

**LAW, NATIVE SOVEREIGNTY & TREATY RIGHTS**  
**(LDST 390-03 & PLSC 379)**

Fall 2023  
Time: Tuesdays 3-5:40  
Place: Jepson Hall 102  
Phone: 804-287-6494

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**PURPOSE:** This course introduces you to, and more importantly, requires you to analyze U.S. domestic policy and federal law as it pertains to Native nations as the original sovereign peoples in the U.S. and to their individual citizens/members. In Part 1 we engage in a critical analysis of the principal actors--Native nations (including the status of individual Natives), federal, and state governments--involved in this distinctive government-to-government and intergovernmental relationship. We also discuss the role that activism, the media, and organizations--both governmental and non-governmental (i.e., interest groups, the public, etc.)-- play in the development or hindering of Native peoples and federal Indian policy, law, and governance. In Part 2 of the course, we broadly examine the historical development of the major federal Indian policy eras and the initiatives generated during those periods from before the beginning of the Republic to the present. Finally, in Part 3 we engage in a focused analysis of several specific Indigenous policy issues and other topics: religious freedom, economic development, federal recognition, treaty rights, and international developments--topics that are particularly important at the moment. We conclude the course by suggesting some possible policy avenues the different sovereigns might consider to improve intergovernmental relations.

**REQUIRED READING:**

Stephen L. Pevar, The Rights of Indians and Tribes, 4<sup>th</sup> ed. (NY: Oxford University Press, 2012)

David Wilkins and Heidi K. Stark, American Indian Politics and the American Political System, 4th ed. (Lanham, MD: Rowman & Littlefield, 2018).

**ADDITIONAL READING:** An additional group of readings has been put together and is available on Blackboard. The U.S. Supreme Court cases can be found at the Law School, the main library, or on-line. If you go online you can visit these sites: <http://www.supremecourt.gov/opinions/>; <https://caselaw.findlaw.com>; <https://www.tribal-institute.org/lists/supreme.htm>. You might also visit the Native American Rights Fund website out of Boulder, CO. They have an extensive collection of Tribal law related materials that could prove useful.

**VERBAL PARTICIPATION**: As our class is small and meets only once a week, we will operate as a seminar. Thus, you will all be expected to orally contribute to the critical analysis of each week's readings. To quote a former colleague: "I see you as intellectual producers of knowledge; not as mere consumers of knowledge."

**LEAD DISCUSSANT**: Each student will be required to be the **lead discussant** of an assigned article, chapter, court case, law, etc. I will make these assignments at the appropriate times throughout the semester. If you are leading the discussion of a given work you must submit your **briefing comments** in writing to me the day before you are scheduled to lead the discussion of your text. As the leader of a given assignment you may guide the discussion in class using any approach you deem worthwhile. In previous classes some students have prepared power points, others have organized their classmates into small groups to answer a question or set of questions you will have prepared in advance, or you may simply provide me and your classmates with a critical analysis of whatever the assigned reading was.

**WEEKLY QUESTIONS ASSIGNMENT**: You will be required to submit two broad essay questions to me no later than 5:00 pm each Monday. Pitch your questions as if you were the instructor and I the student and you were testing my knowledge of the materials read. Your questions should address pertinent issues raised in the week's readings. Your **first** question should be broadly comparative in nature, when the readings allow for that. Specifically, it should reflect your ability to compare and contrast information, differentiate between facts and opinion, and recognize and evaluate author bias, if that is detected. It should also indicate your competence to make critical judgments and draw firm conclusions about the materials read. Your **second** question can be about anything that struck you in the readings. If you agree or disagree with an author's findings I will want to know why. I don't always agree with the authors I read, 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 analyzed the materials and not simply consumed them you will be better prepared for class and more confident about engaging in substantive discussions of what we've read together. Submit your questions via e-mail. **I will always acknowledge that I have received them and will offer suggestions, criticisms, or general thoughts on what you've presented.** Always make a hard copy of your questions and bring it to class. Your questions are meant to be an opportunity for real engagement with these topics. My goal is that you express your ideas confidently, but your remarks must be based in knowledge and facts, not raw opinion. Your questions are an important way for me to determine that you are actively engaging the assigned materials. You may inquire, at any time, how you're doing on this important assignment. At mid-term I will provide you with a preliminary letter grade on this component and other aspects of your course work.

**OTHER EXPECTATIONS**: In addition to the reading assignments, active participation, final exam, and written assignments, the only other requirement is that you regularly attend class.

Three (3) unexcused absences and you will be administratively dropped from the course.

I weight the above requirements as follows:

Verbal Participation: 25%  
Weekly Questions: 25%  
Lead Discussant: 25%  
Final Exam: 25%

I use the typical, if imperfect, 10-point scale-- 90 & above =A to A-; 80-89 =B to B-; 70-79=C to C-, etc.

