

# Cultural Considerations in Judging: Tribal Sovereignty & Indigenous Communities

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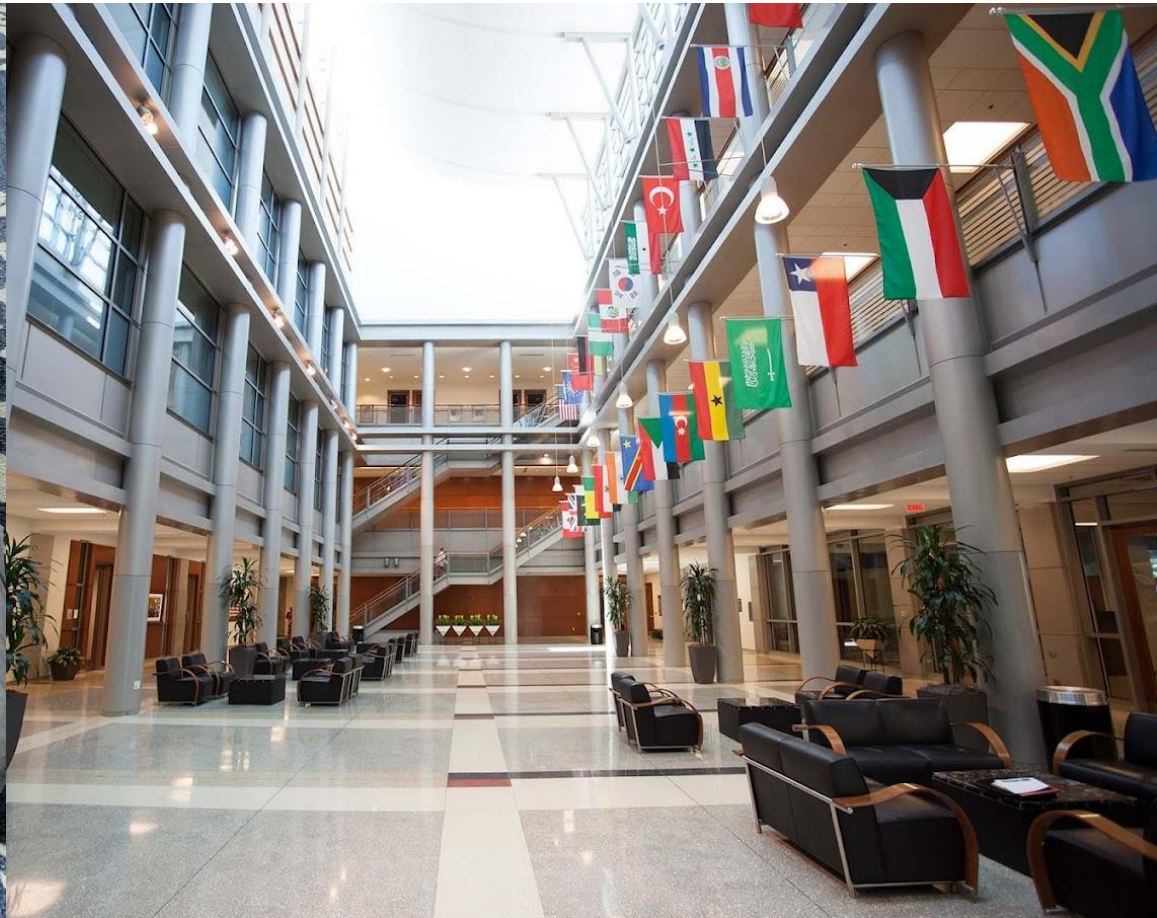
Aila Hoss, JD

Associate Professor

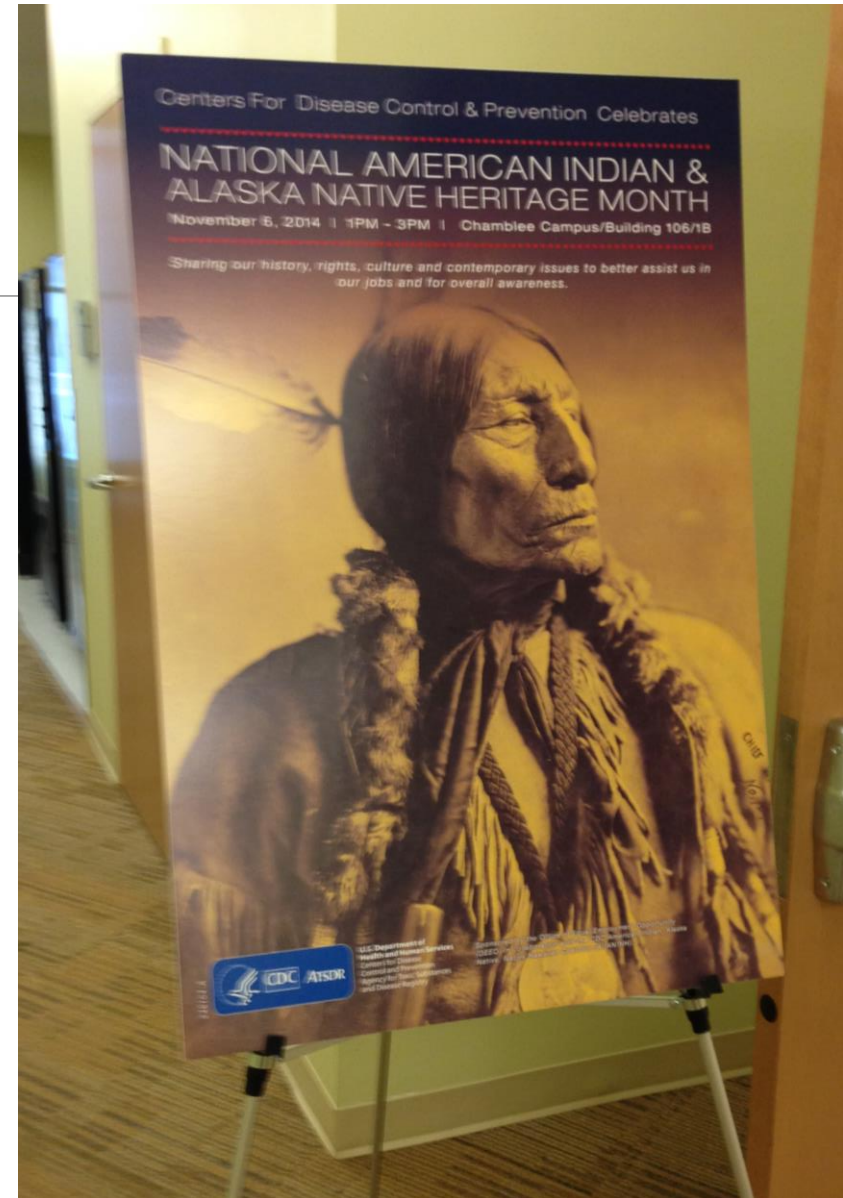
Indiana University McKinney School of Law

