

TEACHING INDIAN LAW

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INTRODUCTION

Federal Indian Law is among the most comprehensive courses in the law school curriculum, typically covering issues in criminal law, property law, contracts, constitutional law, international law, and civil jurisdiction, all in a context of a complex history of inter-governmental relations played out against a backdrop of often profound cultural difference. The course invariably calls upon faculty and students to wrestle with troubling questions, the answers to which are not always clear.

It is also a field that is growing. When I first started teaching Federal Indian Law twenty years ago, the Association of American Law Schools Faculty Handbook listed fifty-nine professors at forty-five schools who self-identified as teaching Native American Law.¹ This number was supplemented by an unknown number of adjuncts, including myself. This year, the Handbook lists 127 full-time faculty at eighty-five schools self-identifying as teachers of Native American Law.² Some suggest that the increase is due in part to a perception that, as a result of gaming, tribes have more money to spend on lawyers.³ I think a better explanation is that, as a result of several decades of relatively greater federal legislative support for tribal governments, tribes have been more visible, and law students—and faculty—have felt it advantageous to learn something about them. This is certainly the case at the

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1. AMERICAN ASSOCIATION OF LAW SCHOOLS, AALS DIRECTORY OF LAW TEACHERS 1990–1991, at 1068 (1990).

2. AMERICAN ASSOCIATION OF LAW SCHOOLS, AALS DIRECTORY OF LAW TEACHERS 2009–2010, at 1725–26 (2009).

3. See, e.g., Tanya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765, 788 (2009) (noting the “increasing call” for law schools to “increas[e] students’ exposure to federal Indian law topics” based, in part, on the fact that “students increasingly are encountering federal Indian and tribal law issues in practice”); Gabriel S. Galanda, *A Need to Know Indian Law*, OR. ST. B. 62, 62 (Nov. 2003) (noting that tribes are “becom[ing] an influential economic, legal and political force” due in part to their gaming revenues), available at <http://www.osbar.org/publications/bulletin/03nov/parting.html>.

University of Oklahoma College of Law, where most of my students expect to deal with or work for tribes in practice and want to know the rules.

Given the large number of faculty who have no experience with Federal Indian Law, either as teachers, students, or practitioners, I will begin with some basics. After that, I will offer my thoughts on the aspects of the course I have found most challenging during my years teaching it. I suspect these observations will resonate with my colleagues who have been teaching in the field for a while. I hope that they will make the road easier for those inclined to follow.

There are three Federal Indian Law casebooks currently on the market. The oldest of these, *American Indian Law: Native Nations and the Federal System*⁴ ("Clinton"), was first authored by Monroe Price in 1973 and is now co-authored by Robert N. Clinton, Carole E. Goldberg, and Rebecca Tsosie.⁵ At 1286 pages, it is also the longest. Clinton is published by LexisNexis. The second, *Cases and Materials on Federal Indian Law*⁶ ("Getches"), first co-authored by David H. Getches, Charles F. Wilkinson, and Daniel Rosenfelt in 1979 and since 1993 co-authored by Professors Getches, Wilkinson, and Robert A. Williams, Jr., is published by Thomson-West.⁷ It runs 1030 pages. For thirty years, Clinton and Getches were the only two casebooks on the market. In 2008, Thomson-West introduced a third casebook, *American Indian Law: Cases and Commentary*⁸ ("Anderson"), co-authored by Professors Robert T. Anderson, Bethany Berger, Phillip P. Frickey, and Sarah Krakoff. It is the shortest of the casebooks at 951 pages (plus an appendix containing the text of the U.S. Constitution).

All of these casebooks are organized roughly the same way. Each begins with an introduction and a chapter on history. In Clinton, the history section runs about 100 pages, just under one-tenth of the total text. In Getches, it is longer: about 210 pages, or one-fifth of the text. Anderson's history section runs about 150 pages, or one-sixth of the text. Each casebook includes materials on Comparative and International Indigenous Peoples Law. In Clinton, these materials follow the history section and comprise about fifteen pages. Getches and Anderson position these materials at the end of their casebooks, Getches devoting about eighty pages to the topics, Anderson about fifty pages. The remainder of the casebooks—the materials addressing the

4. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* (5th ed. 2007).

5. *Id.* at xv.

6. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (5th ed. 2004).

7. *Id.* at v–vi.

8. ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* (2d ed. 2010).

substantive U.S. and tribal law—focuses primarily on rights and jurisdiction issues. Clinton’s chapter titles are as follows: “Recurring Issues in Tribal-Federal Legal Relations” (including definitional questions such as “Who is an Indian?,” Equal Protection, and the canons of construction for interpreting the tribal-federal legal relationship (e.g., treaty construction)); “Tribal Sovereignty and its Exercise;” “Federal & State Claims to Legal Authority in Indian Country;” “Jurisdiction under Special Statutes;” “Tribal Rights to Land & Cultural Resources;” and “The Operation of the Reserved Rights Doctrine: Hunting, Fishing, and Water Rights.” Getches begins with “The Federal-Tribal Relationship” (including tribal property rights), then moves to “Tribal Sovereignty and the Administration of Justice in Indian Country;” “Tribal Sovereignty and Jurisdiction: Congressional and Judicial Recognition and Limitations;” “Tribal and State Conflicts over Civil Regulatory and Adjudicatory Jurisdiction;” “Reservation Economic Development;” “Indian Religion and Culture;” “Water Rights;” “Fishing and Hunting Rights;” and “Rights of Alaska Natives and Native Hawaiians.” Anderson’s chapters are: “Federal Power in Indian Affairs: Scope, Sources and Limitations;” “Tribes, Indian Country and Criminal Jurisdiction;” “Tribal Sovereignty;” “State-Tribal Struggles Over Jurisdiction;” “Tribal Jurisdiction Over Non-Members;” “Natural Resources, Hunting, Fishing and Gathering Rights;” “Water Rights;” “American Indian Religion and Culture;” and “Alaska and Hawai’i.”

In part because of its lengthier treatment of the history of Federal Indian policy, about which most students know little before beginning the class, I have taught mostly from Getches. In a three-hour lecture course, I will assign all of the casebook chapters except “Indian Religion and Culture,” “Water Rights,” “Fishing and Hunting Rights,” and “Rights of Alaska Natives and Native Hawaiians.” I introduce these materials elsewhere in the course. Water rights, for example, can be covered in brief in conjunction with the reserved rights doctrine. I introduce fishing and hunting rights with the canons of treaty construction.

Because the casebooks necessarily provide information on a wide variety of subject areas, I find my students invariably want to know more about particular topics. At the University of Oklahoma, we handle this by regularly offering supplemental courses in Native American Natural Resources Law, Tribal Courts and Tribal Law, Indian Water Law, and Comparative and International Indigenous Peoples Law. Starting in Fall 2010, we plan to add courses in Indian Gaming Law and Indian Cultural and Religious Rights. With the exception of Native American Natural Resources Law, which uses a fine casebook co-authored by Professors Judith Royster and Michael Blumm,⁹ each

9. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCE LAW: CASES AND MATERIALS (2d ed. 2007).

of our current courses relies on materials prepared by the instructor.¹⁰ Guest speakers are readily available in Oklahoma, and all of the faculty involved in teaching these courses include visiting lecturers in their classes. Many take their students on field trips.

If the course is offered to introduce a little-known area of the law and there is no perceived need to cover extensive amounts of material, Federal Indian Law is a perfect class—especially for those who like active student participation. The materials themselves are so inherently interesting that generating discussion in class is easy. For those who want to cover more (as we do at Oklahoma), the challenge is reining in student discussion to keep the class on schedule.

During my twenty years of teaching Federal Indian Law, I have come to believe the following to be among the chief components in a successful class, by which I mean one that communicates information and stretches students' minds. This list is of course my own and no doubt my colleagues would have their own lists. These are admonitions I offer to myself at the start of every semester.

I. TEACH THE HISTORY

It is very easy in teaching Indian Law, especially to non-Indian students, to play to majoritarian guilt. Native peoples have been treated badly from the beginning of our colonial history. Most students, in my experience, will come in believing this. Others, however, will come into the class believing that this history has been exaggerated. One of my jobs as an Indian Law teacher, I believe, is to present the historic record and allow it to speak for itself. And trust me, it will. I have never had to express an opinion on the treatment of Native Peoples in any Indian law class I have taught. It has not been necessary. To teach the history properly, I recommend reading widely. All of the Indian Law casebooks mentioned above contain historical materials, and most are very good. That said, U.S.–tribal relations is a large field, and there is new information coming out every day. Joining a good history listserv is a useful way to keep up with the literature. Several university presses, including our own, specialize in Native American topics, and I am sure they would all be happy to add you to their mailing list. For those interested in learning more about the background of individual major cases, see *Indian Law Stories* (Phillip P. Frickey, Carole Goldberg, & Kevin Washburn, eds., forthcoming 2010).

