The Wisconsin State Legal System and Indian Affairs in the Nineteenth Century: A Lost Chapter in Wisconsin's Legal History

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I. INTRODUCTION

As Wisconsin developed as a state during the nineteenth century, its supreme court and legislature devoted time and effort to resolving disputes relating to Indian affairs. While there was no doubt that the federal government reigned supreme over the realm of Indian law, the policies that the federal government created were not impermeable constructions that completely divested state governments from addressing issues regarding Indians. Simply put: Holes existed in the federal policies.

Over the course of the nineteenth century, the federal government removed an indigenous people from its soil. At the same time, the federal government attempted to trade with them, educate them, civilize them, and provide them with an adequate area to live. In the midst of all of this, the federal government also sought to open the American frontier to expansion, develop natural resources, admit new states to the union, and placate the fears of states already admitted. Furthermore, states sought to establish their own identities while also attempting to expand and develop state resources and land. In essence, the complexities of developing and settling a nation precluded the federal government from divesting all Indian matters from the purview of the state.

This Article examines the issues relating to Indian affairs that arose outside the scope of federal authority and found their way into the Wisconsin legal system. To that end, this Article briefly examines early federal law and also describes Wisconsin’s Indian tribes. Throughout the nineteenth century, these tribes had numerous contacts with the federal government and

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experienced increased exposure to federal policies. However, in many instances, the application of these policies resulted in ambiguities regarding interactions between Indians, the state, and the citizenry.

The Wisconsin Supreme Court and state legislature did not address these ambiguities with an eye towards challenging federal authority. Rather, the court and legislature worked within the framework of federal law to the extent possible and established "state" law only when necessary.

II. FEDERAL INDIAN LAW

In the nineteenth century, the President and Congress solidified the federal government as the primary force in Indian affairs by generating and implementing Indian policies such as civilization, education, removal, and reservation. The Supreme Court used the doctrines of discovery and conquest to justify ultimate federal authority over Indian lands. In addition, the Court asserted federal control over Indian tribes by classifying them as domestic dependent nations not subject to state laws. Ultimately, in order to both protect Indian tribes and to provide for the development of the nation, the Court and Congress sought to keep Indian affairs within the realm of federal authority.

A. United States Supreme Court Cases

In a series of early nineteenth-century cases, the United States Supreme Court established the federal government as the primary authority in Indian Law. In the first of these cases, *Fletcher v. Peck*, the Court briefly addressed the very nature of Indian title to land.1 Chief Justice John Marshall first noted that courts should respect Indian title.2 However, Marshall also added a caveat: Courts should respect Indian title "until it be legitimately extinguished."3 Once extinguished, the land would be subject to seisen in fee on the part of the state. Thus, in 1810, the Supreme Court laid a legal foundation through which the federal government could legitimately divest Indians of their title to land.

Although not an Indian law case per se, *Fletcher* announced the Court's theory regarding the acquisition of Indian lands. Thirteen years later, in

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1. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); see also Francis Paul Prucha, *American Indian Policy in the Formative Years* 185 (1962) [hereinafter Prucha, Policy]. Although the court addressed it, the nature of Indian title was peripheral to the ultimate issue of the case. In *Fletcher*, the Court was primarily concerned with the authority of the state of Georgia to pass a law that annulled the title of a good faith purchaser. The issue of Indian title arose because in 1763, Great Britain reserved the land in question to Indians. *Fletcher*, 10 U.S. (6 Cranch) at 141.

2. Fletcher, 10 U.S. (6 Cranch) at 142.

3. Id. at 143.
Johnson and Graham's Lessee v. M'Intosh, the Court made this theory the very basis of future Indian policy. The case concerned two parties who claimed title to the same parcel of land in Illinois. One party received title by a patent from the federal government. The other party received title from Thomas Johnson, who acquired the land directly from an Indian tribe. Marshall framed the issue as whether Indians had the power to give, and private individuals had the power to receive, title to land. In answering this question, Marshall examined the doctrines of conquest and discovery. Regarding discovery, Marshall stated that it "gave title to the government by whose subjects or by whose authority it was made." Thus, the rights of native people "were necessarily diminished . . . by the original fundamental principle, that discovery gave exclusive title to those who made it."

The doctrine of conquest, however, authorized only the acquisition of title. Conquest gave the United States a mechanism to exercise its "exclusive right to extinguish the Indian title of occupancy." Marshall stated that "title by conquest is acquired and maintained by force," and the "conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people." In essence, Indian title amounted to mere occupancy that the United States, as conqueror, could easily take away. Furthermore, because of their status as the conquered, Indians were "deemed incapable of transferring the absolute title to others." Ultimately, Marshall held that based on the doctrines of discovery and conquest, the party who received title from the Indians did not "exhibit a title which [could] be sustained in the courts of the United States."

Whereas Fletcher and Johnson established the federal government's rights and authority regarding title to lands, two later cases delved into the actual

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6. Id.
7. Id. at 572. At the outset, Marshall explicitly stated that the Indians were in rightful possession of the land they sold. Id.
8. Id. at 573.
9. Id. at 574.
10. Marshall theorized that under the discovery doctrine, the United States actually acquired title to American soil from France and Great Britain. Id. at 574-85.
11. Id. at 587.
12. Id. at 589-90.
13. Id. at 591.
14. Id. at 604-05.
legal status and rights of Indians themselves. In *Cherokee Nation v. Georgia*, the Cherokee tribe sought an injunction from the Supreme Court to restrain Georgia from executing certain state laws. Justice Marshall, who again delivered the opinion of the Court, noted that the crucial issue was whether the Court had original jurisdiction to hear a case brought by an Indian tribe. The answer rested on the legal status of the Cherokee Nation. Marshall first held that the Cherokee were not a state of the union, nor were they aliens, nor were they a foreign nation. Developing a new classification, Marshall described Indian tribes as “domestic dependent nations” whose relationship to the United States “resembles that of a ward to his guardian.” Nothing in the Constitution granted the Court original jurisdiction over domestic dependent nations; thus, the injunction was denied.

*Worcester v. Georgia* marked the first case in which the Supreme Court addressed the authority of a state over Indian matters. Georgia prosecuted Worcester and other missionaries for failing to obtain a permit to reside on the Cherokee territory as required by state law. Worcester appealed his case to the Supreme Court, arguing that the state law was “repugnant to the constitution, laws, and treaties of the United States.” However, the issue in this case extended beyond Worcester’s conviction. Counsel argued that Georgia attempted to “extend her code over the whole [Cherokee] country, abolish its institutions and its laws, and annihilate its political existence.” Thus, the real conflict was between the state of Georgia and the federal government.

In holding that Georgia laws could not extend to Cherokee lands, Marshall first found that in making treaties and passing laws regarding Indian tribes, the federal government considered “Indian territory as completely separated from that of the states.” Furthermore, the Cherokee Nation comprised a “distinct community” that retained its right to self-government.

16. Cherokee Nation, 30 U.S. (5 Pet.) at 2. For an insightful description of the events leading up to and following *Cherokee Nation*, see PRUCHA, POLICY, supra note 1, at 233-49.
18. Id. at 17-20. Not being a member of one of these classifications is important because the Constitution grants the Supreme Court jurisdiction over states, aliens, and foreign states. U.S. CONST. art. III, § 2.
21. Id. at 536.
22. Id. at 542.
23. Id. at 557.
24. Id. at 556, 561.
Additionally, Marshall went on to hold that intercourse with Indian tribes was completely "vested in the government of the United States." For those reasons, Georgia laws had no effect on Indian lands.

