

The Structural Violence of Federal Indian Law

Aila Hoss, JD

Associate Professor

Indiana University Robert H. McKinney School of Law

Agenda

- Historical Context
- Principles of Federal Indian Law
- The Structural Violence of Federal Indian Law

Federal Indian Policy Periods

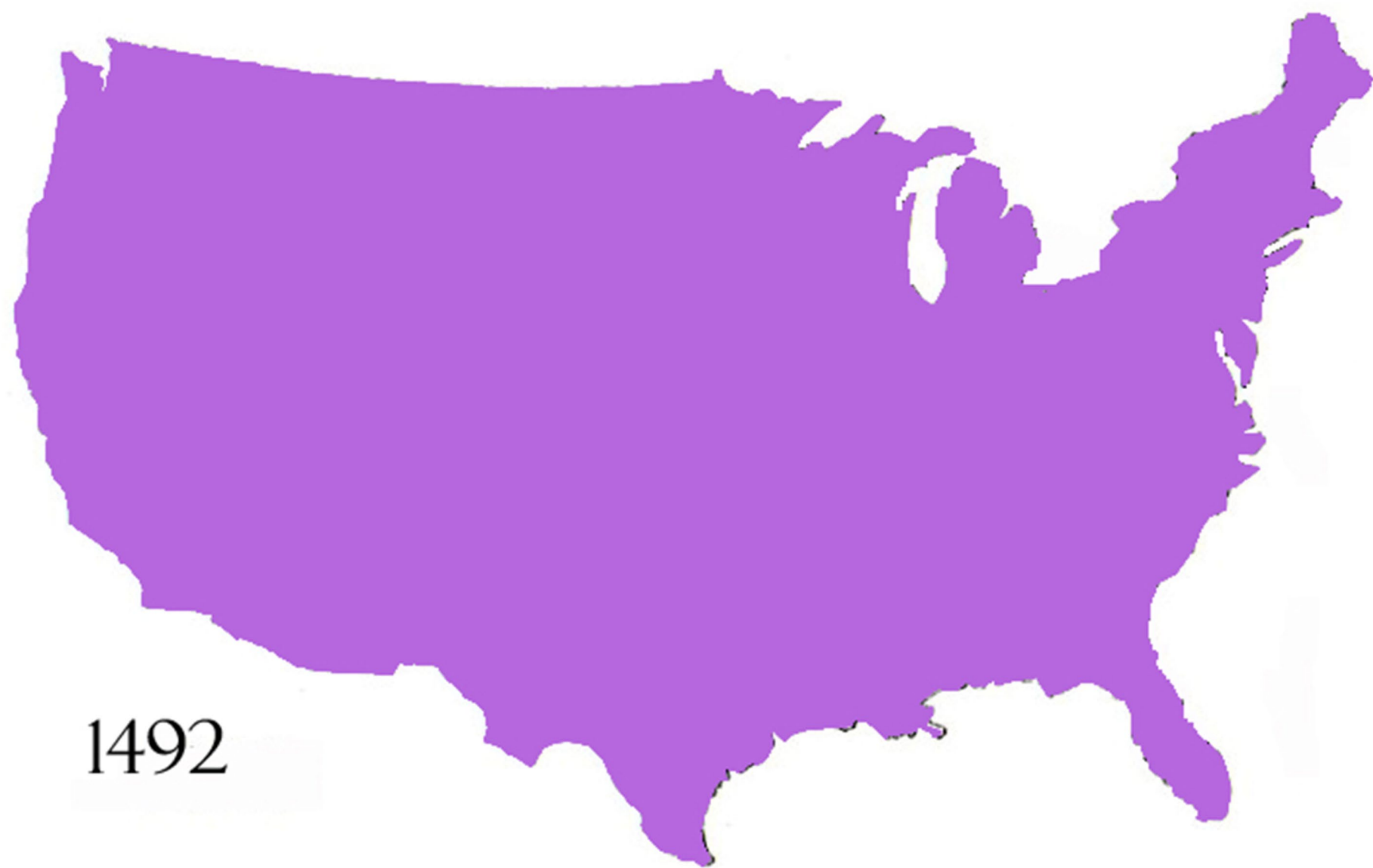
1. Colonial Period (1492-1776)
2. Confederation Period (1776-1789)
3. Trade and Intercourse Act Era (1789-1835)
4. Removal Period (1835-1861)
5. Reservation Period (1861-1887)
6. Allotment & Forced Assimilation Period (1871-1934)
7. Indian Reorganization Act Period (1934-1940)
8. Termination Period (1940-1962)
9. Self-Determination Era (1962-present)

