



HUSCH BLACKWELL

Tribal Lands & Jurisdiction: Fundamental Principles of Indian Law

Inter-Tribal Task Force
Tribal Real Estate Training

April 6-7, 2017

Rothschild, WI

Samantha Skenandore, Senior Counsel

Overview

- I. History of Federal Indian Law Policy
- II. Key Principles
- III. Tribes, the Federal Government and the States
- IV. Issues of Jurisdiction
- V. Tribal Law & Government
- VI. Key Land Policy & Case Illustration

I. History of Federal Indian Law Policy

- Chief Justice John Marshall – 4th Justice of the U.S. Supreme Court (the “Marshall Trilogy”), 1801-1835
- Presided over 3 major cases that became the basis for federal Indian law



Johnson v. M'Intosh (1823)

- Issue: Can tribes sell their own land? Answer: No.
- Illinois and Piankeshaw Nations conveyed land to non-tribal individuals seeking court recognition of the proper sale.
- Court found that title to land held by the conquering country (U.S.)
- Tribes cannot convey land to private parties without federal consent
- Tribal sovereignty is not full sovereignty – it is diminished

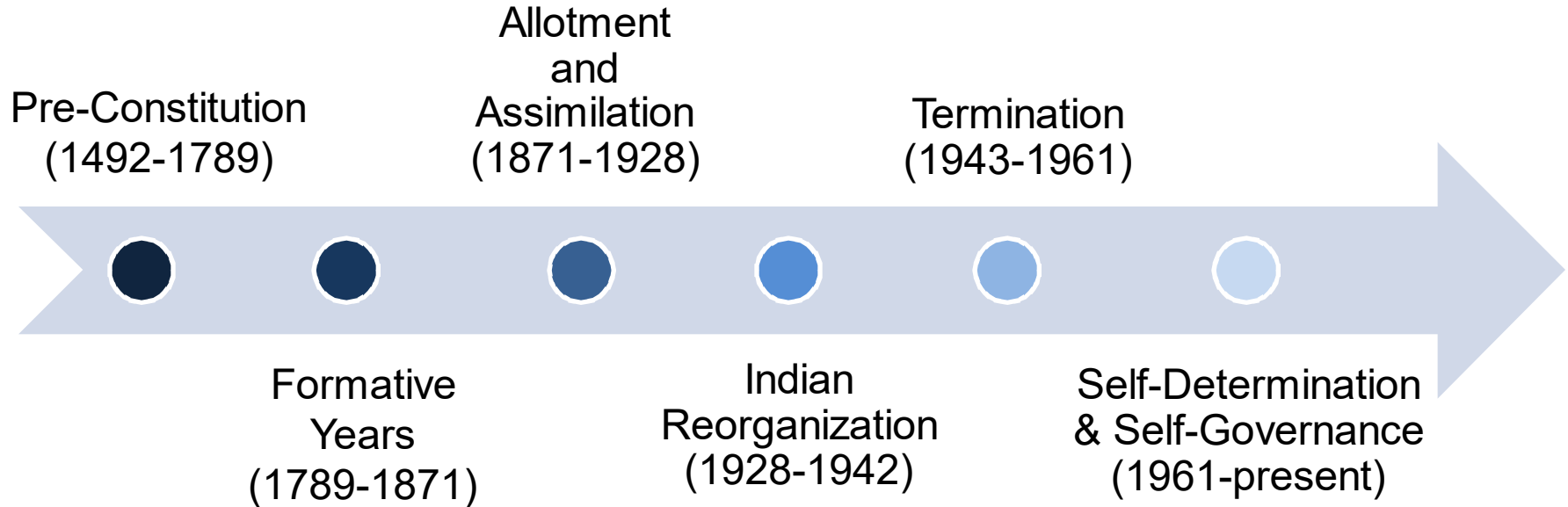
Cherokee Nation v. Georgia (1831)

- Issue: Does state law apply to tribal jurisdiction?
- Answer: No. Never reached merits of case due to jurisdiction
- Distinguishes tribes as “domestic dependent nations”, not “foreign states” for jurisdictional case reasons (diversity jurisdiction)
- Indians have rights to land they occupy – only feds can change that
- Tribes are in a state of “pupilage”
- Establishes the guardian-ward nature of the federal-tribal relationship
- Protects tribes from states

Worcester v. George (1832)