B. Other Sources of Federal Control

Even before the Court solidified federal authority over Indian matters, the government had used legislative acts, Indian agents and agencies, and the military to create and implement Indian policy. Indian policy in the nineteenth century first consisted of attempts to civilize and educate tribes. While not abandoning civilization and education, by the 1830s the government changed its emphasis to outright removal and eventually established the reservation system. Be it civilization or reservation, education or removal, as Indian policy evolved, an underlying theme always remained: "[W]hite settlement should advance and the Indians withdraw."

Initially, however, the government structured Indian policy to foster friendship and create allegiances with the Indian tribes. Specifically, by regulating Indian trade, the government sought to establish a relationship of goodwill by protecting tribal interests. For example, the government designed legislation to provide a mechanism to force whites to respect Indian treaties. These early trade and intercourse acts also established a system of trade and licensing between Indians and federal agents. To enforce these acts, Congress created the Indian Department. Under this system, Indian agents implemented policy by reporting violations of the trade and intercourse acts to military commanders on frontier posts. In turn, the military enforced Indian policy and regulated the fur trade.

The government hoped that this well-organized and well-protected system

25. Id. at 561.
27. One author noted the incongruous and contradictory nature of the various federal policies. Id. at 149-50. Specifically, fostering education proved difficult when Indians were removed to areas where it was difficult to survive. Id.
28. PRUCHA, POLICY, supra note 1, at 186.
30. PRUCHA, POLICY, supra note 1, at 45.
31. Id. at 51-52. The Indian Department was located within the War department, but later shifted to the Interior Department. 2 CURRENT, supra note 26, at 149.
32. PRUCHA, POLICY, supra note 1, at 56.
33. ROBERT C. NESBIT, WISCONSIN: A HISTORY 83 (2d ed. 1989). Specific to Wisconsin, the military and Indian agents sought to regulate trade, control contacts with whites, provide for the peaceable cession of land, and maintain peace generally. Id. at 84-85.
of trade would serve as a launching pad for its civilization policy.\textsuperscript{34} By using trade to introduce Indians to agriculture and manufactured goods, the government believed tribes would realize the folly of traditional ways and adopt white culture.\textsuperscript{35} The government also supported efforts by missionary groups to create schools on Indian lands.\textsuperscript{36} For instance, in 1819, President James Monroe allocated a $10,000 civilization fund to organizations that educated Indian children.\textsuperscript{37} In addition to these types of direct appropriations, individual treaties also provided funds for Indian education.\textsuperscript{38}

Attempts at civilization and education occurred simultaneously with the settlement of Indian lands by whites. As the tide of the American population began to expand westward, the federal government sought to avoid conflicts between Indians and white settlers by implementing the removal policy.\textsuperscript{39} Although not completely abandoned, civilization and education fell prey to this new policy.\textsuperscript{40} For example, one impetus for removal was that through encounters with white settlers, Indians had adopted all aspects of white culture, both good and bad.\textsuperscript{41} This nullified advances made through civilization and education. Another impetus for removal was the “fear of a bitter federal-state jurisdictional contest” that had already resulted in a conflict with the state of Georgia.\textsuperscript{42} Finally, the removal policy paved the way for further government acquisition of land and the expansion of settlement.\textsuperscript{43}

Out of the removal policy arose the inevitable question of where removed Indians should go. In order to prevent hostile encounters with white settlers, promote civilization, and provide for the general welfare of Indian tribes, the government established reservations for displaced tribes. Initially, the government carved small reservations out of original tribal holdings.\textsuperscript{44} After the Civil War, many believed that the best way to open lands for expansion

\textsuperscript{34} PRUCHA, POLICY, supra note 1, at 214.
\textsuperscript{35} The government introduced Indians to various “agricultural implements, blacksmith equipment, hogs and cattle, seeds, looms and spinning wheels, and saw--or gristmills.” ALICE SMITH, THE HISTORY OF WISCONSIN: FROM EXPLORATION TO STATEHOOD 127 (1973).
\textsuperscript{36} PRUCHA, POLICY, supra note 1, at 219-21.
\textsuperscript{37} PRUCHA, FATHER, supra note 29, at 151.
\textsuperscript{38} PRUCHA, POLICY, supra note 1, at 223-24.
\textsuperscript{39} Id. at 224-27.
\textsuperscript{40} One author noted that “no matter what the government attempted, and no matter which tribe was involved, the effect was the progressive impoverishment of the Indian peoples.” NANCY OESTREICH LURIE, WISCONSIN INDIANS 14 (1987).
\textsuperscript{41} Id. at 195-97. This conflict resulted in Cherokee Nation and Worcester. See supra notes 15-25 and accompanying text.
\textsuperscript{42} Id. at 317.
\textsuperscript{43} Id. at 562-66.
and to civilize the Indian was to create one large reservation. This theory eventually fell out of favor and was replaced by exactly the opposite approach. Instead of forming a gigantic reservation, the government reduced reservation sizes and, in some cases, transferred land directly to Indians. Ultimately, Indian tribes clung to islands of land floating in a sea of settlement and development.

III. INDIANS OF WISCONSIN DURING THE NINETEENTH CENTURY

For Indian tribes of Wisconsin, the federal approach created a century of geographical and political change. Four indigenous tribes, the Potawatomi, Winnebago, Menominee, and Chippewa, attempted to retain tribal lands and customs amidst the onslaught of white settlement. Complicating matters was the arrival of the Oneida, Stockbridge, and Brothertown tribes. Subjects of a removal policy that was in full force, these three tribes found frustration and hardship during their long journey from the east coast to their eventual new homes in Wisconsin. To understand Indian involvement in the legal history of Wisconsin, it is first important to understand who they were, how they came to be in Wisconsin, and how federal policy affected their lives.

A. Indigenous Tribes

1. The Potawatomi

The Potawatomi lived primarily along the Lake Michigan shoreline and engaged in seasonal hunting, gathering, and maize cultivation. Politically, the tribe organized into clans based on lineage where leadership was determined by heredity. The Potowatomi clans did not have chiefs, but were governed by elders. During the 1600s the Potawatomi negotiated an alliance

45. Id. at 577-81.
46. Id. at 190. The benefits of this approach were twofold. First, Indians could profit by selling the land; thus, the government could avoid further appropriations. Second, whites could satisfy their insatiable desire for land by purchasing title from Indians.
47. For example, all three tribes originally relocated to Indiana, where the government promised them land. Land negotiations, however, fell apart and the tribes migrated to Wisconsin. LURIE, supra note 40, at 12. Indeed, the author recognizes that many tribes inhabited Wisconsin. This article does not discuss all of them, but focuses on Wisconsin’s primary tribes for which there is a significant amount of known information.
48. GREAT LAKES RESOURCE DEVELOPMENT PROJECT OF AMERICANS FOR INDIAN OPPORTUNITY, FACTS ABOUT WISCONSIN INDIANS 6 (1973) [hereinafter FACTS]; see also ROBERT E. BIEDER, NATIVE AMERICAN COMMUNITIES IN WISCONSIN, 1600-1960, at 23 (1995).
49. BIEDER, supra note 48, at 23.
50. Id. at 72-73.
with the French based on the growing fur trade. The Potawatomi continued this relationship with the French, and later the British, well into the 1800s.

