HOW THE INDIANS LOST THEIR LAND

Law and Power on the Frontier

STUART BANNER

THE BELKNAP PRESS OF
HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England

7

Reservations

Removal had been based on the assumption that the West was bi enough to provide the Indians a sanctuary from settlers for hundreds o years, but that assumption turned out to be spectacularly wrong. Settlers were crossing the Mississippi in large numbers, some headed as far as California, within a decade or two. By the late 1840s it became clear that the systematic removal of the 1830s would provide no more permanent a solution to the conflicts between settlers and Indians than the piecemeal removals of the preceding two centuries. The "Indian problem" had not disappeared; it had only moved west. But now there was no place left to push the Indians.

The result was the Indian reservation, an island of Indian territory within a sea of white settlement. The creation of reservations took place during a time of very rapid federal land acquisition. By the 1880s the pattern of land tenure in the West had been completely transformed—the Indians retained virtually no land that was not part of a reservation. By then, however, the optimism surrounding the creation of the earliest reservations had faded away. In the 1840s, reservations had offered promise to both sides of an uneasy coalition of white supporters—those seeking to protect the Indians from whites, and those seeking to protect whites from Indians. By the 1880s both sides were disillusioned.

During this same period there was recurring warfare between Indian tribes and the United States. Indeed, except during the Civil War and its immediate aftermath, fighting Indians was the main thing the U.S. Army did. This was the era of George Custer and Philip Sheridan (remembered most for declaring that "the only good Indians I ever saw

ere dead"), of Crazy Horse and Geronimo, of the Sand Creek Massae and the Battle of the Little Big Horn—the era described in Dee rown's *Bury My Heart at Wounded Knee* and portrayed in countless ovie westerns.[1] It was no coincidence that all this fighting took place hen the federal government was actively purchasing Indian land and reating reservations, because the fighting was about land. The federal overnment never stopped structuring land transactions, including hose involving reservations, as voluntary sales by the Indians, but ev- eryone on both sides of the frontier knew that the contractual form was a sham. There had always been inconsistency between the form and the substance of Indian land transactions, but the contrast was never greater than in the second half of the nineteenth century.

Overrun

Long before the word *reservation* acquired the specific meaning of an area set aside for Indians, it was a term of property law referring to the act of retaining for oneself rights in land one was conveying to another. When a person granting a parcel of land wished to retain a portion of the parcel, for example, or perhaps the right to possess the parcel for a certain time, or the right to continue using the parcel for certain purposes, his lawyer would include a reservation in the deed, a clause *reserving* the relevant rights to the grantor. Over time, the land or the rights retained by the grantor also came to be called a *reservation*. If A conveyed land to B but retained some for himself, for instance, the land still owned by A was a *reservation;* A had reserved it from the grant to B. Reservations in this sense were routine elements of land transactions, whether grants from the government to individuals or sales from one individual to another.

The idea of setting land aside for Indians was also very old by the nineteenth century. In seventeenth-century Massachusetts, many of the Indians were already living in "Indian villages" or "praying towns" established specifically for Indian habitation, and there were similar areas set aside for the Indians in other colonies. After the Revolution, Britain continued to set aside parcels of land for the indigenous inhabitants of its other colonies.[2] Some of the earliest treaties between Indian tribes and the United States, from the 1780s and 1790s, defined zones of land reserved for the Indians that were surrounded by areas open to white settlement. Such zones were referred to as "reservations" as early as the

1794 Treaty of Canandaigua, because they were reservations in the old sense of the word—parcels the tribes retained while ceding the rest of their land to the government. As the white population increased and the Indians sold more of their land, it became increasingly common for tribes to be living on reservations in this sense, surrounded by whites, inhabiting their last remaining tracts of unceded land.

After removal, many relocated tribes now lived on reservations in a new sense of the term—land the *government* had selected from *its own* land and reserved for the Indians' use. The areas to which eastern tribes were removed consisted of land the government had only recently purchased from western tribes. These were parcels that would have been part of the public domain, waiting to be sold to white settlers, had they not been set aside for the incoming eastern Indians.

In the 1840s, land possessed by Indian tribes formed a solid wall from Minnesota down to Texas.[3] There was no overland route west that did not enter the Indians' land, much of which had been granted to the relocated tribes only a decade or so earlier, during the course of removal, back when the West seemed so enormous and so far away that there would be room for all.

By the mid-1840s, however, the West was beginning to look much smaller. Settlers were already heading west in numbers that "could not, perhaps, have been anticipated twenty years ago, when the plan [of removal] was formed," the *United States Magazine* recognized in 1844. The more whites traveled west, the more they would perceive that the Indians were in their way. "The snowy heights of the Rocky Mountains are already scaled; and we but apply the results of the past to the future, in saying that the path which has been trod by a few, will be trod by many. Now the removed tribes are precisely in the centre of this path." The problem became even more acute a few years later, when the United States acquired California, and California turned out to contain gold. Removal, "when adopted, seemed wise and humane," reflected a report of the House Committee on Indian Affairs, but the policy had been overtaken by events. "Its authors never anticipated the rapid progress of the extension of our settlements and population westward. It was supposed that the Mississippi would, for many long years, mark the western confines of this Union." The 1850 census found 93,000 non-Indians in California alone, and many more were on the way. What would happen when so many whites crossed land belonging to Indians?[4]

The need to clear Indians off the white emigration routes to the West

quickly became a recurring theme of the annual reports of the Commissioner of Indian Affairs. "Material changes will soon have to be made in the position of some of the smaller tribes on the frontier," William Medill declared in his 1848 report, "so as to leave an ample outlet for our white population to spread and to pass towards and beyond the Rocky mountains." Medill proposed creating two large "colonies" of Indians, one in the North and the other in the South, in order to free up the space between for whites to emigrate. Medill's successor was Orlando Brown, who reported the following year that the Indians living between Missouri and the Rocky Mountains "consider the whole country their own, [and] have regarded with much jealousy the passing of so many of our people through it, without any recognition of their rights, or any compensation for the privilege." White emigrants were not merely trespassing; they were also killing the buffalo, a matter which "has also caused much dissatisfaction among them." Brown repeated Medill's suggestion to move the Indians out of the way. So did Brown's successor as commissioner, Luke Lea. Lea's successor, George Manypenny, pointed out a related problem: all those emigrants had to settle somewhere, but there was nowhere for them to stop that was not possessed by Indians. Relocating the Indians would open up land for white settlement as well as emigration.[5]