- Issue: Can the state of GA impose criminal penalties to those on Cherokee territory? Answer: No.
- State laws do not apply to tribal territory
- Upholds terms of federal treaty with tribe
- Requires consent of tribe to be subjected to state law
- State has no authority to tax on tribal jurisdiction

History of Federal Indian Law Policy

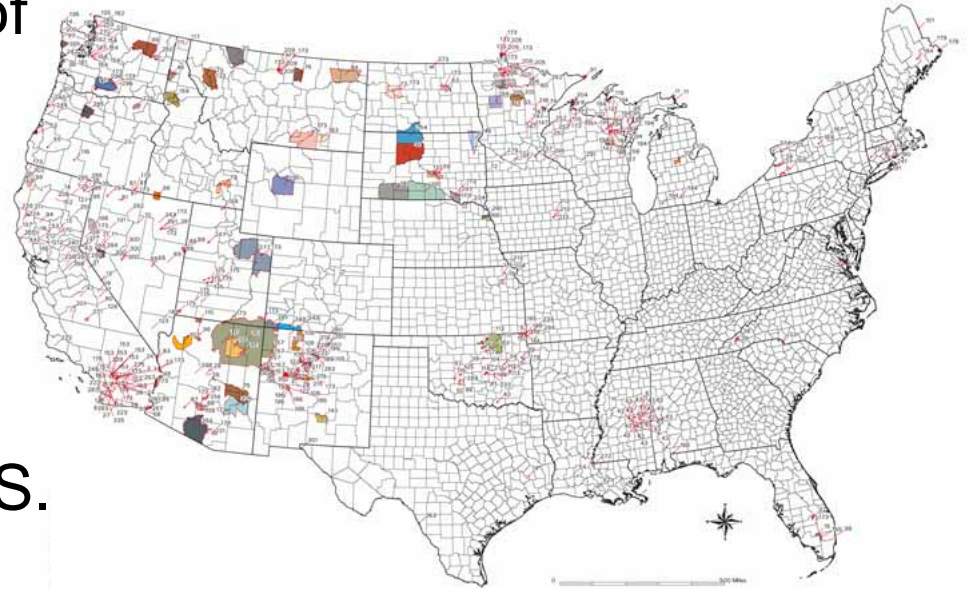


II. Key Principles

- What is “Indian Country?”
- What is an “Indian Tribe?”
- What is Tribal Sovereignty?
- Canons of Construction
- Federalism & Anti-Federalism

Indian Country

- All lands within the limits of any Indian reservation, including rights-of-way running through the reservation
- All dependent Indian communities within the U.S.
- All Indian allotments



Indian Tribe

- The U.S. Supreme Court has classified Indian tribes as:
 - “domestic dependent nations”
 - “distinct, independent political communities”
- There are 567 federally recognized Indian tribes in the U.S.

Tribal Sovereignty

- Main source of federal power: U.S. Const. authorizes Congress the power to regulate commerce with the Indian tribes: “the Indian Commerce Clause” (art. I, § 8)
- Congress has the intrinsic power to deal with domestic tribal affairs
- Executive power over the Indian tribes involves the ability to enter into treaties (Congress ended this authority in 1871)
- Courts interpret the actions of the President and Congress; strike a balance between the rights of tribes against competing interests

Tribal Sovereignty

- Inherent powers of self-government, by reason of their original tribal sovereignty, **not by virtue of any delegation of powers.**
 - Membership
 - Form of tribal government
 - Govern members and territories
 - Administer justice
 - Power to exclude

“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).

Tribal Sovereignty

A tribe retains its sovereignty until Congress acts to divest that sovereignty.

- Limitations may arise through treaties and statutes – **clear and unambiguous**

Limitations
on
conveyances
of tribal
property
Nonintercourse
Act 1834

General
Allotment Act
Dawes Act
1887

Major
Crimes Act
1885

Indian Civil
Rights Act
1968

PL 280
(includes
Wisconsin)
1953

Tribal Sovereignty

- The U.S. Supreme Court's theory of "implicit divestiture"
 - Those tribal powers in conflict with the United States' overriding territorial sovereignty
 - No criminal jurisdiction over non-Indians
 - Limitations on inherent civil authority over nonmembers
 - Authority inconsistent with the Tribe's dependent status

Canons of Construction

Interpretation of federal Indian law (observing trust responsibility)

“[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law.” *Montana v. Blackfeet Tribe*, 471 U.S. 371, 413 (1980).

