I. **HISTORICAL FOUNDATIONS OF FEDERAL INDIAN LAW**  
   a. **DOCTRINE OF DISCOVERY**  
      i. Johnson v. McIntosh (1837, 63) – Plaintiffs bought title to land from Indians; defense later bought same land from US Govt. SCOTUS (Marshall) held that only European Nation could have extinguishable “title” under the *doctrines of discovery*. Thus, McIntosh had superior title (from US) and Johnson only received the possessory right that Indians had at the time of disposition.  
         1. Discovery by “Christian people” gives title to discovery nation  
         2. Discovery gives title to discovering nation, including the power to extinguish title by (1) *conquest* or (2) *purchase*  
         3. Anyone who wants title must receive it from the discovering nation  
            a. Indians cannot alienate title, because they only have occupancy rights, not full ownership rights  
   b. **FEDERAL-TRIBAL TREATY RELATIONSHIP**  
      i. Indian Perception (1756 Cherokee Chief)  
         1. Treaties are a sign of brotherhood and mutual respect  
         2. Parties to a treaty are “one body”  
      ii. American Perception (1783, Letter from President Washington) – treaties are easier than war  
         1. Create a boundary between settlers & Indians (Reservation Policy)  
            a. Achieved in Treaty of Hopewell  
         2. If more land is needed, purchase is preferred to conquest (Inevitability of Removal)  
            a. Treaties viewed as expedient method of removal  
         3. American superiority to claims on land (winning war against GB with whom the Indians fought)  
      iii. Treaty of Hopewell (1795, 87)  
         1. Congress has EXCLUSIVE right of regulating American trade and managing all Indian affairs  
         2. Sets up a boundary – per Washington’s Reservation Policy  
         3. Gives Americans the power to punish Indians based on American laws;  
         4. Gives Americans the power to punish American-on-Indian crime based on American laws  
      iv. Trade & Intercourse Acts (beginning in 1790)  
         1. Set boundary between Indian & non-Indian Country  
         2. Congress has monopoly on affairs with Indians  
         3. Congress regulates trade with Indians (non-land at this point)
c. REMOVAL

i. Background

1. White expansion into Indian territory
   a. Disapproved of by US Govt.
2. Knox (Washington’s Sec. of War): removal beyond Mississippi River is inevitable
3. Pres. Jefferson: American policy is that Indians will incorporate or be removed west of the Mississippi River
4. Removal Act of 1830 – President can give to Indians land west of Mississippi for purpose of removing them from land east of the Mississippi

   1. Strict construction of Indian Commerce Clause of Article III, which discusses “states, foreign nations, and Indians,” so that Indians cannot possibly also be foreign nations
   2. Establishes “guardian to ward” relationship
   3. Practical problem: too many different tribes with different governments to make each a foreign nation
   4. Breakdown of Decision
      a. Johnson & Baldwin: not political states
      b. Thompson & Story: foreign nations
         i. Views Treaty of Hopewell as eliminating Indian property rights in toto
      c. McLead: joins Marshall
      d. Sovereign state: yes 4-2; Foreign nation: no 4-2
         i. Marshall/McLead: yes, then no

iii. Worcester v. Georgia (1832, 112) – VT man moved to Indian Country without a license in defiance of GA law; GA arrested him for violating state law. Marshall wrote opinion invalidating GA laws on two grounds: (1) federal preemption in affairs with Indians and (2) Indian sovereignty over their lands.
   1. These two rationales continue to this day, but PREEMPTION is the more vital one, per a 1976 SCOTUS opinion in which preemption is considered “on the backdrop of Indian sovereignty.”
   2. Desire for peace was bilateral in Treaty of Hopewell – indicating that Cherokee were a separate political power.
   3. Cession of right to manage affairs doesn’t cede sovereignty, only ability to trade with other nations

iv. Canons of Statutory Construction at Work in Worcester
   1. Ambiguities are resolved in favor on Indians
   2. Interpret the language would be interpreted by Indians
3. Indians are not responsible for the nuances of terms in treaties
4. Liberal construction of treaties in favor of Indians

v. Lasting Principles in *Worcester*
   1. Trust responsibility to tribes (guardian and ward)
   2. Federal preemption as a bar to state jurisdiction
   3. Indian sovereignty/self-government firmly established

vi. *United States v. Winans* (1905, 136) – Treaty gave Yakima Indians right to fish “at the usual places in common with citizens of Washington.” Court held that Indians had exclusive fishing rights on Reservation and equal fishing rights off Reservation.
   1. Reserved Rights Doctrine – treaty is a grant of rights FROM Indians to Indians
   2. Canon of Construction: treaty construed as Indians would have interpreted it

