

American Indian Law (Native American Rights and Sovereignty)
Thomas Jefferson School of Law — Spring 2024 Syllabus

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This version of the course syllabus is for public distribution, omitting the academic rules, regulations, and technical information (such as on grading and the paper option) that would only be of use or interest to TJSL students. See also my related essay, “Indian Law Reminiscences (1987–2024).”

I recently decided to dispense with a standard casebook in this course and instead simply assign (and provide free of charge to students) my own selection of cases, treaties, articles, and other primary and secondary source readings. I do, however, require students to buy and read substantial portions of two supplemental books (whose combined cost is a small fraction of the expense of a single typical law school casebook).

Indeed, I now structure the course to a significant extent around one of those supplements, *Indian Law Stories* (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds. 2011) (“ILS”), part of Foundation Press’s deservedly acclaimed series exploring the origins, social background, context, and litigation history of famous cases taught in various law school subjects.

ILS is now available in a Kindle ebook version which conveniently retains the pagination of the original paperback (which unfortunately appears to have gone out of print, though expensive resold copies are available). I tell students either edition is acceptable. Indeed, even if you already own the printed edition, I would urge everyone to support this excellent book by buying the Kindle version (<https://www.amazon.com/dp/B00SX5EHA1>). Books don’t get written by magic! Authors, editors, and publishers need to earn a living from them!

The other supplement is a classic must-read of American history: Zitkala-Sa (Gertrude Bonnin), *American Indian Stories, Legends, and Other Writings* (Cathy N. Davidson & Ada Norris eds., Penguin Books, 2003), also available in both Kindle and paperback editions. Since their modest cost is the same and the original pagination is *not* carried over to the Kindle (a major annoyance of most ebooks), I recommend the printed edition (<https://www.amazon.com/dp/0142437093>).

In the class schedule below, assigned readings in *Indian Law Stories* are indicated with the “ILS” abbreviation. “Zitkala-Sa, AIS” is used to indicate readings in *American Indian Stories*.

Students are instructed to read all footnotes within assigned pages unless specifically told otherwise. Some of the cases and articles are quite lengthy, so the class schedule below may indicate which “Part” or “Parts” are assigned to read. The syllabus may also use the following abbreviations or symbols to describe which portions to read (or not): ch. (chs.) = chapter(s), p. (pp.) = page(s), fn. (fns). = footnote(s), § (§§) = section(s), ¶ (¶¶) = paragraph(s).

Following are the three key learning goals for this course, reflecting its basic scope and content:

1. Students will acquire a basic understanding of important doctrines relating to Native American rights, Indian Nation sovereignty, and the historical relationship between the United States (both federal, state, and local governments), American Indians, and Indian Nation (tribal) governments. These doctrines include Indian treaty rights, tribal sovereign immunity, tribal

immunity from state law, the scope of Congressional power over tribes, criminal and civil jurisdictional boundaries and conflicts, the Indian Child Welfare Act, the Indian Civil Rights Act, hunting, fishing, land, and water rights, and Indian gaming and economic development.

2. Students will enhance their skills in applying the law and in expressing their legal analysis in both written and oral form, including skills in reading, understanding, briefing, and applying court cases, rule comprehension and synthesis, issue identification, and organization and clarity in written and oral presentation.

3. Students will enhance their understanding of how law school connects to legal practice and social realities through discussion of real-world cases and litigation.

Class Schedule and Reading Assignments (updated March 4, 2024)
(summary of topic of each class is followed by assigned readings)

Tuesday, January 9 (Class 1):

The Doctrine of “Discovery” and the Legacy of Conquest, Part 1

Wildenthal, *Native American Sovereignty on Trial* (2003) (excerpts), pp. 1-19

ILS, pp. v-vi (Acknowledgments) and 1-9 (part of Introduction), and ch. 1 (Robertson on *Johnson v. McIntosh*), pp. 29-39 and 41-43 (from 1st ¶ break on 41) (pagination in Kindle matches printed edition) (read fns. 1-2, 4, 7, 14, 21-22, 24, and 37; omit others)

Singer, *Indian Title* (2017), pp. 1-16 (through Part I) and 48 (Part V) (read fns. 5, 17, 21-22, 28, 62-63, and 65; omit others)

Note 1: The remainder of the Introduction to ILS, pp. 10-25, provides additional valuable perspectives and is highly recommended, but there’s no urgency to read it all by Class 1 or even during the first two weeks.

Note 2: While the case of *Johnson v. McIntosh* itself is not assigned reading until Class 2 (January 11), it is highly recommended to read the assigned pages (or as much as you can) before the first class, to get a head start.