In 1829, the Potawatomi succumbed to pressure to cede tribal lands to the federal government. The tribe signed another treaty in 1833, relinquishing its remaining claims to Wisconsin lands. As compensation, the government created a reservation for the Potawatomi in Kansas. Some clans, however, refused to relocate “onto the dry, treeless plains” and argued that “they never ceded their lands east of the Milwaukee River.” Despite these arguments, settlement continued, and the Potawatomi were forced either to remove to Kansas or to flee to Michigan, Indiana, or northern Wisconsin. Eventually, many Potawatomi resettled in Wisconsin near Marshfield and Lake Winnebago. However, in the 1870s tensions between the tribe and settlers arose again. Faced with the possibility of further removal, clans either moved farther north or attempted to create homesteads. Neither strategy proved to be effective, and many suffered from extreme poverty.

2. The Winnebago

The Winnebago held most of their land in what is now south, central, and western Wisconsin. This tribe engaged in a subsistence lifestyle that included growing such crops as rice, corn, beans, squash, tobacco, and pumpkins. Deer, bear, waterfowl, and fish also constituted an important component of the Winnebago diet. As with the Potawatomi, the Winnebago based their social and political structure on the clan. Clans formed distinct villages of birch bark lodges that were semi-permanent in nature. Clan leaders comprised a governing council whose rules were enforced by village police. In the summer, village hunters joined for communal hunts that extended throughout the state and beyond. With the coming of the French and British,
the Winnebago also became heavily involved in the fur trade.65

In 1822, the Winnebago signed their first treaty with the United States.66 They, along with the Menominee, were persuaded to cede some of their eastern holdings for the benefit of the displaced Oneida. Over the next fifteen years the Winnebago entered into a series of treaties that ceded away the remainder of their lands.67 Many Winnebago, however, either failed to leave the state or returned to Wisconsin from such places as Minnesota, South Dakota, and Nebraska.68 In an effort to avoid removal again, many Winnebago took advantage of the Homestead Act of 1862 and purchased homesteads.69 While on these settlements, the Winnebago attempted to continue many of their religious and social practices.70

3. The Menominee

The Menominee originally established villages of bark and reed lodges on the Menominee River near Green Bay.71 Migrating fish provided the Menominee with an important and reliable staple.72 In addition, tribe members embarked on communal hunts for bear, buffalo, and deer.73 As for agriculture, the Menominee cultivated wild rice, beans, squash, and some corn.74 Like the Potawatomi and Winnebago, the political structure of the Menominee centered on the clan.75 Clans elected their own chiefs who would then form the village council and create community policy.76 With the coming of the French also came the fur trade. The fur trade irreversibly
altered the economic and political base of the Menominee, leading them eventually to become dependent on French goods. After the British gained control of the area, French influence still permeated the tribe and would continue to do so when the Americans arrived.

American settlements naturally extended to the town of Green Bay, which rested on the shores of the bay itself, as well as the banks of inland rivers. In 1822 and 1831, the Menominee ceded large tracts of their holdings near Green Bay to the federal government. The Menominee ceded the remainder of their lands in 1848. Facing ultimate removal to Minnesota, Chief Oshkosh negotiated a deal that allowed the tribe not only to stay in Wisconsin but also to resettle on some of their previously held land. In 1856, the Menominee granted a portion of this land back to the government for the benefit of the Stockbridge. In later years, when many tribes allotted their lands for personal use, the Menominee decided to keep their lands under tribal rule.

4. The Chippewa

The Chippewa realm extended from central Wisconsin to Lake Superior. A semi-nomadic tribe, Chippewa culture revolved around hunting, trapping, and fishing. Such an existence did not lend itself to the creation of a strong political system. Instead of the clan system so prevalent in other Wisconsin tribes, the Chippewa formed loosely organized bands designed to control marriages and hunting territories. The Chippewa had extensive contacts with the French and even became middlemen in fur trade. As with the other Wisconsin tribes, the Chippewa culture evolved to accommodate, and to a large extent, depend on, the fur trade.

77. Id. at 62.
78. Id. at 143-44.
79. FACTS, supra note 48, at 10. By 1833, the United States acquired all of the land below the Fox-Wisconsin waterway from the various tribes. 1 SMITH, supra note 35, at 143.
80. 1 SMITH, supra note 35, at 149.
81. ERDMAN, supra note 69, at 43.
82. BIEDER, supra note 48, at 166.
83. Id. Starting in the 1870s, the Menominee sought to capitalize on their valuable timberlands. For an interesting discussion of the Menominee’s struggle with the Bureau of Indian Affairs over lumbering rights, see id. at 160-61.
85. Id. The dense forests of northern Wisconsin were not fit for agriculture; they were fit only for hunting and gathering over a widespread area.
86. BIEDER, supra note 48, at 32, 69; SATZ, supra note 84, at 9.
87. BIEDER, supra note 48, at 68.
88. Id. at 67.
Because of their remote northwoods existence, the Chippewa had minimal contacts and conflicts with early American settlers. Although the northwoods had little economic value as farmland, many government officials prized this region because of its abundance of pine timber. Thus, in 1837, the Chippewa negotiated a sale of their lumbering rights to pine forests in central Wisconsin. Caught in the economic crisis of a declining fur trade, the Chippewa succumbed to pressure from Indian agents and ceded their lands along the Lake Superior shoreline in 1842. In 1850, the Chippewa faced removal to Minnesota, which, for the most part, they successfully avoided. Finally, in 1854, the federal government created the Bad River, Red Cliff, Lac du Flambeau, and Lac Court Oreilles reservations in previously held tribal lands.

B. Removed Tribes

In the early to mid 1800s, three eastern tribes, the Oneida, Stockbridge, and Brothertown, arrived in Wisconsin. Removed from their native lands in the east, these tribes traveled to Wisconsin to find a place to call home.

1. The Oneida

Originally part of the Iroquois Confederacy, the Oneida lost much of their power after the Revolutionary War. With the white population growing in the east, the Oneida faced continued pressure by the federal government to be removed from their lands. In the 1820s, many Oneida migrated to Wisconsin and settled on land granted to them by the Menominee and Winnebago. After a series of treaties, the Oneida obtained a reservation west of Green Bay.

89. FACTS, supra note 48, at 1. For example, the Chippewa did not even have an American Indian Agent until 1837. SATZ, supra note 84, at 8.
90. SATZ, supra note 84, at 13.
91. BIEDER, supra note 48, at 146. The Chippewa believed they were selling only lumbering rights, but “[f]rom the government point of view . . . the [Chippewa] had sold their land in central Wisconsin.” Id. In this treaty they also agreed to move beyond Mississippi when the President requested it. Id. at 166. In fact, territorial Governor Henry Dodge, who also acted as the local Superintendent of Indian Affairs, was directly “appointed . . . to effect a treaty with the Chippewa Indians for a cession of their lands to the United States.” MOSES M. STRONG, THE HISTORY OF WISCONSIN 261 (1885).
92. BIEDER, supra note 48, at 146-47.
93. ERDMAN, supra note 69, at 14. In three years only two thousand had been removed. Id.
94. For a step by step chronology of the migration see STRONG, supra note 91, at 107-115.
95. One author noted that the New York tribes had already begun to adopt white ways and many hoped that they would influence the Wisconsin tribes to do the same. 1 SMITH, supra note 35, at 142.
96. BIEDER, supra note 48, at 128; see also FACTS, supra note 48, at 8.
97. BIEDER, supra note 48, at 128.
in 1838. During the latter half of the nineteenth century, settlers sought to open the Oneida reservation for public use. This wish became a reality when the Oneida participated in the allotment of their reservation after the passage of the Dawes Act in 1887. Eventually, the Oneida sold off their individual allotments, reducing the reservation to a fraction of its original size.

