering intended to restore social relations.[87] Offerees sometimes accepted the offer. Other times, offerees granted forgiveness but refused to accept payment as a show of "both their pride and their wealth."[88] Once the settlement was concluded, the tribe considered the case closed.[89]

Nevertheless, Americans were outraged by Sioux justice – the federal government's favorite Indian was killed and his murderer walked free.[90] Thus, the United States Attorney moved to prosecute Crow Dog for murder in the territorial court of Deadwood, South Dakota. Crow Dog was convicted and sentenced to hang by an all-white jury. Prior to his execution, Crow Dog was permitted to visit the reservation on the condition that he return to be hanged. A severe blizzard ensued days before Crow Dog was supposed to return. No one thought a person would freely travel over several hundred miles through a snowstorm to be hanged, but Crow Dog did. Public support turned Crow Dog's way. After all, people who keep their word in the face of execution must possess a strong sense of honor. Crow Dog's act inspired local attorneys to volunteer assistance in his appeal.[91] Congress was also interested in the issue – whether the United States could assert criminal jurisdiction over reservation crimes

[84] Eastman, *supra* note 68; *Ex Parte Crow Dog*, *supra* note 82.

[85] Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and Untied States Law in the Nineteenth Century 110 (1994).

[86] *Id.* at 105.

[87] *Id.*

[88] *Id.*

[89] Leonard Crow Dog & Richard Erdoes, Crow Dog: Four Generations of Sioux Medicine Men 36 (1995).

[90] Eastman, *supra* note 68.

[91] Bill Markley, *After Crow Dog Shot Spotted Tail, Brulé Law Did Not End the Matter*, Historynet (Mar. 23, 2018), www.historynet.com/crow-dog-shot-spotted-tail-brule-law-not-end-matter.htm [https://perma.cc/4W3E-STB9]; *Ex Parte Crow Dog*, *supra* note 82; James W. King, *The Legend of "Crow Dog": An Examination of Jurisdiction Over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 Vand. L. Rev. 1479, 487 (1999).

involving only Indians – and appropriated money to assist Crow Dog's appeal.[92]

The Supreme Court heard Crow Dog's appeal on November 26, 1883. Crow Dog's guilt was not before the Court. Instead, the Court was solely tasked with determining whether the United States possessed the power to prosecute an Indian who harmed another Indian on a reservation. The Court ruled the United States lacked jurisdiction over Crow Dog. Under the existing statutes, federal criminal law governed crimes between Indians and non-Indians but made no mention of crimes with only Indian parties. Additionally, federal law exempted Indians from prosecution who had been previously punished by the tribe.[93] The Court determined the Sioux treaty did not provide the United States with jurisdiction either.[94]

Aside from the plain text of the law, the Court explained it would be unfair to try Crow Dog in federal court because:

> It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[95]

Crow Dog's presumptive inability to understand the "white man's morality" meant he could not be hanged by the United States.

Although the Supreme Court's decision describes whites as racially superior to Indians, the Court affirmed the right of the Sioux to self-govern. Beneath the layers of nineteenth-century prejudice, the Court's decision was actually a victory for tribal governments. The Court acknowledged that permitting the United States to punish crimes between Indians – by

[92] *Ex parte* Crow Dog, 109 U.S. 556, 562 (1883), *superseded by statute*, Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (2024)).
[93] *Id.* at 558.
[94] *Id.* at 567–68.
[95] *Id.* at 571.

blood – would infringe upon the right of the Sioux to exist as a separate people. Federal prosecution would be imposing "the white man's morality" upon the Sioux in violation of the tribe's treaty-guaranteed right to exist as an independent government.

7.6 CRIMINAL LAW, ASSIMILATION, AND PLENARY POWER

The federal government immediately moved to subvert the Court's decision in *Ex parte Crow Dog*. The Department of the Interior, at the behest of Secretary Henry Teller, answered *Crow Dog* by establishing Courts of Indian Offenses in 1883 to punish Indians for performing traditional activities and expedite assimilation into the white world.[96] As a federal district court in 1888 explained, Courts of Indian Offenses were "educational and disciplinary instrumentalities, by which the government of the United States [was] endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[97] Courts of Indian Offenses were never authorized by Congress;[98] however, Congress responded to *Crow Dog* by passing the Major Crimes Act (MCA) two years later.[99] The MCA authorized the United States to punish murder and six other "major" crimes. The MCA was based upon the premise that tribal laws were incapable of punishing serious offenses.