Thursday, January 11 (Class 2):

The Doctrine of “Discovery” and the Legacy of Conquest, Part 2

Johnson v. McIntosh (1823): statement of facts, p. 560 (¶¶s 20-21), and Marshall, C.J., opinion of the Court, pp. 571-77 (to 1st ¶ break on 577), 587-94 (to last ¶ break on 594), and 604-05 (final ¶ of opinion)

ILS, ch. 1 (Robertson on *Johnson v. McIntosh*), pp. 54-59 (1st full ¶ on 54 to end) (read fns. 100-01 and 107-08; omit others)

Singer, *Indian Title* (2017), pp. 16-40 (Parts II-IV.A) (read fns. 67, 118, 141, 144, 149, 198-99, 203, and 212; omit others)

Tuesday, January 16 (Class 3):

Indian Land Rights: The Distorted Legacy of *Johnson v. McIntosh*

Tee-Hit-Ton v. U.S. (1955): Reed, J., opinion of the Court, pp. 273-91 (read fns. 1, 4, 7, 10-11, and 15-18; omit others), and Douglas, J., dissenting opinion, 291-95 (read fn. on 294-95)

ILS, ch. 7 (Singer on *Tee-Hit-Ton*), pp. 229-59

Thursday, January 18 (Class 4):

The *Cherokee Cases* and Their Contradictory Legacy: Removal, Genocide, and Plenary Federal Power vs. Tribal Self-Government and the Indian Law Canons of Construction

Cherokee-U.S. Treaty of Hopewell (1785) (edited), Treaty of Holston River (1791), pp. 39-42 (omit 1792 and 1794 provisions), and Treaty of Washington (1819), pp. 195-97

Cherokee Nation v. Georgia (1831) (edited): Marshall, C.J., plurality opinion, and separate opinions of Johnson, Baldwin, and Thompson, JJ.

Worcester v. Georgia (1832) (edited): Marshall, C.J., opinion of the Court, and McLean, J., concurring opinion

Wildenthal, *Native American Sovereignty on Trial* (2003) (excerpts), pp. 20-29

ILS, ch. 2 (Strickland on *Cherokee Cases*), pp. 61-80

Tuesday, January 23 (Class 5):

The Assimilation Era, Part 1: Physical Genocide and Plenary Federal Power vs. Inherent Tribal Power

Ex parte Crow Dog (Kan-gi-shun-ca) (1883): Matthews, J., opinion of the Court, pp. 557-58 (to last ¶ break on 558), 562 (4th ¶), and 567-72 (from 1st ¶ break on 567)

U.S. v. Kagama (1886): Miller, J., opinion of the Court, pp. 375-85

ILS, ch. 5 (Harring on *Kagama*), pp. 149-60 (to last ¶ break on 160), 168-71 (through 1st full ¶ on 171), and 180-88 (“Immediate Impact” to end)

Talton v. Mayes (1896): statement of the case, pp. 376-78, and White, J., opinion of the Court, 378-83 (to 1st sentence break on 383) and 384 (three sentences after 3rd ¶ break: “True it is that in many adjudications ...”, “But the existence of the right in Congress ...”, and “It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment”)

Zitkala-Sa, AIS, pp. ix-xxxv (Acknowledgments & Introduction) and 250-60 (California Indians)

Fuller, California Genocide (NYT, Oct. 27, 2021)

Wildenthal, Federal Labor Law, Indian Sovereignty, and the Canons of Construction (2007), pp. 423-29 (Part I to 1st ¶ break on 429) (read fns. 26, 30-32, and 34-38; omit others)

Thursday, January 25 (Class 6):

The Assimilation Era, Part 2: Cultural Genocide and the “War Against the Children”

Haaland v. Brackeen (2023): Gorsuch, J., concurring opinion, slip op. pp. 1-12 (through Part I) and 31-36 (Part II.D)

Zitkala-Sa, AIS, pp. 67-70 (through Part I: My Mother), 77-78 (Part IV: The Coffee-Making), and 83-97 (Part VII: The Big Red Apples; The School Days of an Indian Girl, through Part V)

“War Against the Children” (NYT, Aug. 30, 2023)

Tuesday, January 30 (Class 7):

The Assimilation Era, Part 3: Economic Genocide and Dispossession of Indian Land

Royster, *The Legacy of Allotment* (1995), pp. 6-20 (through 1st full ¶ on 20) (read fns. 20, 28, 33-34, 37-38, 48, 81, 84, 90-91, 93-96, and 100; omit others)

Zitkala-Sa, AIS, pp. 97-113 (The School Days of an Indian Girl, Parts VI-VII; An Indian Teacher Among Indians)

Lone Wolf v. Hitchcock (1903): White, J., opinion of the Court, pp. 563-68

ILS, ch. 6 (Riley on *Lone Wolf*), pp. 189-205 (to 1st ¶ break on 205) and 217-28 (“Appeal to the Supreme Court” to end)

Recommended: Burns, *The American Buffalo* (PBS-TV, 2023), Part 1: Blood Memory (see <https://www.pbs.org/kenburns/the-american-buffalo/watch-guide>)

Thursday, February 1 (Class 8):

The Legacy of the Assimilation Era: Struggles to Regain Indian Land

Zitkala-Sa, AIS, pp. 143-54 (The Widespread Enigma Concerning Blue Star Woman), 155-60 (America's Indian Problem), 163 (introduction), 187-90 (Secretary's Report), 193-95 (America, Home of the Red Man), and 201-04 (The Black Hills Council)

U.S. v. Sioux Nation (1980): Blackmun, J., opinion of the Court, pp. 374-90 (through Part II), 407-17 (Part IV.A-C), 421-22 (1st sentence of Part IV.E and fn. 32), and 423-24 (Part V) (read fns. 1-4, 7-8, 27, 29, and 32; omit others), and Rehnquist, J., dissenting opinion, 424-25 (before Part I) and 434-37 (Part III)

