

NATIVE PEOPLES AND THE U.S. SUPREME COURT
(LDST 390 04)

Fall 2021
Time: Mondays 3:00-5:40
Place: Jepson 108
Phone: 287-6494 (office)

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COURSE DESCRIPTION:

The decisions of the U.S. Supreme Court have had a profound impact on the lives, liberties, and properties of Indigenous peoples. At times, the Court's rulings have worked to protect Native peoples' rights; at other times, the decisions have had devastating consequences. The purpose of this course, broadly put, is to explore the following question: What is the role and what has been the practice of the U.S. Supreme Court as a policy-making institution when dealing with Indigenous nations and their citizens?¹ Such an inquiry invites us to think politically, historically, legally, and theoretically; to ask about the origins and exercise of federal judicial power; and to examine the application of federal law to Indigenous peoples and Native citizens in various areas of law

APPROACH:

We will use several methods of analysis to study the relationship between the Court and Native nations and individuals: theoretical, behavioral, institutional, and case studies. The course will be divided into three sections. We begin by creating a philosophical and theoretical framework in which to evaluate both the role of the Court and its decisions. First, we will briefly look at Indigenous legal and political traditions and discuss how these influenced and were in turn influenced by western legal, political, and cultural traditions. We then turn to an examination of the Supreme Court as a uniquely situated "political" institution. Then we assess the various theories which purport to explain the interinstitutional (vis-a-vis the other branches of government) role of the court, and the court's role in national policy-making. We then examine a seminal question: whether or not Native nations are, in fact, an inherent part of the American constitutional matrix. With the historical, theoretical, and philosophical framework in place, in Part II we will read and analyze a substantial number of important Supreme Court decisions dealing both explicitly and implicitly with Indigenous nations and their citizens. Finally, we end the course with some readings on possible trends and directions this research area may be

¹Native individuals who belong to Tribal nations are citizens not only of their own nation, but are also entitled to the benefits and many of the responsibilities of the federal government and the state they officially reside in. This so-called treble citizenship status is one of the many complicating factors animating the study of federal Indian law and politics.

headed.

REQUIREMENTS:

1) There will also be a major writing assignment for all students. It is in the writing assignment that you will be expected to demonstrate your research skills and analytical abilities. The paper must be 15 pages in length, excluding notes and bibliography. Format: Follow Kate Turabian's style guide or the *Chicago Manual of Style*. You must use **footnotes** in the paper.

In this paper I want you to critically analyze a Supreme Court case that impacts Native nations or individuals. (**Due date: November 22nd**). I will expect a legal/political history of the case you have chosen. In particular, I will want to know the parties; who the attorneys were; the fact situation; the historical era; the dispute; the role of interest groups, if any were involved; the role, if any, of the federal government; and any other relevant data that will allow me to have a good understanding of not only the legal dispute but also the important social, political, and historical developments of the time. In essence, I want you to track the case from before its genesis to its conclusion in the Supreme Court's final opinion. In the process, you will also be describing or speculating on any personal, political, or economic influences which may have influenced the final decision.

2) In addition, each student will be required periodically to be the **lead discussant** of an assigned article, book, or court opinion. I will make these assignments at the appropriate times. If you are leading the discussion on a given assignment you must submit your briefing comments in writing to me the day **before** you are scheduled to speak. I encourage you, class size and your budget permitting, to distribute your briefs to your classmates as soon as they are completed.

3) All students will also be required to submit two or three broad questions to me no later than 5pm each Sunday. These questions should address pertinent issues raised or not raised in the week's readings. [**Note: If you are the lead discussant of a particular reading you are exempt from questions for that week.**] These questions should reflect your ability to compare and contrast information, to differentiate between facts and opinions, and to recognize and evaluate author or institutional bias. They should also indicate your competence to make critical judgments and draw firm conclusions about the materials read. If you agree or disagree with an author's findings I will want to know why. I don't always agree with some author's viewpoints so I'll be interested in your perspective. This exercise will help you focus on the readings and sharpens critical thinking. Because you will have already analyzed the materials, you will be prepared for class and more confident about engaging in substantive discussion.

Note: for the first two weeks I will respond to your submitted questions by offering suggestions on how they might be improved. This is meant to be an opportunity for real engagement with these topics, not a way to find flaws. My goal is that you express your ideas confidently, but your remarks must be based in knowledge, not raw opinion. Submit your

questions by e-mail. Always bring a copy of your questions to class.]

OTHER EXPECTATIONS:

Cell phones may never be used during class. Laptops are not allowed either, with one exception: if you have a documented need recognized by the university's Disability Service office. You must have paperwork verifying the same.

In addition to the above-mentioned assignments, the only other requirement is that you be punctual and regularly attend class. Three (3) unexplained absences and you will be administratively dropped from the course.