As the MCA made its way through Congress, chaos was besieging the tribes located within the boundaries of California. Tribes in California faced turmoil since the discovery of gold in 1849 brought swarms of determined, and often unsavory, Americans to the area.[100] California gained statehood in 1850 and ridding the territory of Indians quickly became the state's official policy. California paid $0.25 per Indian scalp in 1856 and increased the sum to $5 per scalp in 1860.[101] In addition to

[96] Denezpi v. United States, 596 U.S. 591, 594–95 (2022); *Denezpi*, 596 U.S. at 606–07 (Gorsuch, J., dissenting); Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 Drake L. Rev. 1, 27–28 (2018).

[97] United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

[98] Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 236 (1994).

[99] Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (2024)).

[100] Erin Blakemore, *California's Little-Known Genocide*, Hist. (updated Dec. 4, 2020), www.history.com/news/californias-little-known-genocide [https://perma.cc/4RGC-U7EQ].

[101] *Historical Documents*, Tachi Yokut Tribe, www.tachi-yokut-nsn.gov/history#:~:text=1856%20The%20State%20of%20California,to%20save%20the%20existing%20population [https://perma.cc/J6JF-UKRZ].

paying bounties, California reimbursed the expenses of "Indian hunters."[102] Newspapers in California frequently ran stories advocating for Indian extermination, such as this 1865 piece from the *Chico Weekly Courant*: "They are of no benefit to themselves or mankind …. If necessary let there be a crusade, and every man that can carry and shoot a gun turn out and hunt the red devils to their holes and there bury them, leaving not a root or branch of them remaining."[103] Many of the California Indians who escaped slaughter were subjected to slavery under the state's Act for the Government and Protection of Indians, which was not fully repealed until 1937.[104] Disease, murder, and slavery reduced California's Indian population by 95 percent between 1850 and 1900.[105] Tribes within California were losing their lands and being forced onto reservations.

The Hoopa Valley Reservation was established in northwestern California in 1864.[106] Though designed for the Hoopa, the reservation also encompassed traditional Yurok tribal lands.[107] Several other tribes were displaced onto the Hoopa Valley Reservation as well.[108] On the reservation, tribes were subjected to intense federal pressures to adopt white ways, but the tribes held fast to their customs and laws. As Hoopa Valley Indian agent Charles Porter[109] observed, the Hoopa would not yield to Christianity or United States law. Porter recognized tribes continued to govern themselves, claiming, "[T]he only men among themselves that the Hupa would respect … [are] the elders and traditional leaders."[110]

[102] *Act for the Government and Protection of Indians*, PBS Am. Experience, www.pbs.org/wgbh/americanexperience/features/goldrush-act-for-government-and-protection-of-indians/ [https://perma.cc/G2VF-GC9N].

[103] Brendan C. Lindsay, Murder State: California's Native American Genocide, 1846–1873, at 67–68 (2012).

[104] Kimberly Johnston-Dodds & Sarah Supahan, *Involuntary Servitude, Apprenticeship, and Slavery of Native Americans in California*, Cal. Indian Hist., https://calindianhistory.org/involuntary-servitude-apprenticeship-slavery-native-americans-california/ [https://perma.cc/DL74-M3CS].

[105] Hadley Meares, *Genocide, Slavery, and L.A.'s Role in the Decimation of Native Californians*, KCET (June 29, 2016), www.kcet.org/shows/lost-la/genocide-slavery-and-l-a-s-role-in-the-decimation-of-native-californians [https://perma.cc/KV59-B3T6].

[106] Sidney L. Harring, *The Distorted History That Gave Rise to the "So Called" Plenary Power Doctrine: The Story of* United States v. Kagama, *in* Indian Law Stories 149, 152, 159 (Carole Goldberg et al. eds., 2011).