Singer, Indian Title (2017), pp. 40-48 (Parts IV.B-C, and review Part V) (read fns. 226, 228-29, 249, 261, and 269-72; omit others)

Savage, U.S. Will Settle Indian Lawsuit for \$3.4 Billion (NYT, Dec. 8, 2009)

Hevesi, Elouise Cobell Obituary (NYT, Oct. 17, 2011)

Turkewitz, Navajos to Get \$554 Million to Settle Suit Against U.S. (NYT, Sept. 24, 2014) (with photographs from *The Arizona Republic*)

Recommended: Burns, *The American Buffalo* (PBS-TV, 2023), Part 2: Into the Storm (see <https://www.pbs.org/kenburns/the-american-buffalo/watch-guide>)

Also recommended:

“Homecoming,” directed by Julianna Brannum (Comanche), on “efforts to rebuild Native American communities’ enduring relationship to the buffalo” (streaming freely at <https://www.pbs.org/kenburns/the-american-buffalo/homecoming>)

Three additional short films providing Native perspectives on the buffalo are also available at the same website (see <https://www.pbs.org/kenburns/the-american-buffalo/native-narratives-buffalo-revitalization>)

Tuesday, February 6 (Class 9):

The Other Legacy of the *Cherokee Cases*: Treaty Rights and Canons of Construction, 1871-1912

The *Cherokee Tobacco Case* (207 *Half Pound Papers of Smoking Tobacco v. U.S.*) (1871) (edited): Swayne, J., opinion of the Court, and Bradley, J., dissenting opinion

U.S. v. 43 Gallons of Whiskey (May 7, 1883): Field, J., opinion of the Court, pp. 491-94 (to 2nd ¶ break on 494) and 496-98 (from 1st ¶ break on 496)

Review *Ex parte Crow Dog (Kan-gi-shun-ca)* (Dec. 17, 1883): Matthews, J., opinion of the Court, pp. 567 (1st two full ¶¶s) and 572 (last two ¶¶s)

U.S. v. Winans (1905): McKenna, J., opinion of the Court, pp. 377-84

Choate v. Trapp (1912): Lamar, J., opinion of the Court, pp. 667-79 (omit fn. 1)

Thursday, February 8 (Class 10):

The Modern Legacy of the *Cherokee Cases*: The Revival of Tribal Sovereignty, Part 1

Williams v. Lee (1959) (edited): Black, J., opinion of the Court

McClanahan v. Arizona (1973): Marshall, J., opinion of the Court, pp. 165-81 (read fns. 6-8, 12-14, 18, 21; omit others)

ILS, ch. 11 (Berger on *Williams*), pp. 359-86 (read fns. 1, 16, and 91; omit others) (reference on 380 to “jurisdiction over crimes between Indians” should refer to “non-Indians”)

Truman Veto of Bill to Extend State Jurisdiction to Navajo and Hopi Reservations (1949)

Johnson Message to Congress on Indian Policy (1968), pp. 1-5 (through 1st ¶ under heading “Self-Help and Self-Determination”) and 17

Nixon Message to Congress on Indian Policy (1970), pp. 1-6, 8-9, and 17-18 (from 1st ¶ break on 17)

Champagne, How One U.S. President [Nixon] Became a Native Advocate (2015)

Tuesday, February 13 (Class 11):

The Revival of Tribal Sovereignty, Part 2

Bryan v. Itasca County (1976): Brennan, J., opinion of the Court, pp. 375-93 (read fns. 1, 4, 11, 13-14, and 16; omit others)

U.S. v. Wheeler (1978): Stewart, J., opinion of the Court, pp. 314-16 (through Part I) and 322-32 (Parts III-IV) (read fns. 1-3, 18, 20-28, and 33-35; omit others)

ILS, ch. 13 (Washburn on *Bryan*), pp. 421-50

Royster, *The Legacy of Allotment* (1995), pp. 63-78 (Parts VI-VII) (read fns. 350, 358, 360-61, 365-66, 368-70, 375-76, 378, 391-92, 397, and 407-08; omit others)

Thursday, February 15 (Class 12):

The Revival of Tribal Sovereignty, Part 3

Merrion v. Jicarilla Apache (1982): Marshall, J., opinion of the Court, pp. 133-52 and 159 (omit Part III) (read fns. 1, 5-6, 8, 10, 12, 14, and 16; omit others), and Stevens, J., dissenting opinion, 159-60, 168, and 190 (omit fns. in dissent)

Kerr-McGee v. Navajo (1985): Burger, C.J., opinion of the Court, pp. 196-201 (read fn. 4; omit others)

U.S. v. Dion (1986): Marshall, J., opinion of the Court, pp. 735-46

Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law* (1996), pp. 1573-76 (before Part I) and 1617-20 (Part II.B) (read fns. 3-4, 197, and 199-206; omit others)

Tuesday, February 20 (Class 13):

The Revival of Tribal Sovereignty, Part 4

Minnesota v. Mille Lacs Chippewa (1999) (edited): O'Connor, J., opinion of the Court, and Rehnquist, C.J., dissenting opinion