# Welcome to Indianapolis!

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# Acknowledgments



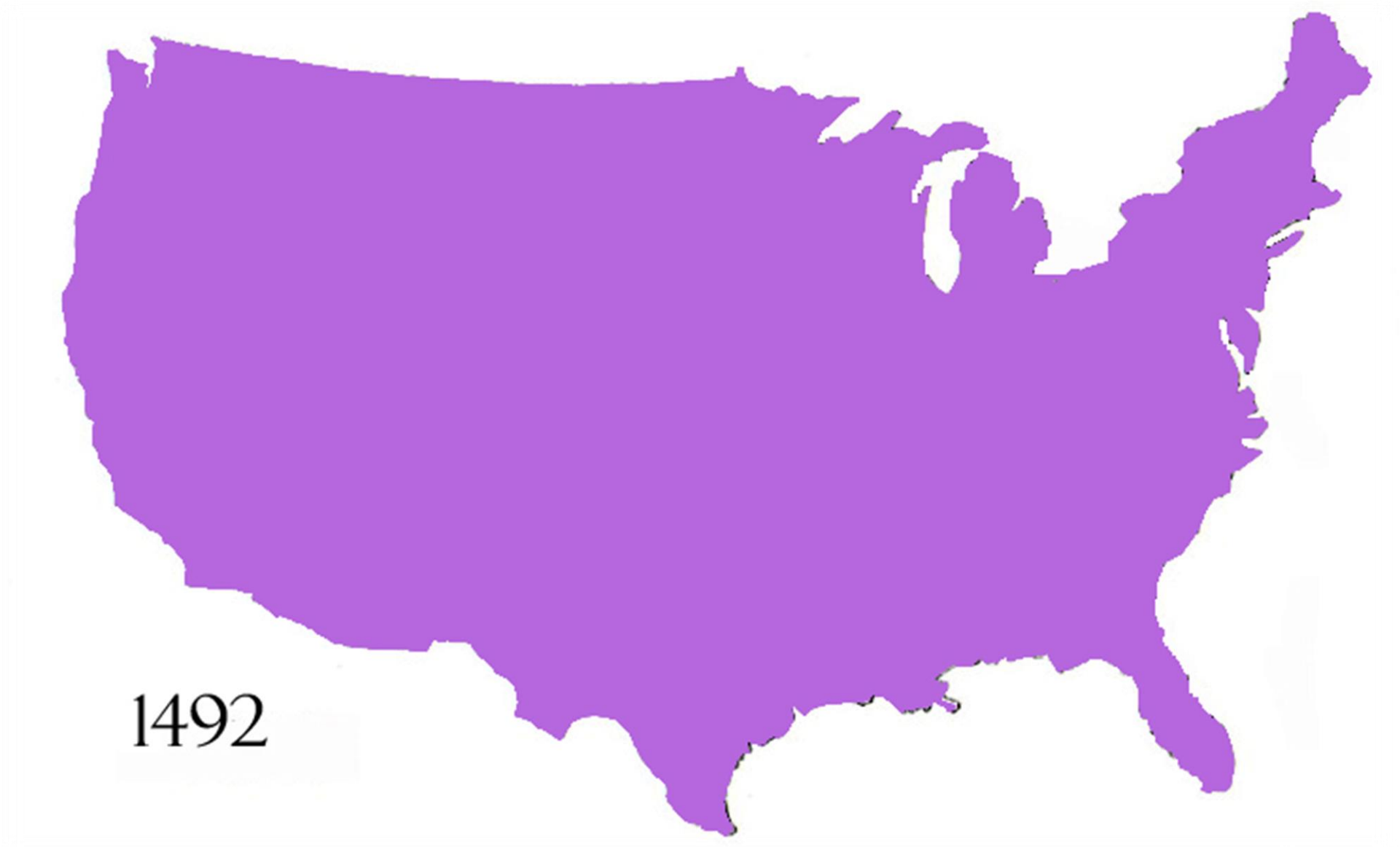
# Our Time Together

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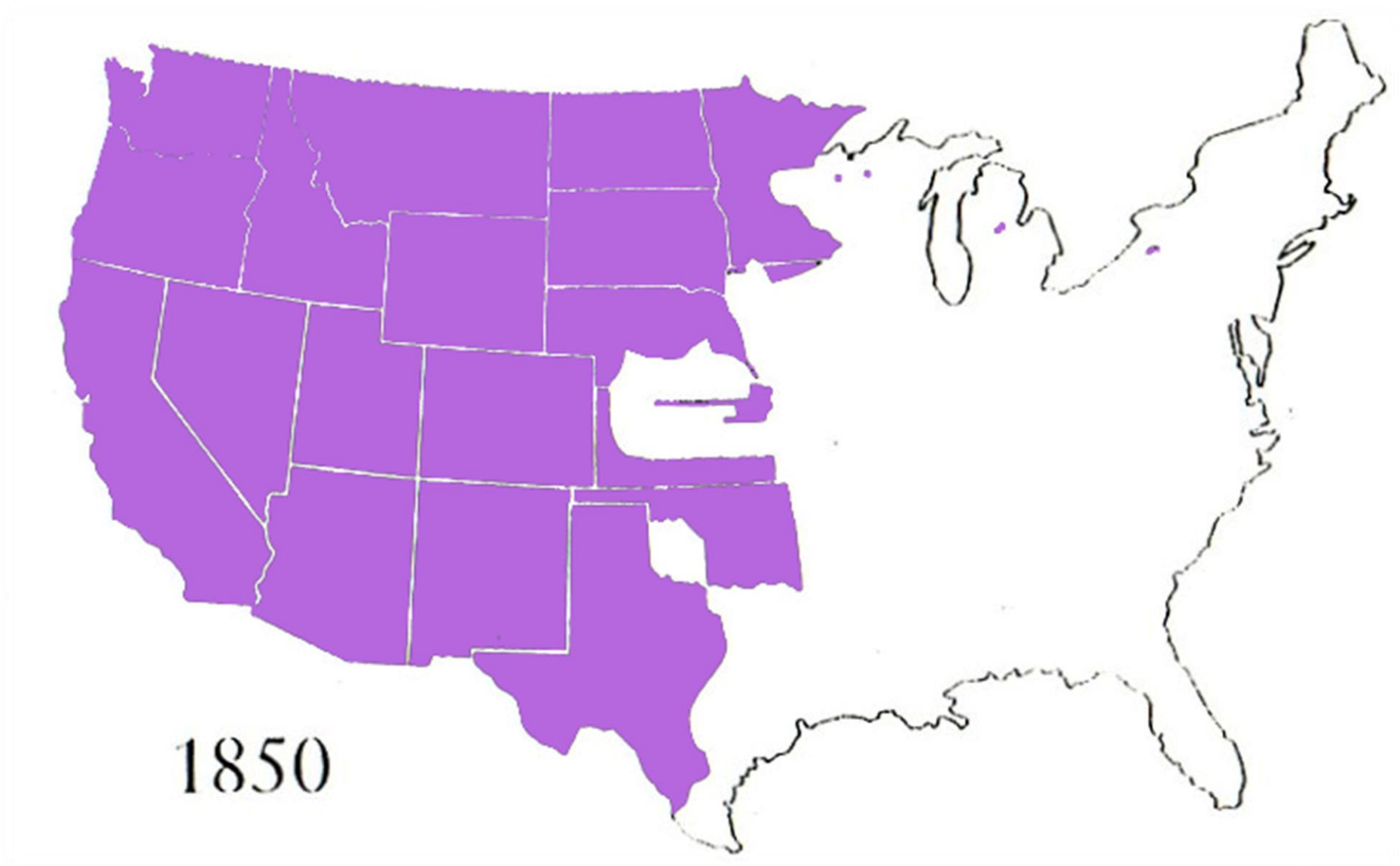
- Context
- Tribal Governments and Federal Indian Law
- Tribal Court Jurisdiction
- Respecting Tribal Sovereignty