Pre-Contact Population Estimates

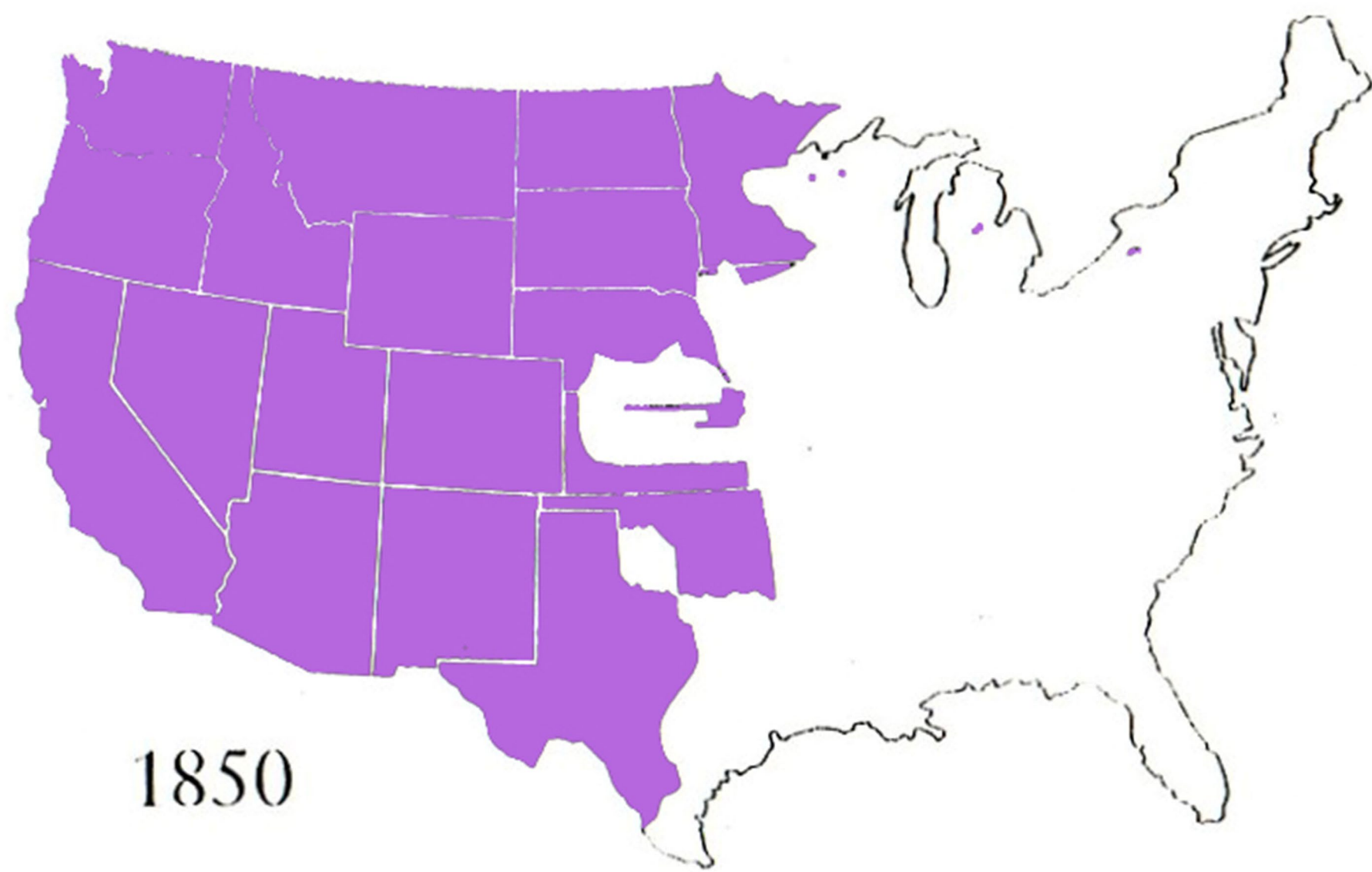
| Estimate | Source |
|-------------|-----------------|
| 1 million | Mooney (1921) |
| 2.1 million | Ublacker (1976) |
| 7 million | Thornton (1987) |
| 18 million | Dobyns (1983) |