vii. *United States v. Washington* (1976, 131) (“THE BOLDT DECISION”) – WA attempted to regulate Indians and non-Indians fishing rights off-Reservation. Boldt held that the state may regulate Indians’ fishing rights in the name of conservation, but ONLY if it first regulates non-Indians and fails to fulfill its conservation goal.
   1. Several treaties involved – all negotiated in Chinook jargon, which isn’t a real language and isn’t the first language of ANY tribe; must be interpreted as Indians would interpret it
      a. Chinook jargon has no phrases for expressing a limitation in rights to take fish
   2. “In common with” means sharing equally, so Indians have the right to 50% of fish off-Reservation and all fish on Reservation

d. **Reservations (Expansion of Federal Power)**
   i. Confine Indians to smaller tracts of land
   ii. Open land to homesteading
   iii. Increase in federal power over “sovereign” Indian nations

e. **Allotment & Assimilation**
   i. Ex Parte Crow Dog (1883, 153) – Crow Dog murdered Spotted Tail on Reservation. Crow Dog’s family pays restitution, per tradition, to Spotted Tail’s family. Federal court convicted Crow Dog of murder and SCOTUS reversed.
      1. Self-governance of Indians required.
      2. Indians can’t understand superior laws of US.
      3. Reaction: Major Crimes Act of 1885
         a. Regulated seven serious crimes under federal law
         b. US demands pushing law into “lawless” Indian Country
c. First time US acts unilaterally with regard to Indians

ii. Kagama (1886, 158) – Indian kills another Indian on Reservation (same facts as Crow Dog). SCOTUS affirmed Congress’ authority to pass MCA and punish Indians for on-reservation activity.
   1. Guardian/ward relationship was the “trust shield,” which SCOTUS turned into a sword.
   2. SCOTUS rejected that Indian Commerce Clause authorized Congress to pass MCA. Instead, it was the trust shield that allowed Congress to pass MCA.
   3. US and States are the only “sovereigns” within the borders of the US.

iii. Dawes Act (Allotment Act) (1887-1934)
   1. Allows President to divide the Reservation into 160 acre parcels
      a. Surplus reservation lands are sold to homesteaders with the proceeds benefiting the Indians
      b. Indians lost 90m acres under this policy.
      c. Caused a checkerboard effect on Reservations (some lands owned by Indians and some by non-Indians)
   i. Raised problems of regulation

iv. Lone Wolf (1903, 182) – Indians challenge Congress’ power to sell “surplus” lands under Allotment Act.
   1. Congressional plenary power over Indian affairs.
   2. SCOTUS deferred to Congress using the political question doctrine.
      a. Assumption: Congress acts in perfect good faith in dealing with Indians.
   3. Congress changed the form of the Indian investment from land to money, which is acceptable.

f. Reorganization
   i. End of Allotment policies
   ii. Indian Reorganization Act of 1934
      1. Goal: revive tribal government
      2. John Collier, FDR’s BIA Commissioner led change
      3. Encouraged self-government with IRA Constitutions
         a. Tribal Counsel includes “Chair” (legislative and executive)
         b. Judiciary appointed by legislative body
         i. Some tribes have changed the original set up to ensure separation of powers.
         c. No change to the structure of government without Secretary of the Interior’s and tribe members’ approval
   iii. Felix Cohen wrote his Handbook of Indian Law
1. Sovereignty: Indian tribes possess powers of any other state
2. Plenary power: But Congress has rendered tribes subject to federal laws, which isn’t an automatic destroyer of sovereignty.
3. Tribal powers qualified or diminished ONLY if done so explicitly by act of plenary power.

   i. House Resolution 53-108
      1. Gave procedure for termination of tribes
      2. Should be done “as rapidly as possible”
         a. Includes ignoring treaties
   ii. P.L. 280 States – extends state civil and criminal jurisdiction into Indian Country in certain states
   iii. Menominee Tribe (1968, 207) – Menominee terminated by an act that did not speak to hunting and fishing rights. SCOTUS held that those rights were reserved because the same committee passed PL 280, which provides for the preservation of those rights.
   iv. Reallocation Program – attempt to move Indians to cities
   v. Indian Civil Rights Act of 1968
      1. Requires tribal consent for a state to become PL 280 state
      2. Limits tribal punishment for civil crimes to 6 months in prison and $500 (later one year and $5,000).
         a. States have no jurisdiction.
         b. Federal is the main enforcer in Indian Country.
      3. Imposes some of the Bill of Rights on Indians
      4. Imposition of law indicates:
         a. Presumption that Indian governments will continue (self-determination)
         b. Usurpation of Indian control over law-making decisions (termination)