[107] *Id.* at 160.

[108] *Id.* at 159.

[109] *Id.* at 155.

[110] *Id.* at 161.

Other tribes similarly held on to their traditional ways and forms of governance.[111]

Though many on the Hoopa Valley Reservation were traditional, Kagama was a Yurok who resided on the Hoopa Valley Reservation that had largely assimilated into the white world.[112] Agent Porter thought more highly of Kagama than the other Indians on the reservation, declaring Kagama "endeavors to live like a white man, and comes nearer to being one – and a good one – in character and conduct than any Indian I have ever met."[113] Kagama desired a tract of reservation land owned by Iyouse, another Yurok,[114] under Yurok law.[115] Kagama had no right to the land he desired under Yurok law, so he sought to undermine tribal law by turning to Agent Porter, who had been illegally granting individual Indians allotments.[116] While waiting for an allotment, Kagama went to Iyouse's home and stabbed him to death in June of 1885.[117] Porter promptly reported the murder to the local United States Attorney who seized the opportunity to file the inaugural prosecution under the MCA.[118]

The case quickly reached the Supreme Court, not to discern Kagama's innocence but to determine whether the United States possessed the constitutional authority to enact the MCA. In support of the MCA, the United States asserted the legislation was presumptively constitutional, and the Commerce Clause provided Congress with the ability to pass the MCA.[119] The United States further argued federal criminal law was needed to assimilate Indians and destroy tribal culture.[120] Kagama countered the MCA was unconstitutional. Evidencing this position, Kagama contended the United States had never claimed the power to prosecute Indian-on-Indian crimes within a reservation until the MCA because tribes were sovereigns.[121]

The Supreme Court sided with the United States in May of 1886 in *United States* v. *Kagama*. The Court rejected the United States' claim that

[111] *Id.* at 159.
[112] *Id.* at 155.
[113] *Id.* at 156.
[114] *Id.* at 157.
[115] *Id.* at 163.
[116] *Id.* at 157.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 174.
[120] *Id.* at 175.
[121] *Id.* at 177.

the Commerce Clause authorized the MCA declaring, "But we think it would be a very strained construction of this clause …."[122] Nonetheless, the Court decided Congress does not need express constitutional authority when legislating in Indian Affairs because:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.[123]

The Court went on to elaborate: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."[124] In other words, Congress requires no express constitutional authority because it is legislating for the Indians' own good.[125]

Following the Supreme Court's decision, Kagama was prosecuted in federal court in the Northern District of California. Ironically, the federal judge directed the jury to issue a not-guilty verdict because the crime actually occurred outside of the reservation's boundaries. Off reservation, jurisdiction rested with California rather than the United States. California did not prosecute Kagama. He returned to the reservation where he lived his remaining ten years.[126]

Although Kagama was not punished under the MCA, the Supreme Court's decision to uphold the law has had extremely deleterious effects on tribal sovereignty. The MCA subverts tribal law and governance. Crime is historically a local matter as criminal laws are supposed to reflect community values. The MCA permits federal prosecutors – who are not members of the tribal community – to punish tribal citizens under externally imposed laws. Likewise, the MCA pulls Indians from their reservations and tries them in distant federal courts where their fate will be determined by a jury who is unlikely to possess a single Indian or a

[122] United States v. Kagama, 118 U.S. 375, 378 (1886).
[123] *Id.* at 383–84 (emphasis in original).
[124] *Id.* at 384.
[125] *Id.* at 384–85.
[126] Harring, *Distorted History*, *supra* note 106, at 181.

member of their community.[127] And the Court's permitting Congress to enact legislation sans express constitutional authority meant the rule of law offered tribes little protection.

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On reservations, the federal government solidified its power over tribes. While the Constitution provided no explicit authority for the federal government's plenary power over tribes, the United States embraced – and continues to embrace – the doctrine. Plenary power enabled the federal government to do whatever it desired in Indian affairs. During the late 1800s, the United States' goals were the acquisition of tribal land and destruction of tribal governments. Congress used its plenary power to accomplish both objectives.

[127] *Id.* at 183; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 755–56 (2006).