I weight the above requirements as follows:

Undergraduates:

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|------------------|-------|
| Weekly Questions | = 20% |
| Briefings | = 20% |
| Participation | = 20% |
| Paper | = 40% |

The scale for grades is the typical, albeit imperfect, 10-point system: 94-100 = A; 90-93 = A-; 87-89 = B+; 84-86 = B, etc.

I encourage you to form small groups to discuss the lectures and readings. It also behooves you to take copious notes of each reading. **Hi-liting** particular passages does only that, it **hi-lites**. Retention of the meaning of this often convoluted material will require you to write out detailed notes for each article, book, or case we study.

I do not assign extra-credit projects, I do not loan my notes, and I do not use a curved grading system. I also reserve the right to modify our readings as the semester progresses. If I do make any modifications you will be notified in advance.

As you can see, I expect a high level of intellectual discussion each time we meet. I also maintain a professional learning environment that expects participation and the constructive exchange of ideas. All viewpoints are welcome, as is scrutiny of those viewpoints. Like many others, I continue to learn about and will always show respect for diverse perspectives and identities.

Finally, I have a somewhat formal approach to teaching based in respect for learning and the privacy of my students. Therefore, I will address you by your last name and ask that you let me know your preferred honorific, such as Ms., Mr., or Mx. Like most people of my generation I am still learning and getting accustomed to more inclusive identifications and will do my best to address everyone appropriately.

REQUIRED TEXTS (All Students):

Carole Goldberg, Kevin K. Washburn, and Philip P. Frickey. *Indian Law Stories*. (NY: Thompson Reuters/Foundation Press, 2011).

David M. O'Brien. *Storm Center: The Supreme Court in American Politics*. 12th ed. (New York: W.W. Norton & Co., 2020).

David E. Wilkins and Tsianina Lomawaima. *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, OK: University of Oklahoma Press, 2001).

ADDITIONAL READINGS (All Students):

The Supreme Court cases are available in hard copy at the Law Library. You will also find them on the internet under Lexis/Nexis. Other helpful websites include: www.oyez.org, www.supreme.justia.com, www.law.cornell.edu/supremecourt/text, or www.caselaw.findlaw.com/us-supreme-court.

Other readings have been placed on Blackboard.

TOPICS AND READINGS (Read it and Reap!)

[Note: The amount of time devoted to each section will vary depending on the material and student interest]

INTRODUCTION TO THE COURSE

PART ONE

A. Indigenous political and legal traditions and western law

READ:

Robert A Williams, Jr. *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600-1800* (NY: Oxford University Press, 1997): Introduction and Chapter 1, pgs. 3-39.

David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin, TX: University of Texas Press, 1997): Chapter 1 “Legal Masks, Legal

Consciousness," pgs. 2-18.

Carole Goldberg and Kevin K. Washburn, *Indian Law Stories* (Oklahoma Press, 2016): Introduction.

David Wilkins and Tsianina Lomawaima, *Uneven Ground* (2001): Introduction.

Vine Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review* 31 (1989):203-223.

B. An Overview: The Supreme Court as a Political Institution in a Federal system: Legitimater, Initiator, or Imperial Power?

READ:

Clinton Rossiter, ed. *The Federalist Papers* (New York: Mentor, 1961, 1999): Numbers 78-82, pages 432-463.

Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* 6 (1957): 279-295.

David M. O'Brien. *Storm Center: The Supreme Court in American Politics* (Norton, 2017). Preface and Chap's 1, 4, 5 & 6.

C. An Overview: Indigenous Peoples and the U.S. Constitution: Are Native nations constitutional or extra-constitutional polities?

READ:

Vine Deloria, Jr., "The Application of the Constitution to American Indians," in Lyons and Mohawk, eds. *Exiled in the Land of the Free* (Santa Fe, NM: Clear Light Publishers, 1992): 281-315.

David Wilkins and Tsianina Lomawaima, *Uneven Ground* (2001): Chapters 3-5.

PART TWO

D. Indigenous Status, Federal Relations, ADependency,@ Trust, and Plenary Power

READ:

David Wilkins and Tsianina Lomawaima, *Uneven Ground* (2001): Chapter 2.

Rennard Strickland, “The Tribal Struggle for Indian Sovereignty: The Story of the *Cherokee Cases*” in Goldberg, Washburn & Frickey (2011), pgs. 61-80.

Cherokee Nation vs. Georgia, 30 U.S. (5 Pet.) 1 (1831)

Worcester vs. Georgia, 31 U.S. (6 Pet.) 515 (1832)

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867)

Angela R. Riley, “The Apex of Congress’ Plenary Power over Indian Affairs: The Story of *Lone Wolf v. Hitchcock*,” in Goldberg, Washburn & Frickey (2011), pgs. 189-228.

Lone Wolf vs. Hitchcock, 187 U.S. 553 (1903)

Gerald Torres, “Who is an Indian?: The Story of *United States v. Sandoval*,” in Goldberg, Washburn & Frickey (2011), pgs. 109-145.