Herrera v. Wyoming (2019): Sotomayor, J., opinion of the Court, slip op. pp. 1-11 (through 1st ¶ of Part II.B) and 13-22 (from Part II.C) (read fns. 1 and 4; omit others) (omit dissent by Alito, J., because it relies mainly on preclusion grounds of little interest to Indian law)

Royster, *The Legacy of Allotment* (1995), pp. 29-43 (last ¶ break on 29 through Part IV) (read fns. 144-45, 147-49, 156-58, 161-62, 166-67, 176, 180-81, 194, 208, 210, 213-14, 217-19, and 221-22; omit others), and review 76-78 (last ¶ of Part VI and Part VII)

McGirt v. Oklahoma (2020): Gorsuch, J., opinion of the Court, slip op. pp. 1-29 (to 1st ¶ break on p. 29) and 36-42 (Part VI) (read fns. 1-7, 12, 14, and 16; omit others in Court's opinion), and Roberts, C.J., dissenting opinion, slip op. pp. 1-2 (before Part I), 7-11 (1st ¶ break on p. 7 to 2nd ¶ break on p. 11), 25-29 (Part III.B from 2nd ¶ break on p. 25), and 35-37 (Part III.C from 2nd ¶ break on p. 35) (read fns. 5-6; omit others in dissent)

Thursday, February 22 (Class 14):

Race, Citizenship, and Native Identity

Elk v. Wilkins (1884): statement of facts, pp. 94-96 (to last ¶ break on 96), Gray, J., opinion of the Court, 98-100 (to 2nd sentence break on 100; omit 2nd ¶ on 98), 106-07 (last ¶ break on 106 to 1st ¶ break on 107), and 109 (last two ¶¶s), and Harlan, J., dissenting opinion, 110 (first two ¶¶s), 112 (1st ¶), and 120-23 (from last ¶ break on 120)

Harrison v. Laveen (Ariz. 1948): Udall, J., opinion of the Court, pp. 457-59 (to last ¶ break on 159), 460-61 (last ¶ break on 460 through ¶ at headnote 8 on 461), and 463 (last two ¶¶s)

Morton v. Mancari (1974): Blackmun, J., opinion of the Court, pp. 537-55 (read fn. 24; omit others)

ILS, ch. 12 (Goldberg on *Morton v. Mancari*), pp. 389-420 (read fns. 8, 10, 19, 29, 42, 64, 112, 118, 124, and 160; omit others)

Romero, *Indian Slavery* (NYT, Jan. 28, 2018)

Walker, *Cherokee Freedmen Descendants* (NYT, Feb. 24, 2021)

Note: Class does not meet February 27 due to the midterm exam period (February 25-27). There is no midterm in this course.

Thursday, February 29 (Class 15):

Tribal Citizenship and Sovereign Immunity

Special Guest Professor: Angela Medrano (Cahuilla), Judge Pro Tem, Intertribal Court of Southern California, and President, Native American Lawyers Association of San Diego County

Santa Clara Pueblo v. Martinez (1978): Marshall, J., opinion of the Court, pp. 51-60 (through 1st two ¶¶ of Part IV) and 62-72 (from Part IV.A) (read fns. 2, 5-6, 8-9, 14, 19, 20, 30, and 32; omit others in Court's opinion), and White, J., dissenting opinion, 72-75 (to ¶ break on 75) and 82-83 (from 1st ¶ break on 82) (read fns. 2-3 and 6; omit others in dissent)

Kiowa v. Manufacturing Technologies (1998) (edited): Kennedy, J., opinion of the Court, and Stevens, J., dissenting opinion

C&L Enterprises v. Citizen Band Potawatomi (2001): Ginsburg, J., opinion of the Court, pp. 414-23 (read fns. 1 and 3-5; omit others)

ILS, ch. 14 (Valencia-Weber on *Santa Clara*), pp. 451-88 (read fns. 2, 5, 38, 45, 51, 69, 91, 101, 111, 113, and 119; omit others)

Rolnick, Santa Clara Update (Prawfsblawg, June 18, 2012)

Jarvis, Who Decides Who Counts as Native American? (NYT, Jan. 18, 2017)

Tuesday, March 5 (Class 16):

Tribal Sovereign Immunity and Lawsuits Against Tribal Officers

Agua Caliente Cahuilla v. Superior Court (Cal. 2006) (edited): Chin, J., opinion of the Court, and Moreno, J., dissenting opinion

Michigan v. Bay Mills (2014): Kagan, J., opinion of the Court, pp. 785-804 (read fns. 4 and 6-8; omit others), Sotomayor, J., concurring opinion, 804-14 (omit fns. in concurrence), Scalia, J., dissenting opinion, 814, Thomas, J., dissenting opinion, 814 (before Part I) and 826-30 (Part II.B), and Ginsburg, J., dissenting opinion, 831-32

Lewis v. Clarke (2017): Sotomayor, J., opinion of the Court, slip op. pp. 1-9 (through 1st ¶ of Part III.A) and 10-12 (Parts III.B-IV) (read fn. 2; omit others)