h. Self-Determination (1961/70- Present)
   i. President Nixon officially ends Termination Period
   ii. Passage of dozens of Acts, all with the goal of giving Indians the power to make law and business decisions in Indian Country
      1. If not that goal, then just to improve living conditions
   iii. Morton v. Mancari (1974, 227) – BIA passed over a non-Indian in favor of hiring an Indian per Indian Preference Statute, which SCOTUS held does not violate the 14th Amendment.
      1. Blackmun didn’t use strict scrutiny but rational basis (“reasonably related”), because the preference to Indians is not racial, but political (quasi-sovereign political entities).
      2. Under Reasonably Related Test, the preference for Indians running BIA is reasonably related to the goal of self-determination, so it passes constitutional muster.
II. FEDERAL-TRIBAL RELATIONSHIP

a. PROTECTIONS & TAKINGS OF NATIVE LANDS

   i. TRADE & INTERCOURSE ACTS

   ii. FEDERAL TAKINGS/EXTINGUISHMENT OF NATIVE TITLE

      1. Claims

         a. Northeast

            i. Trade & Intercourse Act; federal common law

            ii. Seeking ejectment and rental value damages

            iii. Northeast states entered into treaties with Indians in violation of federal T&I Acts

            iv. Typically, Tribes v. State/County

            v. See Oneida Nation

         b. Middle-West

            i. Takings Clause (for treaty recognized lands)

            ii. Seeking return of land and damages

                1. Practically, just damages for failure to justly compensate

                2. Return of land must argue that there was no public purpose

            iii. US/Indian treaties were broken, allowing the US to have access to Indian lands

            iv. Typically, Tribes v. US

            v. See Sioux Nation

         c. Further West

            i. Takings Clause (for lands reserved by Executive Order or aboriginal title)

            ii. Seeking return of land and damages

                1. Practically, just damages for failure to justly compensate

                2. Return of land must argue that there was no public purpose

            iii. Reservations in the West were made by Executive Order or by granting title

            iv. Tribes v. US

            v. See Tee-Hit-Ton Indians for an example of granting “title” (held not to grant title)

      2. Oneida Nation (1985, 205) – Indians sued counties in NY state for violation of the Trade & Intercourse Acts and violation of the common law doctrine of unlawful possession. SCOTUS held that Indians had the right to sue, because no proper defense was asserted.

         a. Laches was rejected by the DC and not appealed.

            i. Dissent wants to use laches
b. Statute of limitations does not govern here, where no SOL is available. Applying state SOL in this situation would contravene Congressional intent.

c. Ratification by the US Govt. – canon of construction required resolving ambiguities in favor of Indians
   i. US govt. did ratify “additional” lands, so it may be that they ratified the NY/Tribe sales

d. Nonjusticiability does not apply here, because Congressional plenary power does not mean total control over all questions of Indian law.

   a. SCOTUS held that only possessory rights were given to Indians, not full ownership rights with divestible title.
   b. SCOTUS further held Indians are not entitled to compensation *without specific legislative direction to make payment.*
   c. Dann (289) – Sisters claim not “aboriginal” title (which was sold), but Individual aboriginal title existed and that the government did not protect Indians from Westward Expansion. Inter-American court held in favor of sisters…but who cares?
      i. Aboriginal title – land to which Indians have a customary connection
      ii. Individual aboriginal title – land to which individual Indians have customary connection.

4. *Sioux Nation* (1980, 365) – Treaty established the Black Hills as Sioux land, but the US broke the treaty by opening the land for gold-digging American settlers. SCOTUS held that opening the land was a takings that was not compensated.
   a. No argument that taking lacked public purpose (which would have returned the land); only that it lacked just compensation.

5. Payments
   a. Aboriginal Title: value at taking, no interest
   b. Executive Order: value at taking, no interest
   c. Treaty-Recognized Taking: value at taking, interest

b. **CONGRESSIONAL PLENARY POWER & TREATY ABROGATION**
   i. Evolution of Determining when treaties are abrogated
      1. Tuscarora – absent clear expression to the contrary, all laws apply to Indians, even if it means a violation of treaty
2. *Seneca* – Congressional abrogation occurs only where there is sufficiently clear and specific ways to show congressional intent

3. *Menominee* – Congress may only abrogate treaty rights when it explicitly says it is doing so

4. *Dion* (323) – Congress must (1) actually consider the conflict between the law and the treaty rights and (2) resolve the conflict in favor of abrogating treaty rights (current law)

   ii. *Dion* (1986, 323) – SCOTUS held that Congress invalidated treaty rights to hunt Bald and Golden Eagles, because Congress considered the conflict and resolved the issue in favor of abrogating those treaty rights.

      1. In the Eagle Protection Act, the statute sets up a permit system whereby Indians can hunt some eagles; such a system would be superfluous if the treaty rights were not abrogated.

iii. *Bourland* (1993, 334) – Flood Control Act allows the US to dam a river, which would flood Indian lands. SCOTUS allows under Dion (allegedly), because the payment for the land in the 1950’s included “final and complete” payment.