2. The Stockbridge

The Stockbridge, a Massachusetts tribe, faced many of the same pressures as the Oneida. White settlers forced the Stockbridge off of their native lands in 1785. The Stockbridge first relocated to New York, then to Indiana, and eventually to Wisconsin. In the early 1820s, the government negotiated with the Menominee and Winnebago regarding land in eastern Wisconsin that could be used for the Stockbridge. Over the next thirty years the tribe continually removed to lands farther west as settlers expanded out from Green Bay. During this time, the Stockbridge broke into two factions. One faction, the Citizen Party, “wanted to divide the reservation into private family holdings.” The other faction, the Indian Party, sought to keep the reservation in communal hands. The Indian Party feared that once the reservation was divided, it would fall into settlers’ hands. In 1856, the Stockbridge were removed to a reservation northwest of Green Bay that was established pursuant to negotiations with the Menominee and the federal government.

3. The Brothertown

The Brothertown tribe consisted of two groups of Indians that banded together in the late 1700s. As many as five Algonquian tribes coalesced to

98. ERDMAN, supra note 69, at 30.
99. NESBIT, supra note 33, at 358.
100. Id. at 358.
101. ERDMAN, supra note 69, at 30.
102. NESBIT, supra note 33, at 85; see also BIEDER, supra note 48, at 143.
103. BIEDER, supra note 48, at 165.
104. Id. In 1848, the Stockbridge accepted a treaty whereby the “citizens” would remain on their lands, and the others would be located to a reservation west of the Mississippi. 2 CURRENT, supra note 26, at 153. When the time came to remove to the reservation, the Stockbridge simply refused to leave. Id.
105. BIEDER, supra note 48, at 166. The leader of the Indian Party, John Quinney, strenuously fought to maintain tribal identity. 2 CURRENT, supra note 26, at 153. For an example of how his heirs carried the fight to the Wisconsin Supreme Court see infra notes 200-07 and accompanying text.
106. BIEDER, supra note 48, at 166.
107. Id. at 21.
form the Brothertown tribe in New York. The group later joined with a Delaware tribe named the Brothertown. As with the Oneida and the Stockbridge, the federal government pressured the Brothertown into removing to the western United States. After arriving in Wisconsin, the Stockbridge ceded a portion of their land to the Brothertown. In 1832, many tribe members chose to become citizens and allotted tribal lands to individuals. Others joined the Stockbridge on reserved lands near Green Bay, hoping to maintain tribal community and traditions. Those that accepted citizenship quickly adopted farming, the English language, and local politics.

IV. INDIANS AND THE WISCONSIN SUPREME COURT

Although the federal government played a dominant role in shaping and implementing policies regarding the Indians of Wisconsin, its dominance was not complete. The federal government’s broad approach to Indian affairs was ill-equipped to handle the aftermath of policy implementation. The Wisconsin Supreme Court found itself adjudicating cases involving issues in Indian law on a regular basis. These cases can be broken down into three categories, each of which represents an area in which the primacy of federal policy failed to provide Wisconsin with an answer to issues relating to Indians. To fill the gaps, the court assumed the responsibility to address the unanswered questions. The first category involved issues relating to property. The Wisconsin Supreme Court examined the relationship between the state and federal government regarding a person’s ability to acquire and transfer Indian lands. In addition, the court analyzed the ability of Indians to transfer title to their land. The second category concerned taxation; specifically, whether the state could tax Indian lands. The third category dealt with state jurisdiction over criminal matters regarding Indians.

A. Property Cases

1. State Government, Federal Government, and the Transfer of Indian Land

In Veeder v. Guppy and Sitzman v. Pacquette, the Wisconsin

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108. Id.
109. Id. The tribe received that name after living on a reservation in Brotherton, New Jersey.
110. NESBIT, supra note 33, at 85.
111. BEIDER, supra note 48, at 155.
112. Id.
113. 2 CURRENT, supra note 26, at 152-53.
114. 3 Wis. 502 (1854).
115. 13 Wis. 291 (1860).
Supreme Court recognized federal authority over Indian lands, but skillfully rationalized decisions that ultimately hinged on state law. The court turned to state law because the cases explored issues outside the broad scope of federal law. For example, Veeder concerned a tract of land in Columbia County in which three persons purported to have claims.\(^{116}\) The land at issue originally belonged to the Menominee; however, on August 8, 1846, Congress granted this tract of land to Wisconsin as part of a larger grant that was "to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal."\(^{117}\) Two years later, the federal government negotiated a treaty with the Menominee regarding the same tract. In this treaty the government actually purchased the land, but allowed the Menominee to continue living there for two years.\(^{118}\)

On June 29, 1848, one month after statehood, the state legislature formally accepted the 1846 federal grant.\(^{119}\) A week later, on August 8, it "passed an act providing for the sale of the land."\(^{120}\) The Menominee were not removed from this tract until 1852.\(^{121}\) In that same year, the Governor officially made his land selection, which was approved by the President, and the tract in question inured to the state.\(^{122}\) Veeder claimed he owned the land because he entered and made improvements on it before the August 8, 1848 Act.\(^{123}\) Another party, Mars, based her title on the fact that she built a dwelling upon the land in 1849.\(^{124}\) Guppy filed a claim with the register of the state land office in 1852, after the Menominee were removed.\(^{125}\) He argued that the state did not receive title until after the Menominee removal; thus, the claims of Mars and Veeder could not stand.\(^{126}\)

The ultimate question the court faced was when, along the timeline mentioned above, did the Menominee land vest to the state. In deciding this question, the court first noted that the federal government was the sole and

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\(^{116}\) Veeder, 3 Wis. at 503. None of the three parties were Indians.

\(^{117}\) Id.

\(^{118}\) Id. at 504. The Menominee could even stay longer with the permission of the President. However, at any time after two years the President could notify the Menominee that the lands were wanted and they would be forced to leave. Id.

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id. at 504-05. The Act contained a provision granting purchase rights to anyone who made fifty dollars worth of improvement on the land before the passage of the Act. Id. at 518.

\(^{124}\) Id. at 506.

\(^{125}\) Id. at 505.

\(^{126}\) Id. at 508-11. Guppy specifically argued that the land belonged to the Menominee until June 1, 1852, when the Governor selected and the President approved this particular tract. Id.
absolute owner of the land and was the "sole and only judge" regarding any rights the Menominee may have had. In addition, because the federal government always retained absolute title, the federal government could grant title to the state at any time. The court also noted that a federal grant takes effect regardless of whether Indians possessed the land or whether the grant was made without their consent. Thus, the court held that the land vested to the state when the grant took effect, which was in 1848, after Wisconsin became a state. Furthermore, the Act of August 8, 1848 specified how the land would be partitioned. According to that Act, Veeder had the best title because he was the first to improve the land.