Lac du Flambeau Chippewa v. Coughlin (2023): Jackson, J., opinion of the Court, pp. 385-90 (through Part III.A) and 392-97 (Parts III.C-IV.B.1) (read fns. 4 and 7; omit others), and Gorsuch, J., dissenting opinion, 402-18

Thursday, March 7 (Class 17):

General Federal Laws in Indian Country: Competing Canons of Construction

Federal Power Commission v. Tuscarora (1960): Whittaker, J., opinion of the Court, pp. 100 (1st ¶), 110-18 (Part I to last ¶ break on 118), 120 (sentence after last ¶ break), and 124 (last ¶), and Black, J., dissenting opinion, 124-28 (to ¶ break on 128) and 142

Review *Merrion v. Jicarilla Apache* (1982): Marshall, J., opinion of the Court, pp. 133-36 (through Part I) and 148-52 (1st ¶ break on 148 through Part II.C), and *U.S. v. Dion* (1986): Marshall, J., opinion of the Court, pp. 738-45 (last ¶ break on 738 through Part II.A)

Donovan v. Coeur d'Alene (9th Cir. 1985): Sneed, J., opinion of the Court, pp. 1114-18 (read fns.)

Iowa Mutual v. LaPlante (1987): Marshall, J., opinion of the Court, pp. 11 (1st ¶) and 17-19 (¶ break on 17 through Part II) (read fns. 9-10; omit others)

National Labor Relations Board v. Little River Ottawa (6th Cir. 2015): Gibbons, J., opinion of the Court, pp. 539-43 (through 1st ¶ of Part II) and 546-51 (Part III.B-D) (read fn. 1), and McKeague, J., dissenting opinion, 556-65 (read fn. 3; omit others)

Note: Class does not meet March 12 and 14 due to spring break.

Tuesday, March 19 (Class 18):

Tribal Criminal Jurisdiction (and Tribal Courts Generally), Part 1

Special Guest Professor: Devon Lee Lomayesva (Santa Ysabel Kumeyaay), Chief Judge, Intertribal Court of Southern California

Delaware (Lenape)-U.S. Treaty of Fort Pitt (1778): read all six Articles, but pay special attention to the first sentence of Article III, the first two sentences of Article IV, and the first sentence of Article VI (as optional historical background, it is recommended to also read the essay on the Treaty of Fort Pitt from the website of the National Museum of American Diplomacy)

Review *Talton v. Mayes* (1896): statement of the case, pp. 376-78, and White, J., opinion of the Court, 378-83 (to 1st sentence break on 383) and 384 (three sentences after 3rd ¶ break: “True it is that in many adjudications ...”, “But the existence of the right in Congress ...”, and “It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment”)

Oliphant v. Suquamish (1978) (edited): Rehnquist, J., opinion of the Court, and Marshall, J., dissenting opinion

ILS, ch. 8 (Krakoff on *Oliphant*), pp. 261-96

Tso, The Process of Decision Making in Tribal Courts (1989), pp. 225-35 (read fns. *, 3, 6, and 19; omit others)

O'Connor, Lessons From the Third Sovereign: Indian Tribal Courts (1997), pp. 1-6 (read fns.)

Thursday, March 21 (Class 19):

Tribal Criminal Jurisdiction (and Tribal Courts Generally), Part 2

Means v. Chinle District Court (Navajo Nation 1999) (including Navajo-U.S. Treaty of 1868) (edited): Yazzie, C.J., opinion of the Court

U.S. v. Lara (2004): Breyer, J., opinion of the Court, pp. 196-207 (through Part II), Stevens, J., concurring opinion, 210-11, Kennedy, J., concurring opinion, 211-14, and Thomas, J., concurring opinion, 214-15 (before Part I)

Means v. Navajo Nation (9th Cir. 2005): Kleinfeld, J., opinion of the Court, pp. 927-28 (through “Facts”) and 931-37 (“Analysis” Parts III-IV and “Conclusion”) (read fns. 3, 4, 49, and 68; omit others)

Cavanagh, Michigan’s Story: State and Tribal Courts Try to Do the Right Thing (1999), pp. 709-20 (read fns. *, 2-3, 5, 10, and 17; omit others)

Cavanagh, Court Forum Addresses Child Welfare Issues (Michigan Live, Oct. 30, 2014), pp. 1-3

Cavanagh, Reflections on Collaboration With Tribal Courts (2015), pp. 22-24

U.S. Department of Justice, Tribal Law and Order Act (TLOA) Report on Enhanced Tribal Court Sentencing Authority (2015)

U.S. Department of Justice, Update on Reauthorizations of the Violence Against Women Act (VAWA) (2022)

Tuesday, March 26 (Class 20):

Federal and State Criminal Jurisdiction in Indian Country

U.S. v. Bryant (2016): Ginsburg, J., opinion of the Court, pp. 142-47 (read fns. 1-5; omit pp. 148-57 of Court’s opinion) (omit dissent by Thomas, J., because it adds little of interest to Indian law beyond his opinions in *Bay Mills* (2014), see Class 16, and *Lara* (2004), see Class 19)