Population Estimates

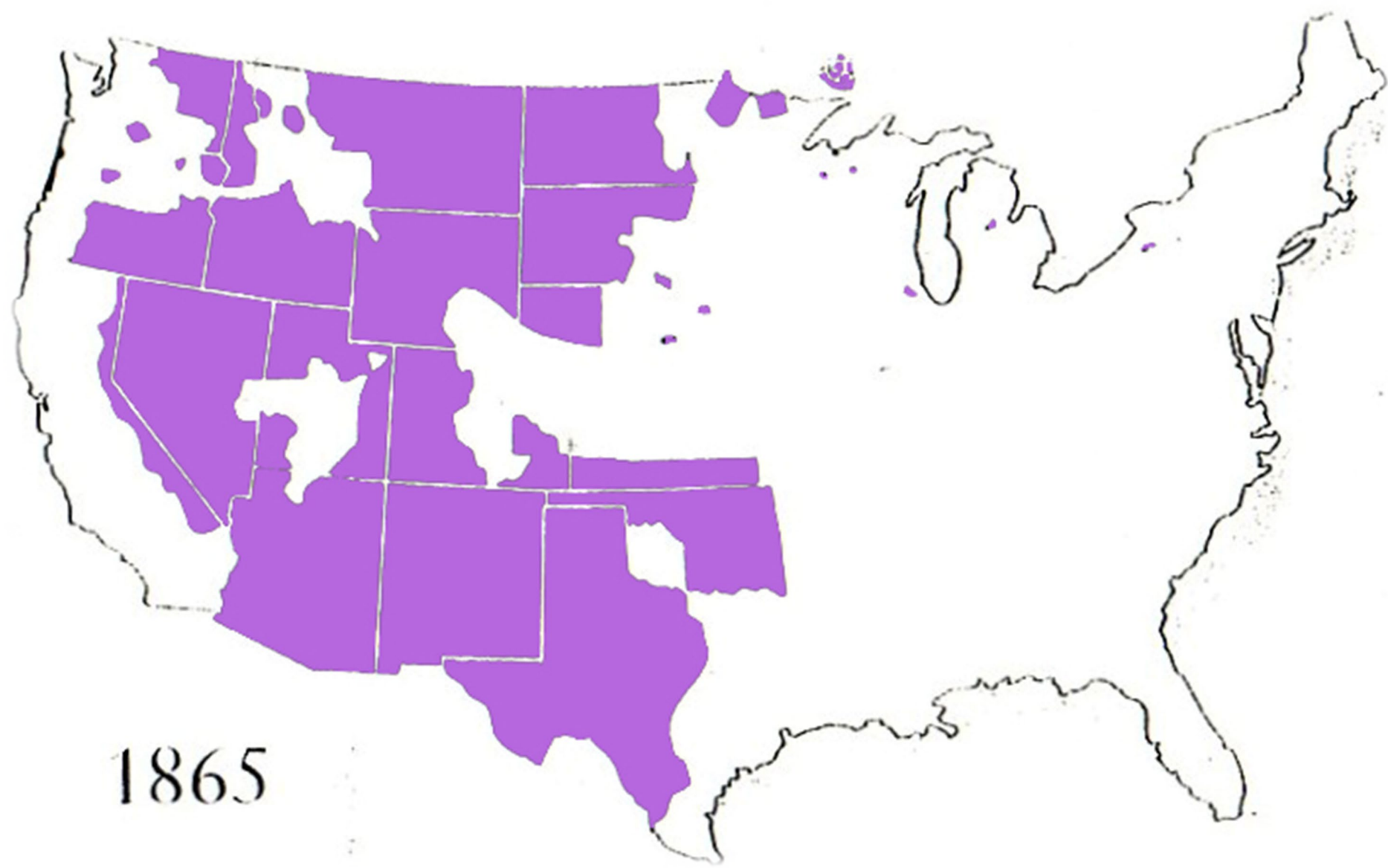
- **2010 Nationwide:** 5.2 million people identified as American Indian and Alaska Native, alone or in combination with another race or races
- **2010 Nationwide:** 2.6 million people identified as American Indian and Alaska Native alone
- **2020 Nationwide:** 9.7 million people identified as American Indian and Alaska Native, alone or in combination with another race or races