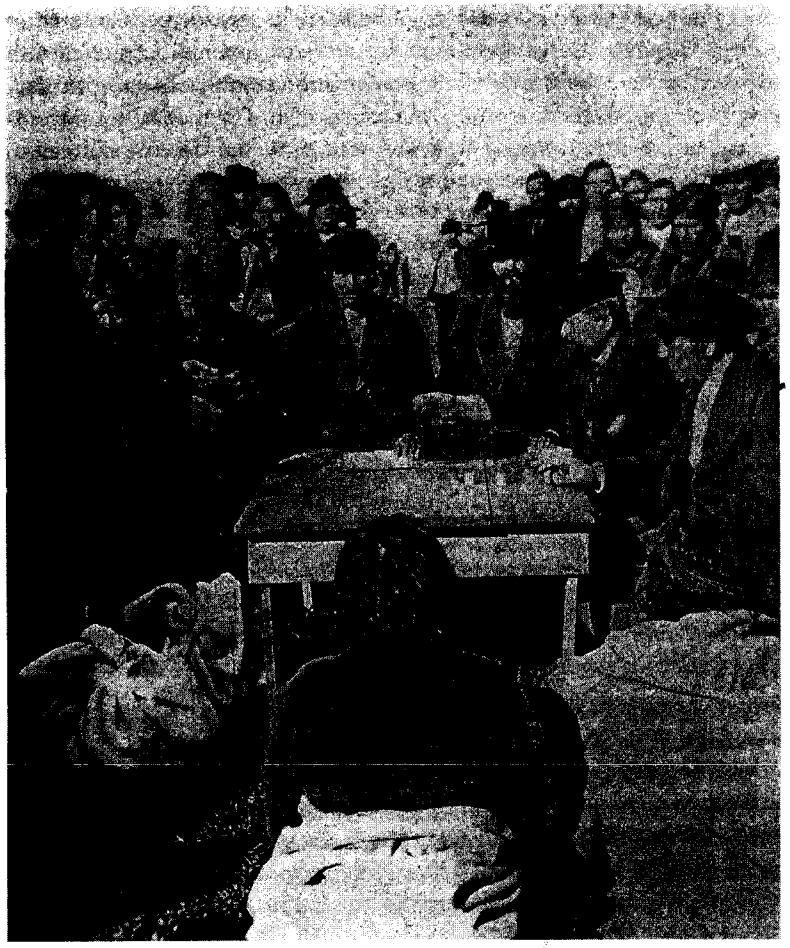
Moving the Indians was only one of three possible solutions. The second would have been to police the frontier to prevent conflicts from arising between Indians and settlers. The Office of Indian Affairs, however, was far too weak and distant to prevent either side from disturbing the other, or indeed to exert much influence on anything that was happening in the West. The third alternative, of course, would have been to stop whites from emigrating. But few whites seriously entertained the idea that the Indians might have the power to choke off westward migration. The *New York Times* was hardly alone in finding it "quite evident, that with civilization spreading across the continent, we never can submit to the roaming and reckless habits hitherto permitted to the Indians. A broad zone of travel, including the railroads and the emigrant routes, must be made absolutely free from the incursions of the marauders." Luke Lea made the point even more firmly in one of his annual reports as Commissioner of Indian Affairs. "When civilization and barbarism are brought in such relation that they cannot coexist together," Lea explained, "it is right that the superiority of the former should be asserted and the latter compelled to give way."[6]

It was this perceived need to keep Indians from interfering with white emigration that gave rise to the idea of confining the Indians to specified locations, but once the idea was in circulation, many suggested that it would benefit Indians as much as whites. As with some of the ostensibly humanitarian reasons offered for removal, some of the arguments in favor of confining the Indians to reservations were no doubt disingenuous. But whites were no more monolithic in their attitudes toward Indians in the 1840s and 1850s than they had been in earlier periods.[7] As always, many were genuinely concerned with the Indians' welfare. By the late 1850s, many such people were just as convinced as the most ardent Indian-haters of the desirability of moving Indians to reservations.

Some argued that reservations would be the lesser of evils—that the Indians would be killed unless they got out of the settlers' way. "The border tribes are in danger of ultimate extinction," Lea warned in 1850. "If they remain as they are, many years will not elapse before they will be overrun and exterminated." The same weighing of alternatives had motivated the humanitarian support for removal back in the 1830s. In the 1850s, it suggested a form of internal removal, into areas where the Indians could be protected from the dangers of contact with whites. In 1856, when Commissioner of Indian Affairs George Manypenny looked back over a decade of growing western cities and expanding western railroads, he was apprehensive about the Indians' future. They would be "blotted out of existence," Manypenny predicted, "unless our great nation shall generously determine that the necessary provision shall at once be made, and appropriate steps be taken to designate suitable tracts or reservations of land, in proper localities, for permanent homes for, and provide the means to colonize, them thereon." Proponents of moving the Indians to reservations could sincerely think of themselves as humanitarians, as people altruistically interested in the Indians' well-being rather than their own.[8]

A second humanitarian argument in favor of reservations was the potential they offered for a more permanent land tenure. The Ojibwa writer and lecturer Kahgegagahbouh—also known by his English name, George Copway—lamented "the perpetual agitation of mind" among many tribes caused by the ever-present "fear of being removed westward by the American government. None but an Indian can, perhaps, rightly judge of the deleterious influence which the repeated removals of the Indians has wrought." Indians were reluctant to invest the labor and money in their land necessary to engage in agriculture, Copway reported, because they remembered what had happened to the eastern tribes who had done so. "Having seen the removal of many tribes," Copway related, Indians were "conscious of the fact, that the government may, and doubtless will, want more land, and they be obliged to sell at whatever price the government may see fit to give, and thus all improvements they have made become valueless to them." Copway accordingly recommended establishing a large permanent Indian territory in present-day South Dakota, where the Indians would be secure enough to farm. The point was repeated several times in the 1850s by various commissioners of Indian affairs. The argument suffered from an obvious weakness: while it was no doubt true that security of title would provide a greater incentive toward investment, why should the Indians believe that *this* relocation would be any more permanent than the earlier ones? Still, the idea that reservations would provide the Indians with more secure land tenure—that things really would be different this time—was powerful enough to endure through the middle decades of the century.[9]

The reservation promised a third benefit as well. White humanitarians were primarily interested not in preserving traditional Indian life but in changing it to more closely resemble their own. They wanted to teach the Indians Christianity, agriculture, literacy, thrift, work discipline—all the practices they summed up as civilization. This sort of education was difficult to provide, however, when Indians were roaming here and there. The reservation, they believed, would aid in civilizing the Indians, by keeping them within a compact space where they could be more easily instructed. "There are many objections to allowing them to live dispersed, in this, their first stage of improvement," argued the Indian agent Benjamin Wilson, sent to California in 1852 to report on the condition of the local tribes. "It interferes too much with education, and deprives them measurably of instruction in religion." Wilson advised forcing the Indians to live together in towns, where they could be compelled to labor a fixed number of hours per day and thus taught to act more like white Americans. "The time has arrived when our Indians are to be gathered into reservations," agreed the Philadelphia philanthropist William Welsh, "and trained in the habits of civilized people, that the Christian Church may exert its holy influences over them." The reservation, in the view of reformers, would be a classroom for the Indian.[10]



On the back of this undated and otherwise unlabeled photograph are the words "Indian payment, Odanah, Wisconsin." If this caption is accurate, the photograph may depict members of the La Pointe Band of the Chippewa of Lake Superior receiving one of the annual payments due under an 1854 treaty. In that treaty, the Chippewa ceded the northeastern corner of Minnesota, along the north shore of Lake Superior. In exchange they received several reservations, including this one in northern Wisconsin (the present Bad River Reservation), as well as the promise of twenty annual payments of money and goods. The creation of Indian reservations became a common feature of land transactions in the early 1850s.