The Rule: Treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians (see, e.g., *Choctaw Nation v. U.S.*, 318 U.S. 423 (1943) and all ambiguities are to be resolved in favor of the Indians (see, e.g. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973)).

Federalism & Anti-Federalism

Federalism:

- application of federal law

Anti-Federalism:

- application of state/local law

The Supremacy
Clause

- Federal statutes are the supreme law of the land (Art. 6, Cl. 2)

III. Tribes, Federal Government & States

- How do tribes interact with the federal government?
- How do tribes interact with state governments?

Treaties

- Between federal government and Indian tribes
 - Treaty Clause, U.S. Const. art. II, § 2, cl. 2
 - Executive authority with Senate consent
 - Commerce Clause, U.S. Const. art. I, § 8, cl. 3
 - “regulate Commerce with...the Indian Tribes.”
 - Not a grant to tribes, but a cession and reservation by the tribes
 - Congressional responsibility to carry out
 - Abrogation

Federal Trust Responsibility

- Federal government's unique relationship with Indian tribes
 - Evolved from treaties, statutes, and courts
 - Reaffirmed through legislation, invoked through administrative action, court decisions
- Scope
- Enforcement
 - Breach of trust claims
 - Administrative Procedures Act



State Authority

- General Rule: No State Authority in Indian Country
 - Congressional plenary authority
 - Federal preemption
 - Infringement
 - right of Indians to make their own laws and be ruled by them – *Williams v. Lee*
 - State's interest
 - Minimal burden – *Moe v. CSKT, Colville*



State Authority

- Congressional grant of authority
 - Public Law 280 (1953)
 - Most crimes and some civil matters
 - Wisconsin (except Menominee)
 - Gaming Regulation
 - Liquor laws

IV. Issues of Jurisdiction

- Criminal Jurisdiction
- Civil Jurisdiction
- Wisconsin is Unique – PL 280
 - Public Law 280 (1953)’s “mandatory” five states includes California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood
 - Transfers federal authority to state authority
 - No retrocession of jurisdiction in P.L. 280

Criminal Jurisdiction

- Tribes possess criminal jurisdiction over members and other non-member Indians
- Tribes do not possess criminal jurisdiction over non-Indians
- Wisconsin is unique – PL 280 (except Menominee)
- Federal jurisdiction
 - Major Crimes
 - 2013 reauthorization of the Violence Against Women Act: recognizing tribes' inherent sovereign right to protect Native women from domestic violence
- Cooperative law enforcement