10. For our future courses, I should note that Carolina Academic Press publishes the text. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW: CASES AND MATERIALS* (2008). For those interested in offering a course in the international human rights dimension of indigenous peoples law, Aspen publishes a text by S. James Anaya. S. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* (2009).

II. DIVORCE RIGHTS FROM CULTURE

Some years ago I noticed a paradox in the caselaw: the more economically successful tribes were and the more they resembled the non-Indian communities that surrounded them, the more likely it was that the Supreme Court would deny them jurisdictional rights. One example will suffice. *Brendale* and *Wilkinson* were non-tribal landowners on the Yakima Reservation in Washington State.¹¹ When they petitioned the tribe for permission to build cabins on their lands, they were turned down.¹² Both went to Yakima County to gain county approval over the tribe's objection that the county lacked jurisdiction to zone reservation lands.¹³ With no majority for an opinion on either claim, the Supreme Court ruled in favor of *Wilkinson* and against *Brendale*.¹⁴ The rationale expressed in the swing opinion, authored by Justice Stevens, is telling and illustrates my point. *Brendale's* land, he wrote, was in a part of the reservation that had retained its traditional tribal "character"—it was "an undeveloped refuge of cultural and religious significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of their culture.'"¹⁵ *Wilkinson's* land, in contrast, lay in an "integrated [and developed] community that is not economically or culturally delimited by reservation boundaries."¹⁶ The underlying message seems to be that if land looks "Indian," as the majority culture conceives it, it is Indian; if it does not, it is not. I began to think of this as the Cherokee paradox. The Cherokee Nation enjoyed an independent existence in the mountains of Georgia, North Carolina, and Tennessee until they adopted a Southern agricultural economy and constitution.¹⁷ In response, Georgia passed a law imposing its code on the Nation and abolishing Cherokee national institutions.¹⁸ The Cherokee Nation sued Georgia in the Supreme Court, and the Court decided it lacked original jurisdiction.¹⁹ The Cherokee were not a "foreign state" under Article III.²⁰ Instead, according to Chief Justice John Marshall, they were a "domestic dependent nations."²¹ The

11. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 417–18 (1989).

12. *Id.* at 417–19.

13. *Id.*

14. *Id.* at 432–33.

15. *Id.* at 441.

16. *Brendale*, 492 U.S. at 444.

17. Mary Young, *The Cherokee Nation: Mirror of the Republic*, 33 AM. Q. 502, 506–07 (1981).

18. *Cherokee Nation v. Georgia*, 30 U.S. 1, 7 (1831).

19. *Id.* at 15–16, 20.

20. *Id.* at 20.

21. *Id.* at 17.

following term in *Worcester v. Georgia*,²² the Court held imposition of Georgia's laws invalid.

I began to suspect after reading these cases that to some on the Court—and I think to many in the majority society—tribal “nationhood” depended on “dependence” and adherence to cultural stereotype. The reality is that tribes can be successful, integrate into the national economy, and still retain their political sovereignty. I think this is a point worth fleshing out in class.