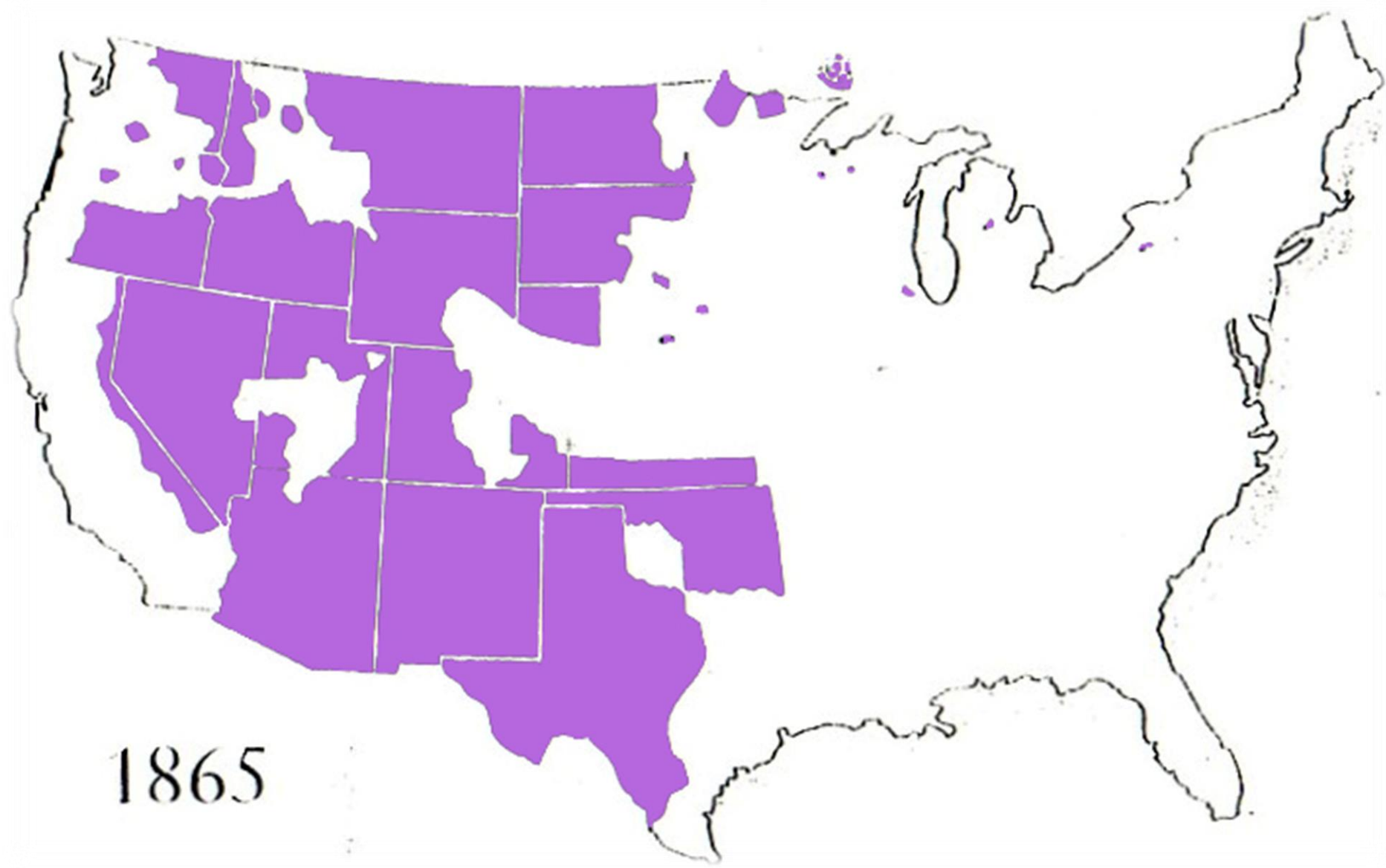
Context

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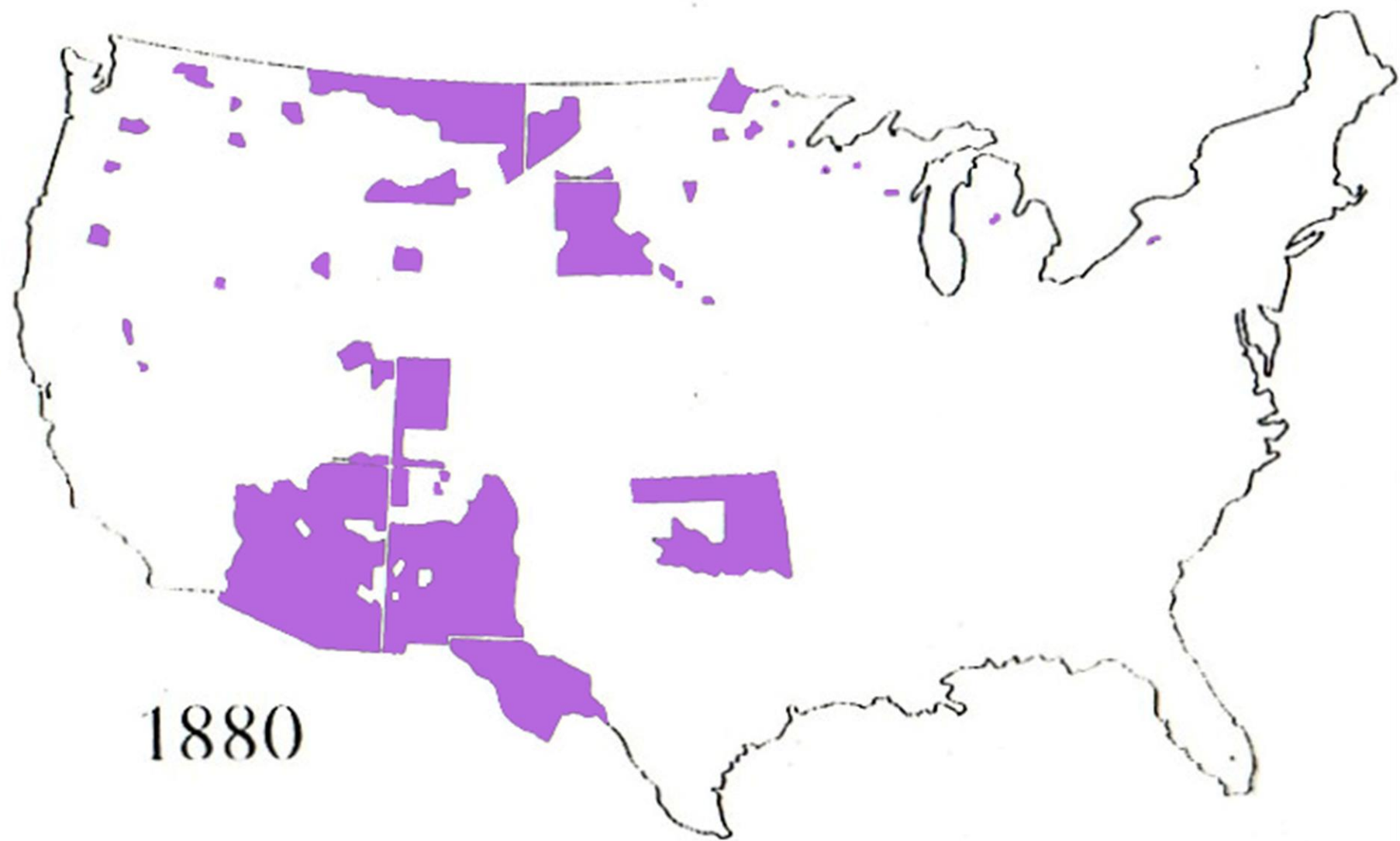


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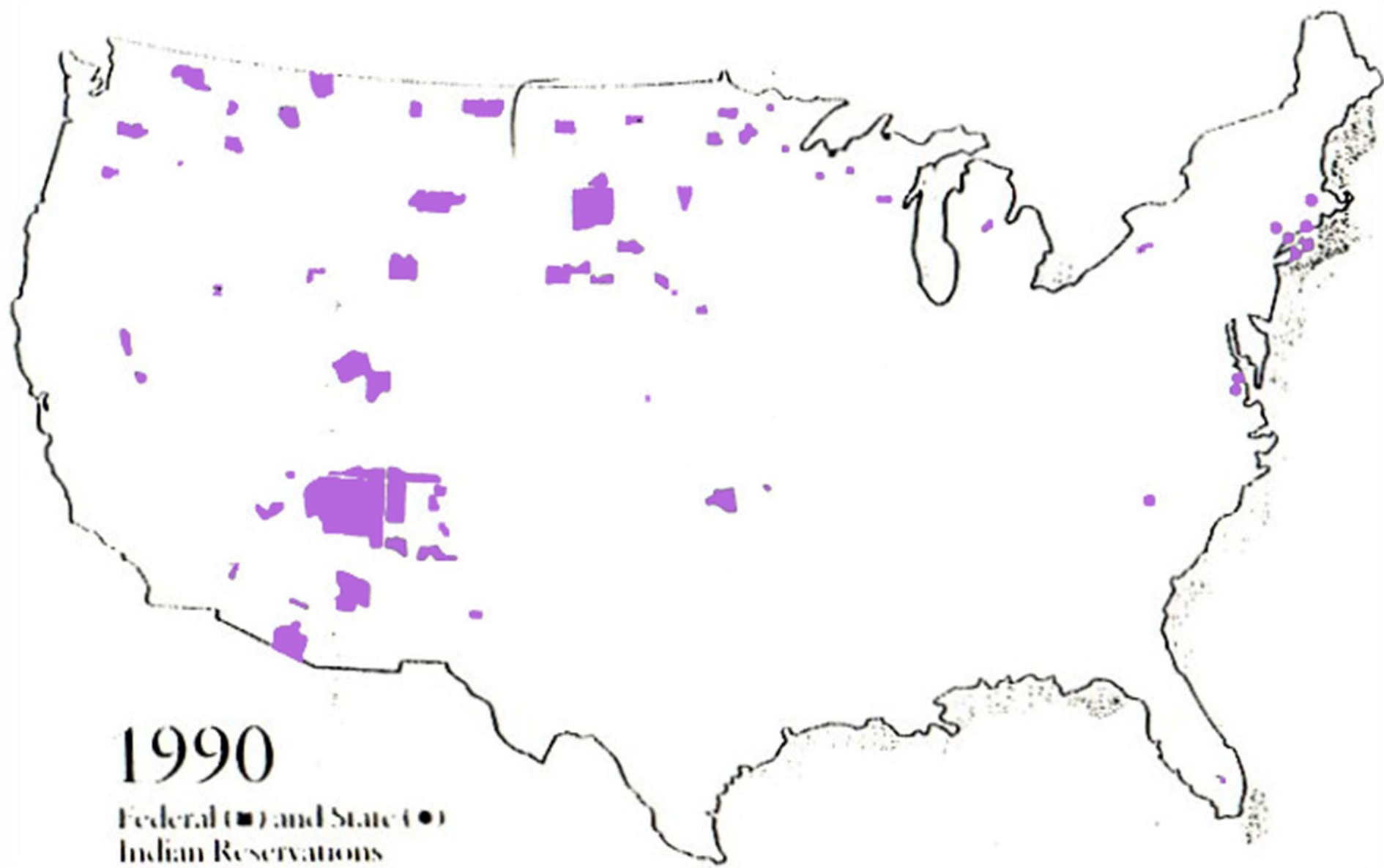