Oklahoma v. Castro-Huerta (2022): Kavanaugh, J., opinion of the Court, slip op. pp. 1-25 (read fns. 2-3, 6, and 9; omit others in Court’s opinion), and Gorsuch, J., dissenting opinion, slip op. 1-42 (read fns. 3-4, 6, and 9-10; omit others in dissent)

Thursday, March 28 (Class 21):

Tribal Civil Jurisdiction Over Non-Indians

Montana v. U.S. (1981) (edited): Stewart, J., opinion of the Court (omitting parts of the opinion, and concurring and dissenting opinions, dealing with Crow Tribe's claim to Big Horn River)

Review *Merrion v. Jicarilla Apache* (1982): Marshall, J., opinion of the Court, pp. 133 (1st ¶), 136-45 (Part II to 1st ¶ break on 145), and 159 (Part IV), and *Iowa Mutual v. LaPlante* (1987): Marshall, J., opinion of the Court, pp. 18-19 (1st ¶ break on 18 through Part II)

Brendale v. Yakima (1989): opinion of White, J., joined by Burger, C.J., and Scalia and Kennedy, JJ., pp. 414-19 (through Part I.C) and 432-33 (Part III) (read fn. 2; omit others in White's opinion), opinion of Stevens, J., joined by O'Connor, J., 433-34 (to 1st ¶ break on 434), 437 (from ¶ break to end of page, including fn. 2), 442-46 (¶ break on 442 to 1st ¶ break on 446), and 447-48 (Part IV) (read fn. 2; omit others in Stevens's opinion), and opinion of Blackmun, J., joined by Brennan and Marshall, JJ., 448-50 (through Part I.A), 455-56 (Part I.A.2 to 2nd ¶ break on 456), and fn. 9 on 467 (omit other fns. in Blackmun's opinion)

Nevada v. Hicks (2001): Scalia, J., opinion of the Court, pp. 355-57 (through Part I), last sentence of fn. 2 on 358, 359-65 (¶ break on 359 through Part II.B), and 375 (last ¶) (read last sentence of fn. 2 and fns. 5-6; omit others in Court's opinion), Souter, J., concurring opinion, 375-76 (before Part I) (read fn. 1), Ginsburg, J., concurring opinion, 386, and O'Connor, J., concurring opinion, 387-88 (through Part I.A), 397 (1st two ¶¶s), and 401 (last ¶)

Plains Commerce Bank v. Long Family Land & Cattle (2008): Roberts, C.J., opinion of the Court, pp. 320-24 (through Part I), 330-31 (1st two ¶¶s of Part III.B), 332 (1st two sentences of 1st full ¶), and 337-38 (last ¶ break on 337 to 2nd ¶ break on 338), and Ginsburg, J., opinion concurring in part and dissenting in part, 342-43 (before Part I), 345-46 (last ¶ break on 345 through Part I), fn. 1 on 348, and fn. 2 on 350

Dollar General v. Mississippi Choctaw (5th Cir. 2014): Graves, J., opinion of the Court, pp. 169-70 (through 1st full ¶ on 170), 173-74 (Parts I-II), and 177 (Part V) (omit fns. and dissent by Smith, J.) (**NOTE:** The Supreme Court, after granting certiorari, 576 U.S. 1021 (June 15, 2015), and hearing oral argument during the 2015-16 Term, **affirmed** the Fifth Circuit *Dollar General* decision **by equally divided vote**, 579 U.S. 545 (June 23, 2016). Justice Scalia had died in February 2016. It is widely assumed that Roberts, C.J., and Kennedy, Thomas, and Alito, JJ., voted to reverse and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., voted to affirm, **but this is speculative** since votes on certiorari and affirmances by equal division are not reported and no justice chose to file an opinion.)

ILS, ch. 16 (LaVelle on *Montana v. U.S.*), pp. 535-37 (before "Background"), 553-60 (1st ¶ break on 553 to 1st ¶ break on 560; see also 1st sentence after 2nd ¶ break: "The briefs by and for the [U.S.] and the Crow Tribe stressed 'the overwhelming importance of the streambed issue' in *Montana*"), 561-62 (last ¶ break on 561 to 1st sentence break on 562), 567 (last ¶), 569-72 (¶ break on 569 through 1st two ¶¶s after "The Supreme Court Decision"), and 585-88 (last ¶ break on 585 ("And perhaps the Justices ...") to 1st ¶ break on 588) (read fn. 141; omit others) (regrettably, considerations of time and the burden of other essential readings preclude assigning most of Professor LaVelle's magnificent chapter, much of which focuses on an issue separate

from *Montana*'s impact on tribal civil jurisdiction over non-Indians: the Crow Tribe's treaty right to the Big Horn River)

Tuesday, April 2 (Class 22):

State Civil Jurisdiction Over Commerce With Indians

Washington v. Colville (June 10, 1980): White, J., opinion of the Court, pp. 138 (1st ¶), 141-45 (Part II), 150-52 (Part IV through 1st ¶ of Part IV.B.1), 154-55 (Part IV.B.2 to 2nd ¶ break on 155), and 156-64 (¶ break on 156 through Part V) (read fns. 8-10, 12-15, 18, and 25-29; omit others), Brennan, J., opinion concurring in part and dissenting in part, 164-66 (to last sentence break on 166) and 168-74 (from ¶ break on 168) (omit fns.), and Stewart, J., opinion concurring in part and dissenting in part, 174-76

White Mountain Apache v. Bracker (June 27, 1980): Marshall, J., opinion of the Court, pp. 137-45 (through Part II) and 148-49 ((¶ break on 148 to 1st ¶ break on 149) (read fns 1-4, 6-7, and 11; omit others) (omit dissenting opinion by Stevens, J., which has little importance beyond the specific facts of the case)

Central Machinery v. Arizona (June 27, 1980): Marshall, J., opinion of the Court, pp. 161-66 (read fn. 4; omit others), and Stewart, J., dissenting opinion, 167 (1st full ¶) and 170 (last ¶) (omit fns.)