In Sitzman, the court analyzed a restriction on an alienation clause that the government included in a treaty with the Winnebago in 1829. The treaty granted a tract of land to Pierre Pacquette, who was part Winnebago. However, Pacquette could not lease or sell his land without the permission of the President of the United States. Pacquette died intestate in 1836, leaving two children. In order to pay off Pacquette's debts, the administrator of Pacquette's estate sold this land at auction to Sitzman. Pacquette's heirs brought an action for ejectment, arguing that the land could not be sold for the payment of debts without the permission of the President. Sitzman argued that this alienation clause was either void or ceased with Pacquette's death.

The court found for Pacquette's heirs in a divided opinion. Justices Paine and Cole both wrote opinions, with Justice Dixon taking no part because he had decided the case at the circuit before his appointment to the supreme court. Paine held that the probate court had no jurisdiction to appoint the administrator of Pacquette's estate; therefore, the transfer to Sitzman was void. Cole did not entirely disagree with this, but felt the case should be

127. Id. at 520. The court stated that "if the United States, in making this grant, violated its obligations to the Indians, that was a matter with which the state had nothing to do." Id.
128. Id. at 523.
129. Id. at 522.
130. Id. at 525.
131. Id. at 517-18.
132. Id.
134. Id.
135. Id.
136. Id.
137. Id. at 295-96.
138. Id. at 299.
139. Id. at 297.
140. Id. at 291.
141. Id. at 301-05. Wisconsin law provided for the appointment of an administrator under only
remanded for trial on this issue. In addition to this holding, Cole addressed the restriction on alienation found in the 1829 treaty. Cole held that the restriction was void because it was "repugnant to the estate granted." He also opined that the federal government included the restriction to protect Indians from being cheated out of their property. However, a federal land patent, Cole reasoned, passed perfect title to the grantee. Once title passed the property, it then became subject to state law. Thus, the land could be transferred without the permission of the President.

The decisions in *Veeder* and *Sitzman* illustrate the ambiguities in certain aspects of federal Indian law. For instance, in *Veeder*, federal law failed to dictate when Indian lands inured to the state after they had been granted. In *Sitzman*, federal law deficiently described the applicability of an alienation clause in certain circumstances. The Wisconsin Supreme Court relied on its own ingenuity and on state law to solve these ambiguities. In so doing, the court created a hierarchical relationship between federal, Wisconsin, and Indian rights regarding land. The court recognized that the federal government initially held supreme title. In that respect, Wisconsin had no authority to take or otherwise control lands reserved to Indians. Reserved Indian land, then, received the most protection from both the federal and state government. *Veeder* and *Sitzman* show that ambiguities arose when Indian lands left Indian hands.

When the federal government granted Indian land to the state or to an individual Indian, as occurred in these two cases, the Wisconsin Supreme Court afforded Indian lands less protection. For example, in *Veeder*, the treaty allowed the Menominee to stay on the land for two years and thereafter until the President directed them to leave. Four years before the Menominee were actually removed, Veeder made improvements on the land in question. In recognizing Veeder's title, the court allowed for development of Indian lands at the earliest possible date. In *Sitzman*, the treaty sought to protect Indian interests through an alienation clause. The only justice to comment on this issue ruled that the restriction was void and

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142. Id. at 313 (citations omitted). Cole essentially argued that Pacquette received an absolute estate in fee simple.
143. Id. at 314.
144. Id.
145. Veeder v. Guppy, 3 Wis. 502, 522-23 (1854). The court even stated that the state had no power to move for the extinction of Indian title. Id.
146. Id. at 504.
147. Id.
that once title passed from the federal government, state law would control. Thus, the court in *Sitzman* also paved the way for early development of Indian lands. Because federal Indian law provided no guidance regarding Indian land once the federal government began to relinquish control over it, the Wisconsin Supreme Court simply filled in the gaps as necessary.

2. Indians and the Ability to Transfer Title

There were also gaps in federal policy regarding land that Indians acquired individually through treaties with the government. Disputes over individual land transfers made by Indians eventually reached the Wisconsin Supreme Court. In *Ruggles v. Marsilliott*[^148] and *Quinney v. Denny*[^149], the court examined transfers made by members of the Stockbridge tribe.

To fully understand these cases and their holdings, a brief history of Stockbridge treaties must be reviewed. In 1843, Congress passed an act in which a portion of the Stockbridge Reservation could be partitioned among individual Stockbridge and held by them in fee simple.[^150] However, title could not be transferred without a patent.[^151] In 1846, the government repealed the 1843 act and established a Citizen District and an Indian District.[^152] Those residing in the Citizen District held their land in fee simple, while those in the Indian District maintained tribal customs.[^153] Also in 1846, the government granted a portion of the very same land to the state of Wisconsin.[^154] In 1848, the Stockbridge negotiated a treaty in which they ceded their land to the federal government and agreed to move beyond the Mississippi.[^155] Many refused to leave, and in 1856, a new reservation was created.[^156]

Amidst this lattice work of treaties and acts arose *Quinney* and *Ruggles*. In both cases individual Stockbridge made transfers pursuant to the 1843 treaty. Quinney transferred his property in 1845. The court held that the 1843 Act gave Quinney equitable title that could be sold and transferred once Quinney received the appropriate patent.[^157] *Ruggles* proved to be a more

[^148]: 19 Wis. 159 (1865).
[^149]: 18 Wis. 510 (1864).
[^150]: *Ruggles*, 19 Wis. at 166 (citing Act of Mar. 3, 1843, 5 Stat. 645 (1843)).
[^151]: Id. The court described the purpose of the Act as follows: “The act of 1843 is based upon the idea that the Stockbridge Indians would drop the customs of savages, and assume those of civilized men, and make these lands their permanent home or residence.” *Id.* at 170.
[^152]: *Id.* at 167.
[^153]: *Id.*
[^154]: *Id.* at 169.
[^155]: *Id.* at 168.
[^156]: *Id.*
difficult case. Jonas Thompson, the Stockbridge who received title under the 1843 Act, transferred his land in 1848, after the 1843 Act was repealed. Complicating matters was the adverse party who claimed the land under the 1846 grant to the state. Ultimately, the court recognized Jonas Thompson’s title and held that the state never actually acquired title to the Stockbridge reservation lands under any act of Congress.

The Brothertown also faced similar problems regarding the transfer of land in *Hammer v. Hammer* and *Fowler v. Scott*. In *Hammer*, the widow of Ira Hammer, a Brothertown, claimed title to land that had been allotted to Ira pursuant to a treaty. The widow, Elizabeth Hammer, married Ira in New York in 1827, but the two separated in 1836. Ira then moved to Wisconsin and started a new family with Betsey Murdock on the Brothertown reservation. In 1839, Elizabeth also came to the Wisconsin Brothertown reservation and began living with another man. The treaty in question provided for the partition and division of the Brothertown reservation and pursuant to its terms, Ira received a portion. The issue was whether Ira had proper title at the time of his death, thus entitling Elizabeth to Ira’s portion. Finding for Elizabeth, the court held that treaty granted Ira valid equitable title.

The court returned to the very same issue in 1885 with the case of *Fowler v. Scott*. In *Fowler*, an 1839 Treaty granted tribe member Hannah Paul a portion of the Brothertown Reservation. Although Paul never received a patent, she transferred the land, and it eventually fell into the hands of Scott. In 1878, the federal government issued a patent for the same plot of land.
land to Fowler. The court disagreed, holding that a map identifying the allotment and a report describing all of the 1839 allotments provided sufficient extrinsic evidence to support Paul’s initial title. Thus, the court found that Fowler could not prove that he had better title than Scott.