      1. Dissent: The payment was for the land, not for the right to regulate non-Indian hunting and fishing on the land.

**c. Federal Trust Responsibility**

i. *Trust Relationship*

   1. Established guardian/ward relationship in Cherokee Nation

   2. US is settlor and trustee; tribes are beneficiary

ii. *Seminole Nation* (340) – SCOTUS held that the Executive Branch breached its fiduciary duties to Indians when it paid money to a notoriously corrupt Indian government, knowing that the money wouldn’t make it to individual tribe members, as was intended.

   1. This rationale doesn’t apply to the Legislative Branch, which has plenary power under Lone Wolf.

iii. *Mitchell II* (1983, 344) – SCOTUS held that Indian timber management statutes created an enforceable trust responsibility of the US on behalf of Indians to have sustainable timber harvests; Indians could use for federal mismanagement.

   1. *Mitchell I* (1980) – where claims do not arise from liability-imposing provisions or implementing regulations, there is not a breach of fiduciary duty (as was the case with timber harvests under the General Allotment Act).

iv. *White Mountain Apache* (2003, 350) – SCOTUS held US had a trust responsibility in the upkeep of Fort Apache on behalf of the White Mountain Apache, because evidence points to (1) executive management of the property and (2) breach of trust duty.
v. *Navajo Nation* (2003, 345) – SCOTUS held there is no trust responsibility to create the best possible contract for Indians under the Indian Mineral Leasing Act when the Indians also have to approve the contract.
   1. Holding otherwise would undermine self-governance rationales.

vi. *Cobell* – ongoing case regarding Individual Indian Money trust accounting systems, which clearly entail a breach of the fiduciary duty to account.

vii. Trust Responsibilities
   1. Loyalty
   2. Prudence (Diversification)
   3. Preservation of Trust Property
   4. Enforcing Claims
   5. Accounting

viii. Remedies for Breach of Trust
   1. Injunctive relief under the APA
   2. Monetary value under the Indian Tucker Act

III. **Tribal Sovereignty & Self-Government**

a. **Tribal Government as Independent From US Govt.**
   i. Cohen: Indians have sovereignty unless explicitly divested
   ii. *Talton v. Mayes* (1896, 381) – Indian accused of killing another Indian in Indian Country, and attempted to use 5th Amendment. SCOTUS held that Bill of Rights are not incorporated on Indians, because Indian governments are not merely extensions of the federal government, but are themselves inherently sovereign.
   iii. *Wheeler* (1978, 384) – Indian is convicted in tribal court and later charged with same offense from same act (a rape) in federal court. SCOTUS won’t apply double jeopardy bar to litigation, because under the 5th Amendment, it is not the same offense when two SOVEREIGNS prosecute the same person.
   iv. Limitations on Sovereignty
      1. By treaty,
      2. By statute,
      3. Or implicit divestment by status as domestic dependent nation

b. **Tribal Sovereign Immunity**
   i. *Kiowa Tribe* (1998, 406) – Tribe defaulted on an agreement made off Reservation, and SCOTUS held that Indians can’t be sued due to sovereign immunity.
      1. Dissent: (1) this case creates law, (2) presents no basis for immunity (in fact, the majority itself doesn’t like sovereign immunity), and (3) is unjust

c. **Indian Civil Rights Act (ICRA) of 1968**
i. Congress imposed limits on the power of tribal governments (which looks a lot like US Bill of Rights)

ii. *Santa Clara Pueblo* (1978, 391) – Indian descendants of Santa Clara Pueblo woman sued under the ICRA’s equal protection clause to be recognized as full members of the tribe despite a tribal regulation that membership passed through the fathers.
   1. SCOTUS: ICRA doesn’t afford this right of action, because ICRA’s goal was self-government; this action ruins self-government.
   2. Ex Parte Young dictated that an officer of the tribe may be sued despite the tribe’s sovereign immunity.

d. **Tribal Justice System**
   i. O’Connor: focus on restorative justice (restitution) rather than deterrence
   ii. Mostly set up by IRA Constitutions
   iii. *Williams v. Lee* (1959, 416) – SCOTUS held that tribal court has exclusive jurisdiction in non-PL 280 state when a civil transaction takes place ON the Reservation between an Indian and non-Indian.
      1. Infringement Test: whether state action infringes on the right of reservation Indians to make their own laws and be ruled by them (absent a governing Congressional Act)