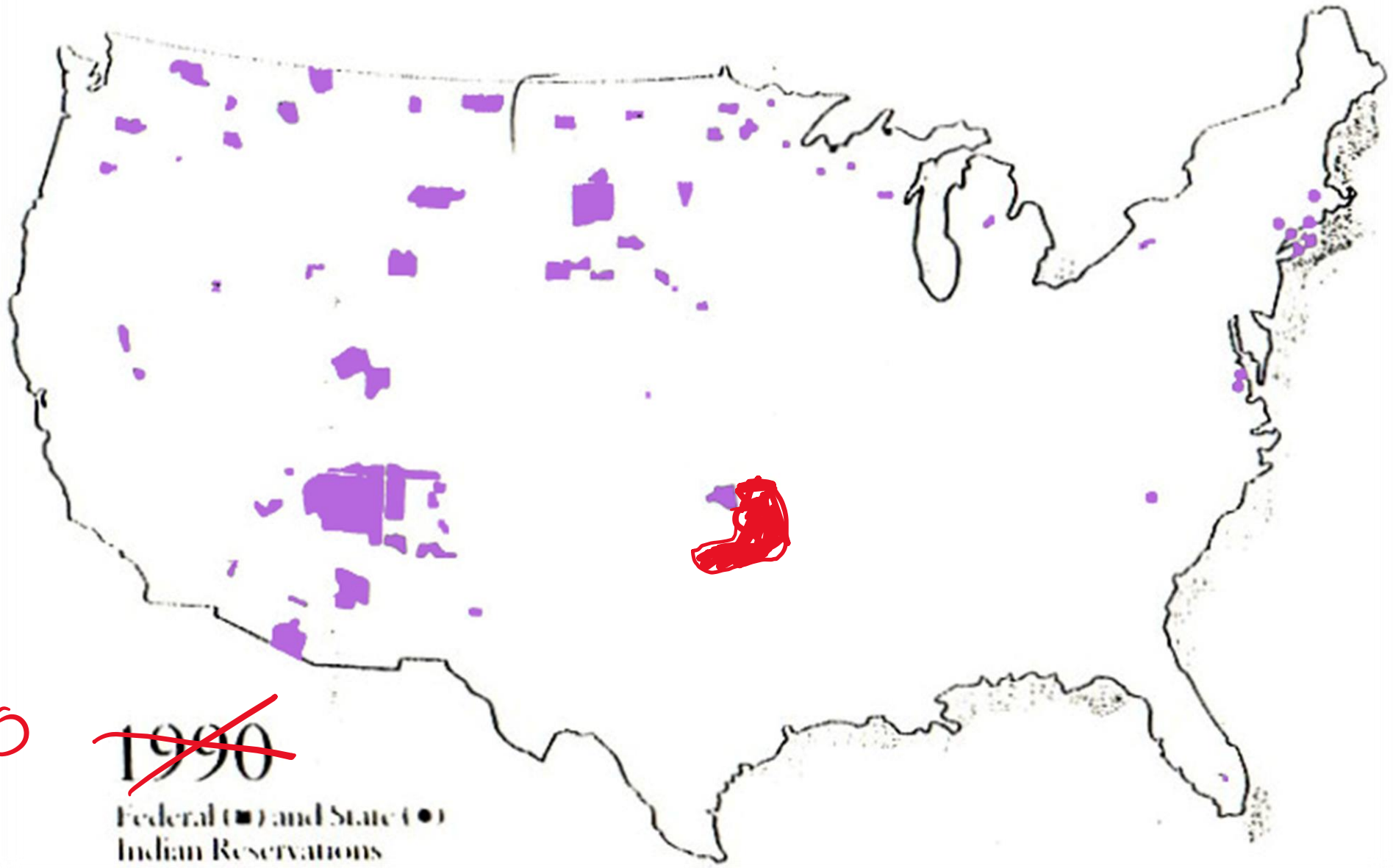
1880

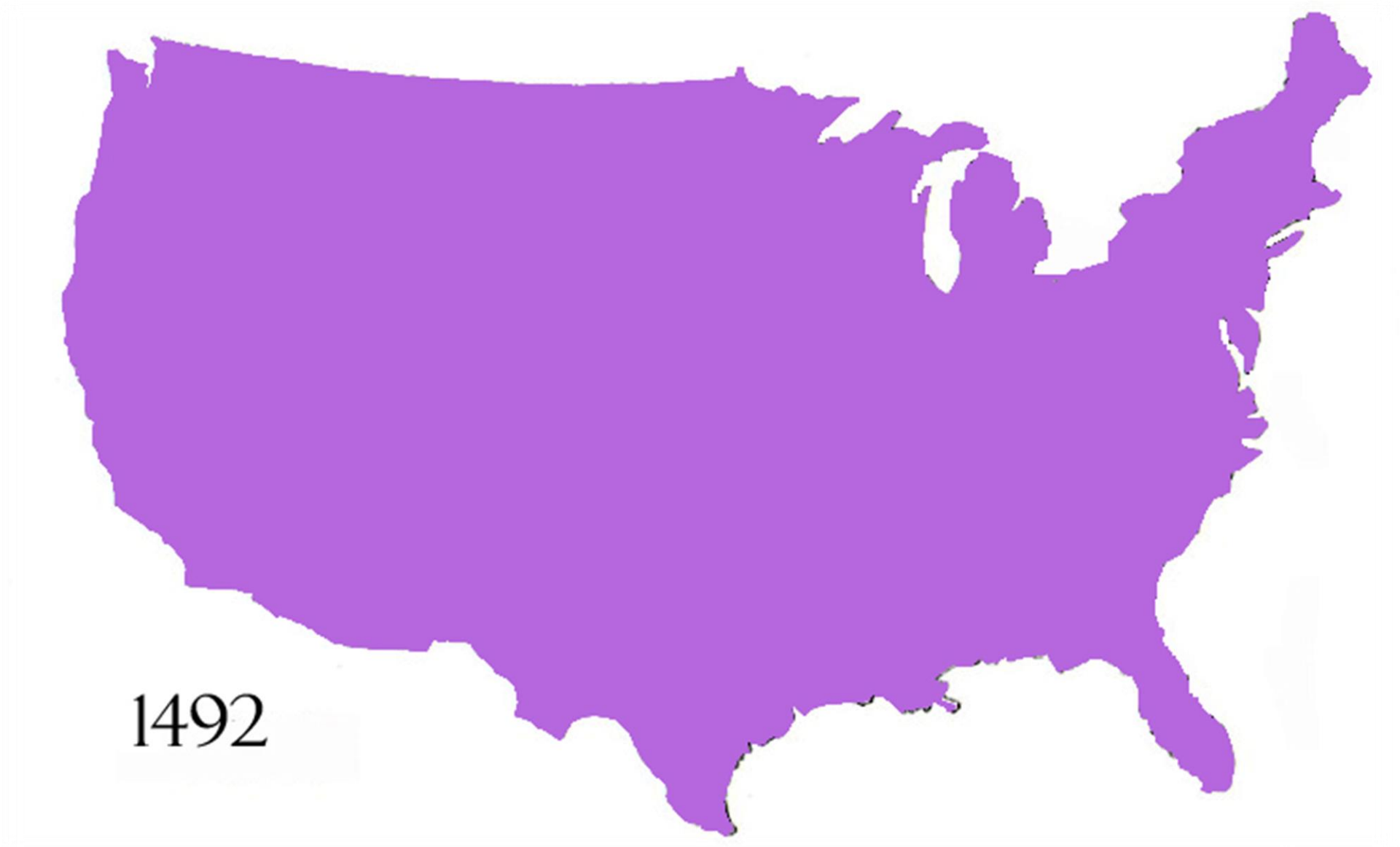


2020

~~1990~~

Federal (■) and State (●)  
Indian Reservations



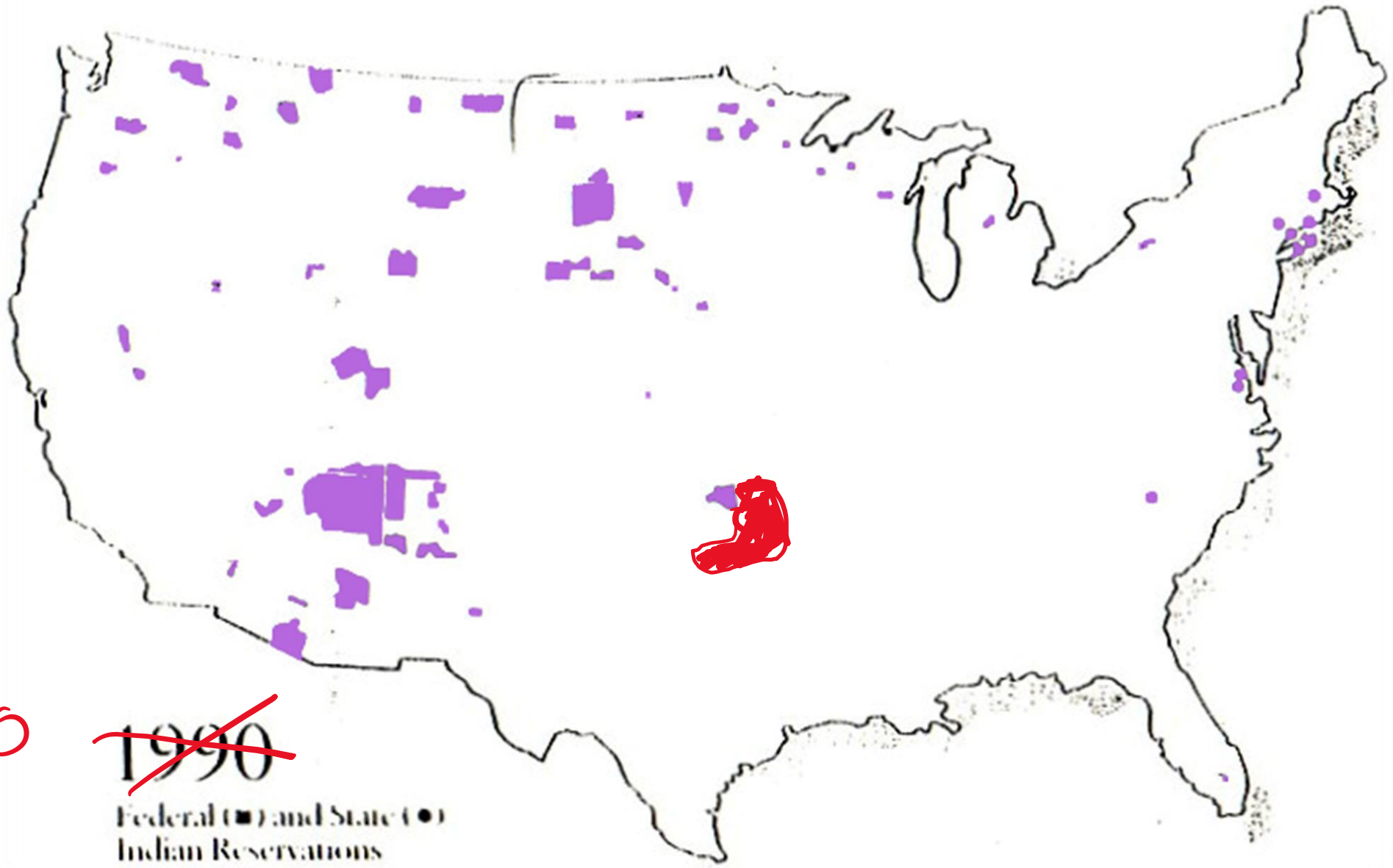


1492

2020

~~1990~~

Federal (■) and State (●)  
Indian Reservations



# Genocide

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## **UN Convention on the Prevention and Punishment of the Crime of Genocide**

Any one of five acts is considered genocide if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

# Historical Trauma

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- **Historical Trauma:** “the collective emotional and psychological injury both over the life span and across generations resulting from the history of difficulties that [Indians] as a group have experienced in America” and has a “layering effect” of individuals and communities.
- **Modern Inequities**
  - Highest rates of per capita police violence
  - High rates of maternal and infant mortality
  - Lack of access to water, broadband, and other necessities in certain areas
  - Real and perceived adverse outcomes in state adjudications

# Strengths and Resiliencies

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“We’re probably at about 98 per cent (fully) vaccinated here on our reservation, (and so), through the efforts of the Blackfeet Tribe, BTBC, Southern Peigan Clinic, Blackfeet DES, Blackfoot Confederacy, Siksika Nation, Piikani Nation, Blood Tribe, U.S. Customs, Canada Border Services, Health officials from State and Provincial governments, the Federal government on both sides – individuals (First Nations and non-First Nations) have been vaccinated!”