U.S. vs. Mazurie, 419 U.S. 544 (1975)

U.S. vs. Lara, 541 U.S. 193 (2004)

U.S. vs. Bryant, 579 U.S. ____ (2016)

Yellen v. Confederated Tribes of the Chehalis Reservation, 594 U.S. ____ (2021)

E. Aboriginal Land Title and Indian Country

READ:

David Wilkins and Tsianina Lomawaima, *Uneven Ground* (2001): Chapter 1.

Lindsay G. Robertson, “The Judicial Conquest of Native America: The Story of *Johnson v. M’Intosh*,” in Goldberg, Washburn & Frickey (2011), pgs. 29-59.

Johnson vs. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)

U.S. ex rel Hualapai Indians vs. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941)

Joseph William Singer, “Erasing Indian Country: The Story of *Tee-Hit-Ton Indians v. United States*,” in Goldberg, Washburn & Frickey (2011), pgs. 229-259.

Tee-Hit-Ton Indians vs. United States, 348 U.S. 272 (1955)

Carcieri v. Salazar, 555 U.S. 379 (2009)

McGirt v. Oklahoma, 591 U.S. ____ (2020)

F. Criminal and Civil Jurisdiction

READ:

Criminal Cases:

Ex Parte Crow Dog, 109 U.S. 556 (1883)

Sidney L. Haring, “The Distorted History that Gave Rise to the “So-Called” Plenary Power Doctrine: The Story of *United States v. Kagama*,” in Goldberg, Washburn & Frickey (2011), pgs. 149-188.

U.S. vs. Kagama, 118 U.S. 375 (1886)

Talton vs. Mayes, 163 U.S. 376 (1896)

Sarah Krakoff, “Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of *Oliphant v. Suquamish Indian Tribe*,” in Goldberg, Washburn & Frickey (2011), pgs. 261-296.

Oliphant vs. Suquamish Tribe, 435 U.S. 191 (1978)

Civil Cases:

Bethany R. Berger, “Sheep, Sovereignty, and the Supreme Court: The Story of *Williams v. Lee*,” in Goldberg, Washburn & Frickey (2011), pgs. 359-387.

Williams vs. Lee, 358 U.S. 217 (1958)

John P. Lavelle, “Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of *Montana v. United States*,” in Goldberg, Washburn & Frickey (2011), pgs. 535-590.

Montana vs. U.S. 450 U.S. 544 (1981)

Nevada vs. Hicks, 533 U.S. 353 (2001)

United States v. Cooley, 593 U.S. ____ (2021)

G. Taxation, Regulatory Jurisdiction & Tribal-State Affairs

READ:

The Cherokee Tobacco Case, 78 U.S. 616 (1870)

Squire vs. Capoeman, 351 U.S. 1 (1956)

McClanahan vs. Arizona State Tax Commission, 411 U.S. 164 (1973)

Merrion vs. Jicarilla Apache Tribe, 455 U.S. 130 (1980)

David Wilkins and Tsianina Lomawaima, *Uneven Ground* (2001): Chapter 6.

Atkinson Trading Co., vs. Shirley, 532 U.S. 645 (2001)

Adoptive Couple vs. Baby Girl, 133 S. Ct. 2552 (2013)

H. Hunting, Fishing, and Water Rights

READ:

Ward vs. Racehorse, 163 U.S. 504 (1896)

U.S. vs. Winans, 198 U.S. 371 (1905)

Judith V. Royster, “Water, Legal Rights, and Actual Consequences: The Story of *Winters v. United States*,” in Goldberg, Washburn, & Frickey (2011), pgs. 81-107.

Winters vs. U.S., 207 U.S. 564 (1908)

Menominee Tribe vs. U.S., 391 U.S. 404 (1968)

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)

I. Individual Indian Rights: Citizenship, Preference, Religion

READ:

Elk vs. Wilkins, 112 U.S. 94 (1884)

U.S. vs. Nice, 241 U.S. 591 (1916)

Carole Goldberg, “What’s Race Got to Do With It? The Story of *Morton v. Mancari*,” in Goldberg, Washburn & Frickey (2011), pgs. 389-420.

Morton vs. Mancari, 417 U.S. 535 (1974)

Gloria Valencia-Weber, “Three Stories in One: The Story of *Santa Clara Pueblo v. Martinez*,” in Goldberg, Washburn & Frickey (2011), pgs. 451-488.

Santa Clara Pueblo vs. Martinez, 436 49 (1978)

Amy Bowers and Kristen A. Carpenter, “Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*,” in Goldberg, Washburn & Frickey (2011), pgs. 489-533.

Lyng vs. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)

Employment Division vs. Smith, 492 U.S. 872 (1990)

PART THREE

J. Final Thoughts?

READ:

David Wilkins and Tsianina Lomawaima, *Uneven Ground* (2001): Chapter 7 & Conclusion

Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, CO: Fulcrum Publishing, 2010): Chapter 15.