By the early 1850s, for all these reasons, federal Indian policy turned to the reservation.[11] Virtually all Indian land cessions from then on resulted in the designation of a circumscribed area in which the selling tribe was to live. The federal government no longer simply purchased land from the Indians, as settlers had done since the early 1600s. Now land transactions typically had two components, a cession from the Indians to the United States and the delineation of a reservation for the Indians. Many of the reservations were created by treaty, when tribes, while selling part of the land in which they held an original right of occupancy, retained the rest. Many others were created by executive order, when the president designated an area of public land that would be withdrawn from the pool available for sale to settlers and reserved for a particular tribe.

Between the 1850s and 1880s, the federal government acquired Indian land at unprecedented speed. By 1870 all the land in Iowa, Minnesota, Texas, and Kansas had either been ceded to the government or designated as a reservation. By 1880 the same was true of Idaho, Washington, Utah, Oregon, Nevada, Wyoming, Nebraska, and Colorado; by 1886 it was also true of Montana, Arizona, and New Mexico. It had taken whites 250 years to purchase the eastern half of the United States, but they needed less than 40 years for the western half. The rush of settlers that had created the reservation policy was also driving the pace of land acquisition. At the same time, whites' growing interest in experiencing uninhabited "natural" landscapes caused the federal government to acquire even more Indian land, to be set aside as national parks once the Indians had been expelled. The East had been acquired in small bits, but some of the transactions in the West involved immense areas of land. More than 75 percent of Nevada, for example, was acquired in two bites; the large majority of Colorado in three. It was not long before the West was dotted with Indian reservations.[12]

By 1881, when a Senate committee considered a bill that would have regulated Indian affairs in certain areas, including "lands to which the original Indian title has never been extinguished, but which have not been specifically reserved by treaty, act of Congress, or otherwise, for the use of the Indians," this quoted phrase raised some eyebrows. A few decades earlier, most of the West would have fallen within that classification, as land the government had neither purchased from the Indians nor set aside as an Indian reservation. In 1881, however, legislators realized that the quoted passage had become unnecessary. They struck it

from the final version of the bill, they explained, because "they believe that there are no such lands in the United States." As the political scientist Robert Weil concluded a few years later in his treatise *The Legal Status of the Indian*, few, if any, tribes "now live upon territory that has not been ceded to the United States." Instead, Weil reported, "most of them live upon reservations."[13]

There were two broad reasons for creating reservations, however, and in some respects they were at cross-purposes. Some proponents of the reservation were primarily interested in keeping the Indians from interfering with whites; others were primarily interested in keeping whites from interfering with the Indians. That tension would prove to be important in determining what life on the reservation was actually like. If a reservation was to keep Indians away from whites, the boundaries of the reservation would face inward. The purpose of the reservation would be to confine the Indians, in order to increase the settlers' freedom of movement. On the other hand, if a reservation was to keep whites away from Indians, the boundaries of the reservation would face outward. The purpose of the reservation would be to confine the *settlers*, in order to increase the *Indians'* freedom of movement. A reservation could be a prison, if the lock was on the outside, or it could be a haven, if the lock was on the inside. Everything depended on what the reservation was supposed to accomplish.

Nations Die like Men

In principle, no reservations could be created without the Indians' consent. All through the nineteenth century, the U.S. Supreme Court continued to declare that Indians held their lands by right of occupancy, which the Court defined in 1835 as "a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation." The government of the United States, as the land's fee simple owner, had the exclusive right to purchase the Indians' right of occupancy whenever a tribe was willing to sell, but the government could not force a sale. In *Johnson v. M'Intosh*, the 1823 case in which the Court first discussed Indian property rights in their unsold land, John Marshall's opinion had left open the possibility that the government could extinguish the Indians' right of occupancy by fiat as well as by purchase, but the later cases emphatically rejected that notion. Rather, the Court insisted, "their right of occupancy is considered as sacred as the fee simple of the whites." When Congress in the 1860s granted to the state of Kansas for railroad purposes a tract that included some land the Osages still held by right of occupancy, the Court found the Osages' land implicitly exempted from the grant. "The perpetual right of occupancy, with the correlative obligation of the government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land," a majority of the justices held. "For all practical purposes, they owned it." Three dissenters would have found that Congress merely intended to grant fee simple title in the land subject to the Indians' ongoing right of occupancy, but even that, the majority argued, would "involve a gross breach of the public faith" owed by the government to the Osages. There was no room to doubt, as a legal matter, that the only way the government could acquire the Indians' land was to purchase it.[14]

Indeed, in a series of cases in the 1850s the Court made it clear that the Indians' right of occupancy entitled them to bring suit to eject, as trespassers, settlers who had purchased the government's fee simple title to land the Indians had not yet sold, but that settlers had no similar right to evict the Indians, even from land the Indians had already sold, a right the Court held was reserved to the federal government.[15] A person conversant with the Supreme Court's cases, but not with actual practice in the West, would have believed it impossible for an Indian reservation to exist unless a tribe wished to live there.

Land acquisition looked very different close up. In the Colorado Territory, for example, Colonel John Chivington was less impressed with the sanctity of the right of occupancy than the lawyers were. Some of the Cheyenne chiefs had agreed in 1861 to give up much of the tribe's land in return for a reservation on the Arkansas River in the southeastern part of the Territory, but others had not. By 1864, as white immigration into Colorado continued and tension between settlers and the remaining Cheyennes was running high, Chivington led a military expedition into a Cheyenne settlement near Sand Creek. What followed was best described, not by any advocate for the Indians, but by the Joint Committee of Congress formed to investigate.

> And then the scene of murder and barbarity began—men, women, and children were indiscriminately slaughtered. In a few minutes all the Indians were flying over the plain in terror and confusion. A few who endeavored to hide themselves under the bank of the creek were surrounded and shot down in cold blood, offering but feeble resistance. From the sucking

THE NEW INDIAN WAR.
NOW, NO SARCASTIC INNUENDOES, BUT LET US HAVE A SQUARE FIGHT.

Indian land policy has always been a subject of controversy among whites. In this 1878 *Harper's Weekly* cartoon, "The New Indian War" is fought between Carl Schurz, the secretary of the interior, and General Philip Sheridan, the leader of several campaigns against Indian tribes in the 1860s and 1870s, representing the War Department. "The Noble Red Man" in the middle holds, in his pockets, a peace pipe pointing at Schurz and a tomahawk pointing at Sheridan.

> babe to the old warrior, all who were overtaken were deliberately murdered. Not content with killing women and children, who were incapable of offering any resistance, the soldiers engaged in acts of barbarity of the most revolting character; such, it is to be hoped, as never before disgraced the acts of men claiming to be civilized. No attempt was made by the officers to restrain the savage cruelty of the men under their command, but they stood by and witnessed those acts without one word of reproof, if they did not incite their commission. For more than two hours the work of murder and barbarity was continued, until more than one hundred dead bodies, three-fourths of them women and children, lay on the plain as evidences of the fiendish malignity and cruelty of the officers who had so sedulously and carefully plotted the massacre, and of the soldiers who had so faithfully acted out the spirit of their orders.[16]

The survivors moved to the reservation. This was not the process envisioned by the Supreme Court.