**Blackfoot Confederacy Gifts Surplus COVID-19 Vaccines at the Medicine Line**





# Tribal Gov'ts and Federal Indian Law

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# Tribal Law v. Federal Indian Law

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- **Tribal Law**

- The laws of individual Tribes including constitutions, codes, case law, and customary law

- **Federal Indian Law**

- The body of law that defines the rights, responsibilities, and relationships between Tribes, states, and the federal government.

# Tribal Governments & Federal Indian Law

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- 574 federally-recognized Tribes within the boundaries of the United States.
- Tribes are sovereign nations with a government-to-government relationship with state and federal government.
- Tribes maintain jurisdiction over their lands and people.

# What is Tribal Sovereignty?

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- **Sovereignty**: the right to make their own laws and be ruled by them
- Tribal sovereignty extends across Tribal citizens and Tribal lands
- This sovereignty is an inherent authority and not based on federal law.
- Tribal sovereignty remains intact unless explicitly removed by congress or implied by “domestic status”

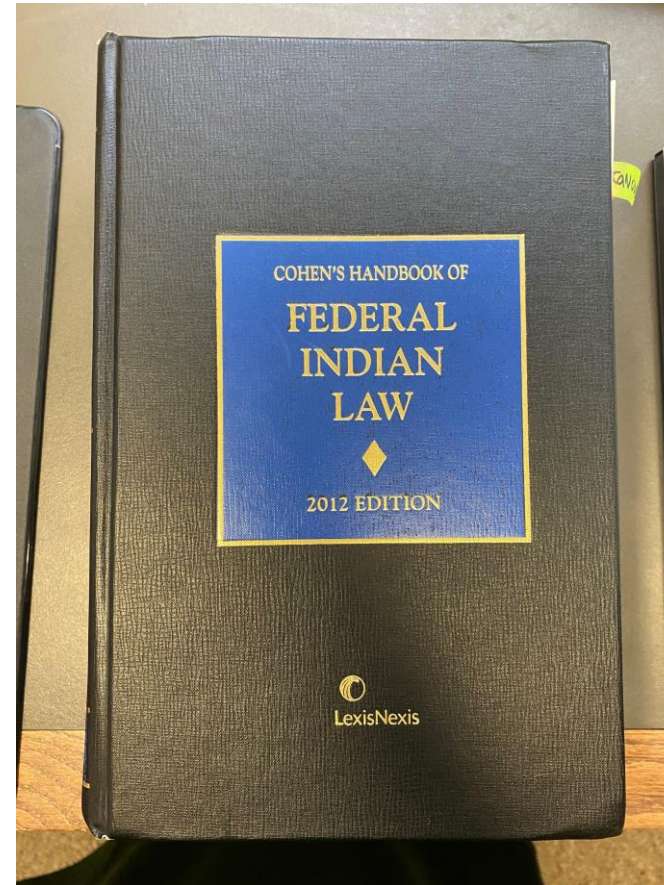
\* about to discuss more

# Where does Tribal sovereignty come from?

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“Those powers which are lawfully vested in an Indian tribe are not . . . delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”

*Cohen's Handbook* (1941)



# Tribal Governments & Federal Indian Law

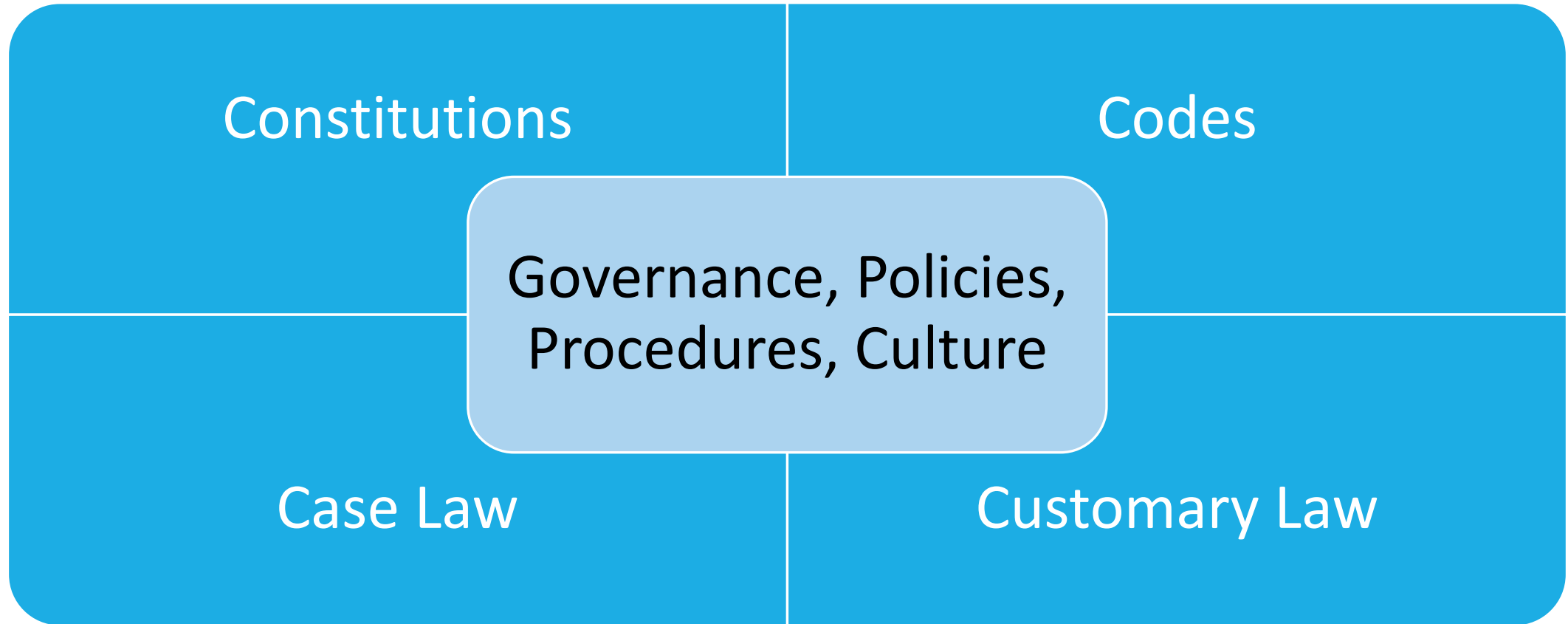
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- Tribes pass laws; adjudicate disputes; and maintain governments.
- There are complex jurisdictional tests and statutory schemes that govern relationships between Tribes, states, and the federal government in practice.



# Tribal Law

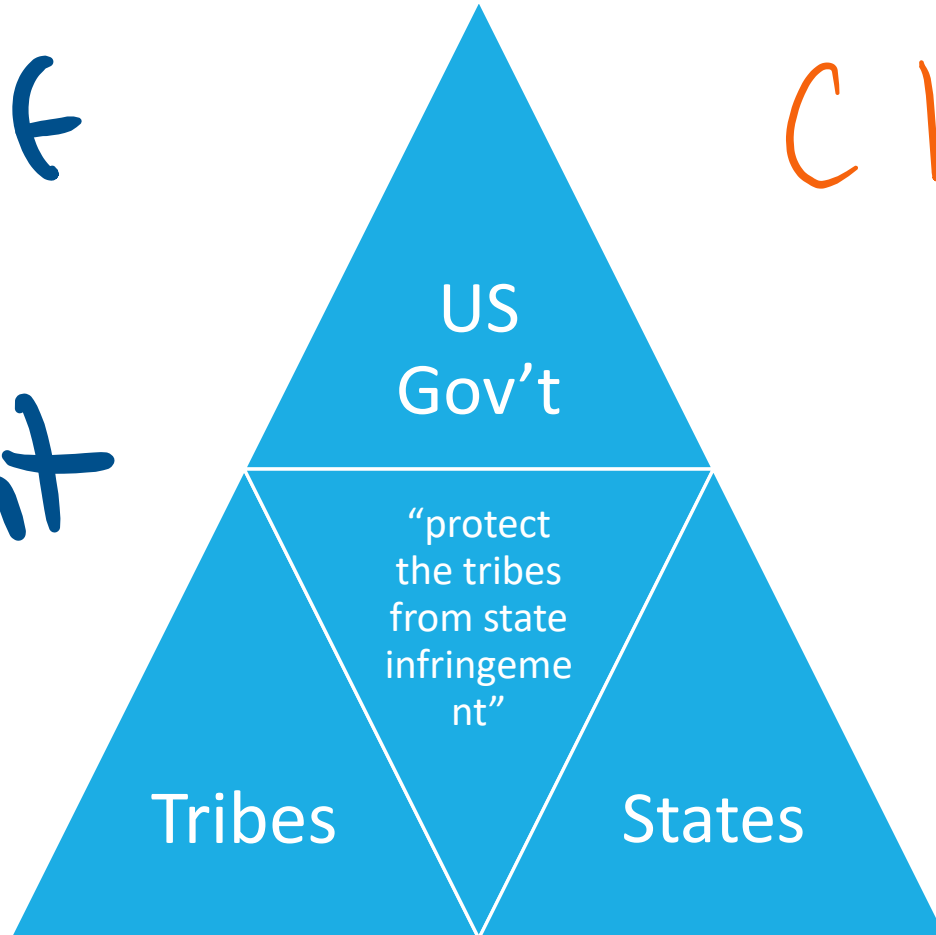
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# Trust Relationship

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Principle of  
Domestic  
Dependent  
Nations



Cherokee Nation v.  
GA  
(1831)



# Trust Relationship

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- The US Supreme Court has found that a unique trust relationship exists between the federal government and the tribes in light of their history, treaties, agreements, legislation, and case law
- Examples
  - Trust lands
  - Trust funds
  - Tribal consultation

*See, e.g., United States v. Mitchell*, 445 U.S. 535 (1980); *Menominee v. United States*, 391 U.S. 404 (1968); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).  
*Passamaquoddy v. Morton*, 528 F.2d 370 (1st Cir. 1975).

