

# PREFACE

There are 574 federally recognized Indian tribes in the United States as of this writing. Each Indian nation has the authority, often expressed in an organic document such as a tribal constitution or a treaty with the United States, to legislate for the general welfare of the tribe, its people, and its land. Tribal ordinances and resolutions often are codified into tribal codes and published in book form and on the Internet, *e.g.*, Grand Traverse Band Code; Hoopa Valley Tribal Code; Navajo Nation Tribal Code. Other tribes not only publish their laws but make readily available any proposed legislation; the best example is the *Odawa Register*, a circular published by the Little Traverse Bay Bands of Odawa Indians that parallels the *Federal Register*.

There are more than 400 American Indian tribal courts currently in operation, and that number is growing. American Indian tribal courts decide thousands of cases daily, with misdemeanor criminal cases, child welfare, and tribal administrative law cases constituting the large portion of tribal court dockets. Some tribal courts, such as those of the Navajo Nation, handle more than 100,000 cases each year, while other tribal courts handle only a very few cases. Many tribal courts span the full panoply of subject areas, from criminal to civil to probate to divorce to environmental law; others handle only a select few subject areas, such as tribal conservation courts, which adjudicate disputes involving tribal treaty fishing and hunting rights. The variety of tribal court disputes is endless.

“Tribal law” is to be distinguished from “federal Indian law.” Loosely speaking, federal Indian law is the law covering the relationships between the federal, state, and tribal governments. The key feature of federal Indian law is the exclusion of federal and state laws from the internal governance of Indian tribes. In short, every Indian nation is free to adopt its own laws and be ruled by them, to paraphrase the United States Supreme Court. *Williams v. Lee*, 358 U.S. 217, 220-21 (1959).

This casebook delves exclusively into the laws of American Indian tribes and the cases decided by tribal courts. Most professors and students will find that a course in Federal Indian Law or a similar topic area will be helpful in

engaging the materials in this book. *E.g.*, DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS & MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (7TH ED. 2016); MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* (2017); *RESTATEMENT OF THE LAW OF AMERICAN INDIANS* (2022). “Federal Indian law” and “tribal law” are linked to some extent, but there are significant differences.

Indian country is ready for a comprehensive set of materials on what some academics and practitioners have called the “real Indian law”—the law of Indian nations and tribal courts. It is a new field, and scholarship on the subject has taken off only in the past few years.

These materials are intended to assist students in navigating tribal courts and other indigenous dispute resolution forums, and how to otherwise practice law in Indian country. Students need to learn that nearly all tribal jurisdictions can and do apply their own laws, not the laws of the United States or state law.

This book will rely heavily on the standard cases and notes format of most law school casebooks, and will offer in-depth legal commentary and background on the history of tribal law and justice systems.

The original inspiration for this law school text comes in part from two works commissioned for the Turtle Mountain Band of Chippewa Indians’ Project Peacemaker. The first, authored by Justin Richland and Sarah Deer, is *Introduction to Tribal Legal Studies*, published in 2004, in a second edition in 2009, and in a third edition in 2016 by AltaMira Press. The second, authored by Carrie E. Garrow and Sarah Deer, is *Tribal Criminal Law and Procedure*, also published by AltaMira Press, in 2004, and in a second edition in 2015. These materials were designed for tribal community college and undergraduate students, and likely are the first comprehensive American Indian tribal law textbooks. An additional source of inspiration is Frank Pommersheim’s *Broken Ground and Flowing Waters: An Introductory Text with Materials on Rosebud Sioux Tribal Government*, published by the Sinte Gleska College in 1977.

One additional note: part of the reason American Indian tribal law materials for law students have been slow in coming is that the law of Indian nations is relatively difficult to find. This is changing, rapidly, as tribes develop their own Internet presence and publish their laws online. Moreover, hundreds of tribal laws and ordinances, as well as tribal constitutions, are posted on the website of the Native American Rights Fund’s National Indian Law Library, the University of Oklahoma Law School website, and others. The same is true for tribal court decisions. Many tribal courts post their decisions online, or in self-commissioned reporters, such as the Navajo Reporter and the Muscogee (Creek) Nation Reporter. Other tribes create intertribal court systems as a means of pooling their limited resources, such as the Northwest Indian Tribal Court System (which publishes the NICS Tribal Court Appellate Opinions, or “NICS App.”), the Southwest Intertribal Court System (which publishes the SWITCA Reporter), and the Northern Plains Intertribal Court System. The first tribal court reporter was the Tribal Law Reporter, which came and went in the 1970s. In 1980, the American Indian Law Reporter began publishing selected tribal court decisions but stopped publishing several years ago. Another significant reporter is the Oklahoma Tribal Court Reports.

In recent years, Westlaw (American Tribal Reports) and Lexis-Nexis have posted selected tribal court decisions.

### ***Structure of the Materials***

Chapter 1 is a survey of the history of American Indian tribal governments. Indian nations predate the United States and possessed their own forms of government, often radically different from the tribal governments that now exist. Interestingly, a traditional tribal government functioned as a kind of court, deciding disputes among people. The second half of the chapter is a survey of how tribal governments have adapted to the interventions and negligence of the American government.

Chapter 2 is an introduction to tribal justice systems, that is, tribal courts. The first tribal courts were not indigenous institutions; they were imposed upon tribal communities in the nineteenth century as a means of breaking down tribal cultures. But tribes have now taken over these courts and developed their own justice systems. Chapter 2 also includes an important theoretical discussion about the use and utility of customary and traditional law in modern litigation, as well as a discussion of the role of tribal judges.

