

caste system just to reinvent it in a new country while boasting of liberty and ignoring their cruel hypocrisy, which denied others who craved freedom.

As early as 1610, unfair laws were passed prohibiting the sale of weapons to Indigenous people. But they gained rifles and defended themselves. Wagon trains of armed settlers were allowed to expand westward over the Appalachian Mountains into the Ohio Valley and beyond the Missouri River and were protected by federally funded squadrons, hired hands, and civilian militias allowed to kill Native Americans under criminal codes created for White self-defense. During an era of expansion that extended to California, settlers constructed homesteads that became towns and built roads through reserved Indigenous lands.

#### FROM COLONIAL SETTLERS TO HOMESTEADERS

Westward expansion onto Indigenous land was resisted using many tactics—including the law, even if it was often manipulated against the Indigenous. They challenged the government, and the president, in court, all the way to the US Supreme Court, to defend their treaty rights as land was taken with abandon and laws were passed to prevent them from reclaiming it.

The US Constitution has several direct and indirect references to Indigenous peoples, one of which is coincidentally placed within the same provisions determining that an African in America would be counted as three-fifths of a person. Article 1, Section 2, states in part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

In concept, Indigenous people living on their designated lands were not taxed because their land was considered a separate nation, a tribal nation, or sovereign territory within the United States.

Agreements between the US and Indigenous nations are binding treaties and under Article 6, the Constitution, federal law, and all treaties

with nations inside and outside its borders “shall be the supreme Law of the Land.” Also, under the Commerce Clause of Article 1, Section 8, Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Yet the federal government entered into hundreds of treaties with various Indigenous nations and consistently failed to honor their legally binding obligations.

The first treaty between the newly formed American government and Indigenous peoples was under the Articles of Confederation. It was signed on September 17, 1778, in hopes of maintaining an extended peace between the Delaware Tribe and the government, but it fell apart within weeks due to ongoing violence and a lack of communication.<sup>44</sup> The treaty was negotiated in good faith by attorneys Andrew and Thomas Lewis representing the United States of North America and John Kill Buck representing the Delaware Nation.<sup>45</sup> The highly ambitious document laid out how “a perpetual peace and friendship shall henceforth take place, and subsist between the contracting parties. . . . The Delaware Nation would give free passage through their country to the [United States] troops.”<sup>46</sup>

However, the forces of settler colonialism, the lack of local enforcement, and the breadth of territory undermined even the few sincere federal efforts to respect Indigenous land rights. Then, Shays’s Rebellion, a White, farmer-led uprising in Massachusetts, exposed further weaknesses in the Articles of Confederation, resulting in the historic 1787 Convention, in Philadelphia, to produce a constitution that established a strong central government; it was ratified in 1789. The first treaty with the Indigenous under the second government, the United States of America, was the Indian Trade and Intercourse Act of July 22, 1790, passed by Congress, to give the federal government control over commercial interactions, called intercourse, between non-Natives and the Indigenous people.<sup>47</sup> Unfortunately, the Intercourse laws, and there would be many—1793, 1796, 1799, 1802, and 1834—soon became known as the Indian Non-Intercourse Act. This collection of laws laid the foundation for unequal federal policies governing US-Indigenous affairs, trade, criminal justice, displacement, acquiring lands, and even “civilizing” Native peoples through assimilation to White Protestant culture.

The Seneca Chief, Cornplanter, brilliantly set out the history of concerns over land, violence, and broken promises on December 1,

1790, when the murder of two Seneca men received no justice from the federal government and settlers continued to build homes on Seneca land. Chief Cornplanter said:

We must know from you, whether you mean to leave us, and our children, any land to till. Speak plainly to us concerning this great business. All the Lands we have been speaking of belonged to the Six Nations: no part of it ever belonged to the King of England, and he could not give it to you. The Land we live on our Fathers received from God, and they transmitted it to us, for our Children and we cannot part with it. . . . Was it intended that your people should kill the Senecas, and not only remain unpunished by you: but be protected by you against the next of kin?<sup>48</sup>

One year after the constitutional creation of the new national government, and weeks after the Seneca letter, President George Washington gave a speech responding to the Seneca Nation on December 29, 1790, in Philadelphia. He sought their trust in a new federal system and the Intercourse Act to solve disputes, punish nonnative offenders before conflicts became bloody wars, and designate "Indian Country" as a safe haven.<sup>49</sup> Travel across Native land required a system of passports controlled by the federal government. But frustrated tribal leaders watched as land-grab settlements continued legally and illegally on designated Indigenous lands with few consequences for White interlopers. As the eighteenth century ended, what was clear from all of these laws and treaties was the tightening grip and endless greed—despite the flowery words in the Constitution—of a government hellbent on executing a multigenerational plan to take Indigenous land and remove Native peoples so that the US could realize the fullness of its supposed Manifest Destiny. In response to this war on the Indigenous was a century of resistance in defense of land and culture against settler colonialism that was upheld by federal laws, murder, rape, military violence, and a complicit federal court system.