New Mexico v. Mescalero Apache (1983): Marshall, J., opinion of the Court, pp. 325-26 (to 1st ¶ break on 326), 327-31 (1st ¶ break on 327 to ¶ break on 331), 333 (last full ¶), and 338-42 (Part III.B and 1st ¶ of Part III.C) (read fns. 24 and 26; omit others)

Cotton Petroleum v. New Mexico (1989): Stevens, J., opinion of the Court, pp. 166-70, 173 (1st ¶ of Part II), 175-76 (last ¶ of Part II), 177 (1st ¶ break to last sentence break), and 183-87 (¶ break on 183 through Part III) (read fns. 4, 15, and 18; omit others in Court's opinion), and Blackmun, J., dissenting opinion, 193-96 (through 1st two sentences on 196), 203-04 (last ¶ of Part I and 1st ¶ of Part II), and 208-11 (from ¶ break on 208) (read fns. 7 and 14; omit others in dissent)

Wagon v. Prairie Band Potawatomi (2005): Thomas, J., opinion of the Court, pp. 99-101 (through Part I) and 110 (1st ¶ of Part III) (omit fns. in Court's opinion), and Ginsburg, J., dissenting opinion, 116-18 (to 2nd ¶ break on 118), 123-25 (1st ¶ break on 123 through Part I), 126 (1st ¶), and 129-31 (from ¶ break on 129) (read fns. 1-2 and 12; omit others in dissent)

Washington v. Cougar Den (2019): opinion of Breyer, J., joined by Sotomayor and Kagan, JJ., slip op. pp. 1-18, Gorsuch, J., concurring opinion joined by Ginsburg, J., slip op. 1-11, Roberts, C.J., dissenting opinion, slip op. 1-10 (read fns. 1-2), and Kavanaugh, J., dissenting opinion, slip op. 1-6 (read fn. *)

Thursday, April 4 (Class 23):

Indian Water Rights

Winters v. U.S. (1908): statement of the case, pp. 565 (to last sentence break in 3rd ¶) and 566-68 (1st sentence break on 566 to 2nd ¶ break on 568), and McKenna, J., opinion of the Court, 575-77 (¶ break on 575 to 2nd ¶ break on 577)

Arizona v. California (1963): Black, J., opinion of the Court, pp. 550-52 (to last sentence break on 552), 555-60 (¶ break on 555 through 5th sentence on 560: “The Act as finally passed ... was ... intended to put an end to the long-standing dispute over Colorado River waters.”), and 595-601 (Part V to 1st ¶ break on 601) (omit other parts, and the dissenting opinions, because they have little or no bearing on Indian water rights)

Arizona v. San Carlos Apache (1983): Brennan, J., opinion of the Court, pp. 548-59 (through Part II), 566-69 (¶ break on 566 to 2nd ¶ break on 569), and 570-71 (Part V) (read fns. 1-2 and 17; omit others in Court’s opinion), Marshall, J., dissenting opinion, 572, and Stevens, J., dissenting opinion, 572-75 (to 2nd ¶ break on 575) and 579-81 (from 2nd ¶ break on 579) (omit fns. in Stevens’s opinion)

Arizona v. Navajo Nation (2023): Kavanaugh, J., opinion of the Court, pp. 558-59 (before Part I) and 565 (1st three ¶¶s on 565), and Gorsuch, J., dissenting opinion, 574-88, 590-95 (from Part II.B), and 598-99 (Part IV)

ILS, ch. 3 (Royster on *Winters*), pp. 81-91 (before “Proceedings in the Ninth Circuit”), 93-100 (“The Supreme Court Decision” to 3rd ¶ break on 100), and 105-07 (“The Continuing Importance of *Winters* Today” and Conclusion)

Krakoff, Not Yet America’s Best Idea: Law, Inequality, and Grand Canyon National Park (2020), pp. 559-69, figures 1 and 2 on 570-71, and 646-48 (from 2nd ¶ break on 646) (read fns. 4-5 and 487; others may be omitted)

Tuesday, April 9 (Class 24):

Indian Civil Rights and Education

Special Guest Professor: Lawrence R. Baca (Pawnee)

Baca earned his J.D. from Harvard Law School and was an attorney in the Civil Rights Division of the U.S. Department of Justice (DOJ) for 32 years (1976–2008), including four years as Deputy Director of the DOJ Office of Tribal Justice (2004–08). He was also President of the Federal Bar Association (FBA) in 2009–10, and for 20 years Chair of the FBA Indian Law Section and a moving force behind the FBA’s annual Indian Law Conference, the leading national event of its kind. He has been a mentor and inspiration to countless attorneys, students, and teachers, Native and non-Native. He has also served as President of the National Native American Bar Association and as Adjunct Professor of Law at several law schools.