In Farrington v. Wilson, the court directly addressed the validity of a transfer made by a Winnebago of mixed descent. Antoine Grignon, who was part Winnebago, received a tract of land pursuant to an 1829 treaty. Grignon transferred his land to Daniel Brodhead who later transferred it to the defendant Wilson. Farrington, the guardian of Grignon’s children, argued that the original transfer from Grignon to Brodhead was invalid because it was completed without the permission of the President. Wilson argued that the treaty placed an invalid alienation restriction on the land.

Using strong language, the court held that “[t]he validity of the restriction found in the treaty . . . is unquestionable.” Deferring completely to the authority of the federal government, the court noted that “Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property.” Thus, because Grignon failed to solicit the permission of the President, his transfer to Brodhead was invalid.

These cases show that the Wisconsin Supreme Court supplemented gaps in federal Indian law regarding land transfers made by Indians. Although the court often recognized the authority of the federal government, broad federal policy could not adequately deal with nuances in land transfers that occurred in a rapidly developing state. When addressing cases of Indian land transfer,
the court actually strengthened federal policy by often finding for the person who had received title from the federal government. *Farrington* marks the only case in which the court failed to approve of the actions of the original grantee. In that case, however, the court supported federal policy by upholding the alienation restriction. Furthermore, the court recognized that Indians often received merely equitable title, and state authority over these lands was limited. Although the court may have strengthened federal policy in a sense, the fact that these issues fell to a state court further illustrates that federal Indian law was not all encompassing.

**B. Taxation of Indian Lands**

In addition to land transfers, the Wisconsin Supreme Court also struggled with the authority of the state to tax Indian lands. This issue had widespread ramifications regarding the effectiveness of certain aspects of Indian policy. Under the civilization policy, the government reduced reservations to private holdings so that Indians could more easily adopt aspects of white society. Once the lands became privately owned, they also became subject to taxation. However, many Indian landowners found themselves in dire financial straits and unable to meet the tax burden. A default on tax payments paved the way for state seizure of privately held Indian lands. In effect, taxation threatened to nullify the civilization policy by rendering private Indian holdings a financial impossibility.

Against this backdrop, the court analyzed the taxation issue in three cases. In the first case, *Farrington v. Wilson*, the court examined the Wisconsin statute providing for the taxation of Indian lands. The statute exempted from taxation lands held by noncitizen Indians, which were not “held by them by purchase.” In *Farrington*, the issue rested on the meaning of “held by them by purchase.” Specifically, the court addressed whether the legislature intended “purchase” to be construed according to its technical or popular sense. Under the technical approach purchase meant “the acquisition of real estate by any means whatever except descent.” The popular sense

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185. *Id.* at 390-91.
186. See *supra* section II.B.
188. *Id.*
189. 29 Wis. 383 (1871).
190. *Id.* at 392.
191. *Id.*
192. *Id.*
193. *Id.*
defined purchase as "acquisition of real estate for a valuable consideration." 194

The court held that unless otherwise designated by the legislature, the court must construe words according to their common meanings. 195 Thus, for the purpose of taxation, "purchase" required an exchange of valuable consideration. The court then ruled that the initial transfer to Grignon, who was part Winnebago, did not constitute a sale, but merely a gift that the legislature did not intend to tax. 196 The court further held that the exemption extended to Grignon's heirs. 197 Providing implicit support for civilization, the court noted that Grignon's heirs had been removed out of state and had no means to pay for any tax that would be assessed. 198 Conversely, any Indian who adopted the ways of the whites and had the ability to purchase land should expect to be taxed. 199

The court again addressed this issue in Quinney v. Town of Stockbridge 200 and Hilgers v. Quinney. 201 Both of these cases involved the same plaintiff and the same plot of land. In Quinney v. Town of Stockbridge, the plaintiff argued that he received his land by descent as heir-at-law from John Quinney, a Stockbridge Indian. 202 Thus, his land could not be taxed because it was not held by purchase. The town argued that the land could be taxed because the plaintiff lived apart from, and was not otherwise connected with, the tribe. 203 Showing none of the sympathy that accompanied the Farrington decision two years earlier, the court found for the town. Specifically, the court held that the plaintiff never proved that the original grantee, John Quinney, did not hold the land by purchase. 204 The court further held that if the land were held by purchase, it would remain so regardless of to whom it was transferred. Thus, Indians receiving land by purchase would have to pay taxes even if they

194. Id.
195. Id. at 393.
196. Id. at 392-93. Referring to lands that Indians did not hold by purchase, the court stated: "It was totally incompetent for the legislature of this state, under the constitution of the United States, and that of this state, to tax such lands." Id. at 394. Furthermore, the court noted that the federal government retained sole power and control over Indian lands not held by purchase. Id.
197. Id. at 396.
198. Id.
199. Id. at 395.
200. 33 Wis. 505 (1873).
201. 8 N.W. 17 (Wis. 1881).
202. Quinney, 33 Wis. at 506. John Quinney strenuously advocated the Indian Party position within the Stockbridge tribe. See supra notes 101-05, 157-60 and accompanying text; see also Bieder, supra note 48, at 165. In a strange bit of historical irony, these two cases turned on the court’s determination that John Quinney, by virtue of accepting a land grant, severed ties with the tribe and adopted civilized life.
203. Quinney, 33 Wis. at 506.
204. Id. at 508.
maintained tribal customs. In Hilgers, the court reaffirmed this holding by finding that John Quinney and the plaintiff divorced and separated themselves from the Stockbridge tribe by virtue of accepting the land grant. The Hilgers court also examined the actual patent and ruled that the land was transferred in exchange for valuable consideration. For these reasons, the court deemed the tax assessment appropriate.

In addressing the tax issue, the court strove to incorporate a purely state matter into existing federal Indian policy. For example, the tax cases show that Indians who bought and sold land and otherwise adopted white culture would become subject to state tax law, while those who clung to traditional ways would remain under federal authority. Whether this supported federal Indian policy is debatable. Indians were often removed to barren parts of the state, with poor hunting and worse soil. Thus, it is unlikely that Indians attempting to farm this land after receiving personal allotments could generate enough revenue to pay taxes. Under the worst case scenario, attempts at civilization could lead to de facto removal. However, the tax cases illustrate the court’s willingness to exert state authority when it believed federal authority ceased.

C. Jurisdiction

Jurisdictional issues constituted the final area in which the Wisconsin Supreme Court delved into the realm of Indian affairs. The court first addressed the issue of criminal jurisdiction in State v. Doxtater. In that case, the court determined whether the state criminal code extended to Indian reservations. Doxtater, an Oneida, committed adultery on the Oneida reservation with a non-Indian. After being convicted, Doxtater appealed, arguing that state courts had no jurisdiction over him because of his status as an Indian. The court held that anyone residing within the boundaries of a state was subject to the laws of the state unless jurisdiction had been exempted. In turn, a treaty, constitution, or act of the United States may exempt jurisdiction. In the absence of such an exemption, the state was

205. Id. at 509.
206. Hilgers, 8 N.W. at 18.
207. Id.
208. 2 N.W. 439 (Wis. 1879). Territorial Wisconsin also addressed the issue of crimes committed by Indians. In such cases, Judge James Doty made it clear that the territorial courts had jurisdiction only when white men were involved. Smith, supra note 35, at 219.
209. The other party in this affair was Elizabeth Harris. State v. Harris, 2 N.W. 543 (Wis. 1879). The court summarily upheld her adultery conviction after deciding Doxtater. Id.
210. Doxtater, 2 N.W. at 446-47.
assumed to have jurisdiction when it was admitted to the union.\textsuperscript{211}