Chapter 3 is a survey of modern tribal constitutional law. Nearly all tribes discussed in this casebook are constitutional republics, with some remarkable exceptions. Chapter 3, like the first two chapters, relies heavily on secondary sources, but moves directly into tribal court doctrine by sampling the rich history of tribal constitutional adjudication, where some of the greatest crises of modern tribal governments have occurred.

Chapter 4 concerns tribal citizenship, one of the most important subject areas in tribal law: Who is an Indian? Beginning with this chapter, the large majority of the key materials included in the casebook are tribal court cases.

Chapter 5 concerns tribal elections. Virtually every major tribe has its own version of *Bush v. Gore*, and this chapter covers those disputes, as well as cases about the qualifications of voters and candidates.

Chapter 6 covers civil rights claims in tribal courts. While the United States Constitution does not apply to Indian nations, Congress has attempted to impose most of the federal constitutional rights on tribal governments in the Indian Civil Rights Act. The United States Supreme Court has held that tribal courts, and not federal courts, are the sole place to enforce those rights. This chapter surveys several key due process and equal protection cases, but also focuses on important flashpoints in tribal law, including the Cherokee Freeman, tribal banishment, and same-sex marriage.

Chapter 7 surveys tribal criminal law and procedure. This is a microcosm of the field, given that a whole casebook could be dedicated to this subject area. This chapter offers some of the more famous tribal law cases, including the Navajo Nation's prosecution of Russell Means. The chapter also offers a brief history of the tribal police, tribal criminal jurisdiction (which is limited to Indians only), and how tribal legislatures and courts effectively enforce laws against non-Indians.

Chapter 8 deals with domestic relations, including marriage and divorce law, probate law, and the law of children. For many tribal courts, the

overwhelming majority of their dockets fall into these areas, but there are relatively few published tribal court decisions.

Chapter 9 involves the very rich tapestry of tribal property. It begins with a long excerpt from an important scholarly article on various traditional tribal property structures, before delving into cases about tribal lands, tribal public trust property, and jurisdiction.

Chapter 10 covers contract law. Contract law in tribal courts generally does not deviate in large measure from the law applied in state and federal courts, but this chapter helps students focus on the practical application of contract law to the unique factual disputes that arise in Indian country. Of note, this chapter involves cases dealing with suits against tribal governments and tribal businesses, the probable clients of students who move on to practice in Indian country.

Chapter 11—on torts—is also more practical than doctrinal, although a rich history of traditional tribal tort law has survived the assimilation of tribal governments into the American polity. Moreover, many United States Supreme Court cases involving the jurisdiction of Indian tribes begin as tribal court tort actions.

Chapter 12 is on civil procedure but focuses more on the operation and authority of tribal courts than on rote doctrine. This chapter encompasses a wide variety of key practical areas, such as tribal court contempt power, judicial recusal, professional responsibility, and jurisdiction.

Chapter 13 may cover the least obvious tribal law-related subject area—tribal regulatory and administrative law—but may well be the most important chapter. As tribal nations have entered the complex world of shared governance between federal, state, and tribal authorities, tribal government bureaucracies have grown exponentially. This chapter offers a brief survey of tribal administrative law, organized by subject area such as employment, housing, land use, and tribal trust funds, but it also goes into great detail in discussing the wide variety of tribal bureaucratic structures that have arisen just in recent decades. Concomitant with this topic is the underlying authority of tribes to regulate lands and peoples within Indian country.

Chapter 14 is focuses on tribal regulation of attorney practice and professional responsibility of lawyers and lay advocates in tribal jurisdictions.

### ***Miigwetch!***

I wish to acknowledge many of the leaders in the field, those who are tribal law academics and tribal court practitioners, and jurists who have assisted me over the years in learning about tribal law and in the development of these materials.

The two people who have taught me the most, by far, about American Indian law are Wenona T. Singel and John Petoskey. Wenona, my lovely spouse, serves as an appellate justice for the Little Traverse Bay Bands of Odawa Indians and was formerly the chief appellate justice for the Grand Traverse Band of Ottawa and Chippewa Indians. She is director of the Indigenous Law and Policy Center at the Michigan State University College of Law. John, the

longtime general counsel of the Grand Traverse Band, is one of the great pragmatic Indian law thinkers of his time and a great mentor.

I also wish to thank Zeke Fletcher and Judge Michael Petoskey, two others who have influenced me from the beginnings of my legal career. Judge Petoskey, along with his cousin John, has been most responsible for the development of the law of the Michigan Ottawa and Potawatomi tribes as anyone in modern history. Judge Petoskey has served as a jurist for every tribe in the Lower Peninsula of Michigan, and has served as the initial chief judge of the Grand Traverse Band, the Little Traverse Bay Bands, the Pokagon Band of Potawatomi Indians, the Nottawaseppi Huron Band of Potawatomi Indians, and the Match-E-Bash-She-Wish Band of Pottawatomi Indians (Gun Lake Band). Zeke, my brother, is a brilliant Indian lawyer, a cutting-edge transactional attorney and litigator who is always willing to talk through all the interesting details of tribal law.

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Finally, there is no way to know all of American Indian tribal law, and any important omissions and errors in this text are my own.

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