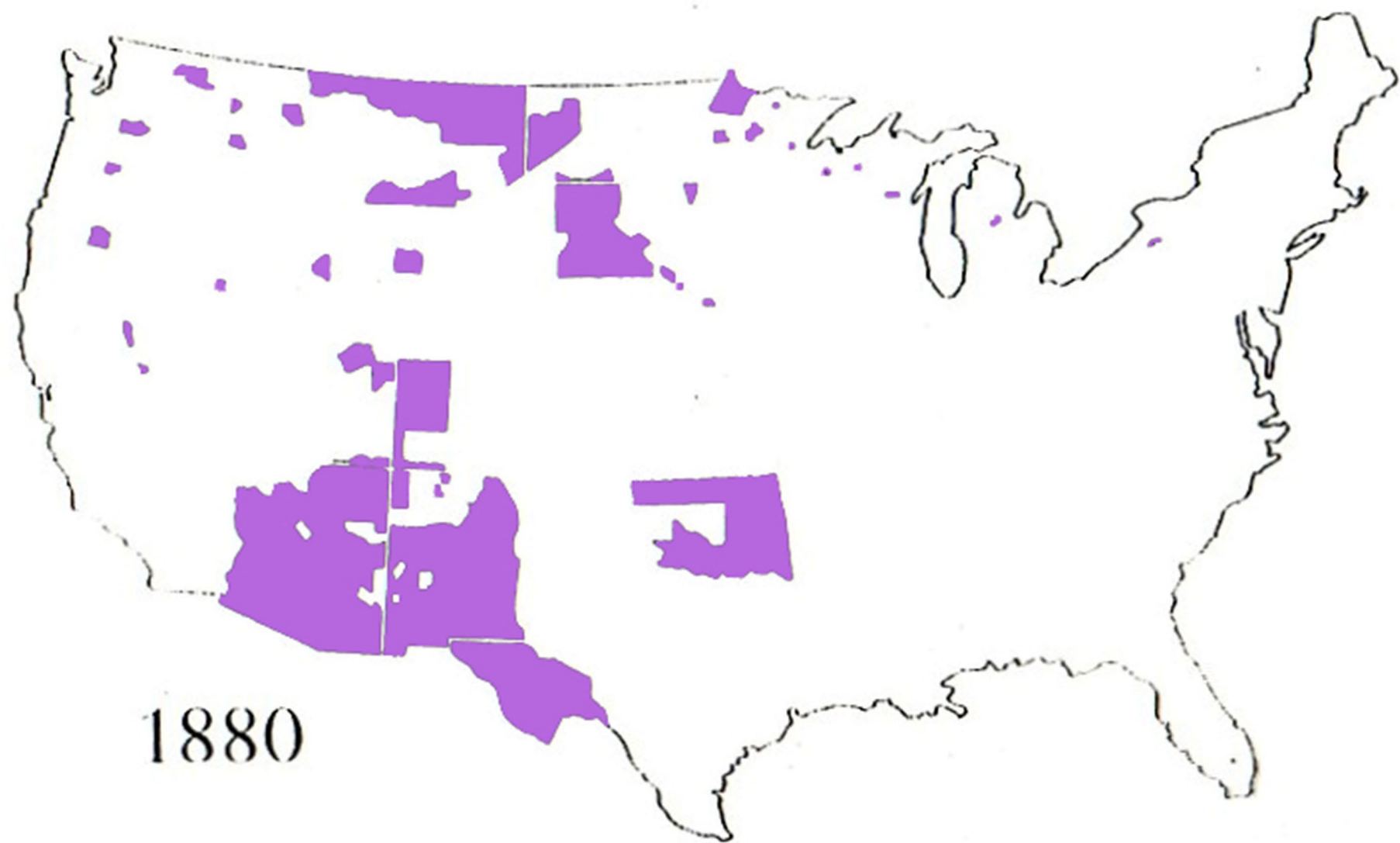


1492

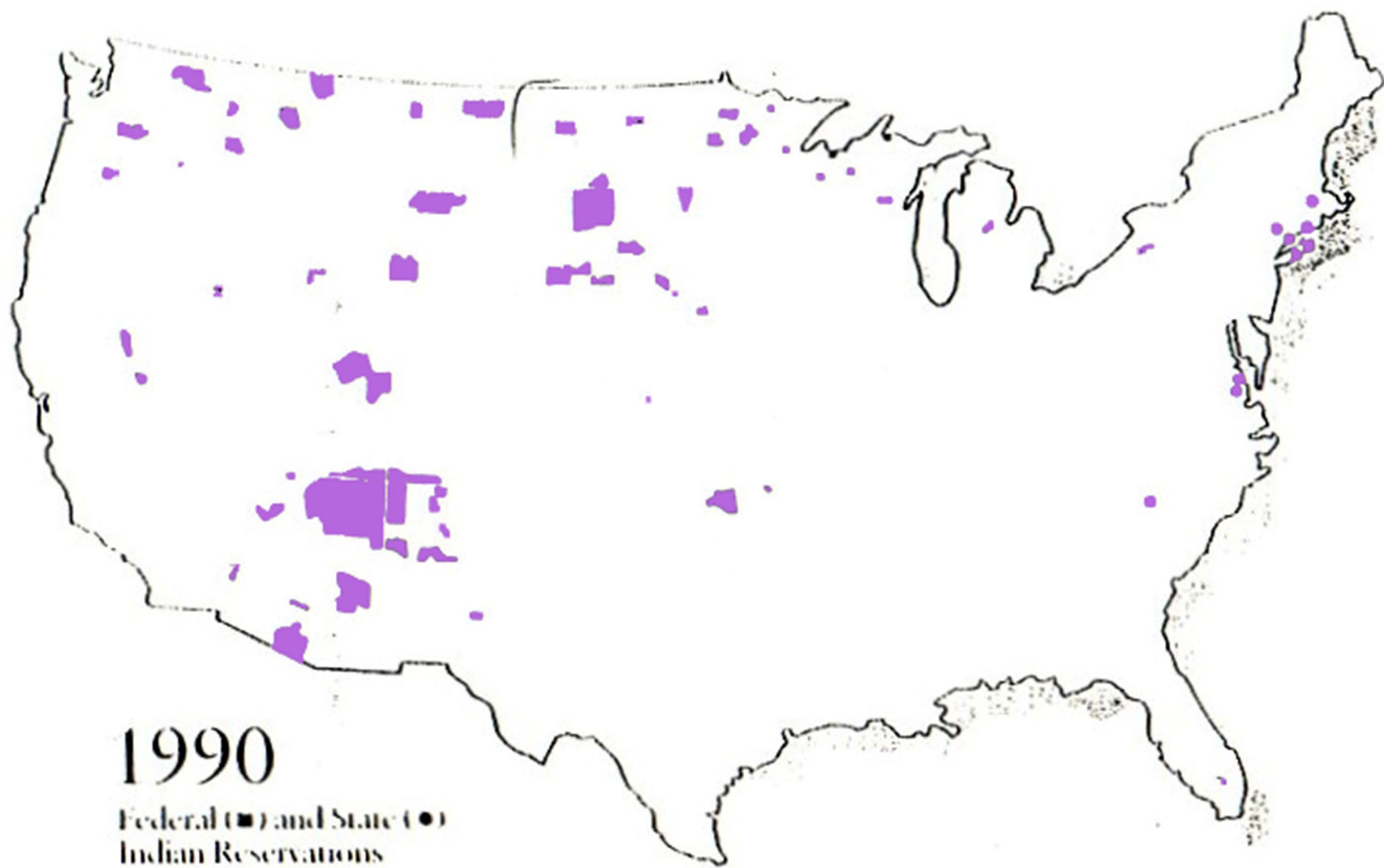


1850





1880

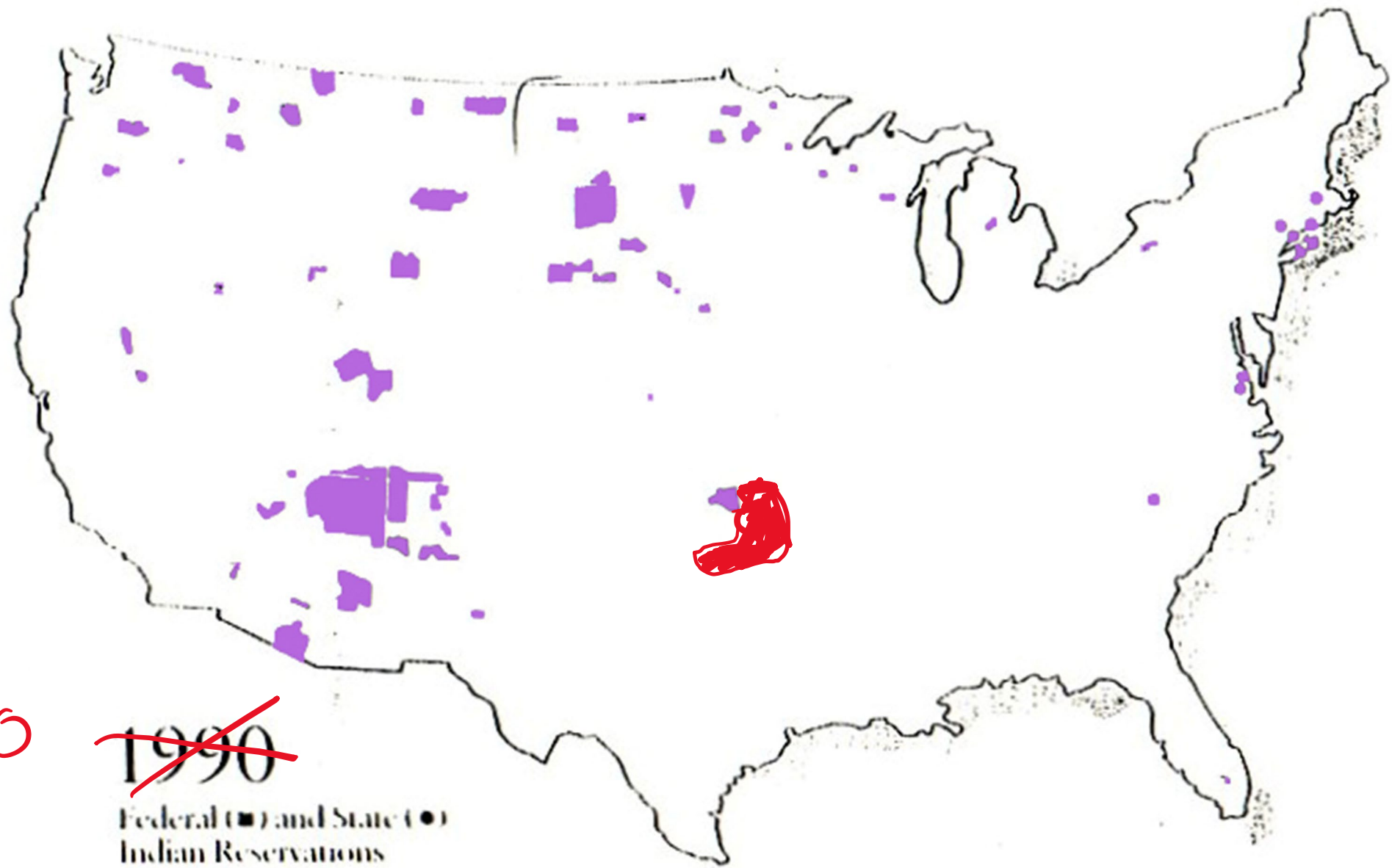


2020

2020

~~1990~~

Federal (■) and State (●)
Indian Reservations



What is federal Indian Law?

Federal Indian Law

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

Tribal Law

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

Sources of Federal Indian Law

Doctrine of Discovery

“It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.”

Johnson v. M'Intosh, 21 U.S. 543, 595

Sources of Federal Indian Law

Indian Commerce Clause

“Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Article I, Section 8, Clause 3