Over the next two decades there were several other episodes in which the Army forced Indians onto reservations at the point of a gun. The same year as the Sand Creek Massacre, the Army marched the Navajos into a new reservation against their will. The Crows underwent a similar compelled resettlement in the early 1880s, after the local Indian agent Henry Armstrong decided that "the time has come when the Indians ought to be *governed* and there is no way to govern them but by force."[17]

Perhaps the best remembered of the forced relocations was that of the Sioux, after gold was discovered in the Black Hills in 1874. The Black Hills were within the Sioux Reservation, the boundaries of which had been defined only six years earlier. By the winter of 1875–76, however, gold had lured fifteen thousand white trespassers into the reservation. When the Sioux refused to sell the Black Hills, the Army attacked. The United States and the Sioux fought a series of skirmishes through the spring and summer of 1876, during the most famous of which, at Little Big Horn, George Custer and all the men under his command were killed. Congress responded by cutting off food to the Sioux until they agreed to cede the Black Hills. Facing the prospect of starvation, the Sioux finally gave in.[18]

Even in the absence of overt force, the treaties creating reservations often suffered from the same problems that had infected Indian treaties for centuries. Sometimes promised compensation was never paid. Sometimes the signatures of chiefs were obtained by bribery. There had always been some distance between the formal law and actual practice; in the mid-nineteenth century, that gap grew very wide.

Actual practice diverged from the formal law most sharply in California, where the white population increased so quickly in the 1850s and 1860s that the pace of formal land acquisition could not keep up. The government could not even adhere to the pretense of obtaining land and creating reservations by treaty. Robert Stevens, sent by the federal government to California to report on Indian affairs, found several Indian

reservations, all of which had been created when whites had seized Indians' land by sheer force. "As is well known," he explained, "there have been no formal ratified treaties with the Indians, or extinguishment of title in this State, any more than by the inherent extinguishment conferred by the natural rights of man, evolved in the necessities of the continually incoming emigrants, who wish to occupy and develop the soil." Stevens himself thought the absence of any treaties a good thing. "The men of the past must give way to the men of the present," he concluded. "After all, nations die like men."[19] But this was not the way reservations were supposed to be created as a legal matter. In principle, the Indians of California had the same right of occupancy as Indians anywhere else. The government was supposed to be purchasing it.

The reservations had been set up to serve inconsistent purposes, and by the 1870s it was obvious that the goal of confining the Indians was winning out over the goal of protecting them. In some cases the government compelled tribes to cede land and accept reservations; in others, the government forced dissident members of tribes onto reservations they did not wish to inhabit. These actions were sometimes justified on paternalistic grounds, as being for the Indians' own benefit. William Welsh considered himself a pro-Indian activist, for instance, and he was quite concerned that individual Sioux were leaving their reservation without first obtaining the permission of the government's Indian agent.[20] But it would take an extreme form of paternalism to excuse all the slaughter that accompanied the forced relocations of the 1860s and 1870s. In many of the new reservations, the lock was all too clearly on the outside.

The nature of the reservations was displayed most starkly whenever the Army tracked down Indians who had escaped from reservations, a task soldiers were repeatedly asked to perform. The Comanches, for example, regularly slipped away from their reservation, and were just as regularly chased by troops and brought back.[21] The notion of *escaping* from a reservation—even the idea that Indians would need permission to leave—would have been inconceivable to the early humanitarian proponents of reservations, who could not have imagined that the reservation would be used to incarcerate the Indians.

Three celebrated escapes in the late 1870s focused public attention on the issue. In 1877 a Nez Percé band led by Chief Joseph was herded back onto the Nez Percé Reservation in Idaho after attempting to flee to Canada. The Northern Cheyennes had been forced onto a reservation in present-day Oklahoma, but in 1878 a group of three hundred Northern Cheyennes escaped and fled to the north, back toward their home. The Army caught up with some of the Cheyennes in Nebraska. Others made it as far as Montana before they were captured, six months after the escape. Those who were not killed were forced to return to the reservation. Even more spectacular was the escape of the Poncas, a small tribe who had likewise been moved to a reservation in Oklahoma. In 1879 the chief Standing Bear led many of the Poncas north. Again, the Army pursued them, and captured them in Nebraska. With the help of white sympathizers (including General George Crook, their captor, who was carrying out an order he personally found unjust), the Poncas brought suit in federal court. They persuaded the court to grant a writ of habeas corpus ordering their release. "I have searched in vain," Judge Elmer Dundy concluded, "for the semblance of any authority justifying" the government "in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place." The government had the power, and indeed the obligation, to keep trespassers *out* of a reservation, Judge Dundy held, but no power to keep Indians in. By then the Poncas' story was headline news. Their cause was taken up by white reformers, all the while confirming the growing impression that Indian reservations were doing more to wall Indians in than to keep settlers out.[22]

These repeated escapes testified to the hardships of life on many of the reservations. Some reservations housed multiple tribes with little in common—even tribes with a long history of animosity toward each other—because the government was not particularly careful about which tribes would be placed with which. Peter Pitchlynn, a Choctaw emissary to Congress, pointed out the difficulties involved in consolidating several tribes in a single place. Each tribe was accustomed to its own sovereignty, Pitchlynn explained. "They have been separate and independent of each other from time immemorial, and are exceedingly sensitive in relation to any matters that may affect this independence." But that was only the start of it. Some tribes were agriculturalists, while others were hunters. "Their languages are wholly different; most of the tribes do not understand each other. . . . Their laws and customs are wholly different."[23]

Tribes accustomed to hunting found it difficult to continue when confined to a reservation. Agricultural tribes had trouble growing traditional crops in a new location. "The bringing of us here has caused a great de-

crease of our numbers, many of us have died, also a great number of our animals," reported the Navajo Barboncito, after the tribe was relocated to the Bosque Redondo Reservation. "Our grandfathers had no idea of living in any other country except our own and I do not think it right for us to do so." The problem was "this ground we were brought on, it is not productive. We plant but it does not yield. All the stock we brought here have nearly all died." The Navajos had given up planting crops. When they ran out of food they ate their animals. After a few years at Bosque Redondo, the Navajos were destitute. The land was more fertile on the Wichita Reservation, so the Caddos and Wichitas were more successful at growing crops and raising livestock, but they too found it impossible to produce enough to feed themselves, so, like many tribes, they were dependent on meager government rations for survival, and their population steadily declined. Life on the reservation, many found, was considerably worse than life had been before.[24]