Civil Jurisdiction

Tribal authority
has been limited
by courts

- **Identity:**
tribal citizens and non-citizens
- **Location:**
land status

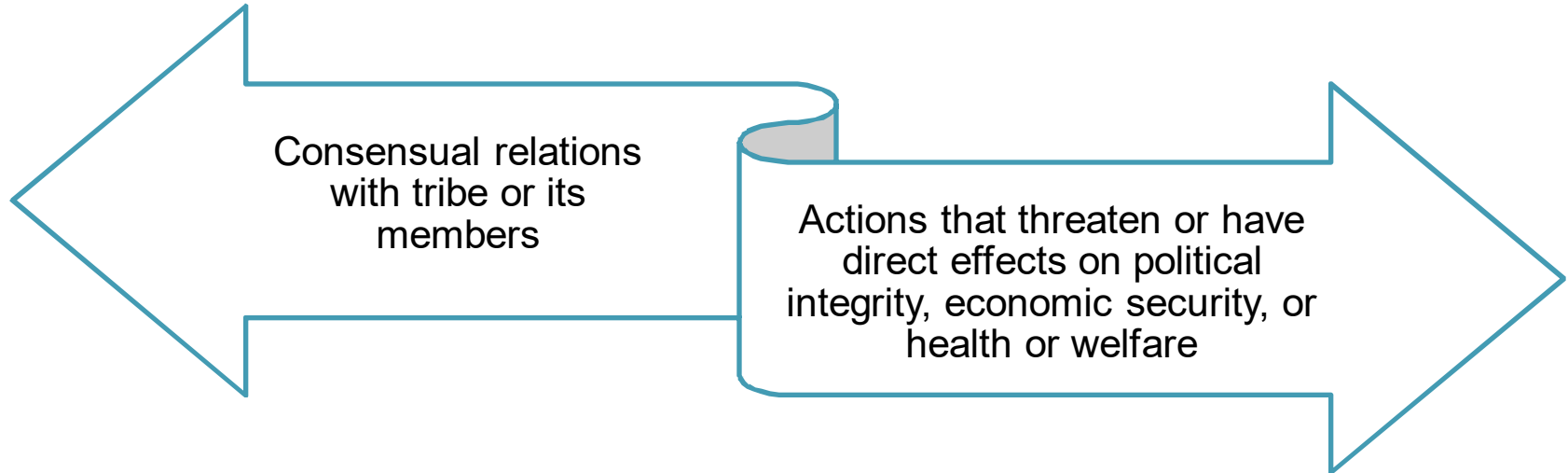
Civil Jurisdiction

U.S. Supreme Court:

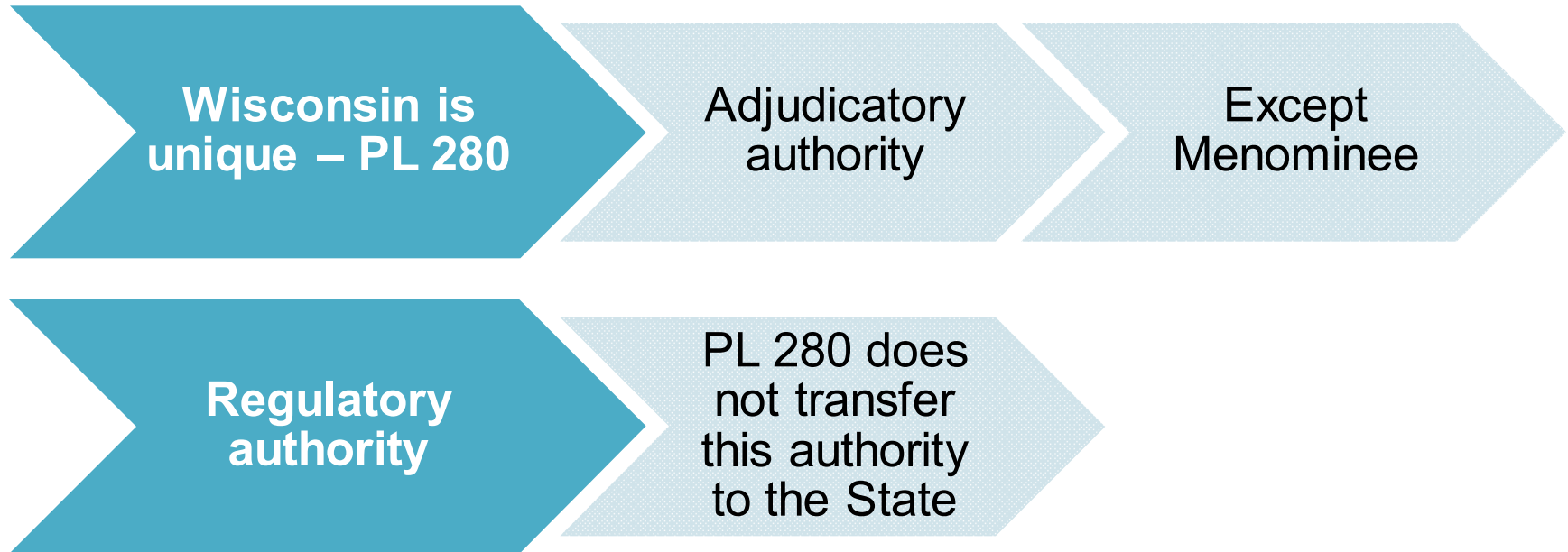
- “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes.” *Montana v. U.S.*, 450 U.S. 544, 563-65 (1981).
- The regulation of hunting and fishing by nonmembers on non-Indian fee lands within reservation boundaries bore “no clear relationship to tribal self-government or internal relations” and hence was not part of the Crow Tribe’s inherent sovereign authority.