III. DIVORCE POLITICAL STATUS FROM ETHNICITY

In Oklahoma (and I am sure elsewhere), everyone has heard someone say “you don’t look Indian.” This comes from a sense that “Indian” is an ethnic or racial designation. And while that is certainly true, it is not the whole truth for purposes of Federal Indian Law. The key case is *Morton v. Mancari*.²³ Several employees of the Bureau of Indian Affairs in Albuquerque protested that they had been passed over for promotion because they were non-Indian.²⁴ Their attorneys argued that the Bureau’s promotional and hiring preference for tribal members constituted racial discrimination under the Fifth Amendment and could only survive if it satisfied the requirements of strict scrutiny review.²⁵ The Supreme Court held that the classification was not race-based, but political—what disadvantaged the plaintiffs was not their race, but their lack of a tribal membership card—and subjected the preference to rational basis review, which it easily satisfied.²⁶ The identification of tribes as political and not racial groups is essential to a proper understanding of tribal sovereignty. The issue is complicated, however, by the decision of most tribes to require a certain descent or blood quantum as a condition of citizenship. To many tribes, this is understandably seen as necessary to the preservation of group identity and culture. But the fact that tribes have made this decision does not mean that it is required. Indeed, some tribes have allowed non-Indians citizenship rights. The Cherokee Nation, for example, historically allowed spouses of citizens to become citizens themselves,²⁷ and the Five Nations in Eastern Oklahoma all historically allowed citizenship rights to be enjoyed by descendants of former slaves.²⁸ Understanding that there is

22. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

23. 417 U.S. 535 (1974).

24. *Id.* at 539.

25. *Id.* at 551.

26. *Id.* at 553–54.

27. Curtis Act, 30 Stat. 495, 502 (1898).

28. See generally DAWES COMMISSION, THE FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES IN INDIAN TERRITORY (1907) (listing the citizens of the Five Civilized Tribes (i.e., Five Nations) from 1898–1907 and dividing them into categories, including “Citizens by Marriage” and freed slaves). See also Donald A. Grinde, Jr. & Quintard Taylor, *Red vs Black: Conflict and Accommodation in the Post Civil War Indian Territory, 1865–1907*, 8 AM.

flexibility in citizenship reduces the Equal Protection anxiety many students (and faculty) may feel when exploring tribal rights issues. Students are more comfortable with separate rights for other nations than they are with separate rights for subnational racial groups. The fact of this flexibility helps us better understand the basis for tribal claims to national sovereign status.

IV. TEACH THE RESERVED RIGHTS DOCTRINE

Students, even (and sometimes especially) students well disposed to acknowledge tribal rights, often come to class convinced that the United States “gave” things to the tribes: for example, that the United States “gave” the tribes their reservations. In fact, in the majority of instances, the tribes ceded lands to the United States and reserved what they did not cede.²⁹ This is important in defining rights. Under the reserved rights doctrine,³⁰ what is not ceded is retained. Thus, if a treaty is silent concerning the conveyance of a right and the tribe is doing the ceding, the right is retained by the tribe. If the United States is ceding to the tribe, the reverse presumption arguably prevails. A little rethinking here goes a long way to help students understand the current rights configuration.

V. TEACH ECONOMIC DEVELOPMENT—AND RECOGNIZE IT AS A POLITICAL ISSUE

This is what many clients need advice on and what interests some students most. It is also a source—perhaps the biggest source—of non-Indian angst. I have lost track of the number of times I have been asked at public events “what’s with all these tribal smokeshops selling untaxed tobacco?” You and your students should have an answer. In my experience, students readily grasp the point of smokeshops by walking through the mechanics of tribal economic development options. First, as a consequence of Supreme Court case law and federal legislation (*Johnson v. M’Intosh*³¹ and the Trade and Intercourse Act³²), tribes cannot mortgage their lands. This makes accumulating cash for any sort of economic development project problematic. One solution was to take advantage of an arguable exemption from state sales and excise taxes and sell products produced elsewhere tax-free through tribally owned or licensed stores. Because of the remote locations of much of Indian Country, the tax

INDIAN Q. 221 (1984) (providing overview of racial relations, intermarriage, and citizenship in Oklahoma).

29. See, e.g., STATE OF OREGON LEGISLATIVE COMMITTEE SERVICES, BACKGROUND BRIEF ON INDIAN TRIBES 2 (May 2004), available at http://www.leg.state.or.us/comm/commsrvs/background_briefs2008/briefs/GeneralGovernment/OregonIndianTribes.pdf.

30. For an overview of the reserved rights doctrine, see Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61 (1994).

31. 21 U.S. 543 (1823).