When applying these rules to the case at hand, the court found that Wisconsin retained criminal jurisdiction over the Oneida reservation.\textsuperscript{212} First, the Oneida reservation rested wholly within state boundaries.\textsuperscript{213} Second, the court found no federal exemption that precluded the state from assuming criminal jurisdiction over the Oneida.\textsuperscript{214} Thus, under the Tenth Amendment, Wisconsin took jurisdiction over Indian criminal matters because the federal government did not explicitly reserve jurisdiction.\textsuperscript{215}

Subsequent to this decision, federal law largely preempted Indian criminal law. In 1885, Congress enacted a law that extended federal criminal jurisdiction to tribal lands.\textsuperscript{216} A year later, the United States Supreme Court examined the authority of Congress to pass such an act in \textit{United States v. Kagama}.\textsuperscript{217} The court held that by virtue of Indian’s status as wards of the nation, Indian criminal matters fell within congressional jurisdiction. In addition, the Court noted that the 1885 Act applied only to crimes committed by Indians on Indian lands.\textsuperscript{218}

Although the 1885 law and \textit{Kagama} essentially nullified the \textit{Doxtater} holding, the reasoning in \textit{Doxtater} endured.\textsuperscript{219} In \textit{Stacy v. La Belle},\textsuperscript{220} the Wisconsin Supreme Court used this reasoning to extend state jurisdiction to a contract action involving a Menominee Indian who failed to pay the purchase price for goods. Despite numerous federal trade and intercourse acts, the court stated that it could find no federal statute or treaty that precluded a state from assuming jurisdiction over a contract action.\textsuperscript{221} Finally, in \textit{Schriber v. Rufus},

\begin{itemize}
\item \textsuperscript{211} \textit{Id. at 448}. The court distinctly noted that the United States could punish Indians for crimes committed in U.S. territories. \textit{Id.} However, this power ceased once the state was admitted to the Union. \textit{Id.}
\item \textsuperscript{212} \textit{Id. at 451-52}
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id. at 451.}
\item \textsuperscript{215} \textit{Id. at 448.}
\item \textsuperscript{216} Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (1885).
\item \textsuperscript{217} 118 U.S. 375 (1886).
\item \textsuperscript{218} \textit{Id. at 383, cited in State v. Rufus, 237 N.W. 67, 71 (Wis. 1931).}
\item \textsuperscript{219} The Wisconsin Supreme Court explicitly and officially reversed \textit{Doxtater} in 1931. State v. Rufus, 237 N.W. 67, 71 (Wis. 1931).
\item \textsuperscript{220} 75 N.W. 60 (Wis. 1898).
\item \textsuperscript{221} \textit{Id. at 62}. The court stated that:
\end{itemize}

In the absence of any federal statute or treaty to the contrary, and upon the principles stated, we must hold that a state court may take jurisdiction of an action on contract in favor of a white man, and against an Indian belonging to a tribe and a particular reservation.

\textit{Id.}
The court cited to Doxtater in holding that the state had the authority to include the Menominee reservation within the physical boundaries of a town.

The Wisconsin Supreme Court recognized federal jurisdiction over Indian matters only when it had specifically been asserted. This represents a subtle but significant departure from the federal perspective. From Fletcher through Kagama and from the first trade and intercourse act through the Act of 1885, the federal government asserted jurisdiction over Indians by classifying them as non-American and non-foreigners, outside of the purview of the state but worthy of government protection. Uniquely defining Indians as “wards of the nation,” the federal government carried out the policies of civilization, education, and removal, while attempting to leave Indians with as much autonomy as possible. This complicated endeavor was made more complicated when a state asserted Indian jurisdiction. However, by asserting jurisdiction when it was not specifically precluded, Wisconsin simply sought to exercise its own judgment over matters affecting both the development of the state and the people within its boundaries.

V. INDIANS AND THE WISCONSIN STATE LEGISLATURE

During the nineteenth century, the Wisconsin legislature addressed state specific issues that fell outside the scope of federal Indian policy. Through constitutional provisions, statutes, uncodified general laws, memorials, and joint resolutions, the legislature created a legal identity for Wisconsin Indians under state law. For example, the legislature used the state constitution and statutes to implement state policies regarding Indian suffrage, taxation, and gaming. In addition, for matters concerning specific tribes or narrow issues, the legislature turned to uncodified general laws, memorials, and joint resolutions.

A. The Constitution and Statutes

Wisconsin’s very first constitution set forth parameters regarding Indian voting rights within the state. The Indian Suffrage Clause granted voting rights to “[p]ersons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.”222 Other persons qualified to vote included “[c]ivilized persons of Indian descent, not members of any tribe.”224 The legislature eventually codified these suffrage provisions into the Wisconsin

222. 29 N.W. 547 (Wis. 1886).
223. WIS. CONST. art. III, § 1, cl. 3 (1848).
224. WIS. CONST. art. III, § 1, cl. 4 (1848).
In 1879, the legislature amended Indian suffrage laws to include a specific provision relating to the Chippewa. These sections provided voting rights to any Chippewa who subscribed to an oath that he was not a member of a tribe and had not made a claim to the United States for aid. Finally, an 1898 constitutional amendment specified where Indians who had the right to vote could vote.

In addition to voting rights, the legislature passed laws concerning taxation and Indian hunting and gaming. Regarding the latter, the legislature exempted Indians from many of the fish and game restrictions. For example, unlike other residents of the state, Indians could use certain types of nets to fish. They could also hunt or trap a wider variety of animals including grouse, woodcocks, ducks, geese, and other fowl. The caveat to these exemptions was that the Indian must be "uncivilized," and the activity must occur on the reservation.

Finally, like the federal government, the state did not hesitate to take an extremely paternalistic approach regarding the issue of Indians and liquor. Hoping to keep Indians from acquiring alcohol, the legislature criminalized the sale of intoxicating liquors to Indians. To ensure its effectiveness, the statute imposed duties upon Indian agents, local sheriffs, and constables to enforce the provisions of the law whenever they had good reason to believe it had been violated.

B. Uncodified Laws, Memorials, and Joint Resolutions

The majority of these kinds of legislative pieces concerned the relationship between the citizenry of Wisconsin, Indians, and land. First, uncodified laws provided an outlet through which the people and the legislature could promote the development of the state within the framework of federal Indian policy. For example, as early as 1838 the territorial legislature passed an act for the partition of lands originally reserved to Fox Indians of mixed descent. An act passed on August 8, 1848, which became

225. WIS. STAT. tit. II, chap. 6, § 1, cls. 3, 4 (1849).
226. WIS. STAT. tit. II, chap. 5, § 12a (1879).
227. WIS. CONST. art. XIII, § 5 (1898).
228. See supra Part IV.B; see also WIS. REV. STAT. tit. V, chap. 15, § 4, cl. 7 (1849) (exempting property owned by noncitizen Indians, except when purchased by them).
229. WIS. REV. STAT. chap. 183 (1878).
230. Id.
231. Id.
232. WIS. REV. STAT., tit. XI, chap. 30 (1849).
233. Id.
234. 1838 Wis. Laws 54. By act of congress on June 30, 1834, Fox and Sacs "half breeds"
of paramount importance in *Veeder v. Guppy*, serves as another example. That Act created the mechanism through which former Menominee lands were to be divided. Thus, the legislature used uncodified laws to link the results of federal treaties to the assertion of state authority over former Indian lands.