U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, WHAT IS THE FEDERAL INDIAN TRUST RESPONSIBILITY,  
[www.bia.gov/FAQs/index.htm](http://www.bia.gov/FAQs/index.htm).

# Trust Relationship

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“In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, **it has charged itself with moral obligations of the highest responsibility and trust.**”

*Seminole Nation v. United States*, 316 U.S. 286, 296–7 (1942)

# Trust Relationship

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“The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as **a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages**. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.”

Bureau of Indian Affairs

# Trust Relationship

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“[t]he United States has mismanaged Indian trusts for nearly as long as it has been trustee.”

*Cobell v. Norton (“Cobell VI”), 240 F.3d 1081, 1086 (D.C. Cir. 2001)*

# Plenary Power Doctrine

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- The Supreme Court held that Congress has plenary power to legislate regarding all matters concerning Indians.

*Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883)

*United States v. Kagama*, 118 U.S. 375, 384–5 (1886)

# Loss of Sovereign Powers & Treaty Rights

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- **Loss of Sovereign Powers**

- Express by Congressional plenary power
- Implied by “dependent status” or by virtue of being “conquered”

- **Abrogation of Treaty Rights**

- At will power by Congress
- Requires clear congressional intent; does not need to be express

# Tribal Court Jurisdiction

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# Tribal Judicial Systems

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- **Types**
  - Courts of Indian Offenses (CFR Courts)
  - Tribal Courts
  - Traditional or Peacemaker Courts



“Kill the Indian. Save the man.”



1882



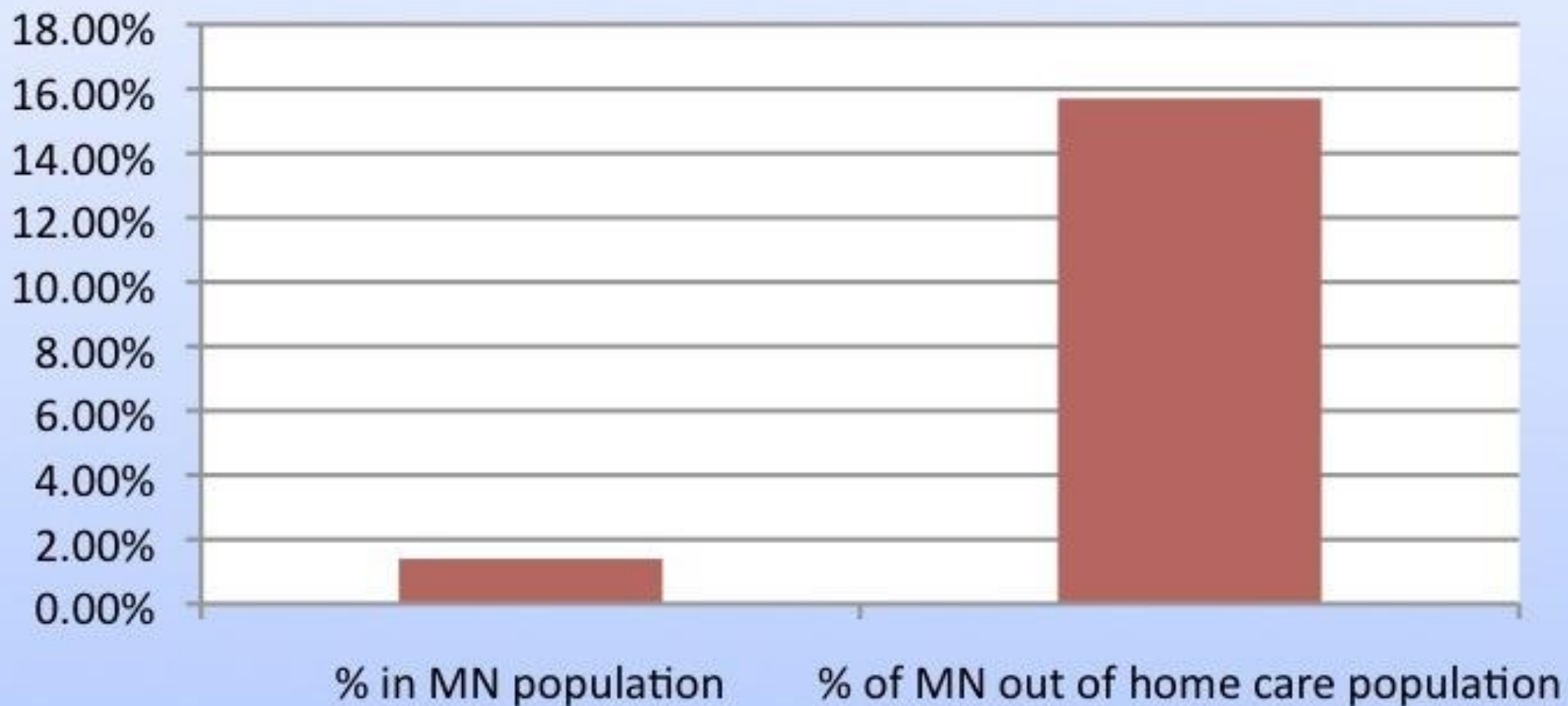
1885

# Indian Child Welfare Act (1978)

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“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”