IV. **Federal, State, & Tribal Authority in “Indian Country”**

a. **Definition of Indian Country**
   i. § 1151
      1. (a) within the four corners of a Reservation
         a. Look to Solem factors
      2. (b) all dependent Indian communities
         a. Situations where US govt. recognized Indian communities but did not define its land (*Sandoval*)
            i. Federal exercises some supervision or control over community
         b. Includes land put in **trust** as well
      3. (c) all Indian allotments not extinguished
         a. includes off-Reservation trust land
   ii. *Solem v. Bartlett* (1984, 464) – SCOTUS used three part factor test to determine whether land is a reservation in “Indian Country.” (Finding no magic language, no contemporary agreement, and a complete failure in the allotment in the case at bar, SCOTUS held the land remained Indian Country.)
      1. Statutory Language
         a. Must be magic language of “sell and dispose” with tribe getting the proceeds (c.f.: DECOTEAU)
         b. “public domain” and “thus diminished” are not dispositive, because those weren’t terms of art in 1908
i. This argument is rejected by DeCoteau and Hagen

2. Events Surrounding
   a. Mutual agreement on change in title
      i. Legislative history & contemporary understanding
   b. Here, ambiguous who exercised jurisdiction, but tribe set up headquarters in area alleged to be outside Indian Country

3. Events Subsequent
   a. How did BIA, tribes, Congress, & states treat the land – as Indian Country or not?
   b. Who lives there now?

iii. Yankton (1998, 471) – State may erect a dump on lands opened for allotment, because (1) magic language used, (2) Interior told Indians on land to “adopt new life wholly” when allotment opened, and (3) non-Indians live on 90% of the land and are 2/3 the population
   1. Diminishment: two ways to diminish: (1) reduce territory by saying it’s not Indian Country or (2) reduce powers by saying no tribal authority exists
   2. Jurisdiction exercised by state since 1802

iv. DeCoteau (462) – Land opened for allotment no longer Indian Country, because (1) magic words used (2) 1889 Agreement and (3) residents are 30,000 non-Indian, 3,000 Indian
   1. Magic language: “cede, sell, relinquish, and convey all right, title, and interest” for a sum certain

v. Hagen (469) – Finds it no longer Indian Country when (1) land “restored to the public domain” (2) Interior speaks of “lifting nailed boards” of the boundaries and (3) 85% non-Indian residency.
   1. Accepts as sufficient statutory language return to “public domain” rationale (DECOTEAU) rather than Solem’s rejection of it in n.17
   2. State jurisdiction exercised by state for a long time

vi. What’s really going on? (O’Connor in Hagan)
   1. Consider present demographics
      a. Solem – has Indians, so it’s Indian Country
      b. Not so in DeCoteau, Hagan, & Yankton
   2. Consider patterns of government
      a. Solem – incoherent jurisdiction
      b. Hagan & Yankton have state jurisdiction
   3. Consider the “justifiable expectations” of persons living there
      a. Based on those two other factors (demographics and patterns of government)
b. **Criminal Jurisdiction**
   i. **Major Crimes Act**
      1. Covers major enumerated crimes committed by an Indian against anyone on a Reservation
         a. Federal jurisdiction
      2. In PL 280 states, state has jurisdiction
         a. Tribes may or may not have jurisdiction
      3. In non-PL 280 states, for crimes committed on the Reservation…

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* **ICCA:** All federal laws apply unless (1) Indian on Indian crime, (2) Indian defendant is already fully prosecuted by the tribe, or (3) treaty preserves tribes exclusive sovereignty. But #3 is rarely used.

** **Oliphant:** Even though ICCA has no exception for tribal jurisdiction over non-Indians, tribes have no power to prosecute non-Indians.

c. **State Jurisdiction**
   i. **PL 280**
      1. Termination Era policy of assimilation
      2. Transfers jurisdiction from federal govt. to state govt. in “five willing states” but retains trust status of lands
a. Now applies to six mandatory states & other states on certain issues (n.1 on 498)

b. ICRA requires states and tribes to agree to allow the state to take PL 280 jurisdiction

   a. Legislative history of PL 280: end lawlessness on Reservations; thus PL 280’s conferral of civil adjudicative authority is limited to PRIVATE civil litigation (not regulatory civil litigation)
      i. Congress knows how to express its intent to subject Indians to the full sweep of state law – but it did not do so here
   b. Canon of construction for liberally construing in favor of Indians: Congress knows how to terminate an Indian reservation, and it has not done so here. Ambiguities are resolved in favor of Indians.

4. *Menominee Tribe* (1968, 207) – Menominee terminated by an act that did not speak to hunting and fishing rights. SCOTUS held that those rights were reserved because the same committee passed PL 280, which provides for the preservation of hunting & fishing rights.