Making matters worse, the reservation had promised to shelter the Indians from encroaching whites, but the federal government proved no better at keeping white trespassers off the Indians' land than it had ever been. A formal declaration that a given tract of land was an Indian reservation could not change the reality on the ground: the trespassers were scattered over an enormous area, they greatly outnumbered the relatively small number of soldiers who had the responsibility of removing them, and in any event those soldiers were, most of the time, more interested in protecting the settlers than the Indians. Some of the federal government's Indian agents genuinely wanted to evict trespassers, but they knew they lacked the power. "The Indian Country is being filled up with squatters," agent B. F. Robinson complained in 1854; "I am at a loss to know how to proceed." As the white population of the West grew, varieties of encroachment multiplied. In the Southwest, for example, white farmers diverted scarce water from Indian farms. White miners took minerals from beneath Indian lands. A reservation was a line on paper. It was no barrier to the appropriation of the Indians' resources.[25]

And sometimes settlers took more than land or water. "Neither our territorial nor military authorities ever punish white men, according to law, for robbing, and especially murdering Indians," charged a broadside published by the New York–based American Indian Aid Association. "The Indian race is not being diminished in consequence of any decree of manifest destiny, as has been most fallaciously asserted by border settlers and other interested persons; but by very different instrumentalities, such as the rum, the rifle, the revolver, and contaminations of their white aggressors."[26] As always, however, the matter looked different from the point of view of the settlers, who tended to think of themselves as peaceful pioneers surrounded by savages. A satirical poem in the New York humor magazine *Punchinello*, titled "The Indian Question (As Viewed in the West)," summarized the settler perspective:

> This is *our* business, understand!
> You Eastern folks, with tempers bland
> All get your views at second-hand.
> *We* are the ones that take the brunt
> Of every lively Indian-hunt,
> So don't be angry if we're blunt.
> If any body's scalped it's *us!*
> So we've a well-earned right to cuss,
> And you've *no* right to make a fuss.
> Talk as you please about their "rights;"
> That don't include their coming nights,
> And cutting out our lungs and lights.[27]

There was nothing new about this sentiment, but that is the point—the existence of reservations could hardly alter the incompatible incentives and perspectives that had always characterized the frontier.

There were many whites who sympathized with the Indians, as in all prior periods, and by the 1870s and 1880s they were firing a steady barrage of criticism at the government for forcing the Indians to cede their land and live on reservations. "It is scarcely necessary to say, what is universally conceded," argued the poet and journalist John Greenleaf Whittier, "that the wars waged by the Indians against the whites, have, in nearly every instance, been provoked by violations of solemn treaties, and systematic disregard of their rights of person, property and life." "We ought to have learned something from past experience in regard to the removal of Indians from their homes to satisfy the convenience or greed of the white man," declared Charles C. Painter on behalf of the Indian Rights Association, the most important of the reform organizations. "The Nez Perce war of 1877 was caused by an attempt to force Joseph's band of Lower Nez Perces to abandon their own home," Painter recalled. "All our troubles with the Chiracahua Apaches since 1876 have come from our attempts to remove them from their native mountains. . . . The war with the northern Cheyennes came from an attempt

to make them stay in the Indian Territory." And of course "the shame and disgrace of the Ponca removal is yet fresh in mind." The *New York Times* likewise recalled "the miseries and the wars that are due to coaxing or coercing Indians from their ancestral homes." "Our Indian policy," the *Times* concluded, "is usually spoliation behind a mask of benevolence." The most famous of the reformers was Helen Hunt Jackson, who filled her 1881 classic, *A Century of Dishonor*, with story after story of tribes forced to give up their land. A few decades earlier, reformers like these had been among the most enthusiastic proponents of the reservation. They had not expected reservations to be created and maintained by violence.[28]

The law governing the acquisition of land from the Indians had always been at odds with the actual practice of obtaining land, going back to the early colonial period, but the divergence between the two reached its widest point in the second half of the nineteenth century. The size of the gap between theory and practice had always been a function of the relative power of settlers and Indians. By the late nineteenth century, the settlers were more powerful relative to the Indians, in terms of numbers and technology, than they had ever been. The white population of the United States was increasing very fast. Many were heading to the West. The government was democratically accountable to the settlers but not to the Indians, who could not vote and who would have been greatly outnumbered even if they could.

The interesting question, then, is not why there developed such a large gap between the law on paper and the law in practice, but rather why the law on paper did not change. As a matter of Supreme Court doctrine, the Indians continued to enjoy the right to live on their own land as long as they wanted to. They had the power, in theory, to refuse to convey their land to the government, to refuse to move to a reservation, and to leave a reservation so long as they were not trespassing on someone else's land. As accounts of forced relocations and foiled escapes filled the newspapers, and as Congress held hearings into atrocities committed by United States soldiers in the course of herding the Indians into reservations, Supreme Court justices could hardly have avoided learning the reality of life in the West. Yet the Court continued to adhere to the fiction that Indian land transactions were void unless voluntarily entered into by the Indians.

The Supreme Court did little, to be sure, to stop the government from exploiting its superior power over the Indians. Instead, in a series of cases beginning in 1870, the Court consistently held that Congress has the power to enact statutes that abrogate Indian treaties. In the first of these cases the Court upheld the validity of a federal tax on tobacco produced on the Cherokee reservation, despite the existence of a treaty granting the Cherokees immunity from such taxes. Later cases applied the same principle to permit Congress to take land away from reservations and grant it to non-Indians. In the most notorious of these cases, *Lone Wolf v. Hitchcock*, the Court refused to consider the complaint of the Kiowas that Congress had deprived the tribe of land in a manner clearly inconsistent with the 1867 Treaty of Medicine Lodge. "It was never doubted that the *power* to abrogate existed in Congress," Justice Edward White's opinion reaffirmed, and "as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." The Court's passivity ensured that the Indians' property rights were far stronger in principle than in practice.[29]

It is conventional today to criticize the Court for cases like *Lone Wolf*, and to suggest that the justices of the era were accomplices to the forced dispossession of the Indians. One historian, for example, calls *Lone Wolf* "the culmination of the late-nineteenth-century attack by the federal legislature and judiciary on Native American political and legal rights." While the justices were no doubt men of their era, with attitudes toward Indians that would be out of step with prevailing beliefs a century later, such criticism is overdrawn. The idea that Congress could abrogate Indian treaties was not devised as a method of harming the Indians. It followed from the well-established doctrine that Congress had the power to abrogate treaties with foreign countries. Such a power was necessary, American lawyers realized, because otherwise Congress would be unable to declare war (which is often inconsistent with existing treaties) or to respond in other ways to changing aspects of the international climate. By the late nineteenth century, lawyers were accustomed to thinking of international treaties as capable of being repealed, like any other laws, by a subsequent act of Congress. The justices instinctively placed Indian treaties in the same category.[30]

The analogy was not perfect: Indian tribes were far more dependent on the federal government's promises than was any foreign country, and so they were far more vulnerable when Congress abrogated a treaty. One might have argued, in cases like *Lone Wolf*, that the consequences of a broken treaty were more dire to Indian tribes than to foreign countries,

and that Congress should accordingly be held to its promises.[31] But if Indian treaties differed in some respects from treaties with foreign countries, they were also similar in many ways. Federal officials perceived the same need for flexibility with respect to Indian tribes (to fight wars, for example, when relations soured) as with respect to foreign countries. Perhaps most important to a legally trained mind, Indian treaties, like foreign treaties, were, in a formal sense, agreements between sovereigns. Although Indian tribes had largely lost the power associated with real sovereignty, in the law they were still sovereign entities. To a late nineteenth-century lawyer, it would have seemed anomalous to grant Congress any less power to break an Indian treaty than it already had to break a foreign treaty. The line of cases exemplified by *Lone Wolf* was driven as much by a lawyerly desire for consistency as by any racism or land hunger on the part of the Supreme Court.