## Out-of-home placement of American Indian children in MN



■ % of foster care population that is AIAN

▨ % of child population that is AIAN

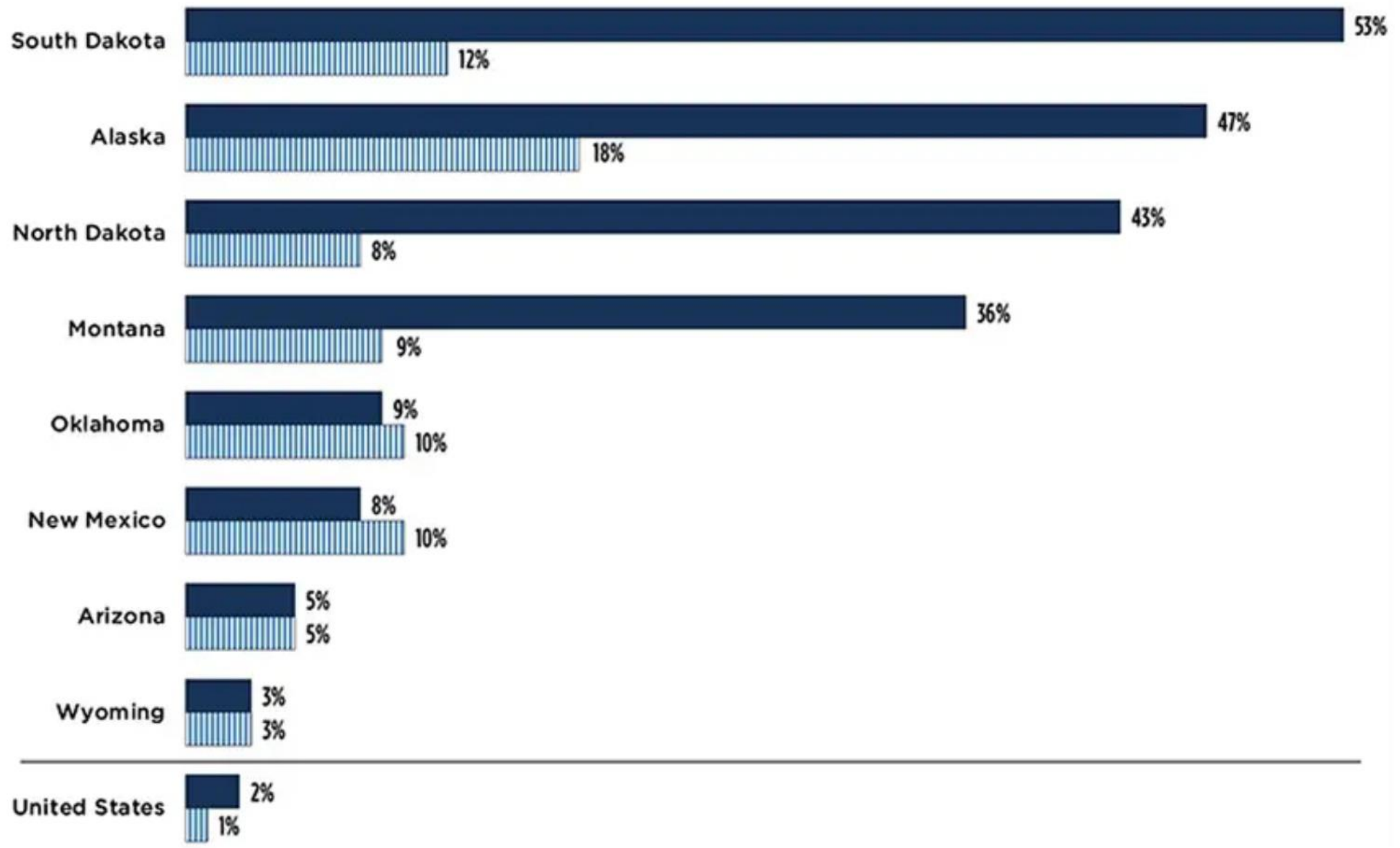
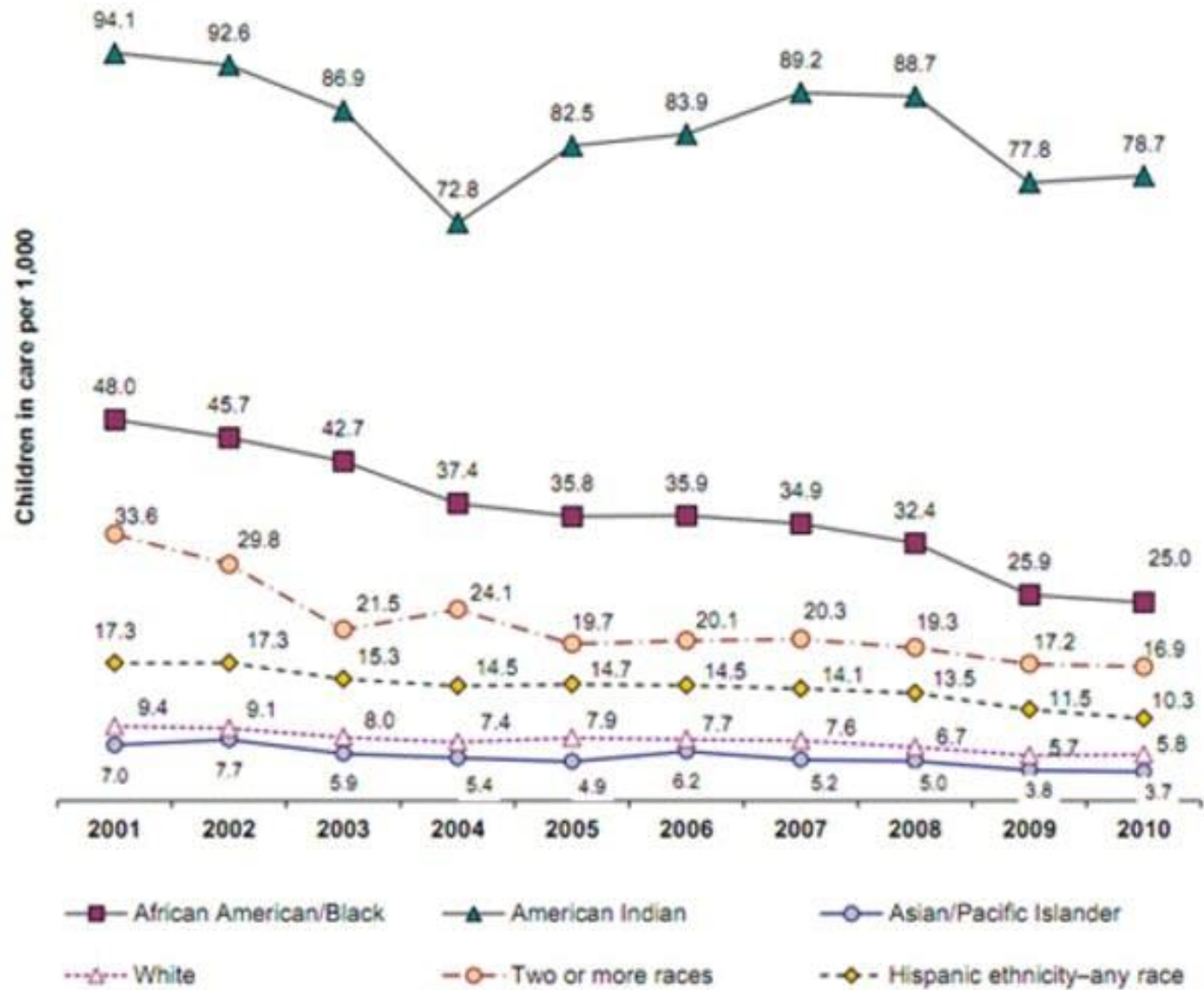
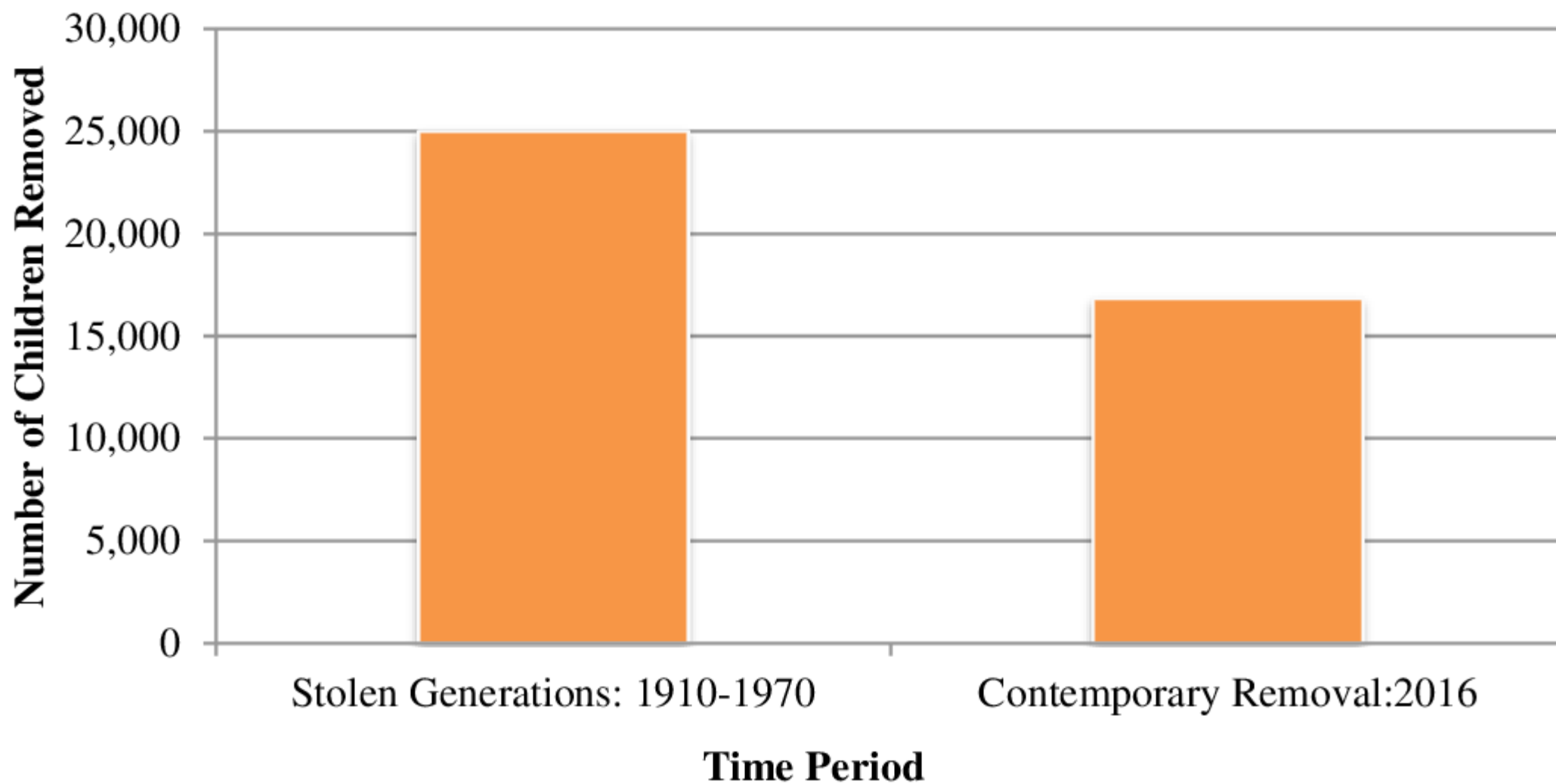


Figure 7. Children in Out-of-home Care per 1,000 in the Child Population by Race/Ethnicity, 2001–2010



## Number of Indigenous Children Removed by Time Period



**Figure 1: Number of Indigenous children removed during Stolen Generation compared to 2016<sup>31</sup>**

# Indian Child Welfare Act

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- Indian child
- Child custody proceedings
  - Adoption
  - Foster care
  - Preadoptive placement
  - Termination of parental rights
- Jurisdictional scheme
  - Tribal court exclusive
  - Tribal/state concurrent

# Indian Child Welfare Act

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## PROCEDURAL SAFEGUARDS

- Notice
- Transfer to tribal court
- Intervention
- Invalidation

## SUBSTANTIVE SAFEGUARDS

- Continued custody standard
- Active efforts standard
- Placement preferences





**Chrissi Ross Nimmo**

@mizhardcase



Folks who seek to dismantle [#ICWA](#) fit into one of four categories:

- 1) non-indians who want to adopt indian kids
- 2) people who profit off #1
- 3) non-indians who want to weaken tribal sovereignty
- 4) people who profit off of #3

[#defendICWA](#)

5:21 PM · Apr 7, 2021 · Twitter for Android

# Dobbs v. Jackson Women's Health Org.

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[A] woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.<sup>46</sup>

46. See, e.g., CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18–44 Years of Age in the United States 16 (Aug. 2008) (“[N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas **the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent**”).