5. *Cabazon* (1987, 724) – CA, a PL 280 state, made it a “crime” to operate casinos beyond a certain capacity, but SCOTUS invalidated crime, saying that it was truly a regulation.
   a. Look to what the state is actually trying to do: in CA, some gaming is allowed, so it’s not as if gaming is against public policy.
      i. Criminal/prohibitory – reflects public policy and state is allowed to regulate only criminal/prohibitory under *Bryan v. Itasca County*
      ii. Civil/regulatory – some acts are allowed, but the manner of action is regulated; state may not regulate
   b. Federal and tribal interests (economic development) outweigh state interest (preventing organized crime)

ii. CIVIL JURISDICTION

1. TAX & REGULATION
   a. *McClanahan* (1973, 556) – SCOTUS held that AZ could not levy income tax on an Indian who derived income solely from with the Reservation.
      i. Backdrop of tribal sovereignty: helpful, but no longer dispositive
ii. Judicial plenary power: courts use balancing test to weigh competing tribal, state, and federal power to determine when infringement on tribal sovereignty is acceptable

b. *Colville* (1980, 566) – SCOTUS held that WA may tax non-Indians who conduct business on Reservation (buying cigarettes).
   i. Perhaps different if Indians weren’t just “marketing a tax exemption” which is a wholly off Rez activity.
   ii. Colville includes non-member Indians (since they fall under the rationale of Colville’s “they wouldn’t do business on the Rez but for the tax advantage”)
      1. Protecting non-member Indians does not protect self-government rationale (“backdrop of Indian sovereignty”) of McClanahan since non-members are not governed

c. *Bracker* (1980, 579) – SCOTUS denied AZ’s ability to tax a non-Indian entity acting in Indian Country, because it is preempted by federal law, here through a comprehensive regulatory scheme.
   i. Preemption through either:
      1. Explicit statement of federal law
      2. Occupying the field
         a. Traditionally (Worcester)
         b. Comprehensive federal regulations
   ii. States must have more than just an interest in raising revenue.

   i. Preemption: by express statement OR by state regulations interfering or infringing on federal/tribal interests in favor of state interests.
      1. Requires a weighing of interests.

2. **Civil Adjudicatory (Indian Child Welfare Act)**
      i. Exclusive Jurisdiction § 1911(a)
         1. Where Indian child domiciled in Indian Country
Holyfield (1989, 663) – Indian parents were members and domiciled on Choctaw Rez, but had twins off-Rez and surrendered them off-Rez. SCOTUS held that those children were domiciled in Indian Country, because the parents remain to be domiciled in Indian Country, without regard to the actual location of where the dependent children live (off Rez).

2. Indian “ward” domiciled in Indian Country
3. Not in PL 280 states, which are subject to concurrent jurisdiction based on transfer of proceedings

ii. Transfer of Proceedings § 1911(b)
   1. Presumptive Tribal Jurisdiction – State court must transfer if moving party gives notice to the tribe and parent unless:
      a. Either parent objects
      b. Tribal court declines transfer
      c. “Good cause” exists not to transfer (not including “child’s best interests”)
         i. No tribal court
         ii. Proceedings already advanced
      iii. Child over 12 objects

b. Substantive Provisions
   i. Adoption § 1915 (order of preference)
      1. Member of extended family
      2. Member of Indian tribe
      3. Other Indian tribe
   ii. Foster care § 1915 (order of preference)
      1. Member of extended family
      2. Member of Indian tribe
      3. Other Indian tribe
      4. Indian-licensed foster home

d. TRIBAL JURISDICTION
   i. INHERENT TRIBAL JURISDICTION
      1. CRIMINAL
         a. Oliphant (1978, 510) – SCOTUS held Indian tribal courts do not have jurisdiction over non-Indians.
         i. Construed in favor of US govt. the Treaty with Choctaw’s ambiguity over criminal Indian jurisdiction extending to non-Indians.
         ii. No divestment by treaty or statute, but divestment of inherent power by status as a dependent nation.
b. *Duro* (1990) – SCOTUS held tribes have no criminal jurisdiction over non-member Indians.
   i. Shortly after, Congress passed 1992 Amendments to ICRA, which invalidated Duro and said that tribes have criminal jurisdiction over all Indians.

c. *Lara* (2004, 520) – SCOTUS held that Congress may “fix” Duro, because criminal jurisdiction is not a constitutional issue but a common law issue.
   i. Kennedy, concurring: constitutional issues at stake, but this is mostly common law
   ii. Thomas, concurring: must reexamine all of Indian law, because we say there is Congressional plenary power AND tribal sovereignty; that’s impossible.
   iii. Souter/Scalia, dissent: this is a constitutional issue.