Meanwhile, the *Lone Wolf* line of cases existed alongside another line that was more favorable to the Indians. Even as events in the West were at their blackest, the Court continued all the while to insist that Indians possessed an inviolable right of occupancy in their unceded land.[32] One could, perhaps, understand such statements in a Machiavellian way, as deliberately ineffectual blather intended to cover up the actual conquest going on in the West. But it is hard to see why justices bent on conquest would have perceived a need to cover it up. The Court's consistent reiterations of the right of occupancy are more convincingly interpreted at face value, as genuine reports of what the justices perceived the law to be. In part this was a product of the inherent conservatism of the law, the standard reluctance to depart from precedent unless the circumstances absolutely require it. The Court's reaffirmation of the right of occupancy must also have been in part attributable to the ambivalent nature of the eastern intellectual climate. The justices would have read newspaper accounts of actual events in the West, but they would also have been familiar with eastern humanitarian opinion. They knew of the Sand Creek Massacre, but they also knew the shock that it provoked among eastern intellectuals. As in any period, it would be a mistake to treat white policymakers as monolithic in their attitudes toward the Indians.

In the second half of the nineteenth century, then, the Supreme Court was playing a standard role in an old drama. It was the conscience at the center of government, too far from the frontier to have much real influence, issuing rules for the humane treatment of the Indians that would largely be ignored in the field. This was the role played by the imperial government in London before 1776, and by certain executive branch officials of the federal government in the early republic. In the middle and late nineteenth century, while the Army was slaughtering Indians and herding them into reservations, the Supreme Court was keeping alive an old legal tradition of recognizing the Indians' property rights. That would prove crucial in the twentieth century, when better times came for the Indians and some tribes were able to use that legal tradition to their advantage.

From Treaties to . . . What?

It was increasingly apparent by the middle of the nineteenth century that many of the treaties in which tribes ostensibly consented to live on reservations were not treaties in the full sense of the word, but documents papering over the exercise of force. This growing realization led, in 1871, to a change in the legal form by which Indian land was acquired.[33]

Indian treaties had been the subject of steady criticism since the early 1800s, on the ground that it was anomalous to enter into treaties with inhabitants of one's own country. The point had long been made by people like Andrew Jackson and John Calhoun, who argued that Indians should instead be regulated directly by the government, just like white Americans were. That sort of criticism had never died out. Commissioner of Indian Affairs William Dole, for example, took up the argument in his annual report for 1862. "It may well be questioned whether the government has not adopted a mistaken policy in regarding the Indian tribes as quasi-independent nations, and making treaties with them for the purchase of the lands they claim to own," Dole suggested. "They have none of the elements of nationality; they are within the limits of the recognized authority of the United States and must be subject to its control." The Seneca Ely Parker, the first Indian to be appointed Commissioner of Indian Affairs, made the same point in his annual report for 1869. "A treaty involves the idea of a compact between two or more sovereign powers, each possessing sufficient authority and force to compel a compliance with the obligations incurred," reasoned Parker, but Indian tribes lacked the strength to compel their own members to comply with treaties. "It is time that this idea should be dispelled, and the government cease the cruel farce of thus dealing with its helpless

and ignorant wards." On this view, Indian treaties were a vestige of a time when tribes were much like foreign states—when they controlled a territory separate from the area inhabited by settlers, and when regulating their members directly would have been militarily impossible. Those days, the critics suggested, were long gone. "There is not a civilized nation on the face of the globe that undertakes to make treaties with roving bands of savages," declared William Lawrence of Ohio on the floor of the House of Representatives. The Indians, he concluded, "are dependent tribes, within our jurisdiction and subject to our laws."[34]

As Lawrence's remark suggested, many also found Indian treaties anomalous for a second reason: the Indians were simply too primitive to treat with. After eighteen months among the Sioux, the Indian agent D. C. Poole concluded that the Indian "has a childlike interest in the present and small care for the future." George Custer, who pointedly gave his autobiography the subtitle *Personal Experiences with Indians*, mocked the romantic image of the Indian as portrayed by armchair writers like James Fenimore Cooper. Out on the plains, Custer insisted, "we see him as he is, and, so far as all knowledge goes, as he ever has been, a *savage* in every sense of the word; . . . one whose cruel and ferocious nature far exceeds that of any wild beast of the desert." On this view, negotiating treaties with Indians made no more sense than negotiating treaties with animals. If the Indians were savages, *Harper's Weekly* noted, "let us act accordingly. There is no prohibition upon hunting the buffalo. Every hunter rides and shoots at his own risk. We propose no buffalo treaties; we have no buffalo reservations." Why treat the Indians differently? *Harper's* was joking, but Custer was not, and he was hardly alone in his view.[35]

Observations like these were attributable in part to a hardening belief that Indians were biologically inferior to whites. Although it is impossible to measure changing attitudes with any certainty, it seems likely that the prevailing view a century earlier was that whites were merely farther along the path to civilization than Indians, and that with time and appropriate instruction the Indians might close the gap. By the second half of the nineteenth century, however, a growing interest in evolution and heredity, and a growing acceptance of biological explanations for racial differences, caused many whites to believe that differences between themselves and the Indians were permanent parts of the natural order. Indian treaties were once understood as devices for civilizing the Indians, but now many saw no point in even trying.

This sort of criticism of treaties can also be traced to the changing characteristics of the Indian tribes that settlers encountered. It was one thing to enter into a treaty with a large group like the Cherokees. It was quite another to sign a treaty with some of the tiny tribes of the West. "One of these treaties which has been made in Oregon was with the Umpquas," remarked an amused Aaron Augustus Sargent of California. "There are thirty-eight individuals, men, women, and children, all told, as shown by the census of the 'great nation' of Umpquas! Another of the treaties has been made with the Calapooias, binding us to pay, year after year, several thousand dollars to them. They number two hundred and eighty-two souls, men, women, and children. Another of these great nations, with which the treaty-making power has made treaties, are the Rogue River Indians, and we are bound to pay them thousands of dollars. They number altogether two hundred and thirty-six individuals. A great nation with whom treaties should be made!" Tribes like these were "simply the wards of the Government, to whom we furnish means of existence, and not independent nations with whom we are to treat as our equals," Sargent declared. "Ought not that fact to be admitted? Has not the comedy of 'treaties,' 'potentates,' 'nations,' been played long enough?"[36]

Indian treaties also affected the balance of power within the federal government in ways that created recurring conflict. The Constitution confers upon the Senate alone the power to ratify treaties, but requires the concurrence of the Senate and the House of Representatives for ordinary legislation. When Indian treaties committed the federal government to pay tribes in exchange for land cessions, as they often did, the House found itself forced to agree to appropriate money for purposes it had no voice in choosing. Worse, Indian treaties often reserved for Indians the very same land that congressional representatives wanted to grant to settlers, at a time when representatives were the only directly elected members of Congress and many represented districts in which reserving public land for the Indians could be a serious political liability. There were always members of the House who resented the institution of the Indian treaty.