# Haaland v. Brackeen (June 15, 2023)

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- Original Plaintiffs
  - Three non-Native couples
  - Birth mother of one child
  - Texas, Louisiana, Indiana
- TX Federal District Court Decision (2018)
  - ICWA is unconstitutional
  - Significant departure from principles of federal Indian law
- 5<sup>th</sup> Circuit (2021)
  - Some provisions violate the 10<sup>th</sup> amend by commandeering state authority
  - Adoptive placement with Indian families and foster homes violate EPC

# Haaland v. Brackeen (June 15, 2023)

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*Roberts*

*Alito*

*Kagan*

*Kavanaugh*



*Barrett*

*Thomas*

*Sotomayor*

*Gorsuch*

*Jackson*

<u>Issue</u>	<u>District Court</u>	<u>5<sup>th</sup> Circuit</u>	<u>Supreme Court</u>	<u>Reasoning</u>
<b>Did Congress exceed its authority when enacting ICWA, a matter of family law? Does Congress have plenary power over Indian affairs?</b>	Yes	No	No	Substantial precedent Federal law preempts state law
<b>Does ICWA commandeer state powers under the 10<sup>th</sup> Amendment by requiring states to follow federal stds?</b>	Yes	Yes*	No	Applied to both individuals and governments
<b>Does ICWA, in treating Native children differently, violate EPC? Does ICWA provisions that prioritize Native placements violate EPC?</b>	Yes	Yes*	Plaintiffs lacked standing	Plaintiffs could not demonstrate they have suffered an injury in fact
<b>Does allowing Tribes to alter the order of priority for placements violate the non-delegation doctrine?</b>	Yes	No	Plaintiffs lacked standing	Plaintiffs could not demonstrate they have suffered an injury in fact

# Respecting Tribal Sovereignty

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# Tribal Court Orders: ICWA

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**25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings**

**(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes**

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

# Tribal Court Orders: Protection Orders

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18 U.S.C. § 2265. **Full faith and credit given to protection orders**

**(a) Full Faith and Credit.**--Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory<sup>1</sup> as if it were the order of the enforcing State or tribe.



# Tribal Court Orders: Child Support

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28 U.S.C. § 1738B. **Full faith and credit for child support orders**

**(a) General rule.**--The appropriate authorities of each State--

**(1)** shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

**(2)** shall not seek or make a modification of such an order

...

**(9)** The term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country

# Tribal Court Orders: Child Custody

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## **Uniform Child Custody Jurisdiction and Enforcement Act**

### **Sec. 104. APPLICATION TO INDIAN TRIBES.**

(a) A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this [Act] to the extent that it is governed by the Indian Child Welfare Act.

[(b) A court of this State shall treat a tribe as if it were a State of the United States for the purpose of applying [Articles] 1 and 2.]

[(c) A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3.]

# Comity

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- American Law Institute, Restatement of the Law: The Law of American Indians § 35
- Absent federal or state law requiring that full faith and credit be given, state and federal courts may recognize the judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of Tribal courts of Indian tribes as a matter of comity.
- Tribal judicial acts are **presumptively valid and enforceable**

# INDIANA'S INDIAN LAWS: INDIGENOUS ERASURE AND RACISM IN THE LAND OF THE INDIANS

*By: Aila Hoss\**

## I. INTRODUCTION

In response to a request for funding on Tribal and Indian law research, a director level position from Indiana University who reviewed a draft of the proposal stated that the author needed to “clear why a team from the middle of Indiana is positioned to conduct this research” and that it is her job “to point out the obvious.”<sup>1</sup> In the author’s teaching evaluations for her first year property law class, students indicated that they wished the author spent less time on Indian law.<sup>2</sup> These statements are just two examples of the active disdain for the research and study of Indian law within a major university in Indiana, the “Land of Indians.”<sup>3</sup> But it is also a symptom of a larger disinterest and hostility to the inclusion of Tribal and Indigenous issues, pervasive across communities and institutions in the state.<sup>4</sup> Only one of the state’s four law

# Thank you!

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# Sovereign Immunity

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- **Sovereign Immunity: immunity from suit**
  - Longstanding principle as applied to Tribes
  - Requires Tribal consent or Congressional waiver
- **Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (1998)**
  - Confirmed sovereign immunity from suits arising from off-reservation conduct
  - Previous cases have never based immunity on the location of the conduct
- **Immunity of Tribal Officials**
  - Application of Ex Parte Young (1908)
  - May be sued for injunctive relief in federal court for violations of federal law

# Remedies

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## TRIBE

- Money damages
- Property

## GOV'T OFFICIALS

- Injunctive relief
- Declaratory judgment

# Sovereign Immunity

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- Corporations created and managed by Tribes for Tribal purposes (“arms of the Tribe”) share Tribal sovereign immunity
- Court has NOT said whether Tribal officials can be sued in state court for state law violations
- Congressional Waiver
  - IGRA
  - Self-Governance contracts/compacts; Tribes must have insurance and the insurer must waive Tribal SI defenses



# Sovereign Immunity Comparison

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	State	Tribe
Can the sovereign waive its own immunity?	yes	yes
Can the federal government waive immunity for the sovereign?	Art I – no 14 <sup>th</sup> - yes	yes
Can the sovereign assert its immunity against the federal government?	no	no
Can the sovereign assert its immunity against a state?	no	yes
Can the sovereign assert its immunity against a Tribe?	yes	yes
Can officials of the sovereign be sued for monetary relief?	no	no
Can officials of the sovereign be sued for declaratory or injunctive relief?	yes	yes

“The special brand of sovereignty the tribes retain – both its nature and its extent – rests in the hands of Congress.”

Michigan v. Bay Mills (2014)

# *Baby Veronica* (2013)

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- “Continued custody”
- “Active efforts” to prevent break-up
- Adoptive placement preferences
- Breyer’s concurrence
- Constitutional considerations?



# If a child is not a tribal member, the child is an Indian child if

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- ✓ A. The child is eligible for tribal membership
- B. Both biological parents are tribal members
- ✓ C. One biological parent is a tribal member
- D. A and B
- ⓔ E. A and C
- F. The child cannot be an Indian child

Which of the following is NOT a child custody proceeding?

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A. Adoption

B. Divorce

C. Foster care

D. Preadoptive placement

E. Termination of parental rights

# Tribal court jurisdiction is exclusive if the child

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- ✓ A. Resides in Indian country
- B. Has at least one parent who resides in Indian country
- ✓ C. Is domiciled in Indian country
- ✓ D. Is a ward of the tribal court
- E. Any of these
- F. A, B, or D only
- ✓ G. A, C, or D only
- H. C or D only

# Either parent may petition for

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A. A transfer from Tribal court to state court

B. A transfer from state court to Tribal court

C. Both A and B

D. Neither A nor B

# The *Holyfield* twins

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- A. Reside in Indian country
- B. Are domiciled in Indian country because their parents are domiciled there
- C.** Are domiciled in Indian country because their mother is domiciled there
- D. Do not reside in / are not domiciled in Indian country because they have never been on the reservation



# McGirt v. Oklahoma (2020)

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding “all their land, East of the Mississippi river,” the U. S. government agreed by treaty that “[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians.” Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and “permanent home to the whole Creek nation,” located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

# Majority



- “Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”
- “There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome these terms.”
- “The only question before us, however, concerns the statutory definition of “Indian country” as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law.”

# Dissent



- “[U]nbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation.”
- “The decision today creates significant uncertainty for the State’s continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.”
- “[W]e determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and “all the [surrounding] circumstances,” including the “contemporaneous and subsequent understanding of the status of the reservation . . . Yet the court declines to consider such understandings here, preferring to examine only individual statutes in isolation.”

# Oklahoma v. Castro-Huerta (2022)

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- **Issue:** Can Oklahoma prosecute non-Indians for crimes against Indians in Indian country?
- **Holding:** The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.
- 5-4 decision

# Oklahoma v. Castro-Huerta (2022)

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## ■ **Gorsuch Dissent:**

- "Where this Court once stood firm, today it wilts."
- "[T]his case has...more to do with Oklahoma's effort to gain a legal foothold for its wish to exercise jxd."
- Public Law 280 w/Tribal consent
- Congressional fix
- Why are you applying the *Bracker* test???!!!!?????

# Criminal Jurisdiction in Indian Country (non-PL 280)

<u>Victim</u>	<u>Defendant</u>		
	Indian		Non-Indian
<b>Non-Indian</b>	<u>Major Crime</u> ✓ Federal (MCA) ✓ Tribal X State	<u>Non-Major Crime</u> ✓ Federal (ICCA & ACA if not already punished by Tribe) ✓ Tribal X State	X Federal X Tribal ✓ State ( <i>McBratney</i> )
<b>Indian</b>	<u>Major Crime</u> ✓ Federal (MCA) ✓ Tribal X State	<u>Non-Major Crime</u> X Federal ✓ Tribal X State	✓ Federal (ICCA & ACA) X Tribal ( <i>Oliphant</i> ; except VAWA) ✓ State ( <i>Castro-Huerta</i> )
<b>No Victim</b>	✓? Federal (ACA fed type crimes) ✓? Tribal X State		✓? Federal (ICCA) X? Tribal ( <i>Oliphant</i> ) ✓? State ( <i>McBratney</i> )