2. **REGULATORY**
   a. *Montana* (1981, 537) – Tribe NOT allowed to assert civil regulatory power (duck hunting & fish regulations) over non-members living on land within the reservation’s exterior borders owned in fee by non-members.
      i. RULE: Generally, there is no tribal regulatory jurisdiction over non-members except
         1. (1) when non-members enter **consensual** relationships with Indians or
         2. (2) a lack of regulatory power would threaten or have a **direct effect** on the tribe’s
            a. (a) political integrity,
            b. (b) economic security, or
            c. (c) health and welfare
               i. Entire tribe, not just one individual

   b. *Brendale* (1989, 550) – County zoning allowed two developments within a Rez by non-Indians: one in land opened for allotment, one in “pristine” land not opened for allotment. SCOTUS held that open land is under county zoning (6-3), but pristine land is zoned by tribe (5-4).
      i. White+3: County zoning over both
      ii. Blackmun+2: Tribal zoning over both
iii. Stevens/O’Connor: County over open, tribe over closed

c. *Bourland* (1993, 553) – Extends Montana not just to fee lands, but to all federally-run and federally-owned lands.
   i. Here, an involuntary land transfer from tribe to federal govt. for federal reservoir.

3. **Civil Adjudicatory**

   a. *Strate* (1997, 619) – Extends Montana to (1) adjudicative powers and (2) on state right of way over tribal lands.
      i. Car accident between two non-Indians on state highway that ran through a Rez.
      ii. Exhaustion requirements only presume adjudicative jurisdiction where regulatory jurisdiction exists; exhaustion is not a bar here, where MT applies (not tribal jurisdiction).
      iii. Both exceptions fail, because (1) no consensual agreement that had a nexus to events giving rise to suit and (2) no threat to self-governance to allow state to adjudicate claim between two non-Indians in a traffic accident.

   b. *Hicks* (2001, 627) – SCOTUS held that no tribal adjudicative jurisdiction exists (because no regulatory jurisdiction exists – STRATE) over non-Indian state wardens enforcing state law on Reservations.
      i. No burden to allow state adjudication
      ii. No legislative delegation of power to tribes

ii. **Delegated Tribal Jurisdiction**


V. **Reservation Economic Development**

   a. **Management & Development of Natural Resources in Indian Country**
      i. Land Leases (surface uses)
         1. 25 years plus 25 year option (typically)
         2. Many Rez have 99-year lease
      ii. Mineral Lease (subsurface uses)
         1. 10 year lease
         2. Extension IF productive
a. Communicative leases → company combines several sites to make a “community” such that if one site is productive, company may extend the leases at all of the sites

iii. Timber Management
   1. Federal authority is “comprehensive” and management ranges from “mediocre to abysmal”
      a. Too early to tell if it’s successful yet

iv. Land included: Reservation, Indian allotted lands, privately owned lands, off-Reservation Indian fee lands

b. CHALLENGES, PROBLEMS, & SUCCESSES IN RESERVATION ECONOMIC DEVELOPMENT
   i. Goal: promoting Indigenous business and non-Indian investment
   ii. Keys to economic development
      1. Sovereignty – “de facto sovereignty” (the ability to make decisions)
         a. Tribes have incentive to make good decisions; BIA does not
         b. Implicit divestiture of tribal sovereignty undermines “de facto sovereignty” which discourages stability needed for investment and growth
         c. Trust Responsibility adds bureaucracy, paternalism that undermines de facto sovereignty
      2. Institutions – mechanisms for exercising sovereignty
         a. Laws: a system in effect
            i. Cochiti – not necessarily written
         b. Independent judiciary
            i. Parties that are Indian and non-Indian alike look to an independent judiciary to resolve conflicts; can’t be biased
         c. Separation between business and politics
            i. Business people are good at business; politicians are not
               1. Flathead Reservation separated business & politics and had great success
         3. Cultural Match – government should reflect the tribe’s culture
            a. White Mountain Apache have a strong central government
               i. Main resource: timber
               ii. Easier to make decisions about timber with centralized power
            b. Oglala Sioux at Pine Ridge have IRA government
Traditionally, a spread out people with localized government
ii. Reservation is large with lots of small villages
iii. This system doesn’t work for Sioux

c. Indian Gaming
i. Cabazon (1987, 724) – CA, a PL 280 state, made it a “crime” to operate casinos beyond a certain capacity, but SCOTUS invalidated crime, saying that it was truly a regulation.
1. Look to what the state is actually trying to do: in CA, some gaming is allowed, so it’s not as if gaming is against public policy.
   a. Criminal/prohibitory – reflects public policy and state is allowed to regulate only
      criminal/prohibitory under Bryan v. Itasca County
   b. Civil/regulatory – some acts are allowed, but the manner of action is regulated; state may not regulate
2. federal and tribal interests (economic development) outweigh state interest (preventing organized crime)

ii. Indian Gaming Regulatory Act
1. Classes of gaming
   a. Class 1 – powwows
   b. Class 2 – Bingo
   c. Class 3 – Casino
      i. State must approve Class III compact and must allow some form of gambling
      ii. For casino to exist, must be a compact and state must already allow other gaming

iii. Dispersion of profits (in order)
   1. Tribal services first
   2. Economic development of the tribe or neighboring tribes
   3. Members