Meyers v. San Juan School District (D. Utah 1995): Jenkins, J., opinion of the Court, pp. 1551-62, 1569-73 (Part II.G), and 1578-81 (Part IV) (read fns. 1-3, 5, 7, 10-12, 14-16, 33, 42, and 44; omit others)

Sinajini v. San Juan School District (D. Utah 1997): Sam, J., opinion of the Court, pp. 320-27, and on appeal (10th Cir. 2000): McKay, J., opinion of the Court, pp. 1239-42

Baca, *Meyers*: *The Brown v. Board of Indian Country* (2004), pp. 1155-80 (read fns. 7, 8, 11, 52, 67, 71, 95-96, 98-99, 105, 110, 128, 142-43, 151, 153, and 156-57; omit others)

Baca, *A Recipe From the Diversity Cookbook: “First You Hire One Indian”* (Federal Lawyer, 2017)

Thursday, April 11 (Class 25):

Federal and Tribal Powers Over Indian Children: The Indian Child Welfare Act (ICWA)

Special Guest Professor: Joanne Willis Newton (Chisasibi Cree, Québec, Canada), Judge Pro Tem, Intertribal Court of Southern California, and experienced ICWA litigator

Mississippi Choctaw v. Holyfield (1989): Brennan, J., opinion of the Court, pp. 32-43 (to last sentence break on 43), 44-45 (last ¶ break on 44 through 1st sentence after ¶ break on 45), 47-50, and 53-54 (Part III) (read fns. 1, 3, 12, and 28; omit others), and Stevens, J., dissenting opinion, 54-55 (through 1st ¶ on 55) and 64-65 (last two ¶¶s) (omit fns. in dissent)

Adoptive Couple v. Baby Girl (2013): Alito, J., opinion of the Court, pp. 641-56 (read fns. 1-4, 7, and 12; omit others in Court's opinion), Breyer, J., concurring opinion, 666-67, Scalia, J., dissenting opinion, 667-68, and Sotomayor, J., dissenting opinion, 668-92 (read fns. 1, 3, 6-9, and 15-16; omit others in Sotomayor's opinion)

Berger, In the Name of the Child: Race, Gender, and Economics in *Adoptive Couple v. Baby Girl* (2015), pp. 295-310 (through Part I.B), 319-36 (Parts II-III), 347-48 (2nd ¶ break on 347 to ¶ break on 348), and 356-62 (Part V.C and Conclusion) (read fns. 1, 25, 53, 63, 69, 187, 193, 201, 225, and 392; omit others)

Haaland v. Brackeen (2023): Barrett, J., opinion of the Court, pp. 263-64 (before Part I), 268-70 (Part I.B), 272-80 (Part II), and 291-92 (1st ¶ of Part IV), Gorsuch, J., concurring opinion, 331-33 (Parts III-IV) (and review 297-307, through Part I), Kavanaugh, J., concurring opinion, 333-34, Thomas, J., dissenting opinion, 334-35 (before Part I), and Alito, J., dissenting opinion, 372-75 (read fn. 1) and 381 (last two ¶¶s)

Tuesday, April 16 (Class 26):

Indian Gaming and Economic Development

California v. Cabazon (1987): White, J., opinion of the Court, pp. 204-12 (to ¶ break on 212) and 214-22 (Part II) (read fns. 1, 10-11, 18, 20-21, 23, and 25; omit others), and Stevens, J., dissenting opinion, 222-23 (1st two ¶¶s) and 225-27 (from last ¶ break on 225) (omit fns. in dissent)

Rincon v. Schwarzenegger (9th Cir. 2010): Smith, J., opinion of the Court, pp. 1022-32 (through Discussion, Part I), 1036-37 (Part II.C before Part II.C.1), and 1041-42 (Part III and Conclusion) (read fns. 2, 8, 12-15, 17, and 26; omit others), and Bybee, J., dissenting opinion, 1042-44 (before Part I)

Ysleta del Sur Pueblo v. Texas (2022): Gorsuch, J., opinion of the Court, slip op. pp. 1-11 (to 1st ¶ break on 11) and 12-20 (from 1st ¶ break on 12) (read fns. 1 and 3-4; omit others), and Roberts, C.J., dissenting opinion, slip op. 1-2 (before Part I) and 16 (last ¶)

Review ILS, ch. 13 (Washburn on *Bryan*), pp. 444-50

Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction* (2007), pp. 511-31 (Part V & Conclusion) (read fns. 314-20, 340, 351, 364, 372, 374, 378, and 380-81; omit others)

Thursday, April 18 (Class 27):

In-class student presentations.

Note: The class previously scheduled for Tuesday, April 23, will not be held on that day and has been postponed to Tuesday, April 30 (see below), at the usual time and location.

Tuesday, April 30 (Class 28):

General review.

Thursday, May 9:

Final exam (scheduled for 2:00-5:00 pm).