32. 4 Stat. 729 (1834) (relevant part currently encoded at 25 U.S.C. § 177 (2006)).

exemption had to be sizeable to lure customers. For this reason, the most viable products were those the use of which the states were attempting to discourage via the imposition of sin taxes. These turned out to be tobacco and motor fuels. Enter the smokeshop. Indian gaming is another industry born of tribal immunity from state regulation. The Supreme Court held in 1987 that tribes could offer high-stakes bingo and other games—effectively free of state regulation.³³ In 1988, Congress passed the Indian Gaming Regulatory Act limiting that freedom.³⁴ Under the Act, if tribes want to operate facilities offering, for example, slot machines, they are directed to enter into a compact with the surrounding state.³⁵ A new federal regulatory body—the National Indian Gaming Commission—was created to ensure compliance with federal law and was funded by tribal gaming proceeds.³⁶ This aspect of tribal gaming—the extent of regulation—is one students often do not understand coming into the course. Rules explication in the economic development area can diminish the concerns of some students that current law unfairly advances Indian interests in violation of Equal Protection.

VI. CONFRONT THE TENSION BETWEEN INDIVIDUAL AND COLLECTIVE RIGHTS

Many students—especially those who enter the course thinking it primarily a civil rights course—will imagine that, just as in most civil rights courses, the rights of individual Indians will occupy center stage. They are wrong. Not only do individual rights occupy but a small portion of the typical Indian Law course, at many important junctures they conflict with the collective rights of tribes—and lose. For example, The Indian Child Welfare Act,³⁷ passed in 1978 to stem the flow of Indian children being removed from Indian families and placed with non-Indian adoptive parents, allows the child's tribe a powerful and often decisive role in the placement process, even where the views of the tribe and the biological parents conflict. This creates a tension that should be addressed.

VII. TEACH THE COMPARATIVE AND INTERNATIONAL MATERIALS

Each of the major Indian Law casebooks includes materials on international and comparative indigenous peoples law. These materials are important. For one thing, the field is rapidly internationalizing. In September 2007, the United Nations General Assembly adopted the U.N. Declaration on the Rights of Indigenous Peoples,³⁸ the first comprehensive international

33. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987).

34. 25 U.S.C. §§ 2701–21 (2006).

35. *Id.* § 2710(d)(3)(A).

36. *Id.* §§ 2702(3), 2704(a), 2717(a)(1).

37. *Id.* §§ 1901–1963.

38. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

statement on the collective rights of indigenous peoples.³⁹ For another, understanding that the United States is not alone in sorting out how to relate to indigenous peoples (and vice versa), and understanding how others have fared, is important in assessing our successes and failures.

I began teaching a comparative and international indigenous peoples law course at Oklahoma in 2000. I invited my friend, Brad Morse from the University of Ottawa, to assemble a class and join my students and me in a semester-long video conference exploring indigenous peoples issues in our respective countries. The class was a great hit with students, word spread, and it soon included students and faculty from eight participating universities: two in Canada, two in Australia, three in Aotearoa/New Zealand, and Oklahoma.⁴⁰ Last year, we demonstrated the class for the International Association of Law Schools Annual Meeting in Shanghai. I do not know if it is true, but we were told we were likely the first international law school class in the world. I mention our experience to underscore how doable teaching comparative indigenous peoples law can be. It does not matter if you know much yourself, as long as your school is willing to invest in distance education, the costs for which seem continually to decline.⁴¹

CONCLUSION

As I mentioned above, I hope this brief personal overview will prove useful to my colleagues at other law schools considering teaching a course in Federal Indian Law. I should in fairness confess a larger aim. It seems trite to observe that education on complex issues facilitates constructive conversation, but in my experience the huge lack of understanding on the part of those with no exposure to Native American Law issues actually renders the observation meaningful in context. If you should decide to try the class, I'm sure all of us who teach it now will be grateful for your help.

39. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights For All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007).

40. Participating faculty have included Professors Melissa Castan and David Yarrow (Monash University), Professor Catherine Iorns (Victoria University), Professor Margaret Stephenson (University of Queensland), Professors Paul Chartrand and Ruth Thompson (University of Saskatchewan), Professors Nin Tomas and Khylee Quince (University of Auckland), and Professor Robert Joseph (Waikato University). Professor Morse is now Dean of the University Waikato School of Law.

41. For discussion of the technological and pedagogical issues involved, see Margaret Stephenson, Bradford Morse, Lindsay G. Robertson, Melissa Castan, David Yarrow & Ruth Thompson, *International and Comparative Indigenous Rights Via Videoconferencing*, 19 LEGAL EDUC. REV. 237 (2009).