#### TRAIL OF BETRAYALS

An estimated 1.5 billion acres of land was confiscated from the Indigenous through unfair treaties and executive orders between 1776 and 1887, when the Dawes Act was passed.<sup>50</sup> The infamous Trail of

Tears was decades in the making. Removal of Native people had taken place in fits and starts. Always, there was Indigenous resistance to divide-and-conquer tactics fomenting intra-tribal violence, a devastating strategy utilized on people of color and oppressed groups that must be countered successfully by unity. With the creation of a strong central government, the practice of government-planned removal began. Indigenous leadership did not anticipate that a government founded on a constitution, touted as a document of liberty, would be used as a tool for their removal and near annihilation.

In President Thomas Jefferson's First Annual Message, delivered in 1801, he spoke of selling public land to raise needed revenue: "The success which has attended the late sales of the public lands, shows that with attention they may be made an important source of receipt." Those Indigenous peoples who would be affected were to be assimilated into American culture, their land confiscated by treaty and redistributed to White American settlers expanding the country westward. Peace may have been well intentioned, but it was not long-lasting.

By 1802, the Indian Trade and Intercourse Act was regulating the interactions between Indigenous people and settlers. The ostensible plan was to preserve peace on the frontier, but it only further restricted Indigenous people's freedom to buy from, sell to, or trade with Whites living near them, including prohibiting the sale of liquor to Native people on or off their own tribal land.<sup>51</sup> Segregation and starvation must have been the motives behind such legislation, because as the settler population expanded, abusing natural resources, the Indigenous found hunting more difficult, which forced them to rely on "illegal" trade. Federal non-Intercourse laws criminalized trade between the Indigenous and White settlers, leading to starvation and crime. Chief Cornplanter's concerns were realized, leading to wars and litigation as promises made by George Washington fell away.

The US Bureau of Indian Affairs was created in 1823 to "oversee Treaty negotiations, manage Indians schools, and Indian trade." In *Johnson and Graham's Lessee v. William McIntosh*, an 1823 case, the US Supreme Court was presented with a private dispute involving Indian land.<sup>52</sup> The land was inherited from British relatives who bought it in 1775 from the Piankeshaw Indians. The opposing party, William McIntosh, contended he had bought the land directly from the US government. The court ruled in favor of McIntosh, explaining

that the Piankeshaw, and all Indigenous for that matter, never had a legal right to their land. It was a dubious logic at best, and self-serving for the US settler government at worst.

Chief Justice John Marshall wrote the opinion on behalf of the Court, which ruled that because the Piankeshaw never "owned" the land in the traditional European-based commercial sense, they could not sell it. Indigenous peoples did not own the land they had occupied for at least a millennium; there was no deed of sale given to them by a higher authority, no proof of sale. Therefore, it was not their land, which meant the Indigenous were prohibited from selling their land to private parties. They could only sell land to the federal government. The prevailing attitude toward Indigenous property rights would question if one owned land merely by having lived on it for hundreds of years. The court determined, "Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state."<sup>53</sup> The court is referring to the Indigenous as uncivilized and reducing land rights to mere occupancy rights, as if they were squatters. Since the Court had ruled the Indigenous did not "own" their land, the federal government and President Andrew Jackson were in position to move them from ancestral land to reserved land or reservations.

The court would only allow the Indigenous a restricted interest in their own land—and to be thus restricted by the federal government meant a loss of sovereign right to the land of their birth the moment the Europeans invaded and "discovered" that land. The court stated:

Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives. . . . Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state.<sup>54</sup>

The law was being used to incrementally dispossess the Indigenous using murder by a thousand cuts. In 1830, Georgia enacted laws that ignored Native land rights and gave parcels out to create and expand White settlements.

Thinking the US courts would abide by their own laws, Native Americans protested by suing to protect their land rights and refusing

to leave it, disputing the endorsed deeds.<sup>55</sup> The US Supreme Court decided *Cherokee Nation v. Georgia*, a case in 1831, and the next year, *Worcester v. Georgia*.<sup>56</sup> In both these decisions, the Court fell back, capitulating to political pressure by President Jackson and assuming a position that would be used in future slavery cases. In the Cherokee case, the Court said it lacked jurisdiction to determine claims concerning an Indian nation within the United States.<sup>57</sup> The Indigenous witnessed betrayal by the rule of law and oppression as the role of law.