United States Constitution

Sources of Federal Indian Law

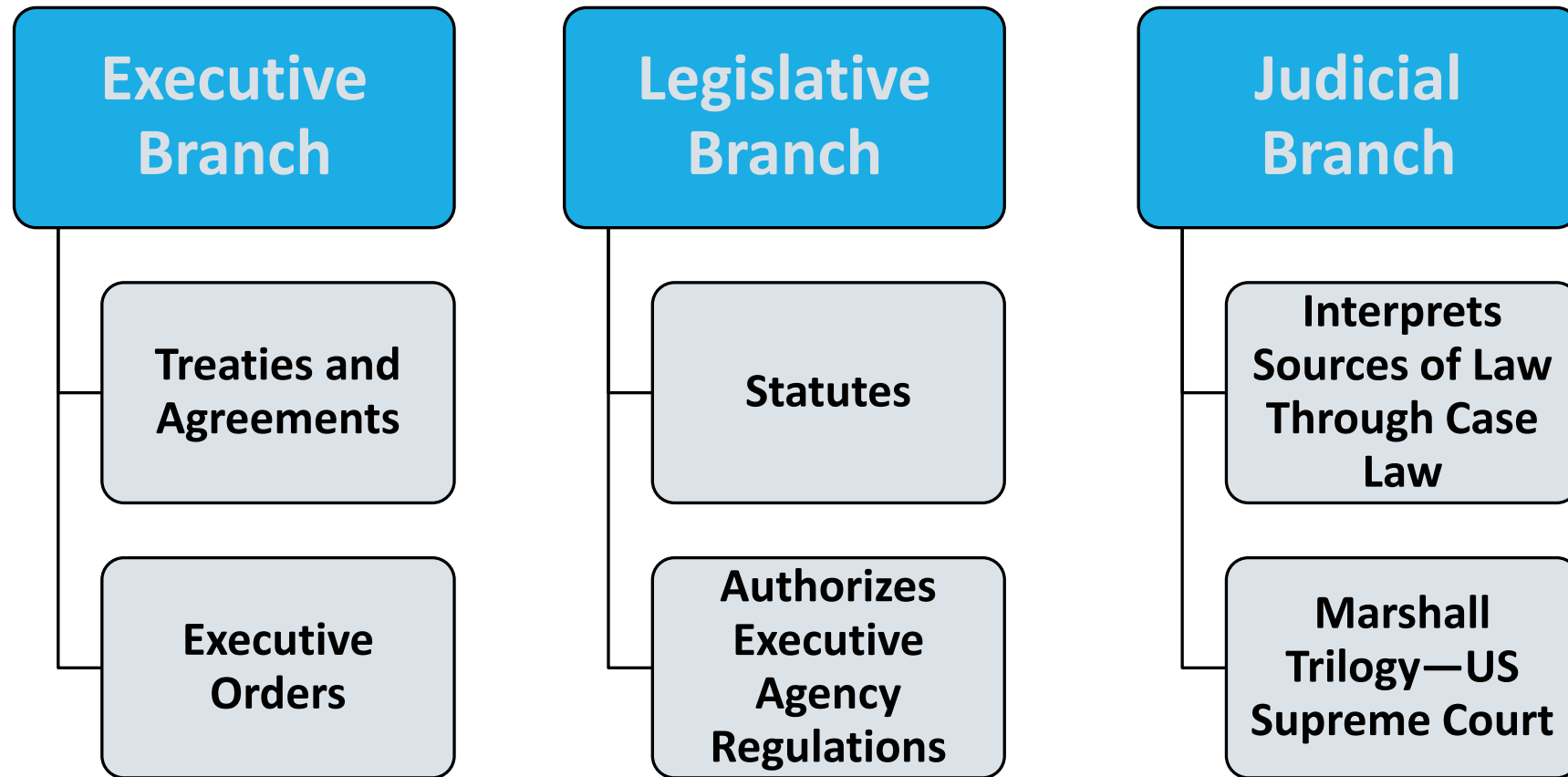
Supremacy Clause

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”

Article VI, Clause 2

United States Constitution

Sources of Federal Indian Law



What are Indian Tribes Under US Law?

- **Federally recognized** Tribes are recognized as sovereign nations by the US. As such, Tribes have a government-to-government relationship with the US.
- **State-recognized** Tribes are recognized as sovereign governments by an individual state. As such, those Tribes have a government-to-government relationship with that state.
- **Non-federally recognized** Tribes are not considered sovereign governments by the United States. They are often organized as nonprofit corporations.

Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831); *Worcester v. Georgia*, 31 U.S. 515, 531 (1832).

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE , FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES (2012), *available at* <http://gao.gov/assets/600/590102.pdf>.

Tribal Sovereignty Doctrine

- ***Williams v. Lee*, 358 U.S. 217, 271 (1959)**
 - While Congress has plenary authority over Tribes, state laws cannot infringe on tribal sovereignty.
 - “Absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”
- Diversity of Tribal Governments
 - Each Tribe is a unique sovereign nation with its own culture, history, and government