Civil Jurisdiction

Two exceptions to the Montana rule exist, which establish Indian tribes retain inherent sovereign power of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands:



Civil Jurisdiction



V. Tribal Law & Government

- Traditional
- Modern
- Sovereign Immunity
- Resource management

Tribal Law & Government

Traditional forms of government

- Significant variation throughout the U.S.
- Highly structured vs. decentralized
- Wisconsin examples

Modern forms of government

- Indian Reorganization Act (1934)
- Constitutions
- Corporate charters

Tribal Law & Government

Tribal Councils

- Wisconsin examples
- Broad authority

Tribal Courts

- Criminal, Children, Probate, Civil, Drug
- Traditional dispute resolution

Tribal Law & Government

Tribal Executives

- President, Governor, Chairman, Chief
- Separation of Powers
- Tribal Departments

Tribal Law

- Customary/traditional law
- Codified law
- Common law
- Administrative law

Sovereign Immunity

- Immunity from suit or process
- UNLESS –
 - Congressional abrogation unequivocally expressed
 - Explicit and express tribal waiver
- Scope
 - Off-reservation activities
 - Governmental and commercial activities

VI. Key Land Policies and Cases

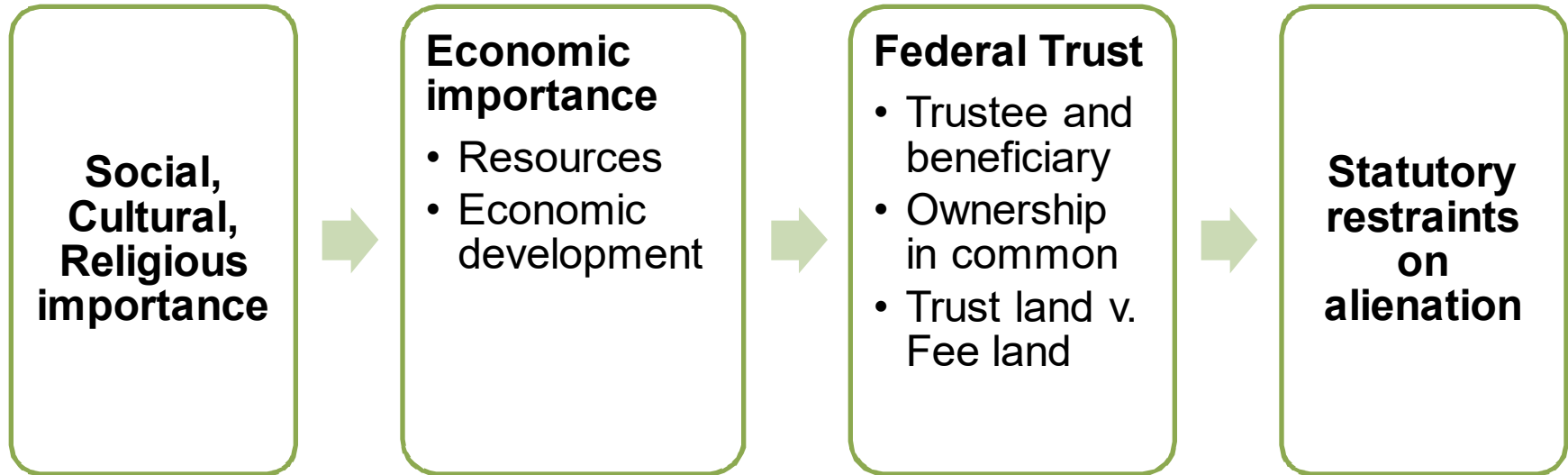
- Land & Land Status
- Key Policies
- Cases

Land and Land Status

- Trust land
 - Tribe or individual Indian
- Fee land
 - Tribe or individual Indian
 - Non-Indian
- Fee to Trust
 - Indian Reorganization Act
 - Protecting and increasing Indian trust land base
 - Section 5 (25 U.S.C. § 465)



Land and Land Status



Key Land Policies – U.S./Tribes

- Treaties
 - Peace
 - Reservations and land cessions
- Nonintercourse Act 1834 - Limitations on conveyances of tribal property (highly litigated)
- Dawes Act 1887 - General Allotment Act (termination policy)
- Public Law 280 (1953) (diminishing of jurisdiction)

Key Land Policies

- Various Land Claims Settlement Act (ongoing)
- 25 U.S.C.
 - Various regulations
 - Ex., Indian Land Consolidation Act (1983)

Case Illustration

Oneida Tribe of Indians of Wisconsin v. Village of Hobart,
542 F.Supp.2d 908 (2008)

Holding that tribally-owned fee lands, even if within the tribe's reservation boundaries, is subject to eminent domain, unless it is taken into trust by the United States



HUSCH BLACKWELL

Questions?

Samantha C. Skenandore, Senior Counsel
Husch Blackwell | Madison

608.234.6078 | samantha.skenandore@huschblackwell.com