VI. Reserved Treaty Rights
a. Off-Reservation Hunting & Fishing Rights
   i. Indians On-Reservation
      1. Reserved rights to hunting and fishing unless expressly ceded by treaty
      2. These rights survive termination (Menominee)
      3. But if rights are terminated, whatever off-Reservation existing rights substitute
      4. Federal & tribal regulations on Rez
         a. Under Puyallup, state can regulate only when
            i. In the name of conservation
            ii. Non-Indians were first regulated
iii. Regulations aren’t discriminatory

ii. Non-Indians On-Reservation
   1. Montana Test dictates outcome

iii. Indians off Reservation
   1. Allows Indians to catch fish where they’re being caught
         i. Stevens: “in common with” construed in favor of Indians to mean 50% of the harvest
            1. Includes on-Reservation, off-Reservation fishing by Indians and non-Indians
            2. Some fish may only be fished by Indians (exclusive rights)

iv. Abrogation of Hunting & Fishing Rights
   1. *Mille Lacs Band* (1999, 880) – Treaty of 1837 guarantied (sic) to Ojibwa hunting & fishing rights “during the pleasure of the President. Court denied that rights were ever abolished.
      a. 1850 Executive Order purporting to abrogate rights: made under Removal Act, which required approval of Indians before removal; no approval in an Executive Order
      b. 1855 Treaty stating Indians “relinquish and convey to US any and all right, title, interest in lands”: but no specific mention of hunting & fishing rights, so Indians would have thought they still had those rights, even if no land rights
      c. Equal Footing Doctrine – MN enters the Union on an equal foot with all other states
         i. Stevens: no irreconcilable conflict between the state’s management of resources and Indian rights
            1. Overrules *Race Horse*

b. RESERVED WATER RIGHTS
   i. Establishing Water Rights
      1. Winters Doctrine: when US created Reservations, it necessarily included the right to water through and adjacent to the Rez
         a. Otherwise, Rez would be valueless
      2. Prior Appropriation governs the Western States
   ii. Quantifying Water Rights
a. Executive Order for creating Rez falls under Winters Doctrine.
b. QUANTITY reserved:
   i. Enough to satisfy all present and future needs, and
   ii. Enough to satisfy “all practicably irrigable acreage (PIA) on the Rez
      1. Since Reservations were intended to be agricultural-based
      2. Non-agriculture Reservations use different quantification system

iii. Regulating Water Rights
    1. McCarren Amendments – allows state court adjudication of federal water rights (including Indian water rights)
    2. Big Horn I (WY, 1988, 807) – WY SC guaranteed large amount of water rights based on PIA for agricultural purposes.
       a. Decision caused political unrest
    3. Big Horn II (WY, 1992, 815) – WY SC refused to allow water to be used for any purpose other than agriculture.
       a. States are to use federal law under McCarren Amendments, but WY used WY state law
       b. Clearly erroneous decision

VII. PROTECTIONS OF INDIAN RELIGIOUS FREEDOM & CULTURAL Resources

a. SACRED LANDS
   i. Lyng (1988, 739) – The Court would not use the free exercise clause as a sword to prevent the Forest Service from building the “GO” Road, a six mile road connecting two small CA towns, where the road ran through an area with dozens of sacred Indian sites. The Court acknowledged that the construction of the road would effectively disallow those sites to be sacred.
      1. Generally applicable and facially neutral laws do not require an exemption based on free exercise.
      a. However, politico-legislative means are available.
      i. And they worked here – Congress de-funded the road.

b. NAGPRA (NATIVE AMERICAN GRAVES PROTECTION & REPATRIATION ACT)
   i. Items to be repatriated
      1. Human remains
      2. Associated funerary objects
         a. Associated with a buried body
      3. Unassociated funerary objects
         a. Buried with, but not associated with, a buried body
      4. Sacred objects
      5. Objects of cultural patrimony
ii. NAGPRA
   1. Prohibits disposition of remains
   2. Requires federal agencies and museums to inventory remains
   3. If identifiable, feds must return (repatriate) the remains

iii. Requirements for Repatriation
   1. Items must be Native American
      a. “of or relating to a tribe, people, or culture that is indigenous to the US
         i. McCain tried to amend to “is or was indigenous to the US” making everything Native American – but leaving other issues still open (cultural affiliation, voluntariness)
      b. 9th Cir (Kennewick) – must be a genetic relationship
   2. Items must be culturally-linked to a tribe
      a. “relationship of shared group identity”
      b. geographic, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other information
   3. No evidence of voluntary transfer in the case of unassociated funerary objects, sacred objects, or objects of cultural patrimony