Despite decades of criticism along these lines, the federal government had continued to enter into treaties with Indian tribes. There were always white humanitarian voices to speak up for treaties, because any other method of acquiring the Indians' land promised to leave the Indians even worse off. But the growing realization in the mid-nineteenth

By the late nineteenth century, land was acquired from the Indians by force, despite the retention of a contractual legal form, and even the more consensual land purchases of the early colonial period had come to be viewed with considerable cynicism. In this 1899 *Life* cartoon, "The Circumvention of the Native by William Penn," Penn trades trinkets for land, while at the lower left an Indian digs what is presumably his own grave.

century that many of the new treaties were shams had the effect of muting this kind of support. The Board of Indian Commissioners, a group of wealthy religious philanthropists appointed in 1869 by President Grant to oversee much of the government's relations with the tribes, concluded in its first annual report that the treaty system should be abandoned and "uncivilized Indians" treated as wards of the government. The Episcopal bishop Henry Whipple, perhaps the best-known white advocate for the Indians in the 1860s, thought the way treaties were negotiated was "one of those blunders which is worse than a crime. We recognize a wandering tribe as an independent and sovereign nation," Whipple argued:

> We send ambassadors to make a treaty as with our equals, knowing that every provision of that treaty will be our own, that those with whom we make it cannot compel us to observe it, that they are to live within our territory, yet not subject to our laws, that they have no government of their own, and are to receive none from us; in a word, we treat as an independent nation a people whom we will not permit to exercise one single element of that sovereign power which is necessary to a nation's existence.
>
> The treaty is usually conceived and executed in fraud. The ostensible parties to the treaty are the government of the United States and the Indians; the real parties are the Indian agents, traders, and politicians. The avowed purpose of the treaty is for a Christian nation to acquire certain lands at a fair price, and make provision that the purchase-money shall be wisely expended, so as to secure the civilization of the Indians. The real design is to pay certain worthless debts of the Indian traders, to satisfy such claims, good or bad, against the Indians, as have been or may be made, and to create places where political favorites may receive their reward for political service.

The Reverend T. S. Williamson agreed that "after treaties are solemnly made, we fulfil, modify or abrogate them as suits our own convenience." Men like Whipple and Williamson were the traditional white constituency for the Indian treaty. When even they started doubting the utility of treaties, the institution could not last very long.[37]

All that was wanting was a reason for members of Congress to focus their attention on the issue. That reason came in 1869, after a flurry of treaties caused the Senate to add several million dollars to the annual Indian appropriations bill, to pay for annuities and other goods promised to various tribes. These additional appropriations aroused so much opposition in the House that in the next session of Congress the House passed a bill prohibiting further Indian treaties. There was enough sentiment along those lines in the Senate for the Senate to agree. The statute eventually enacted in 1871 provided "that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Some members of Congress even wanted to abrogate all the old treaties, but Congress did not go that far. The statute made clear that "nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[38] The old treaties would remain in force. After 1871, however, there would be no new Indian treaties.

But what would take their place? For two and half centuries, Indian land had been acquired in transactions structured as voluntary agreements between the buyers and the sellers—as treaties between sovereigns ever since the Proclamation of 1763, and as a mixture of treaties and private contracts before that. Now that treaties were illegal, how would land be acquired? Francis Walker, the commissioner of Indian affairs, recognized the problem in his annual report for 1872. For as long as the United States had existed, he explained, the nation "pursued a uniform course of extinguishing the Indian title only with the consent of those Indian tribes which were recognized as having a claim by reason of occupancy." Walker acknowledged that "wrong was often done in fact to tribes in the negotiation of treaties of cession. The Indians were not infrequently overborne or deceived by agents of the Government in these transactions." But "formally at least," Indian land had always been acquired in treaties.[39] What now?

The answer emerged very soon. For all the hyperbole in Congress and elsewhere about the incongruity of negotiating agreements with Indian tribes, there was really no other way to go about acquiring the Indians' land. The normative appeal of formally voluntary transactions was too great for them to be abandoned in an instant. Few in the federal government had the stomach to switch to an explicit policy of conquest. Instead, the government quickly adopted a set of techniques that have aptly been called "treaty substitutes."[40] These were methods of acquiring land and establishing reservations that were functionally identical to treaties but were not treaties in the technical legal sense. They were available because the 1871 statute had not prohibited all agreements with Indian tribes. It had only prohibited agreements called "treaties."

One obvious treaty substitute was to have *both* houses of Congress, rather than just the Senate, approve agreements with Indian tribes. Another substitute was for Congress to pass statutes acquiring a tribe's land provided the tribe consented. The land cessions of the 1870s and 1880s were accomplished by these techniques. From the Indians' perspective, they looked exactly like treaties. The only difference between treaties and treaty substitutes concerned the allocation of authority within the federal government. A third treaty substitute was the executive order, which had been used before 1871, alongside the treaty, to set aside public land for Indian reservations. After 1871, presidents simply used the executive order more frequently.

In the end, then, the abolition of the Indian treaty in 1871 was a change in the legal form, but not the substance, of land transactions. It did not affect the pace of land acquisition in the West or the frequency with which the government created reservations. Far more important than the demise of the treaty would be another phenomenon that was taking place at the same time—the growing dissatisfaction with the institution of the Indian reservation.

From Reservations to . . . What?

The concept of the reservation was coming under attack by the 1870s, as it became more and more evident that reservations were not advancing either of the goals that had motivated their creation. Whether one was interested primarily in helping whites settle without the hindrance of nearby Indians, or in helping Indians flourish without the hindrance of nearby whites, the reservation increasingly looked like a failure.

Reservations tended to be created in any given area soon after the area experienced its first significant white settlement, when it was hard to imagine that the land left for the settlers would ever be perceived as inadequate. But the West consistently filled up with settlers faster than expected. The population density of Colorado multiplied fivefold between 1870 and 1880. That of Montana tripled between 1870 and 1880 and tripled again the following decade. As more whites headed west, reservations created years before came to seem unfairly large to settlers who wanted land the Indians appeared to be wasting. In the Indian Territory, for example, tribes removed from the Southeast in the first half of the century held reservations encompassing nearly twenty million acres, one advocate for the settlers complained, while homesteads for settlers were growing scarce. Was it fair, settlers wondered, that a small number of Indians could monopolize so much land, when so many white farmers could put it to better use? "As well keep London in limits, to save orchards adjoining," suggested the Indian-fighting General Henry B. Carrington, "as to hold millions of acres intact for the *red man's hunt*. The tidal wave must sweep on."[41]

To be sure, there were always earnest expressions to the contrary. "These Indian reservations are not, as has been represented by those who covet them, to an unreasonable extent lying unused by the Indians," insisted the Board of Indian Commissioners. "Their owners are not a horde of savage nomads standing in the way of civilization, as they would have us believe."[42] But this sort of dissatisfaction with the reser-

vations would be a constant refrain, one that could only grow louder as the white population of the West grew.