Let me reiterate, I expect a high level of intellectual discussion each time we meet. Remember, you are producers, not consumers in this class. It also behooves you to take copious notes of the readings, outline what you read, and write specific questions about anything you do not fully understand.

P.S. I reserve the right to add or delete readings from those listed below. I do not assign extra-credit projects, I do not loan my notes if you miss class, and I do not use a curved grading system. Finally, **cell phones may never be used in 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.**

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 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.

## **TOPICAL OUTLINE**

(Read it and Reap!)

### **Introduction & Orientation**

#### **PART I: The Political Actors**

##### **A. Who are the Native Nations? Indigenous Government Powers and Political Status**

READ:

Vine Deloria, Jr. "Self-Determination and the Concept of Sovereignty." In Roxanne Dunbar Ortiz, ed. Economic Development in American Indian Reservations (Albuquerque, NM: Native American Studies, 1979): 22-28.

Wilkins and Stark, American Indian Politics (2018): Note on Terminology, (skim the "Timeline"), Read "Introduction," and Chapters 1 and 3.

Pevar, The Rights of Indians and Tribes (2012): Read Chapters 2 and 6.

## **B. Rights & Status of Urban Natives**

READ:

Susan Lobo, "Is Urban a Person or a Place? Characteristics of Urban Indian Country" in Susan Lobo and Kurt Peters, eds. American Indians and the Urban Experience (AltaMira Press, 2001): 73-84.

The Harvard Project on American Indian Economic Development, The State of Native Nations: Conditions Under U.S. Policies of Self-Determination (New York: Oxford Press, 2008): Read Chapter 21 "Urban Indians," pgs. 351-366.

C. Matthew Snipp, "American Indians and Alaska Natives in Urban Environments" in Evelyn Peters and Chris Andersen, eds. Indigenous in the City: Contemporary Identities and Cultural Innovation (Vancouver: UBC Press, 2013): 173-182.

Azusa Ono, "American Indian Homelessness in Cities," in Donna Martinez, Grace Sage, and Azusa Ono, eds' Urban American Indians: Reclaiming Native Space (Santa Barbara: Praeger, 2016): 43-62.

## **C. What is the Nature of the Native Nations-Federal relationship: Trade, Treaties, Trust, Jurisdiction & Territory?**

READ:

Wilkins and Stark, American Indian Politics (2018): Chapters 2 and 4.

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

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

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

United States v. Winans, 198 U.S. 371 (1905).

Pevar, The Rights of Indians and Tribes (2012): Chapters 3, 4, and 5.

Vine Deloria, Jr. "Treaties," in Mary B. Davis, Native America in the Twentieth Century: An Encyclopedia (New York: Garland Publishing, Inc., 1996): 646-649.

Vine Deloria, Jr. and Raymond DeMallie, Documents of American Indian Diplomacy, Vol. 1 (Univ. of Oklahoma Press, 1999): Chapters 4 and 6.

Treaty with the Six Nations, 1794 (7 Stat. 44)

Treaty with the Cherokee, 1835 (7 Stat. 478)

Treaty with the Navajo, 1868 (15 Stat. 667)

Larry Nesper, "Twenty-Five Years of Ojibwe Treaty Rights in Wisconsin, Michigan, and Minnesota," American Indian Culture & Research Journal, vol. 36, no. 1 (2012): 47-77.

#### **D. What is the Native Nations-State relationship?**

READ:

Worcester v. Georgia, 31 U.S. 515 (1832).

Pevar, The Rights of Indians & Tribes, (2012): Chapters 7, 11, 12, and 17.

David E. Wilkins, "Tribal-State Affairs: American States as 'Disclaiming' Sovereigns," Publius (1998): 55-81.

Andrea Wilkins, Fostering State-Tribal Collaboration: An Indian Law Primer (Lanham, MD: Rowman & Littlefield Publishers, 2015): Chapter 2 "State-Tribal Consultation" and Chapter 6 "Taxation."

Proposed "Tribal-Commonwealth Accord: An Agreement between Tribal Nations & the Commonwealth of Virginia."

State of Virginia. Executive Order Number Eighty-Two (2021) "Consultation with Federally-Recognized Tribal Nations for Environmental and Historic Permits and Reviews." (2021)

**E. What role does mass and social media, cultural appropriation, political participation, and Indigenous activism play in the legal, political, and policy process?**

READ:

Casey Ryan Kelly, “Representations of Native Americans in the Mass Media.” In John Nussbaum, ed. Oxford Research Encyclopedia of Communication (NY: Oxford University Press, 2017): 1-37.

Wilkins and Stark, American Indian Politics (2018): Chapters 7-9.