The *Worcester* case involved a dispute over the Georgia legislature's decision to outlaw the presence of any non-Indians on Indigenous land without a license. When White missionaries refused to leave Indigenous land, they were arrested, convicted, and sentenced to four years of hard labor by Native courts. The Supreme Court ruled that Indigenous people had no right over their own land or the people on it. Neither Georgia nor the Indigenous people had the authority to control who could reside on their land; only the federal government had that authority. After this ruling, now that Indigenous people had no right over their land, President Jackson pushed for federal legislation to allow their removal. Jackson signed nearly seventy treaties removing fifty thousand Indigenous people from their land.<sup>58</sup>

#### FIGHTING A TRAIL OF TEARS

An arrogant hardliner, Andrew Jackson remains a hero to those who believe the Indian Wars and violent removal of Indigenous from their land was a necessary betrayal to build a White empire on foreign soil.<sup>59</sup> Jackson was a lawyer and rough-hewn plantation owner, a military man who rose up through the ranks, known for his vicious battle strategies in the Indian Wars.<sup>60</sup> As the seventh president of the United States, he inherited a fledgling nation still finding its footing as the Great Experiment. Jackson held more than one hundred and fifty enslaved human beings on his Tennessee plantation, though some records place the number near three hundred.

Jackson had survived the first attempted assassination of a president of the United States. It's been rumored that he raised three Indigenous children from the Creek Tribe and was said to have referred to them as his "pets." In the evolution of this nation, "Jackson was the Dark Knight in the formation of the United States as a colonialist, imperialist democracy."<sup>61</sup> He gained Indigenous land through politics,

military action, and law, as well as through bribes, violence, and other tactics. The majority of Cherokee refused to sign the removal treaties.

On May 28, 1830, Jackson signed the Indian Removal Act into law, authorizing him to grant lands west of the Mississippi in exchange for Indian lands within existing state borders. A few tribes volunteered to give up land, but most resisted.<sup>62</sup> During the fall and winter of 1838 and 1839, the Cherokees were forcibly moved west by the US government. Approximately four thousand Cherokees died on this forced and brutal march, which became known as the Trail of Tears. Some have argued that the act did not specifically give the federal government the right to take the land or remove Indigenous people. However, the act did allow the Jackson administration "to freely 'persuade, bribe, and threaten' tribal leaders to sign removal treaties."<sup>63</sup>

When Congress passed the Indian Removal Act, it gave President Jackson power to extricate the Indigenous people and populate their land with settlers, just as Powhatan had predicted would happen. Over two centuries, there were too many betrayed treaties, lost battles in court and on the battlefield, and internal skirmishes, while the population of lawless interlopers grew across the Great Plains. European immigrants arrived eager for their free land and share in the mythologized American Dream. The Removal Act states:

That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such Tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there.<sup>64</sup>

This allusion to an "exchange" of lands was a malevolent lie that falsely suggested the Indigenous had a choice in the matter. By May 1838, the removal of Indigenous people had begun, as reservations in Georgia, Arkansas, and the Carolinas were emptied of Indigenous residents. It was Jackson's final solution. The Cherokee, Choctaw, Chickasaw, Seminole, and Creek tribes were forced to walk thousands of miles while White soldiers on horses rode beside the milelong line of four thousand children, women, and men.<sup>65</sup> They were held at gunpoint

for the entire journey to Oklahoma territory, without adequate food, warm clothes, or shelter. They walked north for six months, dying by the hundreds along the way. By winter, President Martin Van Buren said he was pleased to inform Congress that the Cherokee were in "their new homes west of the Mississippi" and that the Removal Act had "had the happiest effects."<sup>66</sup>

Still, the Indigenous were resolute in their spiritual resistance and acts of self-determination. Strategies of engagement varied with the personality of the tribal leaders, the terrain, traditions, resources, and relationship with the oppressor. Indigenous peoples differed in terms of customs, government structure, language, religion, and tribal history, but a common bond remained. The Indigenous who were once pivotal to European survival had become an impediment to White progress. Laws were enacted to protect the lives and land holdings of the settlers over the Indigenous.

The Indigenous fought to maintain their hereditary homeland, culture, religion, hunting grounds, and basic freedom. As battles over land increased, Native Americans were demonized through colonial laws that labeled them "savages" and smeared them as being without a true god or any redeeming value. As Europeans expanded westward, settlers of Indigenous lands were ready to fight the Indigenous over the land they took through government sanction. Because European settlers held deeds to land belonging to Indigenous people, who had no rights or representation in a court of law, the simple defiant act of fighting to hold on to Indigenous land was an act of war. Similarly, the United States deemed the deaths of military officers or civilians in such conflicts as the tragic outcome of self-defense. To assimilate Native Americans, Congress passed numerous laws to oppress, such as the Dawes Severalty Act in 1887. Also known as the General Allotment Act, this act prohibited Indigenous governance of tribal land. Depredation Acts reimbursed settlers for land and property destroyed or taken back by Indigenous people.

#### THE MASSACRE AT WOUNDED KNEE—1890

On the banks of Wounded Knee Creek in South Dakota was the site of the last traditional military battle between the federal government and Indigenous peoples, fought on December 29, 1890.<sup>67</sup> The Indigenous possessed a small fraction of the land before first contact with