Also growing in volume over the second half of the century was the observation that Indians seemed to be using the land on reservations less productively than whites used their land. Critics suggested two different reasons why this was so, but both pointed to the institution of the reservation as the root cause.

One perceived problem was that even though the government was often careful in drawing the *external* boundaries of reservations, it normally said nothing about property rights *within* the reservation.[43] The land within a reservation was simply granted to the tribe as a whole. The absence of government-defined individual property rights, reformers argued, prevented hardworking Indians from enjoying the fruits of their labor, and so discouraged labor in the first place. "I have seen instances of it," explained J. B. Harrison in his treatise on Indian reservations, "when educated young Indians had married, built themselves a house, and laid in a stock of provisions for the winter, flour, meat, vegetables, fruit, sugar, coffee, tea, salt, soap, etc. While the young man is away at work, the old chiefs of the tribe, and their retainers, will come to the house and eat up, and carry away, every vestige of food, and every article of clothing and furniture, leaving the house bare and the young people destitute." The solution was to break up the reservation and vest ownership of land in individuals rather than in tribes as a whole.[44]

The inefficiencies of collective ownership are as familiar today as they were in the nineteenth century, but nevertheless it seems quite unlikely that the lack of government-defined individual property rights inhibited the productivity of reservations. Tribes accustomed to farming already had property systems of their own that allocated exclusive rights to individuals, and those systems still existed on the reservations. Among such tribes, hardworking farmers *did* enjoy the fruits of their labor. Tribes who were traditionally hunter-gatherers, on the other hand, lacked similarly well-established methods of dividing property among individuals. Like hunter-gatherers around the world, they tended to be governed by long-standing norms of sharing, according to which a person who killed an animal was obliged to share the catch with others.[45] These norms would not have transferred well to agriculture, of course, but there is no evidence that any tribe tried to transfer them. The troubles that the nonfarming tribes had in converting to agriculture seem to have been caused by the inherent difficulty of learning a new way of life, rather than by the retention of a vestigially communal system of property rights. The complaint that the absence of individual property rights slowed development on Indian reservations was common among reformers in the late nineteenth century, but it does not seem to have been accurate.

Perhaps the reason most commonly voiced for why the reservations were unproductive, however, was that the federal government was constantly redrawing their boundaries under the pressure of white settlement. "The practice of removing tribes has of course retarded their improvement," one critic noted as early as 1860. "Could it be expected that Indians would take much interest in cultivating land which they were destined to abandon to others?" Agriculture required investment for the future, but without assurance of being able to reap what one had sown, little sowing would get done. The Board of Indian Commissioners reported in 1871 that "the frequent removal of Indians has led to a general distrust of the designs of the Government with regard to them, and the fear of such removal has deprived them of all incentive to improve their lands." By the 1880s the point had been made again and again: land tenure on reservations was too insecure to encourage investment.[46]

The problem, strictly speaking, was not the reservation itself but the government's habit of moving reservations around. But the two issues were inextricably linked, because it was generally understood that the government would be far less likely to move Indians if the Indians owned their land by the same tenure as whites—as individuals rather than as tribes.[47] Under the Constitution, the government could not uproot a white landowner without paying for the market value of the land. If the same law applied to the Indians, they might be as secure as whites.

By the late nineteenth century, moreover, there was considerable sentiment that the reservations had become pockets of poverty and backwardness—the very opposite of what many reformers had hoped they would be a few decades earlier. "The reservation system runs a fence about a great territory and says to civilization, 'Keep off!'" insisted the Congregationalist minister Lyman Abbott, one of the best-known Indian reformers of the 1880s. "It holds back civilization and isolates the Indian, and denies him any right which justice demands for him." Reservations, another critic charged, had turned the Indians into a "race of involuntary prisoners and paupers." That the Indians were still savages was no fault of their own; rather, they were victims of a misguided pol-

icy. As one correspondent suggested in 1885, the same would have hap
pened to anyone: "Place a few hundred white families of a low grade o
intelligence upon an area as large as the State of New Jersey, keep ev
erybody else off the territory, let these people know that the Govern
ment will provide them with blankets and with flour, beef, and sugar, i
they are in want, and they or their descendants would become about a
lazy and barbarous as the Indians in a short time."[48]

The reservation still had its defenders, who argued that the prob
lem was not with the institution but with the way in which it was im
plemented in practice. The idea of separating Indians and whites wa
sound, they argued. If only the government could do something to stop
settlers from trespassing, or if only the government could guarantee, in
practice, that reservations would not be moved in the future, the institu
tion might still serve its intended purposes. Among whites seeking to
promote the welfare of Indians, however, and among the Indians them
selves, there was little confidence that the government would ever be
able or even willing to act so benevolently. Maybe, they began to think,
the answer lay in assimilation rather than segregation. "Cease to treat
the Indian as a red man and treat him as a man," Abbott insisted. "Treat
him as we have treated the Poles, Hungarians, Italians, Scandinavians.
Many of them are no better able to take care of themselves than the In
dians; but we have thrown on them the responsibility of their own cus
tody, and they have learned to live by living." Maybe the best way to
protect the Indians was not to wall them off but to insist that they be
treated like whites.[49]

By the 1880s, however, the West was dotted with all the reservations
that had been created in the previous few decades. Property rights in
these reservations had been guaranteed to Indian tribes by the federal
government in treaty after treaty (before 1871) and then in treaty substi
tutes (after 1871). It was easy enough to say that the reservation was a
failure. But what would take its place? This would be the central ques
tion of federal Indian policy for the next fifty years.

8

Allotment

Each of the major programs that characterized nineteenth-century In
dian land policy was supported by a coalition of the Indians' friends and
foes, and each proved disastrous for the Indians. Removal, in the early
part of the century, and reservations, in the middle, each had the sup
port of two kinds of people—whites trying to protect the Indians by
placing them apart, and whites trying to obtain their land. In each case,
it was clear within a decade or two that only the latter group achieved its
goal. This process took place yet again at the end of the century, when
white humanitarians turned to what they hoped would be a different
method of helping the Indians. In a variety of areas, from education to
political participation, Indian policy turned from segregation to assimila
tion.[1] As applied to land, the ideal of assimilation took the form of the
General Allotment Act, or Dawes Act, of 1887, which envisioned carving
up the Indian reservations into fee simple plots owned by individuals
and families, in the same way whites owned their land. The Dawes Act,
as amended every few years, remained in effect until 1934.

From the Indians' perspective the result was, once again, disaster.
Many supporters of allotment were trying to protect the Indians from
losing more of their land, but allotment also had the support of many
who wanted to accelerate land loss, and once again it was the latter goal
that was achieved. Between 1887 and 1934 the Indians lost most of their
remaining land—86 million acres out of the 138 million in their posses
sion in 1887. One of the goals of allotment was to encourage Indian
farming, but during the period of allotment the extent of Indian farming
declined, both absolutely and relative to whites.[2] Making matters worse,