Tribal Sovereignty & Tribal Inherent Authority

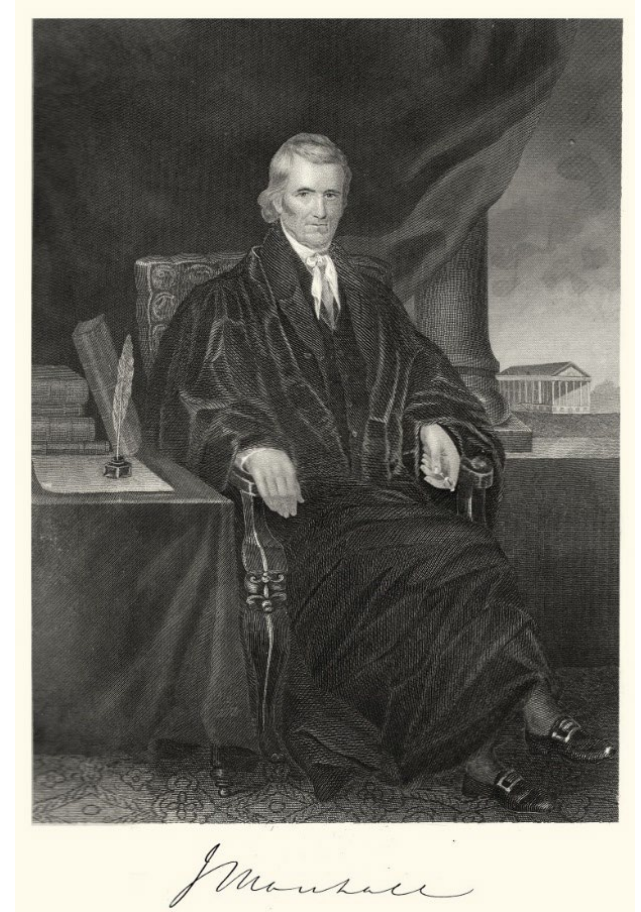
- Tribes have inherent authority as sovereign nations to protect and promote the health and welfare of their citizens using the methods most relevant for their communities
- Tribal inherent authority is a “plenary and exclusive power over their members and their territory, subject only to limitations imposed by federal law,” and includes the power to determine the form of tribal government and the power to legislate and tax, among others. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[1][b]; § 4.01[2].

How Are Indians Defined Under US Law?

- Pre-contact v. Post-contact
- Context
 - Self-identification (e.g., US Census)
 - Tribal membership
 - Federal statutory schemes
 - Urban Indians
- Citizenship
 - Tribal
 - Federal
 - State

Principle of Indian Title

- First Case in the Marshall Trilogy
 - First case involving Tribes before the U.S. Supreme Court
- *Johnson v. M'Intosh*, 21 U.S. 543, 573–4 (1823)
 - Tribes do not have fee title to the lands they have lived on since time immemorial.
 - Since European discovery, “Indian Title” consists of the right to use and occupy the land but not the ability to convey the land.

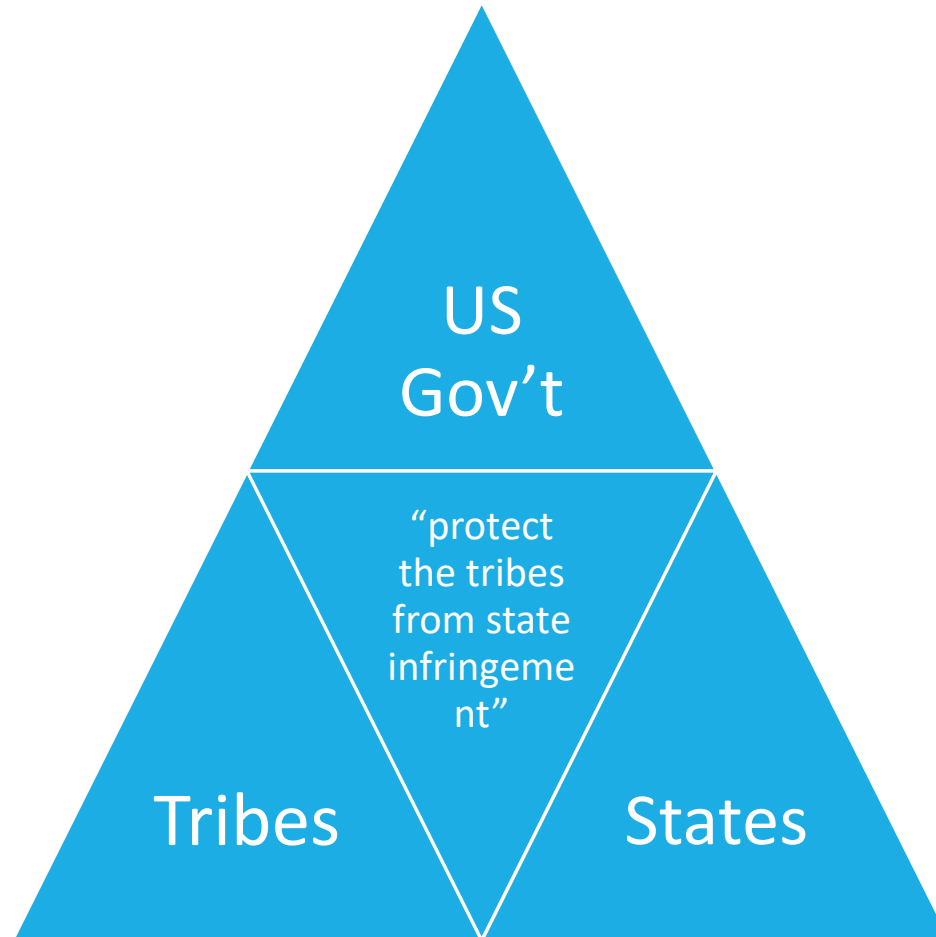


Principle of Domestic Dependent Nations



- Tribes are not foreign states but “domestic dependent nations.”
Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831)
- The court describes this relationship as one between a guardian and a ward.
Id.
- Vis-à-vis state governments, tribes have sovereignty over their land, and it is the responsibility of the federal government to protect the tribes from state infringement.
Worcester v. Georgia, 31 U.S. 515, 531 (1832)

Principle of Domestic Dependent Nations



Plenary Power Doctrine

- 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)

Trust Relationship

- 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.