Second, the legislature used memorials to both the President of the United States and Congress in an attempt to enforce rights over land holdings. Memorials to the President mainly consisted of complaints by the populace concerning specific Indian tribes. For instance, in 1849 and 1857, the legislature submitted memorials regarding the Chippewa. Residents of northern counties complained that bands of Chippewa raided houses, abused women, stole crops, and otherwise impeded the development of the State. The legislature requested that the President either confine the Chippewa to their reservation or remove them farther west.

Memorials to Congress sought a variety of objectives. First, some memorials requested that Congress obtain certain tracts of land from Indian tribes through the treaty process. For example, an 1848 memorial sought the survey and sale of portions of the Menominee reservation. In an 1859 memorial regarding Stockbridge lands, the legislature again sought to expedite the survey of recently acquired tribal holdings. Other memorials sought to regulate the price of Indian lands appearing on the market.

Finally, through joint resolutions to Congress, the legislature voiced concerns regarding Indian lands. In an 1846 resolution, the territorial legislature noted the importance of the Fox River valley and asked Congress

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were granted the right to convey previously reserved land. Act of June 30, 1834, ch. 167, 4 Stat. 740. The Wisconsin act provided for the partition of this land to all those who had claims under the 1834 congressional act.

235. See *supra* Part IV.A.

236. The territorial government also used memorials to notify the President of problems relating to Indians. In 1839, the Governor requested four companies of dragoons to quell Winnebago demonstrations and remove them if necessary. SATZ, *supra* note 84, at 281.

237. See, e.g., WIS. REV. STAT., tit. XI, chap. 30 (1849).

238. 1849 Wis. Laws Joint Mem’l, ch. 7; 1857 Wis. Laws 803 Joint Mem’l, ch. 11. The state government was often more than willing to rely on the federal government when a precarious situation arose. For example, with the resurgence of Indian uprisings in the Midwest in 1860s, Governor Edward Salomon requested that the government arm local recruits to protect against the potential threat. 2 CURRENT, *supra* note 26, at 320-21. Salomon also felt that the “federal government ought to assume responsibility for the Wisconsin Winnebago” regarding their possible removal. *Id.* at 321.

239. 1848 Wis. Laws 333 Joint Mem’l 5.


to extinguish all Indian title along the river. However, not all joint resolutions recommended action adverse to Indian interests. An 1867 joint resolution sought the removal of the Stockbridge to better land than they currently occupied, for the reservation contained poor soil and the climate made farming difficult.

Taken as a whole, these legislative measures proliferated federal policy to the extent that it coincided with state interests. For example, the Wisconsin Constitution and statutes implicitly promoted the civilization policy by allowing only Indians who adopted white culture to vote. In acts pertaining to taxation and gaming, the legislature protected the sanctity of the reservation system by exempting Indians from state restrictions. The legislature promoted state interests in Indian lands through the use of general laws, memorials, and resolutions. At times, the legislature requested that Indians be confined to their reservations; other times it sought their outright removal. Although these land matters, as well as voting, taxation, and gaming, can all be considered Wisconsin specific issues, the legislature sought to create state law in these areas while still working within the framework of federal policy.

VI. CONCLUSION

The contacts that the Wisconsin Supreme Court and state legislature had regarding Indian affairs show that despite the primacy of federal authority, states still addressed issues in this area. In a practical sense, the federal government could implement broad policies applicable to all Indian tribes. However, these broad policies lacked the intricacy to mandate a response to every contact between an Indian and a state or its citizens. By way of analogy, it may be helpful to think of federal Indian policy as a net and the states as the water it passes through. Although the net may be designed to catch everything, something small invariably will escape capture and remain in the water. So it is with issues in Indian law. Federal policy created a net of preemption, but some issues simply fell through to the states.

Specific to Wisconsin, the court faced issues pertaining to the transfer of Indian land, taxation, and jurisdiction. On the surface, these issues appear to fall under the authority of the federal government. The United States Supreme Court unequivocally established federal authority over Indian land in *Fletcher* and *Johnson.* Regarding taxation and jurisdiction, the Court in *Worcester* and *Cherokee Nation* essentially stated that Indians comprised domestic dependent nations not subject to the laws of the state.
The cases that the Wisconsin court faced did not challenge the ultimate authority of the federal government; rather, these cases addressed questions that arose when federal Indian policy stopped providing answers. For example, all of the property cases concerned tracts of Indian land that the federal government allocated to either the state or private parties for personal use. In *Veeder* and *Sitzman*, the court recognized the authority of the federal government, but questioned when Indian lands granted by the federal government actually inured to either the state or private hands. Additionally, the court in *Ruggles, Quinney, Hammer, Fowler, and Farrington* addressed the validity of land transfers made by Indians after they personally acquired the land from the federal government.

The court also examined Wisconsin’s law exempting Indian lands from taxation. This exemption signified Wisconsin’s adherence to the notion of federal supremacy over Indian land. However, the cases of *Farrington, Quinney, and Hilgers* illustrate that ambiguities in federal policy existed. Specifically, the court struggled with incorporating tribal lands that had been partitioned for private use into the Wisconsin tax system. The essence of each case concerned whether the land was held “by purchase,” thereby making it taxable. This issue required the court to examine how Indians received land for private personal use from the federal government. However, nothing in the federal grants or policy dictated how states should treat land transferred in such a manner. Thus, the court decided taxation issues based on its interpretation of existing state law.

Finally, in *Doxtater* and *Stacy*, the Wisconsin Supreme Court addressed issues of criminal and general jurisdiction, respectively. In both cases, the court noted that the United States could prevent the states from assuming jurisdiction over Indian affairs through use of the Constitution, a treaty, or an act. Once again, the court explicitly acknowledged federal authority. However, in *Doxtater* the court held that no act or treaty by the federal government preempted state criminal law regarding adultery. The court used similar reasoning to extend state jurisdiction to a contract case in *Stacy*. *Doxtater* and *Stacy* provide perhaps the clearest example of the court addressing an issue in Indian law because of gaps in federal authority.

The Wisconsin legislature addressed Indian matters by utilizing the constitution, acts, memorials, and resolutions. The legislature used these measures in conjunction with federal Indian policy, not as mechanisms to subvert it. For instance, the state passed measures respecting an Indian tribe’s right to hunt on reserved land. These measures implicitly supported the reservation policy. The legislature also used memorials and resolutions to either request certain tracts of land, or to inform the federal government that Indians were causing disturbances while off their land. In both cases, the
desired effect was to expedite the removal of Indians or to compel them to stay on reservations. This is precisely what the federal government was also trying to accomplish, only on a larger scale.

In addressing questions of Indian affairs, the Wisconsin Supreme Court and legislature both recognized, and even deferred to, federal authority regarding Indian law. This was not a case of Wisconsin taking a radical approach to Indian affairs in an attempt to either change, circumvent, or dilute federal authority. In addition, the holdings of the cases and the legislative results are, for all practical purposes, unremarkable. They essentially show that Wisconsin attempted to work within the framework of federal Indian policy. However, what is of interest is that Wisconsin dealt with some of these issues at all. The very presence of these issues suggests that despite preemption, federal authority could not, and did not, cover every conceivable contact between Indians and a state. In essence, the fallacy of total preemption created a lost chapter in the legal history of Wisconsin.