Taima Moeke-Pickering, Julia Rowat, Sheila Cote-Meek, and Ann Pegoraro, “Indigenous Social Activism Using Twitter,” In Bronwyn Carlson and Jeff Borglund, eds. Indigenous Peoples Rise Up: The Global Ascendancy of Social Media Activism (New Brunswick, NJ: Rutgers University Press, 2021): 112-124.

John Borrows, “Turning Away from the State: Cultural Appropriation in the Shadow of the Courts.” In John Borrows and Kent McNeil, eds. Voicing Identity: Cultural Appropriation and Indigenous Issues (Toronto: University of Toronto Press, 2022): 155-170.

Michael Asch, “Reflections on Cultural Appropriation.” In John Borrows and Kent McNeil, eds. Voicing Identity: Cultural Appropriation and Indigenous Issues (Toronto: University of Toronto Press, 2022): 139-154.

**PART II: The Political History of Native Nations: 1492-Present**

READ:

Wilkins and Stark, American Indian Politics (2018): Chapter 5.

Pevar, The Rights of Indians and Tribes (2012): Chapter 1.

Colin G. Calloway, First Peoples: A Documentary Survey of American Indian History, 6<sup>th</sup> ed. (Boston: Bedford/St. Martins, 2019): Chapter 10 “Nations within a Nation: Indian Country Today” (Read pages 566-613. Skim pages 613-643).

**PART III: The Political Action**

**A. Native Religious Freedom**

READ:

Vine Deloria, Jr. "Sacred Places and Moral Responsibility," in Barbara Deloria, et al., Spirit and Reason: The Vine Deloria, Jr. Reader (Fulcrum Publishing, 1999): 323-328.

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

Edward Valandra, "Mni Wiconi: Water is [More Than] Life," in Nick Estes and Jaskiran Dhillon, eds. Standing with Standing Rock: Voices from the #NoDAPL Movement (Minneapolis, MN: University of Minnesota Press, 2019): 71-89.

## **B. Economic Development in Indian Country**

READ:

Wilkins and Stark, American Indian Politics (2018): Chapter 6.

Pevar, The Rights of Indians and Tribes (2012): Chapters 10 and 16.

Jessica R. Cattelino, "Tribal Gaming and Indigenous Sovereignty, with Notes from Seminole Country," Indigenous Studies Today (Fall 2005/Spring 2006): 187-204.

William Ackerman and Rick L. Bunch, "A Comparative Analysis of Indian Gaming in the U.S." American Indian Quarterly, vol. 36, no. 1 (2012): 50-74.

Jay Precht, "Asserting Tribal Sovereignty through Compact Negotiations: A Case Study of the Coshatta Tribe of Louisiana," American Indian Quarterly, vol. 41, no. 1 (Winter 2017): 67-92.

## **C. Federal (and State) Recognition (Acknowledgment) of Tribes, Bands, or Groups**

READ:

William W. Quinn, Jr. "Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept," American Journal of Legal History, vol. xxxix, no. 4 (October 1990): 321-364.

David Wilkins, "Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgment," Publius, vol. 23, no. 4 (Fall, 1993): 123-142.

Amy E. Den Ouden and Jean M. O'Brien, "Introduction," in Amy E. Den Ouden and Jean M. O'Brien, eds. Recognition, Sovereignty Struggles, & Indigenous Rights in the United States (Chapel Hill, NC: University of North Carolina Press, 2013): 1-34.

K. Alexa Koenig and Jonathan Stein, "State Recognition of American Indian Tribes: A Survey of State-Recognized Tribes and State Recognition Processes," in Ouden and O'Brien, eds. Recognition, Sovereignty Struggles.... (2013): 115-146.

#### **D. Indigenous Peoples and the International Community**

READ:

Russel Barsh, "Political Diversification of the International Indigenous Movement," European Review of Native American Studies, vol. 5, no. 1 (1991): 7-10.

United Nations. Declaration on the Rights of Indigenous Peoples (2007).

Claire Charters, "Indigenous Peoples and International Law and Policy," in Benjamin J. Richardson, Shin Imai, and Kent McNeil, eds. Indigenous Peoples and the Law: Comparative and Critical Perspectives (Oxford: Hart Publishing, 2009): 161-191.

United Nations. Report of the Special Rapporteur on the rights of Indigenous Peoples. "Access to Justice for Indigenous Peoples." United Nations General Assembly. A/HRC/42/37 (August 2019).

#### **CONCLUSIONS: Where do we go from here?**

READ:

Wilkins and Stark, American Indian Politics (2018): Chapter 10.

John Borrows, "Physical Philosophy: Mobility and the Future of Indigenous Rights," in Richardson, Imai, and McNeil, eds. Indigenous Peoples and the Law.... (2009): 403-419.

#### **FINAL EXAM (LAST CLASS)**