Trust Relationship

“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)

Jurisdiction

- Types of jurisdiction
 - Criminal
 - Civil
- Jurisdiction: based on two main factors
 - Identity of the parties involved
 - Location of the action
- Examples of unique jurisdictional structures
 - Public Law 280
 - Alaska Native villages
 - Oklahoma tribes

Cultural Sovereignty

“Political sovereignty and cultural sovereignty are inextricably linked, because the ultimate goal of political sovereignty is protecting a way of life.”

W. Richard West (Cheyenne-Arapaho)

Cultural Sovereignty

“The concept of cultural sovereignty encompasses the spiritual, emotional, mental, and physical aspects of our lives. Because of this, only Native people can decide what the ultimate contours of Native sovereignty will be.”

Wallace Coffey, Former Chairman, Comanche Nation

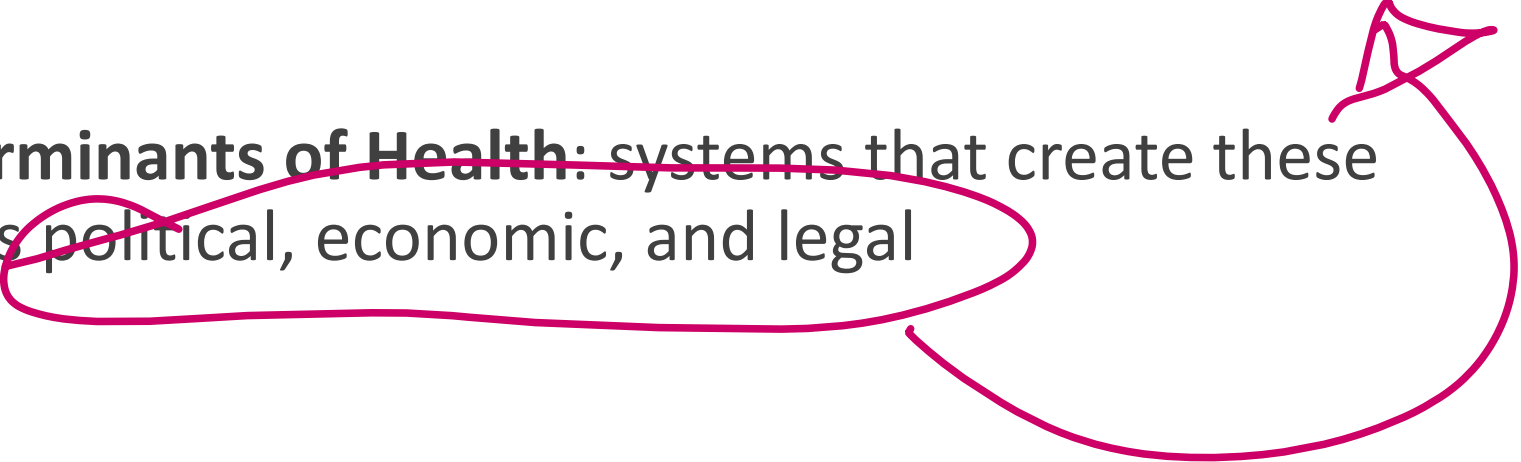
Rebecca Tsosie, Professor of Law, University of Arizona

Cultural Sovereignty

“Cultural sovereignty is the heart and soul that you have, and no one has jurisdiction over that but God.”

Wallace Coffey, Former Chairman, Comanche Nation

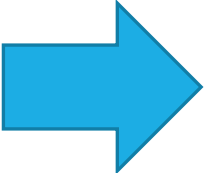
Social and Structural Determinants

- **Social Determinants of Health:** employment, income, housing, education and other conditions that determine inequitable health outcomes
 - **Structural Determinants of Health:** systems that create these inequities such as political, economic, and legal
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About social determinants of health, World Health Organization,
https://www.who.int/social_determinants/sdh_definition/en/ (last visited Jan. 30, 2019).

A conceptual framework for action on the social determinants of health, World Health Organization, 28 (2010), available at
https://www.who.int/social_determinants/corner/SDHDP2.pdf.

Products of Federal Indian Law

- extinguish Indian cultural practices
 - deny tribal property rights to ancestral lands
 - prevent accessing sacred lands and waters
 - impede on rights to practice Indian religions
 - circumvent customary law to address criminal violations committed by Indians on Indian land
 - prevent tribal governments from prosecuting non-Indians who commit crimes on Indian land
 - hyperregulation
 - among others
- 
- Historical Trauma
 - Structural Violence
 - Adverse Childhood Experiences

Structural Violence

Structural violence is “invisible, embedded in ubiquitous social structures, normalized by stable institutions and regular experience” and “occurs whenever people are disadvantaged by political, legal, economic or cultural traditions.”

Winter, D. D., & Leighton, D. C. (2001). Structural violence. In D. J. Christie, R. V. Wagner, & D. D. Winter (Eds.), *Peace, conflict, and violence: Peace psychology in the 21st century*. New York: Prentice-Hall.

ICWA

ISDEAA

NAGPRA

Plenary Power

Domestic
Dependent
Nationhood

Legalized Colonization &
Genocide

Thank You!

Aila Hoss

ailahoss@iu.edu